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The Legal Environment

During the formative period of international organizations, attention was largely[1] focused on their "internal" law, *i.e.* on their functions, powers and procedures under their constitutions and other rules. The assumption that international organizations do not have a common denominator encouraged such introspection. However — to misapply a famous quotation — no organization is an island, entire of itself. For their dealings with the outside world, whether in the sphere of public international law or in that of private law, the internal rules of organizations are relevant but not sufficient.[2]

General legal rules supplementing the internal law of organizations outside its proper sphere of application are little developed. This causes relatively few major problems, largely because practical arrangements circumventing open legal issues can usually be found. Nevertheless, the absence of accepted rules creates a climate of legal uncertainty. Recourse to arrangements evading the legal

[1] There have, of course, been major exceptions to this. For instance, in *The Proper Law of International Organizations* (1962), C.W. Jenks sought to elaborate the general principles applicable to various private law relations of international organizations. While, in a number of areas, it was (and remains) difficult to affirm what the law is, his statement of the issues which may arise is comprehensive. In recent literature, H.G. Schermers, *International Institutional Law* (2nd ed. 1980) deals extensively with the legal environment of international organizations.

[2] On the need for some general rules, applicable to all international organizations, concerning their external relations, see P. Reuter, "Sur quelques limites du droit des organisations internationales", *Festschrift für Rudolf Bindschedler* (1980), p. 491.

issues prevents the development of practice and hence of custom. If the legal environment in which organizations operate is not exactly hostile, it is certainly not well adapted to them.

A. Public International Law

Three major groups of questions regarding the place of international organizations in public international law require some consideration: to what extent are the rules of general international law suitable for application to international organizations; to what extent have rules of international law been evolved which are responsive to specific problems posed by international organizations; and in what manner can international law be made applicable to international organizations?

1. The Suitability of General International Law for International Organizations

"International law is essentially a law *between* States and this remains true in spite of the appearance of various international organizations . . ."[3] Large areas of international law are patently inapplicable to international organizations, which have no territory, confer no nationality and do not exercise jurisdiction in the same sense as States.[4] Other rules, while not as clearly inapplicable, either lack relevance to international organizations or meet practical difficulties of implementation. For instance, while questions regarding the succession of one international organization to another have arisen,[5] the law of State succession has not been noticeably pertinent. The United Nations has referred to such matters as absence of authority to exercise criminal jurisdiction over members of armed forces or of administrative competence relating to territorial sovereignty, to explain its inability as an organization — as opposed to the

[3] I. Brownlie, "The Reality and Efficacy of International Law", 52 *B.Y.* 1, 3 (1981).

[4] An international organization directly administering a territory may be regarded as exercising the functions of a government rather than performing the normal role of an organization.

[5] See, e.g., Cansacchi, "Identité et Continuité des sujets internationaux", 130 *R.C.A.D.I.* 1970-II, p. 1. The question of the possible succession of an international organization to the treaties of its member States is raised by the European Communities.

ability of national military contingents placed at its disposal — to apply detailed aspects of the law of war.[6] And, while it appears to be established that international organizations may not only bring international claims but that such claims may be brought against them, the absence of territorial jurisdiction and of institutional arrangements pertaining thereto make key concepts of State responsibility — such as the exhaustion of local remedies — inapplicable.[7]

Three main subjects are, *prima facie*, suitable for application to international organization: the law of State immunity; the law of diplomatic relations; and the law of treaties. It is no coincidence that the International Law Commission has been examining these subjects in that light. Yet the Commission has not found it easy to arrive at conclusions or to evolve agreed principles, whether paralleling or diverging from the law applicable to States. Answering, in 1970, the question why the Commission left open the application of many subjects to international organizations, one of its members at the time expressed the view that

> the more one looks at the Vienna Convention on the Law of Treaties, the more difficult it will be found to apply its provisions automatically to treaties of organizations. The same is true of other branches of the law. It was not an easy task to take the Vienna Convention of 1961 on Diplomatic Relations and adapt it to the peculiar requirements of ... Permanent Missions to international organizations ...[8]

Some of the specific difficulties will now be considered. In many cases, their potential solution is dependent not only on one or other concept of international organizations, but also on one or other explanation of the reasons for the rule binding on States.

(a) immunity

Overwhelmingly, the status of international organizations is regulated by treaties, whether they be constitutions, treaties between

[6] *U.N.J.Y.B.* 1972, p. 153. What was at issue was the possible acceptance by the United Nations of the Geneva Conventions; the arguments have, however, more general applicability.

[7] Some of the foregoing considerations must be qualified in relation to the European Communities.

[8] S. Rosenne, "The Role of the International Law Commission", *Proceedings of the American Society of International Law at its 64th Annual Meetings* 1970, p. 24 at 32.

States laying down general rules in the matter — such as the Conventions on the Privileges and Immunities of the United Nations and of the Specialized Agencies — or arrangements between particular organizations and countries in which their headquarters or other offices are established. Accordingly, the question whether international organizations enjoy immunity under customary international law has been marginal in the sense that it is liable to arise mainly where an organization is active in a non-Member State and no special arrangements have been concluded, or where treaty provisions are incomplete. There is some literature on the subject and there have been some court decisions favouring immunity in the absence of a treaty obligation;[9] such immunity has been variously justified on the ground of transfer of portions of State sovereignty or of State functions, or on the ground that an international body is by its nature, or the nature of its acts, not subject to national law.[10]

Since there is little reliance on the law of State immunity, there is uncertainty regarding the applicability and suitability of certain of its concepts. Thus, it has widely been assumed that the age-old problem of the delimitation of immunity from jurisdiction — of acts *iure imperii* and acts *iure gestionis* — has little application to international organizations (except where, as in the case of the World Bank, such immunity is expressly limited by reference to the nature of the activities of the organization). The assumption rests on two specific bases: first, many of the relevant treaties[11] provide for immunity from jurisdiction without any qualification; second, the fact that the capacity of international organizations is directly related to their public functions seems to imply that, as a matter of principle, the problem of acts *iure gestionis* should remain unimportant.[12] More generally, "absolute" immunity is justified by

[9] For a review of both, see F. Schröer, "De l'application de l'immunité jurisdictionnelle des Etats étrangers aux organisations internationales", 75 *R.G.D.I.P.* 712 (1971).

[10] See also *Y.B.I.L.C.* 1977-II, Part I, p. 152 for the views of the United Kingdom and Swiss Governments regarding general legal obligations in the matter.

[11] The Conventions on the Privileges and Immunities of the United Nations and the Specialized Agencies and the headquarters agreements of most major organizations. It should be added that there are headquarters agreements which give no immunity from jurisdiction to the organization as such.

[12] Would, for instance, the sweeping denial of immunity for contracts for the supply of goods under the United Kingdom State Immunity Act, 1978, be

the vulnerability of international organizations which have no territory of their own and thus necessarily operate within the jurisdiction of other legal systems, and the law of which is relatively little developed. When the Government of Italy in 1952 communicated to the Secretary-General of the United Nations a ratification of the Convention on the Privileges and Immunities of the Specialized Agencies accompanied by the statement that immunity from jurisdiction would be accorded to the agencies "insofar as said immunity is accorded to foreign States in accordance with international law", this was regarded by the agencies as a reservation and the instrument was, because of their objections, not accepted for deposit.

However, Italian Courts have always applied the distinction between acts *iure imperii* and acts *iure gestionis* to international organizations in the absence of treaty obligations relevant to the subject.[13] United States Courts have done so more recently[14] in a situation in which the only treaty providing for immunity from jurisdiction without qualification relates to the United Nations and national legislation (the International Organizations Immunities Act, 1945) specifically provides that international organizations enjoy the same immunity from suit and legal process as is enjoyed by foreign governments. In 1982, the Italian Court of Cassation went further: it applied the distinction to legal transactions by the F.A.O. in Italy, despite the fact that Section 16 of the headquarters agreement between that Organization and Italy provides for immunity from jurisdiction without qualification.[15] The

suitable for application to purchases by an organization of equipment for technical co-operation projects?

[13] A key case was the decision of the Full Bench of the Court of Cassation in *Branno* v. *Ministry of War*, 22 *I.L.R.* 756. The case, which is also an example of the affirmation of immunity apart from treaty obligation, concerned N.A.T.O. The problem at issue was the provision of canteen facilities for staff.

[14] See, e.g., *U.N.J.Y.B.* 1977, pp. 260-2. On the other hand, the effect on international organizations of the Foreign Sovereign Immunities Act 1976 has not yet been judicially determined. See R.P. Lewis, "Sovereign Immunity and International Organizations", *J.I.L.E.* 1979, p. 675, and the later decision of *Tuck* v. *P.A.H.O.*

[15] The view that such treaty provisions did not affect a distinction considered by Italy to be a matter of customary international law had already been expressed by the Court in a 1976 case concerning I.C.E.M. (*U.N.J.Y.B.* 1973, pp. 197-8) and by a lower court in a 1969 decision concerning F.A.O. (*U.N.J.Y.B.* 1969, p. 238). However, in both cases the legal relationship in question (employer/employee) was held to be a matter of *iure imperii*.

Court eliminated the relevance of that provision to the case before it in part by holding that, in accordance with the rules usually applied to diplomatic immunity, it related only to the seat of the Organization. More generally, it affirmed that the extent of the immunity from legal process enjoyed by F.A.O. must be determined on the basis of the principles of international law developed in respect of the immunities enjoyed by foreign States.[16] It held a lease for offices to be a legal transaction *iure gestionis* on the ground that the "logistic" choice of accommodation is extraneous to the aims of the Organization and does not pertain to arrangements relating to the structure of the Organization. Both the F.A.O. Council[17] and the F.A.O. Conference have reacted by calling for the respect of the Organization's immunity "from all forms of legal process".[18] However, the representative of Italy to the 1983 Session of the Conference made it clear that the Court of Cassation would uphold its doctrine in any interpretation of internal law or treaty.[19] All parties seem resigned to concentrating on measures for immunity from execution. One may accordingly wonder whether other countries, including recent converts to limited immunity, will also move in that direction.

The question is all the more pertinent as the implementation of treaty obligations regarding the immunities of the staff of international organizations has tended to be influenced by the law applicable, between States, to diplomatic representatives. This is true, in particular as regards the grant of immunities to nationals. A number of countries have made express provision in or reservations to treaties on privileges and immunities of international organizations on this subject. In the case of the Convention on the Privileges and Immunities of the Specialized Agencies, ratifications subject to such reservations have not been registered and the countries concerned are not considered to be parties to the Convention. What is more significant, however, is that some countries treat their nationals differently from other staff members, in the absence of such provision or reservations, on the

[16] As seen by the court, the specific treaties would have had to make express exceptions to these principles if they were to be inapplicable.
[17] Resolutions 1/82 and 3/83. See also Doc. CL 82/5 (Report of the 42nd session of the Committee on Constitutional and Legal Matters) and Doc. CL 83/23.
[18] Report of the 22nd session of the conference, para. 345. [19] *Ibid.*, para. 343.

apparent assumption that this is legally permissible.[20] For instance, Section 21 of the Convention on the Privileges and Immunities of the Specialized Agencies provides that, in addition to the functional immunities to be extended to all officials, "the executive head of each specialized agency, including any official acting on his behalf during his absence from duty, shall be accorded in respect of himself, his spouse and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law". Section 15 of the United Kingdom Specialized Agencies of the United Nations (Immunities and Privileges) Order 1974, which gives effect to the Section in question, provides that it "shall not apply to any person who is a citizen of the United Kingdom and Colonies or a permanent resident of the United Kingdom".[21] The executive head would thus be limited to functional immunities, on the lines of the treatment of nationals under the Vienna Convention on Diplomatic Relations. It is permissible to wonder whether this was the intention of the phrase "in accordance with international law" in the Specialized Agencies Convention and, more fundamentally, whether it is appropriate that the status of the executive head of an organization, the exclusively international character of whose functions is recognized by Member States in pursuance of the constitution of the organization, and who frequently represents it in international relations, should be made dependent on his nationality. The statement accompanying the Italian ratification of the Convention, to the effect that Section 21 would be applied to officials of Italian nationality "with the same restrictions as are applicable, in accordance with international law, to diplomatic envoys of Italian nationality" was regarded by the organizations concerned as a reservation which, together with the one mentioned above,[22] has to date prevented registration of the ratification.

In 1980, the Administrative Committee on Co-ordination (consisting of the executive heads of all the organizations of the United Nations family) submitted a statement to the Economic and Social Council[23] in which it expressed its concern that certain States were

[20] Some developing countries do this as regards locally recruited, non-professional staff in offices on their territory, by reference to the wider question of categories of staff entitled to immunities.

[21] S.I. No. 1260, 1974. [22] See above p. 6. [23] U.N. Doc. E/1980/34, Add. 1.

denying the privileges of Section 21 of the Specialized Agencies Convention to their nationals by reference to Article 38 of the Vienna Convention:

> A.C.C. takes the view that the reference to international law in the relevant provisions of the Conventions on the Privileges and Immunities of the United Nations and the Specialized Agencies is meant to define the nature and extent of the additional privileges and immunities to be enjoyed, and not the persons to whom they apply. There is a fundamental difference between the status of diplomatic agents, as representatives of a State, ... and the status of international officials, as servants of the international community as a whole ... who must all be treated alike ... irrespective of their nationality. Indeed, when it framed Section 19 of the United Nations Convention (after which Section 21 of the Specialized Agencies Convention is patterned), the General Assembly rejected a proposal that States should have the right to limit the immunity of their nationals.
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> While the number of cases involved is small, ... A.C.C. feels that it involves an issue of principle, inasmuch as this practice introduces an element of discrimination on grounds of nationality, which is contrary to ... the very concept of an independent international civil service ...

(B) DIPLOMATIC RELATIONS

International organizations frequently establish offices the purpose of which is to pursue relations with particular countries or other organizations. It has gradually become apparent that such offices have similarities with diplomatic missions in inter-State relations; for instance, the resident representatives of the United Nations Development Programme have been seen as an embryo of a diplomatic service of the United Nations family, while certain missions of the European Communities have been described as "Embassies".[24] The functions of such offices and representatives, while not identical to those of diplomatic missions, show analogies. There may have been some doubt as to whether the establishment of the office of an organization in a Member State requires the consent of that State,

[24] See, however, the second report of the Special Rapporteur on Relations between States and Inter-Governmental Organizations (*Y.B.I.L.C.*, 1967-II, p. 135) denying the "representative" character of persons connected with international organizations.

as the establishment of diplomatic relations would;[25] on the other hand, the assignment of particular officials to top relations posts is effectively subject to a form of "agrément", while any member of the "mission" of an international organization may be declared *persona non grata*.

Overwhelmingly, the States with which relations are established will be Members of the organization concerned (or, as in the case of U.N.D.P., of one or more of a group of organizations co-operating within a programme). Exceptionally, the issue may arise for a non-Member State. Thus, in 1982, the Direction du droit international public of the Swiss Federal Department of Foreign Affairs was called upon to give an opinion on the question whether a regional organization had a right of legation in relation to a non-Member State.[26] It took the view that this was dependent on the express or implied powers of the organization in question. It found that, while there was nothing express in the constitution of the organization concerned, its aims and purposes required some activity on the territory of non-Member States and from this concluded that the organization's active right of legation could not be denied. The establishment of relations with a particular country then required the latter's agreement. Given the exceptional nature of the issue, which meant that there could not be said to be customary international law on the subject, the opinion advised that a grant of rights in Switzerland called for parliamentary approval because they represented "new obligations".[27]

More attention has been paid to the accreditation of missions by States to international organizations. Again — as is expressly stated in Article 5 of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character — the possibility of establishing such missions is in theory made dependent on the rules of the organization concerned. Since this is a matter generally not dealt with in express rules, the law has in fact developed as a result of practice. It was

[25] The doubt derives in part from the fact that the functions of such an office are not necessarily directed towards relations with that State.

[26] L. Caflisch, "La Pratique Suisse en matière de droit international public", 38 *Ann. Suisse* 1982, p. 69 at 110-15.

[27] In 1955 the United Kingdom adopted special legislation, the European Coal and Steel Community Act (4 Eliz. 2, ch. 4), to give status to a mission of the E.C.S.C.

perhaps to be expected that the establishment of a permanent mission by a Member State would not be subject to the consent of the organization; as indicated in the preamble to General Assembly Resolution 257(III)A, "the presence of ... permanent missions serves ... to keep the necessary liaison between the Member States and the Secretariat in periods between sessions of the different organs of the United Nations".[28] The same was not necessarily true in relation to non-Member States. In connection with the preparation of the Vienna Convention, a number of countries, including the United Kingdom, expressed the view that the establishment of permanent observer missions by non-Member States should be subject to the consent of the organization.[29] However, practice has been more lax and notifications of the establishment of such missions have frequently been simply accepted.[30] This is reflected in the final text of Article 5 of the Vienna Convention which permits the establishment of permanent missions by Members and of permanent observer missions by non-Members on the same legal footing, without any apparent need for consent.

The question then arises whether the appointment of a particular person as permanent representative or observer is subject to the *agrément* of the organization and whether, conversely, the organization is in a position to declare a representative or observer *persona non grata*. When the matter of permanent missions was considered at the third session of the General Assembly there was a controversial suggestion that their "credentials" be considered by the Credentials Committee of the Assembly; however, the resolution finally adopted provides only for an annual report of the Secretary-General on the credentials of permanent representatives. Practice does not suggest that this is used to give formal approval to appointments and no such approval is envisaged by the Vienna Convention, which provides that the credentials of the head of mission "shall be transmitted to the organization". As regards the converse problem, a legal opinion given to the Secretary-General of the United

[28] For the text see, *Y.B.U.N.* 1948-49, p. 973. For a view that liaison with a technical organization may be better achieved by the competent service in the sending State see *Y.B.I.L.C.* 1971-II, Part I, p. 427.

[29] The United Kingdom would also have required the consent of the host State.

[30] As regards the Holy See in the I.L.O., see Minutes of the 170th Session of the Governing Body (November 1967), p. 142; as regards W.H.O., see *Y.B.I.L.C.* 1971-II, Part I, p. 420.

Nations[31] took the view that there would be warrant for intervention by the United Nations in case of activities by members of a mission which did not pertain to the proper functions of the mission. In such a case, it would be for the Secretary-General to make representations to the State concerned; if these did not achieve satisfactory results, the matter might be brought before the General Assembly. There is nothing on the subject in the Vienna Convention. While there have been some cases of involuntary departure of members of permanent missions, this has usually occurred at the initiative of and for reasons primarily of concern to the host State. It is accordingly difficult to affirm that organizations may, for reasons of their own, declare a member of a permanent mission *persona non grata*.

What, of course, most differentiates relations between States and organizations from inter-State relations is the necessary involvement of a third party, the State in which the organization has its headquarters. This involvement raises two questions, that of the extent of the privileges and immunities which the host State is bound to grant, and that of the manner of protecting the legitimate interests of the host State. It may well be that under general international law regarding State immunity a certain status for representatives of a State is assured even in the absence of a treaty. Similarly, it may be that general rules derived from the independence and sovereignty of States require respect for the interests of the host State. However, the application of general principles to new phenomena requires some definition. Many of the instruments concerning the privileges and immunities of organizations contain provisions on State representatives which were drafted mainly with temporary presence in the host State in mind. As regards universal organizations, the Vienna Convention on the Representation of States has sought to cover the ground comprehensively. It would appear, however, that the major host States consider privileges and immunities granted under the Convention to be defined too extensively,[32] and their powers to react to non-compliance with the

[31] See *Y.B.I.L.C.* 1967-II, p. 165.

[32] J.P. Ritter, "La Conférence et la Convention sur la Représentation des États dans leurs Relations avec les organisations internationales", 21 *Ann. Français* 1975, p. 471, refers in particular to the provisions on accommodation for members of missions, on the status of members, and on the possible start of privileges prior to notification to the host State, as points considered objectionable. Of these, the

obligations of missions to be circumscribed too severely;[33] not one of them has to date ratified the Convention. This suggests that there is as yet no international consensus on the details of the law governing the status of the representation of States in relation to international organizations.

(c) TREATIES[34]

There are a number of theories regarding the basis of a treaty-making capacity of international organizations. The draft provision on the subject elaborated by the International Law Commission — "The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization" — is stated in the Commentary to be a compromise, compatible both with the view that capacity derives from a principle of international law which can be modified only by express restrictive provisions of constituent instruments, and with the view that capacity is exclusively dependent on the rules of the organization concerned.[35] As has been pointed out[36] the main practical difference between these two approaches may be that, in the latter case and particularly

one on accommodation goes beyond the requirements — on a reciprocal basis — of the 1961 Convention on Diplomatic Relations. See also the expression of similar views by J.G. Fennessy, "The 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character", 70 *A.J.I.L.* 62 (1976).

[33] The text eschews the notion of *"persona non grata"*. It permits the host State to take "such measures as are necessary for its own protection," in consultation with the sending State, "in order to ensure that such measures do not interfere with the normal functioning of the mission", and with the approval of the Foreign Minister of the host State.

[34] All references in this Section to provisions elaborated by the International Law Commission refer to the draft articles on the law of treaties between States and international organizations or between international organizations, submitted to the General Assembly in 1982.

[35] Report of the International Law Commission on the work of its 34th Session, Official Records of the General Assembly, 37th Session, Supplement no. 10 (hereinafter referred to as A/37/10), p. 41. A similar compromise was reached by the Institute of International Law in 1973; however, the resolution then adopted refers both to the rules of the organization and to "general practice in this field" and it was made clear that the practice in question might be that of other organizations.

[36] M. Rama-Montaldo, "International Legal Personality and Implied Powers of International Organizations", 44 *B.Y.* 111, 1970.

where there are no express provisions,[37] there always remains room for argument whether the power exists. It would not seem that this is a major problem in relation to the other party with which a treaty may be concluded. Except for some discussion regarding the participation of the European Communities in certain multilateral Conventions,[38] challenge to the capacity of an international organization to enter into treaty relations with a State or another organization is a rarity.[39] At the same time a commitment of the organization is a constraint on the decision-making power of its organs and hence, indirectly, of its Members; there may also be liability for breach of the commitment. While, again, this has not so far given rise to particular difficulty, the fact that there are rarely express rules either on treaty-making capacity or on the organ exercising treaty-making powers leaves considerable room for internal controversy on the constitutionality of particular treaties.

Of perhaps more immediate practical relevance is the question which agreements concluded by international organizations with States or other organizations are in fact governed by international law. The problem is known also in inter-State relations: for instance, a number of States consider that so-called interdepartmental agreements are matters of private law. However, as regards international organizations there are at present no criteria for classifying agreements and there is apparently little practice of including express provisions clarifying the issue. In its comments on the definition of a treaty as "an international agreement governed by international law", the International Law Commission recognizes the existence of the problem: while stating that the draft articles do not purport to

[37] Reliance on the practice of organizations, in general or as part of the "rules" of the organization concerned, is liable to pose the question whether it remains eternally possible to contest the constitutionality of a settled practice or, conversely, whether practice can serve, by a process of interpretation, to develop and hence to some degree modify a constitution. For an examination of the views of the International Court on this issue, see E. Lauterpacht, "The Development of the Law of International Organization by the Decisions of International Tribunals", 153 *R.C.A.D.I.* 1976-IV, p. 380.

[38] See R. Kovar, "La participation de la C.E.E. aux conventions multilaterales", 21 *Ann. Français* 1975, p. 903. Reservations of the U.S.S.R. regarding commodity agreements, for instance, suggest that recognition of the E.E.C. rather than its treaty-making power, has been at issue.

[39] See below, p. 22 for a reference to G.A.T.T.'s capacity to conclude a headquarters agreement; the issue, in fact, was its personality.

provide criteria for determining whether an agreement between international organizations or between a State and an international organization is or is not governed by international law, since this depends essentially on the will of the parties, it does suggest that, where an agreement is concluded by an organization with recognized capacity to enter into agreements under international law and where that agreement is not by virtue of its purpose and terms of implementation made subject either to the national law of any State or to the rules of an organization, it may be assumed that the parties to the agreement intended it to be governed by general international law.[40]

Once we are dealing with "treaties", to what extent do the general rules of the law of treaties, as codified in the Vienna Convention of 1969 on the subject, apply? Again, there are two main approaches. One, which stresses the difference between States as primary and organizations as derivative subjects of international law, would wish the applicability of each rule to international organizations to be demonstrated. The other, exemplified by the United Kingdom,[41] establishes a presumption that once two entities having international capacity are validly in treaty relations with one another their rights as contracting partners are equal "and this presumption must stand unless there are clear reasons, in a particular set of circumstances, for drawing distinctions based upon the character and status of the parties".

Four main issues remain highly controversial.[42] One is the question whether the internal law of organizations, and particularly

[40] Report of the International Law Commission 1982 in U.N. Doc. A/37/10, pp. 28-9. A related question is whether the agreement has in fact been concluded by the organization as such. This issue arose, for instance, in respect of the relationship agreement between the E.E.C. and the I.L.O., entered into by the E.E.C. Commission; it was suggested by some that the agreement related only to the activities of the Commission and not to those of other E.E.C. organs. The question is, in turn, related to but distinct from that of the organs of an organization having treaty-making powers.

[41] See the United Kingdom comments on the first draft of the International Law Commission articles, *Y.B.I.L.C.* 1981-II, Part II, p. 191.

[42] There are other, more secondary, questions. One is the distinction drawn by the International Law Commission between "full powers" for representatives of States and "powers" for representatives of organizations, on the ground that organizations have circumscribed powers. The United Nations has suggested, in its comments (U.N. Doc. A/38/145, Add. 1, p. 20), that "full" powers refer not to the extent of the powers of the principal, but to the extent to which whatever

their constitutional law, can be equated with the internal law of States. A State may 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 to invalidate its consent only if the violation was manifest and concerned a rule of internal law of fundamental importance. It may not invoke the provisions of its internal law as justification for its failure to perform a treaty at all. The International Law Commission finally opted for the application of parallel rules to organizations. However, a number of States and organizations continue to argue that, insofar as the internal law of an organization is itself a treaty, the position of an organization is entirely different. As regards the United Nations the issue is sharpened by Article 103 of the Charter which makes obligations thereunder prevail over other treaties.[43] It has also been suggested that there may be differences according to whether agreements are with Members or with non-Member States. An ancillary question to which the problem is of relevance is whether an organization may be considered, by reason of its conduct, to have acquiesced in the validity of a treaty, when the conduct was itself unconstitutional. Experience, as yet, provides no guidance.[44]

A second issue concerns the power of organizations to make reservations to treaties and to object to or accept reservations made by others. One suspects that an inclination to treat organizations differently from States in this respect derives from the view that reservations have their basis in the sovereignty of States, although early proposals of the International Law Commission, which provided for different treatment, were more subtly justified. However

powers the principal has are given to the agent. But it has taken the Holy See, with centuries of experience in putting princes in their place, to comment that even States do not enjoy "full" powers. (*Ibid.*, p. 8.)

[43] By its terms Article 103 deals with the obligations of Member States under the Charter and under other treaties. In its comments on Article 30 of the draft articles (successive treaties relating to the same subject-matter) the International Law Commission indicates that it did not arrive at a firm conclusion as to whether Article 103 applies also to treaties of organizations.

[44] See, however, Article 4(6) of Annex IX of the U.N. Convention on the Law of the Sea, which provides that "in the event of a conflict between the obligations of an international organization under this Convention and its obligations under the agreement establishing the organization or any acts relating to it, the obligations under this Convention shall prevail".

that may be, the final draft articles would treat organizations differently only in respect of the tacit acceptance of reservations. A number of comments made on the final draft suggest that even this distinction is not necessary. Such little practice as there has been — relating mainly to the treatment by the specialized agencies, as rather particular parties[45] to the Convention on the Privileges and Immunities of the Specialized Agencies, of reservations to that Convention — has involved both objections to substantive reservations and acceptance of procedural ones, without major challenge.

A third problem is that of the manner of creating rights and obligations for Member States through the conclusion of treaties by the organization. Draft article 36 *bis*, requiring the individual consent of Member States, appears to have been drafted primarily with the European Communities in mind. Its unsuitability in relation to universal organizations is suggested in a paper presented to the Sixth Committee of the General Assembly by the Administrative Committee on Co-ordination:

> Thus, [the] draft article cannot be applied, *inter alia*, to headquarters and conference agreements that create both rights and obligations for States which are not parties to them and whose individual consent is neither sought nor given. Moreover, were it to be provided that, in the absence of constitutional provisions to that effect, States members of an international organization can be bound by a treaty concluded by that organization only by their unanimous consent, it should be borne in mind that neither the United Nations Charter nor the constitutions of the specialized and related agencies provide for a unanimity rule.[46]

Some other, perhaps more fundamental, issues are involved in the controversy: for instance, to what extent do treaties of an organization create international rights and obligations directly between the other contracting parties and the Member States of the organization; and what relevance attaches to the manner in which and extent to which the Member States of an organization are liable for its obligations?[47]

[45] See below, p. 35f. [46] Doc. A/C.6/38/4 of 27 October 1983, para. 18.

[47] The Institute of International Law, in a resolution adopted in 1973 (*Annuaire de l'Institut de droit international*, 1973, pp. 797-8), left open the question of the obligations that might arise for Member States from treaties of the organization either under the rules of the organization or under a general rule of international law. One of the proposals submitted to it by its Rapporteur (R.J.

A final question is that of the scope of the commitment of international organizations. States bind themselves in respect of their entire territory unless a different intention appears from the treaty or is otherwise established. As regards organizations, the coverage of subsidiary and related bodies is at issue. It will be discussed in the next section.

By reference to the diversity of the present treaty practice of organizations and to the fact that law in the matter is comparatively recent and fragmentary and continues to evolve, as well as to the procedural difficulties (to be considered below) of making new rules applicable, the Administrative Committee on Co-ordination in the above-mentioned paper took the highly unusual step of suggesting to the General Assembly of the United Nations that it should not proceed in the immediate with the adoption of a formal convention on the subject; this would allow "the acquisition of relevant experience as well as the further development and gradual crystallization of this area of the law, which as yet does not appear ready for codification".[48] The General Assembly, while deciding in principle on a plenipotentiary conference "to be convened not earlier than 1985", continues to have the matter under advisement.*

2. *Specific Problems posed by International Organizations*

As indicated at the outset of this Chapter, rules of general international law are needed for specific problems of international organizations which cannot be answered by the internal law of

Dupuy) would have established a parallel between the power of an organization to create obligations for its Members by external and by internal action. Another would have required Members not to interfere with the implementation of a properly concluded treaty. An interesting example of the latter issue is discussed in H.J. Geiser, *Les effets des accords conclus par les organisations internationales* (1977), pp. 76-90: following a problem which arose in 1963 (*U.N.J.Y.B.* 1963, pp. 164-6) the question was put to Member States of the United Nations whether they would be prepared not to request the extradition from a host State of the organization of persons in that State in response to a U.N. invitation, seeing that the host State was required, under an agreement with the organization, to facilitate their attendance; a substantial number of States replied affirmatively.

[48] Doc. A/C.6/38/4, para. 19.

* [Author's note: After these lectures were delivered, the General Assembly decided, by Res. 39/86, to hold a codification conference in February-March 1986.]

organization alone. One of these is basic: what is an international organization? Another relates to the legal aspects of relations between organizations.

(a) THE DEFINITION OF PUBLIC INTERNATIONAL ORGANIZATIONS

Two inter-related issues arise in international law: which corporate bodies operating in the international sphere may be regarded as public international organizations; and which such bodies have international legal personality, *i.e.* the capacity to exercise rights and assume obligations under international law. Internal law is unhelpful in the sense that, while many constitutions of such bodies provide for their legal personality, those that make it clear that international personality is intended can be counted on the fingers of one hand. Practice is confused and the fact that the matter is examined and conclusions are arrived at for widely different purposes makes generalizations difficult.

It is generally considered that in order to be regarded as an international organization and to have some personality in international law a body must be established by a treaty between States and States must be Members.[49] Practice may be making a number of inroads into that position.

Thus, the participation of existing international organizations in agreements establishing new international bodies is beginning to be accepted. In its Opinion 1/76 concerning the *Draft Agreement Establishing a European Fund for the Laying-up of Inland Waterway Vessels*[50] the Court of Justice of the European Communities *affirmed* that the European Economic Community had the capacity, in an area in which it assumed authority over external relations for the realization of one of the objectives of the Community, to co-operate with a third State in setting up a public international body and to give such body appropriate decision-making powers.[51] Another example, of interest because of the affirmation that the body

[49] The Vienna Codification Conventions define "international organizations" as "intergovernmental".

[50] (Case 1/76) [1977] E.C.R. 741.

[51] Furthermore, the Court considered it to be a necessary corollary of the internal distribution of powers in the Community that the Community and its institutions would, as such, participate with full membership rights in a body so created.

created does indeed have capacity in the sphere of international law, is that of the establishment of the U.N. Demographic Centre in Bucharest. The 1974 Agreement between the United Nations and Romania establishing the Centre specifies in Article I, Section 5, that the Centre has "legal personality distinct from that of the parties and shall not be considered as a body of the United Nations or of the Government".[52] The legal personality referred to could have been intended to be limited to the sphere of private law, particularly as a final sentence of the section provides that the Government shall publish statutory orders concerning the legal status of the Centre. The Director of the Centre accordingly sought guidance. In an opinion of March 1975 the United Nations Office of Legal Affairs took the view that

> considering that both Parties to the Agreement are themselves international entities, and since there is no indication to the contrary, the normal interpretation of Section 5 is that the Parties intended to confer international legal personality on the Centre . . . the exact attributes of the Centre's international legal personality would be defined by, or derive from, the terms and purposes of the Agreement, and it is this personality which, in turn, the Romanian Government would recognize and the acts of which it would regulate for the purposes of Romanian internal law in the regulations referred to in the last sentence of Section 5.[53]

Also, there are suggestions that international agreement to establish international persons need not take the form of a treaty, or indeed be concluded at the governmental level. There are examples of international organizations being established by conferences, without formal treaty.[54] The World Tourism Organization came into being as a result of government acceptances of a statute elaborated in 1970 by its non-governmental predecessor, the International

[52] *U.N.J.Y.B.* 1974, p. 25.

[53] *U.N.J.Y.B.* 1975, pp. 159-60. See also the 1974 Agreement between France and U.N.E.S.C.O. concerning the establishment and operation of an international Centre for registering serial publications (*Journal officiel*, March 1976, p. 1398), Article 4 of which provides for the "legal personality" of the Centre.

[54] The examples commonly given are those of the Colombo Plan Council and the Asian-African Legal Consultative Committee. Where a Conference resolution calls for ratification of a constitution (e.g. in the case of the Arab Labour Organization) the procedure is close to that of the negotiation of a treaty. See also W. Dale. "Is the Commonwealth an International Organization?", 31 *I.C.L.Q.* 451 (1982).

Union of Official Travel Organizations.[55] The Nordic Council, established by parallel parliamentary decisions and composed of parliamentarians, is regarded by many — though not by all — as an international organization.[56] Most provocative is a 1971 United Nations legal opinion on the establishment of a clearing union by the central banks of a number of Asian countries: after referring to Latin American and African precedents and remarking on the inappropriateness of making an agreement regarding such a union subject to the law of a particular country, the opinion suggests that

> [t]he principle that an international legal person can be created by virtue of a treaty is, after all, nothing more than a rule of customary international law, and it may well be that a new customary rule of international law is emerging under which such a legal person could also be created by an agreement concluded solely by autonomous public entities, such an agreement being governed by international law pursuant to another new customary rule . . .[57]

Whatever may be the merits of that suggestion the question of the status of bodies set up by and composed of public entities is posed in other contexts as well; it has arisen, for instance, as regards INTERPOL and as regards certain organizations composed in whole or in part of social security institutions.[58] The question is related to the effect, in international law, of so-called inter-departmental agreements. There is now perhaps a certain flexibility of approach to such forms of public international co-operation.[59]

[55] For a detailed description of the procedure followed see J. Castañeda, "Une nouvelle méthode pour la création d'organismes internationaux. Le cas récent de L'U.I.O.O.T.", 16 *Ann. Français* 1970, p. 625. See also R. Gilmour, "The World Tourism Organization: International Constitutional Law with a Difference", 18 *Netherlands Int' Law Rev.* 275 (1971).

[56] But the Inter-Parliamentary Union is not so regarded. H.G. Schermers (see p. 3, note 1 above) considers that the difference lies in the fact that governments participate in the work of the Nordic Council. Also, it now operates in the framework of the Treaty of Co-operation between Scandinavian Governments concluded in 1962 and amended in 1971, and is paralleled, in that framework, by the Nordic Council of Ministers.

[57] *U.N.J.Y.B.* 1971, 215 at 218. The conclusion may be denied by those who believe that only States can create international custom.

[58] For an examination of some borderline cases see M. Pérez González, "Las organizaciones no gubernamentales en el ambito de la organizacion internacional", 29 *Rev. esp.* 229 (1976). INTERPOL has, after lengthy consideration, been classified by the United Nations as an intergovernmental organization.

[59] See, for instance, "Netherlands State Practice for the Parliamentary Year 1979-80", 12 *Netherlands Yearbook* 165, 178 (1981), for a government explanation of

A second element generally referred to in order to determine whether a body is an international organization and has international personality is that of possessing organs and powers which are its own, as distinct from those of Member States. The problem here, in practice, is to decide where the border between legal dependence and independence lies.

The matter has been of particular importance in recent years in Switzerland because of the adoption of constitutional provisions making accession to or participation in the work of an international organization subject to referendum. Thus it was concluded in 1979 that accession to the International Whaling Convention of 1946 was not subject to referendum because the International Whaling Commission was a body common to the States Parties to the Convention, which expressed their collective will, and not a separate legal entity.[60] The fineness of the distinctions involved and the circular nature of relevant arguments are, however, best illustrated by an opinion on the legal personality of G.A.T.T.[61] It notes the institutional development of G.A.T.T. which, at the outset no more than a treaty, acquired organs after the projected International Trade Organization failed to come into being. It notes further that some authors consider that, by virtue of this development, G.A.T.T. has become a true international organization. Nevertheless, it concludes that G.A.T.T., although *in fact* an international organization because it has organs and a Secretariat, is not an organization *in law* because it has no personality distinct from the Member States and no independent legal will.

the need so to define international organizations in national constitutional documents that account can be taken of developments in the law. "Generally speaking, international public law organizations are taken to be organizations whose membership consists of States and which are brought into being by, or by virtue of, agreements; in addition to these, international law may also recognise other bodies as 'organizations based on international law'." (*Ibid.*)

[60] L. Caflisch, "La pratique Suisse en matière de droit international public 1979", 36 *Ann. Suisse* 1980, p. 139 at 145-50; see also 34 *Ann. Suisse* 1978, p. 49 at 89-94, and 35 *Ann. Suisse* 1979, p. 117 at 132-3.

[61] L. Caflisch, "La pratique Suisse en matière de droit international public 1978", 34 *Ann. Suisse* 1978, p. 49 at 83-7. The practical issue here was the conclusion of a headquarters agreement. The practical suggestion was that the Director-General of G.A.T.T. might conclude the agreement in the name and on behalf of the Contracting Parties. Consideration of the international personality of G.A.T.T. has been complicated by the fact that it has also acted as the Interim Committee of the still-born International Trade Organization.

If a "primary" international organization is not necessarily recognizable at sight, more difficult questions are raised by the status of certain "subsidiary" bodies established by majority decision of the organs of existing international organizations. A very substantial number of subsidiary organs has been created by various international organizations and indeed by existing subsidiary bodies.[62] Their nature, size and permanence varies greatly. The ones of more direct interest in the present context are those given "autonomy" or certain forms of legal capacity which leave ambiguous the legal sphere in which the capacity is to be exercised.

Some subsidiary bodies, for instance of the United Nations,[63] conclude agreements with governments and with other international organizations. This poses the question of the parties to the agreement, in other words, whether the subsidiary alone or the parent organization is bound by and responsible for the due performance of the agreement. The question has theoretical significance because of the light a treaty-making power may shed on the international personality of the body concerned.[64] It has practical implications, particularly when it is recalled that a frequent purpose of the establishment of subsidiary bodies is to separate their finances, largely based on voluntary contributions, from those of the parent organization. The Special Rapporteur of the International Law Commission, on the subject of treaties between States and International Organizations, P. Reuter, found ten years ago[65] that there was uncertainty both as to the legal status of subsidiary bodies and regarding the identification of the party to an agreement concluded by a subsidiary body; he was not certain

[62] Some bodies regarded as "subsidiary" have been established by independent bodies.

[63] They appear to be taken to exercise the treaty-making power of the United Nations: their agreements are registered, apparently under the provision of the relevant regulations which permit registration of treaties to which the United Nations is a party, and, insofar as they relate to privileges and immunities, published in the *United Nations Juridical Yearbook* under the heading of agreements relating to the status of the United Nations (with the curious exception of the agreement signed in 1975 between U.N.E.P. and Kenya).

[64] For an example of a subsidiary body being treated as a "third party" see the headquarters agreement of the International Agency for Research on Cancer. The Agreement is concluded by France and W.H.O., but Article XXII requires the approval of the Agency. (*U.N.J.Y.B.* 1970, pp. 41-5.)

[65] Second Report, *Y.B.I.L.C.* 1973-II, pp. 85-6.

whether it was useful or expedient to seek definition with a view to the greater security for other parties. In 1982, when finalizing articles on that subject, the Commission found itself in the same dilemma:

> It would be useful to make it clear that, unless there is a properly established indication to the contrary, when an international organization binds itself by treaty, it also binds [all the entities, subsidiary organs, connected organs and related bodies which come within the orbit of that international organization and are incorporated in it to a greater or lesser extent]. Conversely, a treaty concluded on behalf of a subsidiary organ should bind the entire organization as well. However . . . [t]his is an area in which notions, vocabulary and the practice of international organizations are not settled, and it seemed wisest to leave aside a subject which [it] is too early to codify.[66]

The question of the legal nature of subsidiary bodies also arises in connection with their ability to rely on arrangements for the privileges and immunities of the parent organization. There have been instances of the affirmation, in this connection, of the legal independence of certain bodies. For instance, in a legal analysis of U.N.R.W.A. a former legal adviser of that body cites two decisions of Egyptian courts affirming that it had juridical personality. In the first (*Husseini* v. *U.N.R.W.A. Representative*, 1957) a Court in Gaza reasoned that, as the Agency and not the United Nations had entered into international agreements with the Egyptian Government relating to the Gaza strip, U.N.R.W.A. "had a juridical personality independent from that of the United Nations" and held that the Convention on the Privileges and Immunities of the United

[66] Report of the International Law Commission on the work of its 34th Session, General Assembly, Official Records, 37th Session Supplement No. 10, p. 80. An example of the ambiguous nature of the treaty-making power of certain subsidiary bodies is provided by the Charter of the United Nations University, adopted by General Assembly Res. 3081 (XXVII) on 6 December 1973. Article II, paragraph 2, expressly empowers the Rector of the University to conclude agreements safeguarding the academic freedom and autonomy of the University "in the name of the United Nations". On the other hand, Article XI, after specifying that the University is an autonomous organ, gives it, in paragraph 2, legal capacity and, in paragraph 3, the power to conclude agreements with governments, organizations and private parties. By contrast to Article II, the capacity and power under Article XI would seem to be exclusively those of the autonomous subsidiary body; whether they belong to the international sphere is not clear.

Nations therefore did not extend to it. In the second (*Jirjis* v. *U.N.R.W.A. Representative*, 1961), a Cairo court accepted that the Agency enjoyed the benefit of the Convention — as had, in the meantime, been expressly affirmed by the General Assembly in Resolution 1456(XIV) of 1959 — but reaffirmed that it possessed a separate juridical personality and was competent to enter into agreements on the international plane.[67] Another example concerns a subsidiary body of the International Labour Organization, the Centre for Advanced Technical and Vocational Training. A provision of the Statute of the Centre confers on it legal personality and such legal capacity as is necessary for the fulfilment of its purposes.[68] The intention was apparently essentially to enable the Centre to deal with private law matters in a manner which would limit the liability for obligations undertaken by it to its own funds and assets; its capacity to do so at its offices in Turin was ensured under an agreement between the I.L.O. and Italy. Nevertheless, when the Centre in 1972 wished to open an office in London the Protocol Department of the Foreign and Commonwealth Office took — and maintained — the view that the provision gave the Centre an international legal personality distinct from that of the International Labour Organization and that, accordingly, it could not rely on the Convention on the Privileges and Immunities of the Specialized Agencies.[69]

Perhaps examples such as the foregoing are primarily the expression of a sentiment that, in establishing subsidiary bodies, international organizations may be having their cake and eating it too. On the one hand, such bodies may have extensive autonomy and relieve the parent organization of responsibility for their actions; on the other, for such purposes as privileges and immunities,[70] or coverage by the Second Protocol to the Universal Copyright Convention,[71] they seek to have the benefit of belonging to the

[67] The cases are referred to in W. Dale, "U.N.R.W.A. — A Subsidiary Organ of the United Nations", 23 *I.C.L.Q.* 576, 591 (1974).
[68] Centre for Advanced Technical and Vocational Training, Art. VIII, para. 1.
[69] Letters of 15 March 1972 and 2 November 1973.
[70] It is now standard practice, as regards U.N. subsidiary organs, for coverage by the Convention on the Privileges and Immunities of the United Nations to be expressly affirmed. This may imply practical problems where the Secretary-General lacks direct disciplinary authority over the staff of a subsidiary body.
[71] This applies only to the U.N. family of organizations.

parent organization. At the same time, the apparent readiness to consider that bodies established by an organ of an international organization[72] and frequently having no "membership" can be independent persons in international law, opens new vistas. It may well be that the considerable problems which have been created in national law by the growth of groups of companies are being paralleled, in the sphere of international law, by the hiving off of certain functions of international organizations to subsidiaries.

(B) INTER-ORGANIZATION RELATIONS

Inter-State relations are based on the principle of respect for the independence and sovereignty of each State. Some comparable principle may be needed in inter-organization relations. What is at issue here is not the co-ordination of their activities which may overlap but the protection of their legal structures and institutions. A few examples may serve to illustrate the nature of the problem.

A number of organizations are empowered to set standards in their field of specialization. The manner in which they do so, and the obligations of Member States in relation to standards so set, are in many of these cases laid down in the constitution of the organization concerned. Where the standards take the form of international conventions, ratification then may create obligations, not only as between ratifying States, but also in relation to the organization.[73] Certain legal consequences flow from this position. For instance, the I.L.O., where the matter is of particular importance because employers and workers as well as governments have a role in the adoption and in the implementation of international labour conventions, submitted to the Vienna Conference on the Law of Treaties that one of the rules of the Organization, diverging from the general law of treaties, was that an inter-se agreement between States varying the terms of ratified international labour conventions was not permissible.[74] What then of standards adopted in other international organizations?

[72] The organ may be a limited one. The aforementioned I.L.O. Centre was set up by the Governing Body and not the General Conference.

[73] See below, Chapter III.

[74] See also M.H. Mendelson, "Reservations to the Constitutions of International Organizations", 45 *B.Y.* 137 (1971), who takes the view that inter-se variations

The question arose in 1978 with the adoption, under the auspices of I.M.C.O., of a Convention on Standards of Training, Certification and Watchkeeping for Seafarers. Article V of the Convention was drafted to provide that all prior treaties and conventions relating to standards of training, certification and watchkeeping for seafarers which were in force between parties to the new Convention would continue to have effect in respect of seafarers to whom the new Convention did not apply and matters for which it had not expressly provided. Concern was expressed by a tripartite I.L.O. delegation to the I.M.C.O. Conference seeing that there were I.L.O. Conventions which were applicable to seafarers to whom the new Convention applied and which dealt with matters provided for therein. This did not lead to a modification of the provision since the Conference declared itself satisfied that there was no conflict between the new and prior Conventions. The question of principle, namely whether the adoption of a convention elsewhere could in itself deprive I.L.O. standards of their effect, remained. It was considered in the I.L.O. Governing Body in November 1978. While some government members took the view that no body other than the International Labour Conference could amend international labour standards or deprive them of effect, others were uncertain of the respective authority of the Conference and of plenipotentiary conferences in a different framework.[75] Finally, the Governing Body was content to note that in this case the new Convention did not impair the effect of I.L.O. standards.[76]

Similar problems are posed by the Convention on the Elimination of All Forms of Discrimination against Women, adopted by the U.N. General Assembly in December 1979. As submitted by the Commission on the Status of Women, the draft convention provided that it would not affect existing conventions adopted under the auspices of the specialized agencies (only) to the extent that they provided for more extensive rights for women. Both I.L.O. and U.N.E.S.C.O. submitted memoranda on the subject.[77] After lengthy discussion, the General Assembly adopted a

are not possible in relation either to organizational or to regulatory standards (*ibid.*, at 145-6).

[75] Doc. G.B. 208/14/25, paras. 13-16.

[76] Minutes of the 208th Session of the Governing Body, IX/7.

[77] U.N. Docs. E/5938 and A/32/218. Both organizations had adopted Conventions on matters dealt with in the U.N. text.

provision which was believed to be a compromise but in fact continues to pose the issue. Article 23 of the Convention provides that "[n]othing in this Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained ... in any other international convention, treaty or agreement in force for [a State Party]". In this case, the practical consequences of the provision are unforeseeable.

Another legal problem of inter-organization relations, of importance within the United Nations family of organizations, is that of harmonizing United Nations — and particularly General Assembly — positions[78] on certain political issues with the constitutional law of specialized agencies.

One example relates to United Nations "invitations" that all assistance be denied to certain countries — in the 1960s Portugal, over a longer period South Africa. In 1967, there was lengthy correspondence between the United Nations and the International Bank for Reconstruction and Development, after the General Assembly requested the Secretary-General to consult with the Bank "in order to obtain compliance" with such resolutions.[79] A memorandum of the U.N. Legal Counsel analysed the Bank's Articles of Agreement and concluded that a "reasonable" interpretation of their terms permitted compliance with the resolutions. A memorandum of the General Counsel of the Bank contested the interpretation, while pointing out that competence to decide questions of interpretation lay with the Executive Directors of the Bank. The two memoranda also reflect conflicting views of the position of specialized agencies: the U.N. Legal Counsel found it "incongruous" that loans be granted by a U.N. family organization to countries the international conduct of which had been condemned virtually unanimously through the United Nations; the General Counsel of the Bank considered this to be "no more than

[78] We are not dealing here with mandatory sanctions in respect of which Members of the United Nations are required by the Charter to take action *inter alia* in other international agencies of which they are Members. However, even this can raise difficulties in other organizations. See, e.g., for an examination of the relevant provisions of the law of the European Communities, P.J. Kuyper, "Sanctions against Rhodesia: the E.E.C. and the Implementation of General Legal Rules", 12 *C.M.L.R.* 231 (1975).

[79] U.N Doc. A/6825, submitted under agenda items 35 and 66.

a reflection of the technical and functional character of the Bank" the Members of which had not deemed it appropriate to give it a larger function in the international community. Finally, the Executive Directors by a majority endorsed the position of the Bank's General Counsel.[80]

Some specialized agencies have similarly found it difficult to give effect to General Assembly resolutions calling on them to grant full membership to Namibia. For instance, when the International Labour Conference considered an application of the U.N. Council for Namibia for membership in the I.L.O., in June 1978, the Legal Adviser concluded that Namibia could not be admitted, for two main reasons: membership under the Constitution was open to States and Namibia had not yet attained statehood within the meaning given to the term in international law; and the Constitution placed obligations on Members of the Organization which could be satisfied only by independent States.[81] In reply the representatives of the Council for Namibia submitted a working paper in which the I.L.O. Constitution was interpreted to imply that in any question concerning the admission of new Members, the I.L.O. must take into consideration and follow the decisions of the United Nations.[82] An author favourable to the admission of Namibia has commented that "this position ... would seem to subject the I.L.O. to decisions taken by another organization, the U.N., even to the extent of overriding the I.L.O.'s own Constitution".[83] Namibia was finally admitted under a compromise

[80] At about the same time I.C.A.O. found that the provision of G.A. Res. 2107(XX) calling on States to deny Portuguese aircraft landing facilities was contrary to the Chicago Convention. For a more recent controversy concerning an I.M.F. loan to South Africa see G.A. Res. 37/2 and 37/32 and Doc. A/37/607.

[81] Record of Proceedings of the 64th Session of the International Labour Conference, 24/20-22.

[82] *Ibid.*, 24/23. All that the Constitution provides is that Member States of the United Nations may become Members of the I.L.O. by accepting the obligations of its Constitution. Another, somewhat absurd, example of "interpretation" of I.L.O. constitutional provisions on membership is provided by the indication in the *United Nations Yearbook*, during a period of years when the People's Republic of China did not actively participate in the work of the I.L.O., that China was not a Member of the I.L.O., with a footnote specifying that the I.L.O. considered it to be a Member.

[83] R. Zacklin, "The Problem of Namibia in International Law", 171 *R.C.A.D.I.*, 1981-II, p. 224 at 317. See also E. Osieke, "Admission for Membership in International Organizations: the Case of Namibia", 51 *B.Y.* 189 (1980), who

which is a masterpiece of legal fiction: the Conference considered that compliance with the terms of the Constitution was prevented only by the illegal occupation of Namibia, and affirmed that the rights of the Namibian people could not be frustrated by illegal actions.[84]

Questions of inter-organization relations of rather a different nature and of greater complexity are posed by the assumption, by the European Communities, of the external relations functions of their Members in matters falling within Community competence. Where these Members participate in other international organizations, their ability to give effect to their rights and obligations in such organizations may be affected. The literature on the subject[85] and some relevant decisions of the Court of Justice of the Communities[86] have addressed the matter primarily from the point of view of the internal law of the Communities. However, here also there may be a need for harmonizing the requirements of two legal orders.[87] Efforts with a view to such harmonization have been

points out that, under its Agreement with the United Nations, the obligations of the I.L.O. are limited to the submission of formal recommendations of the General Assembly to the competent I.L.O. organ.

[84] At the end of 1982, following decisions to admit Namibia by the organs of the I.A.E.A., the United States, as depositary Government of the Statute of the Agency, held the Instrument of Acceptance submitted by the Council for Namibia in abeyance pending comments by the Parties to the Statute, on the ground that the Statute did not permit membership in the Agency by an entity other than a State.

[85] See, e.g., P. Pescatore, "External Relations in the Case-law of the Court of Justice of the European Communities", 16 *C.M.L.R.* 615 at 628ff (1979); J.P. Jacqué, "La Participation de la C.E.E. aux Organisations Internationales Universelles", 21 *Ann. Français* 1975, p. 924; Kovar, see p. 14, note 38 above, at p. 903; "La condition internationale de la Communauté", *Cahiers de droit européen* 1978, notes, 5-6, at pp. 548ff.

[86] In particular, *Kramer and Others* (Joined cases 3, 4, 6/76) [1976] *E.C.R.* 1279 (decisions in the North East Atlantic Fisheries Commission); *Opinion of the Court Given Pursuant to Article* 228(1) *of the E.E.C. Treaty of 11 November* 1975 (Case 1/75) [1975] *E.C.R.* 1355 (decisions of the O.E.C.D.); *Draft Agreement Establishing a European Laying-up Fund for Inland Waterway Vessels* (Case 1/76) [1977] *E.C.R.* 741; *Re the Draft Convention on the Physical Protection of Nuclear Materials, Facilities and Transport* (Opinion 1/78) [1979] 1 *C.M.L. Reports* 131 (draft Convention elaborated in I.A.E.A.).

[87] See also the comment of K.R. Simmonds, "The Evolution of the External Relations Law of the European Economic Community", 28 *I.C.L.Q.* 644 at 664-5 (1979), as regards the application and interpretation of international agreements: "The principle of 'effectiveness', on which the Court has placed such weight, must in such a process of interpretation relate to the positions of

made, in particular by the Communities and the I.L.O.[88] The main problems concern international labour conventions and the application of the provisions of the I.L.O. Constitution relating thereto. For instance, under the Constitution, Member States of the I.L.O. are required to submit newly adopted Conventions to the authority competent to legislate or otherwise implement the instrument. It has been accepted that where a Community organ has the power to legislate on the subject-matter of a particular Convention, submission to that organ may satisfy the constitutional obligation, but a number of ancillary problems remain: should there be submission to national parliaments as well;[89] how can Member States ensure that, as expected under I.L.O. constitutional practice, submission is accompanied or rapidly followed by a statement as to the action to be taken; how can national employers' and workers' organizations be consulted on and advised of proposals for action? Again, because so many relevant requirements derive directly from the Constitution, ratification of international labour Conventions is open only to Member States of the I.L.O. Where, under Community law, the European Economic Community as such has the power to conclude treaties on a particular subject, there would have to be some form of delegation: either the Member States might advise the I.L.O. that they, as Members, will be bound by a ratification communicated by the Community, or the competent organ of the Community might delegate its power to ratify to the Member States. The choice is one of Community law and has not yet been made; the problem is particularly difficult in cases of "mixed competence". An even more difficult question is whether there would be consistency with obligations in relation to the I.L.O. if individual Member States were debarred from ratifying Conventions whenever one or more other Members of the Communities were unable or unwilling to comply with their standards. Finally, there are liable to be problems concerning the

all the parties to the agreement and not only to the effectiveness of the agreement *vis-à-vis* the Community's own policy of integration." (*Ibid.*, at 665.)

[88] For I.L.O. Governing Body consideration, in 1981, of potential problem areas and relevant I.L.O. rules, see Doc. G.B. 215/SC/4/1 and G.B. 215/12/22. For early proposals put forward by the Commission of the Communities in 1980 see COM (80) 315 final.

[89] For the second purpose of submission of informing the public. The United Kingdom has so submitted.

answerability of individual Member States for non-compliance with a ratified Convention where such non-compliance results from Community legislation. On all these issues each organization needs to avoid seeking to give "priority" to its law. Both need to bear in mind the importance of not allowing procedural difficulties to prejudice the effect of the substantive work of either.

3. Means of Applying International Law to International Organizations

There is no reason why rules of international law which are generally recognized as applicable between States and which are not by their nature unsuitable for international organizations should not be automatically binding on the latter.[90] Such a conclusion has been justified on the ground that States bound by rules of international law should not be able to evade them collectively. Alternatively, if international organizations are seen as legal entities distinct from their Members; the applicability of the relevant rules can be explained as a necessary implication of legal capacity and activity in the international legal order.[91] However that may be, it does not appear to have been suggested by any organization that it is free to accept or not to accept legal rules meeting the double test.

A rather different question is that of the relationship between international law and the internal law of organizations. It bears some similarity to the question of the relationship between international law and municipal law, and has been examined by reference to analogous concepts in relation to the European Communities, the internal law of which bears much greater resemblance to the legal order of a State than that of any other international organization.[92] However, as in the case of certain aspects of the law of treaties discussed earlier, the fact that a key element of

[90] H.G. Schermers takes it for granted that international organizations are bound by "general international law" (Schermers, see p. 3, note 1 above, at p. 1383).

[91] For an examination of the theoretical basis of the applicability of general international law, see A. Bleckmann, "Zur Verbindlichkeit des allgemeinen Völkerrechts für internationale Organisationen", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1977), p. 107.

[92] See, e.g., K.M. Meessen, "The Application of Rules of Public International Law within Community Law", 13 *C.M.L.R.* 485 (1976); Kuyper, see p. 28, note 78 above; H.G. Schermers, "Community Law and International Law", 12 *C.M.L.R.* 77 (1975); G. Bebr, "Agreements concluded by the Community and their Possible Direct Effect", 20 *C.M.L.R.* 35 (1983). Earlier literature regarding

the internal law of most organizations is itself an international treaty may call for a different hierarchy of legal norms, and possibly a distinction between the priority given to *ius cogens* and to other rules of international law. Even as regards the Communities such questions have not yet been fully explored in practice.[93]

At the same time if, as has been suggested above, it is not certain to what extent, and with what possible modifications, rules of international law generally recognized as applicable between States may be suitable for international organizations, the most important issue is how a statement of appropriate rules, whether intended to be declaratory of existing law or to represent its progressive development, or both, may be given effect in relation to international organizations.

International organizations appear to be reluctant to admit that they can be bound by a treaty to the terms of which they have not, in one form or another, given their consent. The Court of Justice of the European Communities has been prepared to accept as "guidelines" or "general principles of law" international treaties in which the Member States, but not the Communities, have participated;[94] this is, of course, much easier in an organization with ten Members than in one with 150 or more. The Secretary-General of the United Nations, in performing depositary functions, has had to face the fact that, as regards the treatment of reservations, the terms of the Vienna Convention on the Law of Treaties do not correspond fully to decisions on the subject taken by the General Assembly in 1952 and 1957: in 1975 and again in 1976 he made it clear that he did not believe himself to have the authority to adjust his practice to the Vienna Convention in the absence of new

treaties is discussed in H.J. Geiser, *Les effets des accord conclus par les organisations internationales* (1977), pp. 117-29.

[93] See Meessen (above, note 92) who takes the view that the treaties forming the basis of Community Law would prevail both over treaties and over general international law, but would be so interpreted as not to violate obligations thereunder.

[94] *Nold, Kohlen-und Baustoffgrosshandlung* v. *Commission of the European Communities* (Case 4/73) [1974] *E.C.R.* 491; 55 *I.L.R.* 459, regarding human rights treaties; *Rutili* v. *Minister for the Interior* (Case 36/75) [1975] *E.C.R.* 1219; 62 *I.L.R.* 390, regarding human rights treaties; *Defrenne* v. *Société Anonyme Belge de Navigation Aérienne Sabena* (Case 43/75) [1976] *E.C.R.* 455, regarding I.L.O. Equal Remuneration Convention.

instructions from the General Assembly.[95] Similarly, while the I.L.O. has felt at least morally bound in its staff practices to take account of international labour standards adopted by the Organization and widely ratified by Member States, other organizations have often taken the view that these standards are not binding on organizations. Thus a U.N. legal opinion of 1973, concerning the legal status of a trade union seeking to represent U.N. staff in Geneva, stated that the Freedom of Association and Protection of the Right to Organize Convention, 1948 (ratified by nearly two-thirds of the membership of the Organization)

> is of course only applicable to those States that ratified it and not to any inter-governmental organizations they may belong to. If States feel obliged to bring the provisions or the principles of such treaties to bear on an international organization, they can do so by means of appropriate resolutions in the organization.[96]

In its statement on the draft articles on treaties between States and international organizations, submitted to the General Assembly in October 1983, the Administrative Committee on Co-ordination affirmed that it was essential "that no international organization be bound without its explicit consent by a convention incorporating the draft articles".[97]

Conversely, a number of States are reluctant to accept the participation of international organizations as parties on an equal footing with States in "law-making" multilateral conventions. Their argument of principle is that only States, as the original subjects of international law, are in a position in every respect to establish international law; organizations possess such capacity only in their respective fields of activity and within limits established by their rules.[98] Such participation would in any case raise some practical difficulties. One relates to the great number of international organizations: if the subject matter is of general concern would all be able

[95] *U.N.J.Y.B.* 1975, p. 204; *U.N.J.Y.B.* 1976, p. 210. The fact that the Vienna Convention was not yet in force does not appear to have been determining.

[96] *U.N.J.Y.B.* 1973, p. 171. The same opinion considered the right of association to be applicable to the United Nations by virtue of the Universal Declaration of Human Rights.

[97] U.N. Doc. A/C.6/38/4.

[98] See, e.g., U.N. Doc. A/38/145, p. 8. And note how Annex IX of the U.N. Convention on the Law of the Sea circumscribes the possible accession of an international organization.

to participate or only some;[99] and, if the latter, what would be the value, if any, of the convention in relation to those not participating? Another is that in this context the likelihood of controversy over the treaty-making capacity of particular organizations is greater than in that of bilateral or even multilateral arrangements in pursuance of their normal activities. Also, to what extent and in what manner would acceptance of the convention by international organizations be taken into account for the purpose of its entry into force? Finally, the diversity of practice of international organizations is liable to raise in acute form the problem of reservations to "codifying" treaties.

What then are the possible alternatives?

One possible approach is that of some Conventions on Privileges and Immunities. The United Nations Convention was "adopted", and that applicable to the specialized agencies "accepted" by the representative organs of the organization, prior to being opened to ratification or accession by States.[100] They speak expressly of being "in force" as between the organizations and ratifying or acceding States, and there is no doubt that the organizations consider themselves to be bound by their terms, without being parties thereto in the same sense as States. However, again, the great number of international organizations makes it more difficult to envisage this procedure in respect of a subject which is of interest to all of them, and the problem of "reservations" remains.[101]

Another possibility is a "third party" approach: the convention would be open to ratification and accession by States only but, on the assumption that it would create both rights and obligations for international organizations, these would be invited to consent thereto. This is essentially the approach of the Convention on the

[99] At present there is a group of "principal international organizations" which are invited to send observers to codification conferences and which have been consulted on the draft articles concerning treaties between States and international organizations. They include the United Nations, the specialized agencies and the main regional organizations.

[100] U.N. Doc. A/940 of September 1949 makes it clear that "acceptance" by a specialized agency was a condition precedent to accession in respect to that agency.

[101] In the Convention on the Privileges and Immunities of the Specialized Agencies the Annexes for each organization in fact serve to take account of their differences.

Representation of States in their relations with International Organizations of a Universal Character: while Articles 86-9 make signature, ratification and accession a matter for States, Article 90 provides that "[a]fter the entry into force of the present Convention, the competent organ of an international organization of a universal character may adopt a decision to implement the relevant provisions of the Convention"; furthermore, under Article 2, the Convention only applies to representation in relation to a particular organization "when it has been accepted by the host State and the organization has completed the procedure envisaged by Article 90". The Convention may be a bad precedent in that it has not so far attracted the ratifications of host States and it may be both difficult and pointless for an organization to set in motion the Article 90 procedure unless there is some assurance of concurrent action by the host State. In any case it again applies only to a limited number of organizations and its approach cannot as readily be transposed to a convention concerning all organizations.[102]

In view of considerations such as the foregoing, the Administrative Committee on Co-ordination, in its submissions to the General Assembly in 1982 and 1983 on the subject of treaties between States and international organizations, explored a "soft law" alternative, namely the adoption of the draft articles by, and with the authority of, the United Nations not as a convention but as

> a standard of reference for action destined to harden into customary law. As regards the organizations of the United Nations system — that is, the major universal organizations — such adoption could be accompanied by a formal recommendation, which would be required, under the various relationship agreements, to be submitted to the competent organs of each organization ... As regards other organizations, it would be the

[102] See also "The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Space", (G.A. Res. 2345 (XXII), Annex), the "Convention on International Liability for Damage Caused by Space Objects" (G.A. Res. 2777(XXVI), Annex), and "The Agreement Governing the Activities of States on the Moon and other Celestial Bodies" (*U.N.J.Y.B.* 1979, p. 109) which may apply to organizations responsible for conducting space activities, on the double condition that they declare their acceptance of the rights and obligations provided for in the instrument and that a majority of their Member States are parties to the instrument as well as to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space.

responsibility of States Members both of the United Nations and of those organizations to take the necessary steps so that due account is taken of the standard of reference . . .[103]

An analogous suggestion had already been submitted in comments on the first draft of the articles; however, the International Law Commission preferred to recommend that the draft articles be given the form of a general convention.[104] This was also the decision of the General Assembly, in 1982, in Resolution 37/112. As of now, that decision stands but all its practical implications remain to be decided.

B. Private International Law

Most international organizations differ from States in that their own legal order does not include rules regarding private law transactions.[105] A problem of choice of law accordingly arises for all such transactions of the organization. Moreover, the organization may be called upon to deal with legal situations in respect of which there exists a conflict of laws, without being able to draw upon rules reflecting a public policy of its own.

1. Transactions of the Organization

The determination of the proper law to govern various transactions of international organizations is a large subject on which there exists substantial literature.[106] Recently, a comprehensive review of doctrine and practice regarding the contracts concluded by international organizations with private persons — by far the largest segment of their private law transactions — was undertaken by the

[103] U.N. Docs. A/C.6/37/L.12 and A/C.6/38/4.

[104] Report of the International Law Commission on the Work of its 34th Session, General Assembly, Official Records, 37th Session, Supplement No. 10 (A/37/10), paras. 56-61.

[105] Contracts of employment of international officials, generally accepted as being a matter for the internal law of organizations, are here left out of consideration.

[106] Amongst the classics, see in particular C.W. Jenks (see p. 3, note 1 above); and F. Seyersted, "Applicable Law in Relations between Intergovermental Organizations and Private Parties", 122 *R.C.A.D.I.* 1967-III, p. 427.

Institute of International Law.[107] It is accordingly not proposed here to go over the same ground. Suffice it to say that the Institute survey found that there were no clear trends in practice and that, doctrinally, any answer to the question of the law applicable to the contracts of international organizations could not be divorced from wider controversies concerning such issues as the possible "internationalization" of certain private law transactions, the conclusion of contracts *sans loi*, and the choice of law by international (arbitral) tribunals.

There are, nevertheless, a number of issues of particular relevance to international organizations.

The first relates to the connection, if any, between immunity from jurisdiction and applicable law.[108] In principle,[109] international organizations enjoy immunity everywhere. Moreover, as indicated earlier, for many of them[110] that immunity has been wider than that of States may be because no distinction has been made between acts *iure imperii* and acts *iure gestionis*. This means that States are not in a position to enforce their law against an international organization. But does it also mean that no municipal law can apply to international organizations unless it has been expressly chosen or incorporated by them? The arguments for immunity from jurisdiction — in particular the need to protect organizations from abusive, restrictive and divergent decisions of courts of different countries — do not justify the inapplicability of municipal law. Texts on immunities do not specify such inapplicability. On the other hand, some organizations firmly believe in the inapplicability of municipal law, at least in relation to contracts.[111] For instance, "in no case does the United Nations consider the law of any national system to be binding upon it either in the execution of contracts or in dispute settlements arising therefrom", while

[107] *Annuaire de l'Institut de droit international*, Vol. 57, 1 (1977), pp. 1-191 (Preparatory and final reports, by N. Valticos), *ibid.*, II, pp. 264-317 (discussion); 332-7 (resolution).

[108] Where there is no immunity, jurisdiction, including the freedom of the parties to resort to arbitration, may also be affected.

[109] For organizations with limited membership this may be dependent, as regards transactions having a connection with non-Member States, on the recognition of immunity under general rules of international law.

[110] *I.e.*, for those whose immunity from jurisdiction is not expressly limited by reference to the nature of their activities.

[111] The applicability of the *lex situs* to immovable property is generally accepted.

apparently accepting "from a practical point of view" to give attention to ensuring that contracts are in general compliance with the law of the place of conclusion, the law of the place of performance, and the national law of the private parties with which the contract is concluded.[112] The Rapporteur of the Institute took a more pragmatic stand: "On ne saurait . . . exclure *a priori* qu'un droit étatique puisse être considéré comme régissant un contrat silencieux sur la loi applicable . . ."[113] In other words, it is conceivable that an arbitral or administrative tribunal seized of a contract to which an international organization is a party and which does not specify the law to be applied might find a municipal system of law to be the proper law of the contract. When it would do so in practice may be related to the nature of the contract. To take two extreme examples, the application of municipal law is more likely to a contract for the purchase of pencils for the headquarters of the organization from a company in the same country than to an arrangement under which an organization subcontracts a part of the performance of its obligations under a technical co-operation agreement with a government. However, not all contracts can be as readily classified.

The question of the possible applicability of national legal systems may be of importance also in relation to imperative provisions claiming to override the proper law, whether expressly chosen or not. It is often assumed that international organizations are entirely free to choose the law applicable to their private law transactions. F. Seyersted[114] specifically asserted that all statutory restrictions on such freedom were barred by the immunity of the organizations. On the other hand, C.W. Jenks[115] considered that such restrictions were applicable, in principle, but believed them to be of little practical importance because organizations were expressly exempted from some (e.g. fiscal legislation) and because others had little relevance to the organizations' transactions. In the twenty

[112] *U.N.J.Y.B.* 1976, p. 164. A similar distinction between voluntary compliance and legal subjection is made by B. Knapp, "Questions juridiques relatives à la construction d'immeubles par les organisations internationales", 33 *Ann. Suisse* 1977, p. 51 at 69; while recognizing that compliance with rules relating to electricity and sewage is necessary in practice, he takes the view that these rules are not binding.

[113] Valticos, see p. 37, note 107 above, at 56.

[114] See p. 37, note 106 above, at pp. 468-70.

[115] See p. 3, note 1 above, at pp. 148-9.

years since he wrote legislative provisions regarded as imperative have mushroomed, and the practical importance of the matter may no longer be so negligible. For instance, restrictions on technology transfer may have relevance to purchases of an organization for technical co-operation.[116] Assuming that their applicability is not precluded as a matter of principle, there would be a choice of law problem: the imperative provisions of which legal system could claim to be applied. Traditionally, the mandatory law of the forum alone was applied to the detriment of the law applicable under normal conflict rules; where jurisdiction is given to international administrative or arbitral tribunals, there is no forum in the sense of that practice.[117] However, it is beginning to be accepted that the imperative provisions of the law which would be applicable in the absence of express choice may fall to be applied despite such choice, and that even those of a third State with an overriding interest may be given effect or at least taken into account (with a similar practical result).[118] It could even be argued that, while one national legal system owes little consideration to the public policy of another as reflected in imperative provisions, international organizations might be expected to respect the relevant concerns of their Member States. The subject merits further reflection.

Widely, it is the assumption of organizations that the application and interpretation of their contractual obligations will be decided by reference to "general principles of law", irrespective of whether this has been expressly specified or not. Such confidence may not be altogether justified.

[116] In relation to this particular example, reference must be made also to the exemption, commonly found in texts on immunities, of the property of organizations from export restrictions.

[117] For an examination of the practice of international arbitral tribunals regarding the applicability of imperative provisions of a national legal system see Yves Derain, "Les normes d'application immédiate dans la jurisprudence arbitrale international", *Le Droit des Relations Economiques Internationales* (1982). As regards international organizations the law of the country in which they are established appears sometimes to be regarded as the "forum".

[118] See, e.g., Article 7, paragraph 1, of the E.E.C. Convention on the Law Applicable to Contractual Obligations of June 1980. Similar trends may be found in the Austrian Federal Act of 1978 on private international law, in Swiss draft legislation presently before Parliament and in the U.S. Second Restatement of the Law, on conflicts of laws.

First, one reason for not making express provision in contracts for the applicability of general principles of law is that the other party may hesitate to agree.[119] Insofar as arbitral tribunals, in particular, will seek to determine the common intention of the parties, the road to the application of such principles — unless the parties subsequently agree on reference to them specifically for the point in dispute — may not be direct. Moreover, the situation regarding, on the one hand, contracts between States and private parties and, on the other, contracts between organizations and private parties, is very different. It is not uncommon to find recourse to general principles of law in or in respect of international contracts between States and private parties, and particularly investment contracts. They are intended to serve as a protection for the private party against the use by the State of its own legal order to the private party's detriment.[120] In contracts between international organizations and private parties the shoe is, as it were, on the other foot: it is the organizations which desire the recourse to general principles of law, not so much for the protection of their interests as to emphasize their distance from national legal systems. While, therefore, the status of the organizations may be an argument for the non-application of a national system of law, considerations of justice and equity will not weigh heavily in favour of such a course.

Second, there are many different ideas as to what is meant by recourse to "general principles of law". In contracts between States and private parties such recourse is often supplementary to the application of the national legal system(s) of one or both of the parties and consists in turning towards a wider and more representative range of such systems both to fill gaps and, occasionally, as a corrective. Since, in the case of international organizations, one of the aims is to underline their status as international persons it may well be that the sense given by them to the phrase is that of Article 38(1)(c) of the Statute of the International Court of Justice. Contracts would then in principle be made subject to public international law — always assuming that this is possible in relations with

[119] See, e.g., Seyersted, p. 37, note 106 above, at p. 506.

[120] See, e.g., P. Lagarde, "Approche critique de la Lex Mercatoria", *Le Droit des Relations Economiques Internationales* (1982), p. 132; A.A. Fatouros, "International Law and the Internationalized Contract", 74 *A.J.I.L.* 134 (1980); D.M. McRae, "Legal Obligations and International Organizations", 11 *Canadian Yearbook* 87 (1973).

private parties[121] — and international law, since it is poor in established relevant rules, would be supplemented by general principles drawn from municipal law.[122] More dubiously, particularly where the contracts in question do not relate to anything which could be regarded as falling under a *lex mercatoria*, the general principles of law drawn from municipal systems might be regarded as a distinct legal order. In any of these eventualities it is far from clear what "distillation" of municipal law may be regarded as a general principle of law. At the same time, the greater the extent to which general principles are relied upon the more relevant that question becomes. The Swiss Government has recently taken the view that a rule, even though uniformly laid down by different countries, must, in order to become a general principle of the law of nations, be applied "de manière particulièrement marquée au cours d'une longue période et avoir un caractère éminemment représentatif".[123] The principle would certainly have to be reasonably widely accepted; recent arbitrations have shown that on some important issues there is no convergence of major legal systems.[124] The main example of regular judicial recourse to general principles drawn from municipal law in the framework of an international organization — that of the Court of Justice of the European Communities[125] — is too atypical to serve as a guide; the Communities have a limited number of Members, with much

[121] For an affirmative view, see F.A. Mann, "The Proper Law of Contracts Concluded by International Persons", 35 *B.Y.* 34, 1959; J.A. Barberis, "Nouvelles Questions concernant la personnalité juridique internationale", 179 *R.C.A.D.I.* 1983-I, p. 145.

[122] A very clear exposition of the role of general principles as a supplementary source of law is given in P. Weil, "Principes généraux du droit et contrats d'Etat", *Le Droit des Relations Economiques Internationales* (1982), pp. 403-4.

[123] Message of the Federal Council to Parliament of 10/12/1979 (L. Caflisch, "La pratique Suisse en matiére de droit international public 1980", 37 *Ann. Suisse*, p. 139 at 184-5). The question at issue was whether the fact that all industrialized countries having legislation on the subject of limited civil liability in nuclear matters made such limitation a general principle of law. The test proposed parallels that of international custom. Barberis, see note 121 above, at p. 197, suggests that frequently so-called general principles of law are in fact custom.

[124] See, e.g., *B.P.* v. *Libya*, 53 *I.L.R.* 297.

[125] For an analysis on relevant case law (which does not necessarily or even primarily relate to contracts), see M. Akehurst, "The Application of General Principles of Law by the Court of Justice of the European Communities", 52 *B.Y.* 29 (1981).

common culture, and a legal order which is more akin to that of a State than that of any other international organization. Even there the extent to which principles known only to some Members can be used is an issue. Elsewhere experience is very limited.

All this is not to say that general principles of law should not be used as a source; great international lawyers have spoken of their role in legal progress.[126] However, some heed should be paid to warnings from other authoritative voices. Sir Robert Jennings has expressed his concern

> about the continuing tendency of some to regard Article 38(1)(c) as a blank cheque to go delving among selected municipal laws . . . The large approach to general principles may even have brought about harm. It has encouraged people to argue from quite general principles, divorced from the rules that give them meaning: rules that qualify, that temper and restrict . . .

Sir Hersch Lauterpacht, dealing with general principles of law in connection with judicial legislation,[127] advised caution and restraint for the protection of that still tender plant, international adjudication.

2. Conflict Situations

There are several subject areas in which an international organization may be faced with conflicting indications as to the rights of

[126] See, e.g., Lord McNair, "The General Principles of Law Recognized by Civilized Nations", 33 *B.Y.* 1 (1957).

[127] *The Development of International Law by the International Court* (1958), pp. 166, 172. Akehurst, see note 125 above, at p. 39, has found that link in the work of the Court of Justice of the European Communities:

> The Court can choose to give greater weight to the laws of some Member States than to the laws of others: it can, in certain circumstances, choose from among conflicting principles of national law those principles which it regards as best or most progressive; very often a principle has to be stated in very broad or abstract terms in order to transcend differences of detail between national legal systems, and the Court inevitably has a good deal of discretion in deciding how such vague principles should be applied to the facts of particular cases. In all these ways, the application of general principles of law by the Court is a creative process and not merely a mechanical process . . . In short, there is a tendency for general principles, borrowed initially from the law of Member States, to evolve into principles of judge-made law. (*Ibid.*)

others which it must recognize in its own activities. For instance, questions of applicable law may arise where material protected by copyright is drawn upon in connection with the preparation and use of teaching materials for technical co-operation activities: are the rights of the author (and their limits, in relation to certain types of use) defined by the law of the country of publication of the original material, by the law of the country in which the organization has its headquarters or by the law of the country to which the technical co-operation is being given? In most cases practical problems can be avoided by following the rule most beneficial to the other party or most familiar to him (such as, in the case of copyright material, that of the country of publication). However, in one area no ready escape from conflict situations is possible, namely that of the personal status and family situation of staff members in relation to entitlement to various forms of family benefit and in particular to pensions.

What is primarily at issue is the recognition of divorces and of (second) marriages,[128] without any internal rules regarding such questions as jurisdiction in matters of divorce, the relevance of the fact that the country of origin of the staff member does not provide for divorce, or the conditions of validity of marriages in form and substance.

One possible approach is to be guided by the law of the country of origin of the staff member. This appears to be the policy of the United Nations. A memorandum of September 1979 states expressly that "[i]t is United Nations policy to determine the marital status for United Nations administrative purposes by reference to the law of the home country of the staff member concerned".[129] In that case the finding was that the divorce at issue was not valid under the law of the country where it had been obtained, and a

[128] In an article on "The Law Applicable to International Officials", 18 *I.C.L.Q.* 739 (1969) the present author suggested that other problems of family law, such as the recognition of adoptions, could be avoided by elaborating, in staff and pension rules, self-contained criteria for the entitlement in question, perhaps expressed in terms of dependency rather than in terms of legal relationship. This has been done by some organizations: see, for the interpretation and application of the relevant W.H.O. rule in *Watters* v. *W.H.O.*, I.L.O. Administrative Tribunal, Judgement No. 422, Forty-Fifth Ordinary Session, November 1980.

[129] *U.N.J.Y.B.* 1979, p. 182.

reference to the home country was thus hardly necessary. Similarly, a memorandum of January 1976[130] tested a Mexican divorce and remarriage against the staff member's "personal legal status" under the laws of his home country; at the same time, it found that they would not have been valid, not only under those laws but also under the laws of the matrimonial residence prior to the divorce, of the country of nationality of the two women concerned, of the place of the first marriage "and indeed in most jurisdictions".[131] Much more difficult questions arise where, say, the country of origin of the staff member does not provide for divorce but he is divorced and remarried in the country of his habitual residence.[132] Giving automatic priority to the law of the country of origin in such case may ignore facts recognized "in most jurisdictions" and produce hardship which cannot be justified entirely by the fact that, by retaining home leave and repatriation rights, the staff member does not officially sever his ties with his country of origin. Moreover, there are cases in which the position of the law of the country of origin is itself far from self-evident.

An alternative possibility is to accept any formal legal document issued by an authority competent for the purpose in the country of issue, or to do so at least unless or until the validity of such a document has been denied by the judgment of a court of the staff member's nationality or domicile, as the case may be. Such an approach — followed by a number of organizations — can be justified, on the one hand, by the respect owed by the organization to the legal institutions of all its Members and, on the other, by the lack of competence of the organization to review the acts of these institutions and their recognition, or otherwise, elsewhere. As an administrative arrangement, for such purposes as family allowances or travel, it probably corresponds to the current facts of the staff member's family situation and provides a practical solution. However, it would not seem to be a legal solution that could be applied by an administrative tribunal called upon to adjudicate on two conflicting claims to a pension; the priority it gives to the latest

[130] *U.N.J.Y.B.* 1976, p. 239. [131] *Ibid.*, p. 240.

[132] As early as 1929 Swiss courts decided that international officials could be considered to be domiciled in Switzerland for the purpose of divorce jurisdiction. See *Parlett* v. *Parlett*, 5 *Ann. Dig.* 316.

legal act may go to a system of law which has no reasonable connection with the staff member's personal status.

One question which arises is to what extent international treaties — which are not binding on the organizations or open to accession by them — can serve as guides for their action in the matter. There are now Hague Conventions both on the recognition of divorces (1970) and on the recognition of the validity of marriages (1978). They are not yet widely ratified and hence cannot yet be said to rally an international consensus or to represent general principles of conflict law; in these circumstances, is it open to an organization, as its own policy, to refuse to accept evidence of a divorce, for instance, on the ground that the conditions of Article 2 of the Convention on the recognition of divorces were not satisfied? Also, the texts in effect leave key issues open. For instance, Article 7 of the Convention on the recognition of divorces gives contracting States the possibility of refusing to recognize a divorce when, at the time it was obtained, both the parties were nationals of States which did not provide for divorce and of no other State; is it within the competence of an international organization to decide to refuse recognition in such a case? Since the action of the organization may affect persons which are in no direct relationship to it, it is not as free as it would be in a matter falling wholly within its internal law to draw upon other legal sources.

In effect, there is not at present any generally valid solution to problems of family law as seen from an international "forum". Recourse will accordingly be had to more or less satisfactory practical solutions. The most cynical — in that it gives everyone something and deprives everyone of something — is to use rules designed for polygamous marriages and regard as such anyone with a claim under some system of law to be a spouse. There may even be cases in which the result is socially justifiable.