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Niels Blokker

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Contents

List of Acronyms

ACS	Association of Caribbean States
AEC	African Economic Community
AFISMA	African-led International Support Mission in Mali
ALADI	Asociación Latino Americana de Integración
ALALC	Asociación Latinoamericana de Libre Comercio
AMIB	African Union Mission in Burundi
AMIS	African Union Mission in Sudan
AMISOM	African Union Mission in Somalia
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
AU	African Union
BCBS	Basel Committee on Banking Supervision
BIMSTEC	Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation
BIRPI	Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle
BIS	Bank for International Settlements
CaCJ	Caribbean Court of Justice
CAEMC/CEMAC	Central African Economic and Monetary Community
CALC	Cumbre de América Latina y del Caribe sobre Integración y Desarollo
CAn	Comunidad Andina
CAO	IFC and MIGA Compliance Advisor Ombudsman
CARICOM	Caribbean Community
CARIFTA	Caribbean Free Trade Association
CBSS	Council of Baltic Sea States
CCJ	Corte Centroamericana de Justicia
CEBS	Committee of European Banking Supervisors
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEI	Central European Initiative
CEIOPS	Committee of European Insurance and Occupational Pension Supervisors
CELAC	Comunidad de Estados Latinoamericanos y Caribeños
CEMAC/ECCAS	Economic Community of Central African States
CEN-SAD	Communauté des Etats Sahélo-Sahariens
CEPAL	Comisión Económica para América Latina y el Caribe
CEPGL	Communauté économique des Pays des Grands Lacs

CERN	European Organization for Nuclear Research
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CESR	Committee of European Securities Regulators
CIS	Commonwealth of Independent States
CJEU (formerly ECJ)	Court of Justice of the European Union (formerly European Court of Justice)
CMEA (COMECON)	Council for Mutual Economic Assistance
COBAC	Commission Bancaire d'Afrique Centrale
CoE	Council of Europe
COI	Commission de l'Océan Indien
COMESA	Common Market for Eastern and Southern Africa
CSCE	Conference on Security and Co-operation in Europe
CSME	CARICOM Single Market and Economy
CSTO	Collective Security Treaty Organization
DARIO	Draft Articles on the Responsibility of International Organizations
DARS	Draft Articles on the Responsibility of States for International Wrongful Acts
DSB	Dispute Settlement Body of the World Trade Organization
EAC	East African Community
EACJ	East African Community Court of Justice
EBA	European Banking Authority
EBRD	European Bank for Reconstruction and Development
ECB	European Central Bank
ECCAS/CEEAC	Economic Community of Central African States
ECHR	European Convention of Human Rights
ECO	Economic Cooperation Organization
ECOMIL	ECOWAS Mission in Liberia
ECOMOG	ECOWAS Monitoring Group
ECOSOC	Economic and Social Council of the United Nations
ECOWAS	Economic Community of West African States
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EEC	European Economic Community
EFTA	European Free Trade Association
EIOPA	European Insurance and Occupational Pensions Authority
ELDO	European Launcher Development Organisation
EPO	European Patent Office
ESA	European Space Agency
ESMA	European Securities and Markets Authority

ESRB	European Systemic Risk Board
ESRO	European Space Research Organisation
EU	European Union
EUBAM	European Union Border Assistance Mission
EUFOR	European Union Force
EULEX	European Union Rule of Law Mission in Kosovo
EUNAVFOR	European Union Naval Force
EUPOL	European Union Police Mission
EUPT	European Union Planning Team
EURASEC	Eurasian Economic Community
EURATOM	European Atomic Energy Community
EUTELSAT	European Telecommunications Satellite Organization
EUTM	European Union Training Mission in Mali
FAO	Food and Agriculture Organization
FOMUC	CEMAC Multinational Force in the Central African Republic
FSB	Financial Stability Board
FSF	Financial Stability Forum
GATT	General Agreement on Tariffs and Trade
GCC	Cooperation Council of the Arab States of the Gulf
GFCM	General Fisheries Commission for the Mediterranean
HIPC	IMF Heavily Indebted Poor Countries Initiative
HRC	Human Rights Committee
IACHR	Inter-American Court of Human Rights
IACW	Inter-American Commission of Women
IAIS	International Association of Insurance Supervisors
IBE	International Bureau of Education
IBI	Intergovernmental Bureau for Informatics
IBRD	International Bank for Reconstruction and Development
ICAN	International Commission for Air Navigation
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICEM	Intergovernmental Committee for European Migration
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investments Disputes
IDA	International Development Association
IDI	Institut de Droit International
IEO	Independent Evaluation Office of the IMF
IFAD	International Fund for Agricultural Development

IFC	International Finance Corporation
IGAD	Intergovernmental Authority on Development
IGASOM	IGAD Peace Support Mission in Somalia
IIA	International Institute of Agriculture
IIIC	International Institute of Intellectual Cooperation
IIMSAM	Intergovernmental Institution for the Use of Micro-algae Spirulina Against Malnutrition
IIRSA	Iniciativa para la Integración de la Infraestructura Regional Suramericana
ILA	International Law Association
ILC	International Law Commission
ILO	International Labour Organization
ILOAT	International Labour Organization Administrative Tribunal
IMF	International Monetary Fund
IMFC	International Monetary and Financial Committee
IMO	International Maritime Organization
INMARSAT	International Maritime Satellite Organization
INTELSAT	International Telecommunications Satellite Organization
INTERPOL	International Criminal Police Organization
IO	International Organization
IOM	International Organization for Migration
IORA	Indian Ocean Rim Association
IOSCO	International Organization of Securities Commissions
IOVW	International Organization of Vine and Wine
IPI	International Patent Institute
IPU	Inter-Parliamentary Union
IRO	International Refugee Organization
IRU	International Relief Union
ISA	International Seabed Authority
ISAF	NATO International Security Assistance Force in Afghanistan
ISBO	Islamic States Broadcasting Organization
ISESCO	Islamic Educational, Scientific and Cultural Organization
ISF	Islamic Solidarity Fund
ITCALE	International Technical Committee of Aerial Legal Experts
ITLOS	International Tribunal for the Law of the Sea
ITU	International Telecommunication Union
IUOTO	International Union of Official Travel Organizations
IWC	International Whaling Commission
KFOR	NATO-led Kosovo Force
LAS	League of Arab States

LoN	League of Nations
MERCOSUR	Mercado Común del Sur
MIGA	Multilateral Investments Guarantee Agency
MINURCAT	Mission des Nations Unies en République Centraficaine et au Tchad
MINUSMA	United Nations Multidimensional Integrated Stabilization Mission in Mali
MISAB	Mission Interafricaine de Surveillance des Accords de Bangui
MONUC	United Nations Mission in the Democratic Republic of Congo
MRU	Mano River Union
MUASEC	Mission de l'Union Africaine pour la Sourveillance des Élections aux Comores
NAFO	Northwest Atlantic Fisheries Organization
NATO	North Atlantic Treaty Organization
NGO	Non-governmental Organization
OAPEC	Organization of Arab Petroleum Exporting Countries
OAS	Organization of American States
OAU	Organization of African Unity
OBSEC	Organization of Black-Sea Economic Cooperation
OCAM	Organization Commune Africaine et Malgache
ODED-GUAM	Organization for Democracy and Economic Development-Georgia, Ukraine, Azerbaijan and Moldova Group of States
OECD	Organization for Economic Cooperation and Development
OECS	Organization of Eastern Caribbean States
OHADA	Organisation pour l'Harmonisation du Droit des Affaires en Afrique
OIC	Organization of Islamic Cooperation
OIHP	Office International d'Hygiène Publique
ONUB	United Nations Operation in Burundi
ONUC	United Nations Operation in the Congo
OPCW	Organization for the Prohibition of Chemical Weapons
OPEC	Organization of the Petroleum Exporting Countries
OSCE	Organization for Security and Co-operation in Europe
PAU	Pan American Union
PCIJ	Permanent Court of International Justice
PTA	Preferential Trade Area for Eastern and Southern Africa
RAMSI	Regional Assistance Mission to Salomon Islands
SAARC	South Asian Association for Regional Cooperation
SACU	Southern African Custom Union
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
SARC	South Asian Regional Council

SC	United Nations Security Council
SELA	Sistema Economico Latino Americano
SFOR	NATO-led Stabilization Force in Bosnia and Herzegovina
SICA	Sistema de la Integración Centroamericana
TFEU	Treaty on the Functioning of the European Union
TJCA	Tribunal de Justicia de la Comunidad Andina
UAM	Union Africaine et Malgache
UAMCE	Union Africaine et Malgache de Coopération Économique
UDEAC	Union Douanière et Économique de l'Afrique Centrale
UDHR	Universal Declaration of Human Rights
UEMOA	Union Économique et Monétaire Ouest-Africaine
UfM	Union for the Mediterranean
UMA	Union du Maghreb Arabe
UN	United Nations
UNAMA	United Nations Mission in Afghanistan
UNAMID	United Nations Mission in Darfur
UNAMIR	United Nations Assistance Mission for Rwanda
UNAsT	United Nations Appeals Tribunal
UNASUR	Unión de Naciones Suramericanas
UNCCD	United Nations Convention to Combat Desertification
UNCLOS	United Nations Convention on the Law of the Sea
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFICYP	United Nations Peacekeeping Force in Cyprus
UNFPA	United Nations Population Fund
UNGA	United Nation General Assembly
UNICEF	The United Nations Children's Fund
UNIDO	United Nations Industrial Development Organization
UNIDROIT	International Institute for the Unification of Private Law
UNIFEM	United Nations Development Fund for Women
UNMIK	United Nations Interim Administration Mission in Kosovo
UNMIL	United Nations Mission in Liberia
UNOMIG	United Nations Observer Mission in Georgia
UNOMIL	United Nation Observer Mission in Liberia
UNPROFOR	United Nations Protection Force
UNRRA	United Nations Relief and Rehabilitation Administration
UNTAES	United Nations Transitional Authority in Eastern Slavonia
UNTAET	United Nations Transitional Administration in East Timor
UNWTO	United Nations World Tourism Organization

UPU	Universal Postal Union
WB	World Bank
WEU	Western European Union
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WMO	World Meteorological Organization
WTO	World Trade Organization

List of Abbreviations

ADE	Annuaire de droit européen
AE	Affari Esteri
AEDI	Anuario español de derecho internacional
AFDI	Annuaire Français de droit international
AG	Archivio Giuridico "Filippo Serafini"
AIDI	Annuaire de l'Institut de Droit International
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
Am. U.J. Int'l L. &Pol'y	The American University Journal of International Law and Policy
Anu. Der. Const. LA	Anuario de derecho constitucional latinoamericano
Anu. HLA Der. Int.	Anuario Hispano-luso-americano de Derecho Internacional
Anu. Mex. Der. Int.	Anuario mexicano de derecho internacional
APSR	American Political Science Review
ARLSS	Annual Review of Law and Social Sciences
Australian YIL	Australian Yearbook of International Law
AVR	Archiv des Völkerrechts
BBLJ	Berkeley Business Law Journal
Boston College ICLR	Boston College International & Comparative Law Review
Brooklyn J. Int'l L.	Brooklyn Journal of International Law
BYIL	British Year Book of International Law
Chicago-Kent LR	Chicago-Kent Law Review
Chinese JIL	Chinese Journal of International Law
CI	La Comunità Internazionale
CMLR	Common Market Law Review
Col. HRLR	Columbia Human Rights Law Review
Col. J. of Gender & L.	Columbia Journal of Gender and Law
CYIL	Canadian Yearbook of International Law
DCI	Diritto del commercio internazionale
DPCE	Diritto pubblico comparato ed europeo
DUDI	Diritti umani e diritto internazionale
DUE	Il Diritto dell'Unione Europea
Duke J. Comp. & Int'l L.	Duke Journal of Comparative and International Law
Duke L.J.	Duke Law Journal
East Afr. J. Peace HR	East African Journal of Peace and Human Rights
EG	Enciclopedia giuridica
EJIL	European Journal of International Law

ELJ	European Law Journal
EPIL	Encyclopedia of Public International Law
Fla. J. Int'l L.	Florida Journal of International Law
Fordham Int'l L. J.	Fordham International Law Journal
Foreign Aff.	Foreign Affairs
Ga. J. Int'l & Comp. L.	Georgia Journal of International and Comparative Law
Geo. J. Int'l Aff.	Georgetown Journal of International Affairs
Geo. J. Int'l L.	Georgetown Journal of International Law
Geo Wash. Int'l L. Rev.	George Washington International Law Review
GLJ	German Law Journal
Gottingen JIL	Gottingen Journal of International Law
GYIL	German Yearbook of International Law
Harv. HRJ	Harvard Human Rights Journal
HILJ	Harvard International Law Journal
HRLR	Human Rights Law Review
Hum. Rts. Q.	Human Rights Quarterly
ICLQ	International and Comparative Law Quarterly
ICLR	International Community Law Review
IJHR	International Journal of Human Rights
ILM	International Legal Materials
ILR	International Law Reports
Int'l J. Const. L.	International Journal of Constitutional Law
Int'l R. Red Cross	International Review of the Red Cross
IO	International Organization
IOLR	International Organizations Law Review
ISQ	International Studies Quarterly
It. YIL	Italian Yearbook of International Law
J. Afric. L.	Journal of African Law
JCMS	Journal of Common Market Studies
J. Conflict & Security L.	Journal of Conflict and Security Law
JCR	Journal of Conflict Resolution
JDI	Journal du Droit International
J. Hist. Int'l L.	Journal of the History of International Law
J. HR Pract.	Journal of Human Rights Practice
JICJ	Journal of International Criminal Justice
JPR	Journal of Peace Research

JWT	Journal of World Trade
LEYR	Law and Economics Yearly Review
LJIL	Leiden Journal of International Law
LNOJ	League of Nations Official Journal
LNTS	League of Nations Treaty Series
Loy. L. A. ICLR	Loyola of Los Angeles International and Comparative Law Review
LPICT	The Law and Practice of International Courts and Tribunals
Maastricht JECL	Maastricht Journal of European and Comparative Law
MDR	Monatsschrift für Deutsches Rechr
Mich. J Int'l L.	Michigan Journal of International Law
Modern L.R.	Modern Law Review
MPEPIL	Max Planck Encyclopedia of Public International Law
MPYUNL	Max Plank Yearbook of United Nations Law
NILR	Netherlands International Law Review
Nord. JHR	Nordic Journal of Human Rights
Nord. J. Int'l L.	Nordic Journal of International Law
NYIL	Netherlands Yearbook of International Law
ÖZÖR	Österreichische Zeitschrift für öffentliches Recht
QIL	Questions of International Law
RBDI	Revue belge de droit international
RCGI	Rivista della cooperazione giuridica internazionale
RdC	Recueil des cours de l'Académie de Droit International
RDCE	Revista de Derecho Comunitario Europeo
RDI	Rivista di diritto internazionale
RDILC	Revue de droit international et de législation comparée
RDUA	Revue de droit uniforme africain
Rev. d. int. pr. et d. pen. int.	Revue de droit international privé et de droit pénal international
Rev. es. der. eu.	Revista Española de Derecho Europeo
Rev. es. der. int.	Revista Española de Derecho Internacional
Rev. fr. administr. pub.	Revue française de l'administration publique
Rev. int. police crim.	Revue internationale de police criminelle
Rev. Internat. Org.	Review of International Organizations
Rev. Internat. Stud.	Review of International Studies
Rev. UE	Revue de l'Union européenne
RGDIP	Revue générale de droit international public
RHDI	Revue hellénique de droit international

RIDE	Revue internationale de droit économique
RIPE	Review of International Political Economy
Riv. Dir. Eu.	Rivista di diritto europeo
RTDH	Revue trimestrielle des droits de l'homme
SIE	Studi sull'integrazione europea
Singapore JICL	Singapore Journal of International and Comparative Law
Singapore YB Int'l L.	Singapore Year Book of International Law
Temple Int'l & Comp. L.J.	Temple International and Comparative Law Journal
Tex. Int'l L.J.	Texas International Law Journal
Transnat'l L. & Contemp. Problems	Transnational Law and Contemporary Problems
UNJY	United Nations Juridical Yearbook
UNTS	United Nations Treaty Series
VJIL	Virginia Journal of International Law
VJTL	Vanderbilt Journal of Transnational Law
Wis. Int'l L.J.	Wisconsin International Law Journal
Yale J. Int'l L.	Yale Journal of International Law
YbILC	Yearbook of the International Law Commission
YbIPO	Yearbook of International Peace Operations
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

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General Introduction

Niels Blokker

This introduction will present a bird's-eye view of the evolution of the law of international organizations (IOs). Its purpose is not to give a full overview, but rather to serve as a brief outline of some developments of this law and, as such, as a general framework for the more specific and detailed individual contributions to this book.

Evolution rather than revolution: the development of the law of IOs is mostly the result of a gradual evolution, not so much of abrupt changes. Nevertheless it is possible, within this incremental development, to distinguish different periods in the history of the law of IOs, each period having its own specific characteristics.

Four periods may be distinguished in the evolution of the law of IOs:

1. The early years (19th century to World War I), in which the first IOs were established.
2. The period between the two world wars, when the first more general IOs were established and when the special nature of the law of IOs became more recognized.
3. The period from World War II to 1990: broadening and deepening of IOs.
4. Post-Cold War: euphoria and criticism of IOs.

For each of these periods, examples will be given of the law and practice of IOs.

1 The Beginning (19th Century to World War I)

The oldest IOs were created in the 19th century. Their creation was certainly not the result of some more general master plan or the idea to work towards some form of world government. Rather, they were created out of practical necessity. River commissions and IOs for fields of cooperation such as post, railway transport and telegraph were all created because States were no longer able to govern or regulate these fields individually, in complete isolation. In these fields and in a gradually increasing number of other areas, a common interest among States to cooperate within some permanent international framework began to emerge, in order to ensure freedom of navigation (river commissions), unhampered cross-border communication, *etc.* This is why the Central Commission for the Navigation of the Rhine was created in 1815 (generally seen as the first

international organization), as well as other river commissions (such as the European Commission for the Danube, created in 1856), and organizations such as the International Telegraph Union (founded in 1865), the Universal Postal Union (UPU, established in 1874) and the International Bureau of Weights and Measures (created in 1875).[1]

While the creation of a number of IOs was a new phenomenon, in a number of respects it did not amount to a break with the past. *Plus ça change, plus c'est la meme chose*. Already there was a long history of *ad hoc* diplomatic conferences, in particular at the end of a war (well-known examples are the Westphalia Peace Conference of 1648 and the Congress of Vienna of 1814–1815). Essentially, the nature and rules governing such conferences had much in common with the plenary organs of the oldest IOs, which were often (and are still sometimes) named 'Conference' or 'Congress' (e.g., the Plenipotentiary Conference of the International Telegraph Union the General Conference on Weights and Measures, the UPU Congress).

The law of these early IOs comprised both institutional and substantive law. Much of the institutional law (such as rules on decision-making) built on the existing rules of *ad hoc* conferences. The substantive law was related to the specific field of activity of the organization. In this period, the existing IOs were limited in number and performed functions in some very specific areas of international cooperation. Their law was seen as the law of each specific organization. A general law of IOs or international institutional law did not yet exist, although a few visionary writers were capable of analysing these organizations and their law not only in isolation, but also as part of larger legal and political developments.[2]

This was an era of absolute State sovereignty, as was reflected in much of the law of these early organizations. Decisions were generally taken unanimously, and IOs were not yet seen as independent legal persons. At the same time, some

1 Brief general overviews are given in, for example, Gerard J. Mangone, *A Short History of International Organization* (New York: McGraw-Hill, 1954), in particular Ch. 3, and Inis L. Claude, *Swords into Plowshares: The Problems and Progress of International Organization* (4th edn. New York: Random House, 1971), Ch. 2.

2 James Lorimer, *The Institutes of the Law of Nations* (Edinburgh: Blackwood, 1884); Paul S. Reinsch, *Public International Unions: Their Work and Organization. A Study in International Administrative Law* (Boston: Ginn and Company, 1911); Leonard Sidney Woolf, *International Government* (London: George Allen & Unwin, 1916). See in general Louis B. Sohn, "The Growth of the Science of International Organizations," in *The Relevance of International Law*, eds. Karl Deutsch and Stanley Hoffmann (New York: Anchor Books, 1968), 328–353. See in particular the reference by Sohn (at 332–333) to a three volume publication by Pierre Kazansky (published in Russian).

of the law of these organizations was remarkably innovative and seemingly at odds with absolute State sovereignty. An example is Art. 1(1) of the constituent instrument of the UPU: '[t]he countries adopting this Constitution shall comprise, under the title of the Universal Postal Union, a single postal territory for the reciprocal exchange of letter-post items. Freedom of transit shall be guaranteed throughout the entire territory of the Union'. Some early writers were already familiar with the paradox of 'sovereign reluctance' by States to attribute powers to IOs on the one hand, and the practical necessity for States to cooperate and attribute powers to IOs on the other hand.[3]

2 Between the Two World Wars (1919–1939): From Technical to General International Organizations

The main innovation in this period was the creation of IOs not only in a very specific, technical area of international cooperation, but also in broader fields. The principal example is the foundation of the League of Nations (LoN), but the International Labour Organization (ILO) also covered an area of cooperation that was considerably broader than that of the oldest IOs.[4] At the same time, these two organizations had their *raison d'être* in common with the 19th century organizations: they too were created out of sheer practical necessity, not as a result of some master plan or ideas for world government. Having experienced the Great War, the founding Member States agreed that peace could no longer be maintained by the means of cooperation previously used, but required bolder techniques. *Après le mort, le médecin*…. 'A living thing is born' according to the American President Wilson at the creation

3 See e.g. Georg Jellinek, *Die Lehre von den Staatenverbindungen* (Wien: Hölder, 1882), 164–165: 'Die Abneigung der Staaten aus dem Inhalt ihrer Machtfülle auch nur den geringsten Bruchtheil einem gemeinsamen Institute zu übertragen, ist das größte Hinderniss einer Weiterentwicklung dieser embryonalen Anfänge einer internationalen Verwaltungsorganisation. Trotzdem dehnt sich aber der Kreis der Angelegenheiten, welche zur Bildung internationaler Organe drängen, immer weiter und weiter'.

4 See the opening and closing sentences of the Preamble of the original constituent instrument of the ILO (the 'Labour Provisions' of the 1919 Peace Treaties): '[w]hereas the League of Nations has for its object the establishment of universal peace, and such a peace can be established only if it is based upon social justice;… [t]he High Contracting Parties, moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world, agree to the following:…' (www.ilo.org/public/libdoc/ilo/1920/20B09_18_engl.pdf).

of the League.[5] However, this technique was essentially similar to that used for pre-existing organizations: the creation of a permanent framework for cooperation, in the common interest of States that could no longer individually achieve the objectives of the new organization. This idea is well reflected in Art. 11(1) of the League Covenant: '[a]ny war, or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League'. Since the creation of the LoN, 'collective security is associated with international organization as ham is with eggs', as Claude has aptly phrased it.[6]

During this period, it was gradually recognized that IOs had their own special characteristics, reflected in their respective rules and law, but that, at the same time, these respective rules and law had much in common with one another. For example, whereas originally diplomatic privileges and immunities were given to officials of IOs, several writings in the 1920s and 1930s pointed to fundamental differences between diplomats and officials of IOs and argued that the latter needed their own distinct privileges and immunities.[7]

3 World War II-1990: Broadening and Deepening of International Organizations

During and immediately following the end of World War II, a number of new IOs were created: the United Nations (UN), some other universal organizations that were to become specialized agencies of the UN (such as the IMF, the World Bank, ICAO and the WHO), as well as regional and specific technical organizations. As a result, most international activities of States were governed or influenced by the rules and operation of a rapidly expanding number of IOs, bringing one observer in 1974 to the conclusion that 'they now form a kind of superstructure over and above the society of States'.[8] The *rationale* of all these new organizations was

5 Wilson referred to the League as 'a vehicle of power, but a vehicle in which power may be varied at the discretion of those who exercise it and in accordance with the changing circumstances of the time': address on presenting the draft Covenant of the League to the Third Plenary Session of the Peace Conference at Paris, 14 Feb. 1919, reproduced in *AJIL* 13 (1919): 570–576, quotations at 573.

6 Claude, *Swords into Plowshares*, 246.

7 See e.g. *AIDI* (session de Vienne, Aug. 1924–1925); Cornelis van Vollenhoven, "Diplomatic Prerogatives of Non-Diplomats," *AJIL* 19 (1925): 469–474; Ake W.H. Hammerskjöld, "Les immunités des personnes investies de fonctions internationales," *RdC* 56 (1936): 107–211.

8 Hermann Mosler, "The International Society as a Legal Community," *RdC* 140 (1974): 189.

similar to that of organizations established previously: the management of interdependence, in the common interest of the Member States.

Principal innovations introduced during this period can particularly be found in the scope of powers attributed to IOs and in their strengthened autonomy and legal *status*. Furthermore, the law of IOs became more widely accepted as a specific area of law having its own characteristics, rules and principles.

a *Scope of Powers*

The two best examples of the attribution of considerable supranational powers to IOs are those given to the UN Security Council (SC) in 1945 and those given to the European Communities in the 1950s. In the case of the SC, it was the scourge of war (as mentioned in the opening sentence of the Preamble of the UN Charter) that explains the central position and significant powers conferred upon the SC in the collective security system agreed upon in the Charter. 'Armed force shall not be used, save in the common interest' (Preamble), and the use or threat of armed force by States in international relations is prohibited (Art. 2.4). The SC has the primary responsibility for the maintenance of international peace and security (Art. 24.1). It is for the SC (not for the Member States) to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression' (Art. 39) and to take measures not involving the use of armed force (Art. 41) or to take military action (Art. 42). Decision-making on the use of such considerable powers is by majority vote, five Members having the right of veto (as opposed to decision-making by the LoN Council, where each Member had the right of veto as decisions were taken unanimously). It is the combination of these powers with these decision-making rules that demonstrates great innovation in the organization of collective security, when compared to the preceding, decentralized LoN system.

The European Communities, created in the 1950s, are the other prominent example of the attribution of considerable supranational powers. It is remarkable that this took place in peacetime, even though the scourge of war largely prompted the move towards European integration, reflected in particular in the opening sentence of the Preamble of the 1951 Treaty constituting the European Coal and Steel Community: '[c]onsidérant que la paix mondiale ne peut être sauvegardée que par des efforts créateurs à la mesure des dangers qui la menacent'.[9] In the case of the European Communities, more than in the UN,

9 'World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it'. These words were taken almost literally from the opening sentence of the 1950 Schuman Declaration in which the initiative for the creation of the European Coal and Steel Community was taken.

the transfer of powers was accompanied by the creation of a truly supranational institutional structure. Important institutions (the High Authority/European Commission, the Court of Justice, the European Parliament) were composed of independent individuals.

At the same time, subsequent practice in relation to these two examples also demonstrates that, while it was already exceptional for States to put such powers for IOs on paper, it was something quite different to ensure that the related far-reaching commitments became reality. According to Art. 43 of the UN Charter, all UN Members 'undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities'. However, such agreements have never been concluded, neither in the early post-war years, nor in the post-Cold War period. While alternative forces have been created in practice (*ad hoc* UN peacekeeping forces and *ad hoc* 'coalitions of the able and willing', both usually operating on the basis of SC resolutions), these alternatives are not fully-fledged substitutes for the permanent, standing UN force foreseen by the UN's founding fathers. In the European Communities, according to the original Treaty establishing the European Economic Community (1957), decisions would be taken unanimously in the Council until 1966. As of 1966, decisions in a number of important fields (such as the Community's agricultural policy) were to be taken by qualified majority vote. However in 1965, approaching the end of this transitional period, France was no longer willing to accept what was agreed upon in 1957, and argued that Members could not be outvoted in matters which they considered to be of very important national interest. As a consequence, in subsequent years, the Council did not take decisions by majority vote where this was prescribed, but by *consensus*. Only since the mid-1980s this episode came to a gradual end, partly as a consequence of the increase in membership of the Communities to twelve Members.[10]

These examples illustrate that the attribution of powers does not happen overnight and, moreover, is not a one-time achievement. The exercise of powers by IOs requires constant adequate support from their membership.

The transfer of powers to IOs other than the UN and the European Communities (now the European Union) is perhaps less spectacular, but its implications are significant. The necessities of life in our growing global village

10 See in more detail, with references to further literature, Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (5th edn. Leiden: Martinus Nijhoff, 2011), 543–545.

require the coordination of national policies, agreements on international standards, procedures and frameworks for negotiations and settlement of disputes, *etc.*

b *Strengthening of Autonomy and Legal Status*

Apart from the attribution of powers, an important innovation in the law of IOs during this period was the strengthening of the autonomy and legal *status* of IOs. To some extent, the roots of this innovation can be found already in the LoN era. Two examples are the independence of the secretariats of IOs and the general acceptance that IOs are international legal persons that need a number of basic privileges and immunities.

One of the fundamental characteristics of modern IOs is the independence of their secretariats. As the Administrative Tribunal of the ILO stated in its 2003 *Bustani* judgment: 'the independence of international civil servants is an essential guarantee, not only for the civil servants themselves, but also for the proper functioning of international organizations'.[11] For the UN Secretariat, the key provisions governing the independence of the Secretary-General and UN staff are laid down in Art. 100 of the Charter:

> 1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.
> 2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

These provisions are not only essential for the independence of the UN Secretariat; they have also become the model for similar rules in the constituent instruments of many other IOs.[12] While this innovation became the

11 ILO Administrative Tribunal Judgment No. 2232 of 16 Jul. 2003. On this judgment, see Jan Klabbers, "The *Bustani* Case before the ILOAT: Constitutionalism in Disguise?," *ICLQ* 53 (2004): 455–464; Ana Stanič, "Bustani v. Organization for the Prohibition of Chemical Weapons," *AJIL* 98 (2004): 810–814; Chanaka Wickremasinghe, "Case note: the *Bustani* case before the ILOAT," *IOLR* 1 (2004): 197–207.

12 See e.g., Art. VIII(46–47) of the Chemical Weapons Convention.

standard during this period, its roots are in the early practice of the LoN and the ILO, when these two organizations had to set up their secretariats and reflect on the foundations of an international civil service.

A second example relates to the legal personality of IOs and their privileges and immunities. Since the 1949 *Reparation for Injuries* Advisory Opinion,[13] it has generally been accepted that IOs are normally international legal persons, even though this is only rarely provided for explicitly in their constituent instruments. It is also generally accepted that they require privileges and immunities in order to be able to perform their functions. Such privileges and immunities are usually provided in some detail in multilateral conventions and in headquarter agreements.

c *Unity within Diversity*

This is also the period in which it became widely accepted, in practice and in academia, that the emerging body of law was more than the sum of the laws of each individual international organization. There was increased awareness that issues and problems facing IOs were often highly similar.[14] IOs started to copy each other's rules widely. The 1947 Convention on the Privileges and Immunities of the Specialized Agencies demonstrated that one single regime of privileges and immunities could be applicable to widely diverging IOs (even though this Convention has specific annexes for individual specialized agencies). Specific conventions were drafted containing general rules for IOs, in particular the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Some pioneering studies further demonstrated the coherence of this newly emerging branch of law, sometimes referred to as international institutional law.[15]

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13 International Court of Justice (ICJ), Advisory Opinion of 11 Apr. 1949, *Reparation for Injuries Suffered in the Service of the United Nations*, *ICJ Reports* 1949, 174.

14 See Henry G. Schermers "The Birth and Development of International Institutional Law," *IOLR* 1 (2004): 5–8.

15 The main examples of these studies (published before 1990) are: Arnold J. P. Tammes, *Hoofdstukken van internationale organisatie* ('Chapters of international organization') (Leiden: Martinus Nijhoff, 1951); Clarence Wilfred Jenks, *The Proper Law of International Organizations* (London: Stevens, 1962); Derek W. Bowett, *The Law of International Institutions* (London: Stevens, 1963); Ignaz Seidl-Hohenveldern, *Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften* (Köln: Carl Heymanns, 1967); Henry G. Schermers, *International Institutional Law* (Leiden: Sijthoff, 1972).

4 International Organizations in the Post-Cold War Era (1990-Present): Euphoria and Criticism

This Post-Cold War period is characterized by increased opportunities for international cooperation due to the end of the Cold War. As UN Secretary-General Boutros-Ghali stated in the 1992 Agenda for Peace: 'The adversarial decades of the cold war made the original promise of the Organization impossible to fulfil. The January 1992 Summit therefore represented an unprecedented recommitment, at the highest political level, to the Purposes and Principles of the Charter. In these past months a conviction has grown, among nations large and small, that an opportunity has been regained to achieve the great objectives of the Charter. A United Nations capable of maintaining international peace and security, of securing justice and human rights and of promoting, in the words of the Charter, "social progress and better standards of life in larger freedom." This opportunity must not be squandered. The Organization must never again be crippled as it was in the era that has now passed'.[16]

The new spirit of cooperation is reflected first of all in the practice of the UN. The SC has become more able than before to perform the functions attributed to it in the Charter, as can be seen from the number and substance of its resolutions.[17] This spirit of cooperation has also reinvigorated the work of many other IOs. At the same time, the significant increase in activities of IOs has not only brought successes, but also failures and human catastrophes, as is perhaps unavoidable in the exercise of any public authority. Not unrelated to this renewed vitality, the role and work of IOs has been increasingly criticized during this period.

a *Increased Activities of International Organizations*

There are many examples of this increase in activities. An important example deals with one of the key areas of international law, the *ius ad bellum*. A defining moment

16 UN Doc. A/47/277-S/24111 (17 Jun. 1992), at 1. The Jan. 1992 Summit to which Boutros-Ghali refers is meeting No. 3046 of the SC (31 Jan. 1992), the first meeting of the Council at the level of heads of State and government.

17 On average, since 1990 the Council has adopted more than four times as many resolutions annually than in the 1945–1989 period (before 1990 the Security Council adopted some 15 resolutions each year; in the period 1990–2013 this number was 62). More importantly, the substance of these resolutions adopted since 1990 deal with many conflicts and situations all over the world, creating a large number of peacekeeping operations with more extensive mandates than before, and authorizing the use of force in many cases (while this almost never happened in the period before 1990).

marking the beginning of this period is the adoption of SC Res. 678. On the one hand, this resolution was widely welcomed. Following the invasion of Kuwait by Iraq, the Council adopted a number of other resolutions, culminating in agreement on Res. 678, authorizing the use of force against Iraq. The SC was able, at long last, to perform its functions, almost fully following the relevant rules of Ch. 7 of the UN Charter. On the other hand, the resolution was criticized as a *carte blanche* authorization of the use of force, in which the SC 'delegated away' its authority.[18] Due to the very general wording of the resolution, it could also be used as part of the legal basis for the widely criticized 2003 military operation against Iraq.

Following the adoption of Res. 678 and the above-mentioned criticism of that resolution, the SC authorized the use of force on many more occasions. Since 2000, it has done so in some 100 cases. But none of these authorizations is of a *carte blanche* nature similar to Res. 678. In fact, the SC has developed considerable practice in exercising more control over the authorized operations: by specifying the mandate of the operation, by (almost always) limiting the authorization to a specific time period (a few weeks up to one year), and by requiring regular reporting by those who carry out the authorization.[19]

New developments in this period should be seen in this context of international organizations' increased activities in many areas. Such new developments have taken place in particular in two broad areas: responsibility and accountability for the acts and activities of IOs, and judicial control over such acts and activities. In this period, these acts and activities have often been brought before national and international courts. However, only exceptionally have such courts been able to exercise jurisdiction and to deal with the substance of these cases. These two areas will now be briefly discussed.

b *Responsibility and Accountability for the Acts and Activities of International Organizations*

Path-breaking work in this area was done by the Institute of International Law, following the 1985 tin crisis and the demise of the International Tin Council. In

18 Both in the SC – see UN Doc. S/PV.2963, e.g. at 58 (Cuba) and 76 (Malaysia) – and in literature – see e.g. Burns Weston, "Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy," *AJIL* 85 (1991): 516–535, 517; John Quigley, "The 'Privatization' of Security Council Enforcement Action: A Threat to Multilateralism," *Mich. J. Int'l L.* 17 (1996): 249–283; Giorgio Gaja, "Use of Force Made or Authorised by the United Nations," in *The United Nations at Age Fifty – A Legal Perspective*, ed. Christian Tomuschat (The Hague: Kluwer, 1995), 39–58, in particular at 46.

19 See in more detail Niels M. Blokker, "Outsourcing the Use of Force: Towards More Security Council Control of Authorized Operations?," in *The Oxford Handbook of the Use of Force in International Law*, ed. Marc Weller (Oxford: OUP, 2014).

1995 the Institute adopted a Resolution on 'The Legal Consequences for Member States of the non-fulfilment by International Organizations of their Obligations toward Third Parties', in which it confirmed that IOs are liable for their own obligations towards third parties (Art. 3).[20] Furthermore, in 1996, a committee of the International Law Association (ILA) started to study the much more general topic 'Accountability of International Organizations'. In its report, adopted in 2004, the ILA proposed a number of 'recommended rules and practices'.[21] Last but not least, in 2001 the UN General Assembly requested the International Law Commission (ILC) to begin work on the topic of responsibility of IOs, after the ILC had completed its work on State responsibility. Under the guidance of Special Rapporteur Gaja, the ILC adopted in 2011 the Articles on the Responsibility of International Organizations.[22] The relevance of the work by the ILC on this topic is illustrated by a number of judgments of national and international courts making reference to these Articles or even – before they were adopted – to their drafts.

c *National and International Courts and the Acts and Activities of International Organizations*

In this most recent period, more than ever before, the acts and activities of IOs have been brought before national and international courts. These acts and activities relate both to the internal functioning of IOs (for example, the dismissal of officials or even the head of the secretariat) and to issues concerning their substantive work. Such actions before national and international courts involve a myriad of procedural and substantive questions. Normally, IOs enjoy immunity from the jurisdiction of national courts (at least the national courts of their Members). During this period a number of cases have nevertheless been brought before national courts. In many cases, such as an action in the Netherlands against the UN involving the genocide in Srebrenica,[23] these

20 See the report prepared by Rosalyn Higgins, "The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations toward Third Parties," *AIDI* 66 (1995, session of Lisbon, I).

21 See ILA, Berlin Conference (2004), final report "Accountability of International Organizations" (www.ila-hq.org).

22 These Articles are annexed to General Assembly Res. 66/100 (in which the Assembly '*takes note*' of these Articles). On these Articles, see the various contributions published in *IOLR* 9 (2012): 1–85.

23 In this case, the Dutch Supreme Court concluded with respect to the immunity of the UN: '[t]hat immunity is absolute' (*Stichting Mothers of Srebrenica et al. v. United Nations,* 13 Apr. 2012, Case No. 10/04437 (English translation: www.rechtspraak.nl)).

courts confirmed the organization's immunity from jurisdiction. But in other cases they rejected immunity claims, for example because the applicant did not have any other remedy.[24] Cases dealing with the acts or activities of IOs have also been brought before international courts. As these courts often have no jurisdiction in such cases, applicants have attempted to lift the organizational veil and have brought their cases against Members of the organization.[25] Often they have not been successful, but this practice demonstrates increasing dissatisfaction that the acts of States can be brought before a court whereas the essentially similar acts of IOs cannot. This situation is unlikely to change in the foreseeable future, the only exception being the expected accession of the EU to the European Convention of Human Rights, allowing cases against the EU to be brought before the European Court of Human Rights (ECtHR).

5 Concluding Remarks

In the past two centuries, IOs have become indispensable entities in international society and their law has become an important part of the international legal order. They have been created out of practical necessity: a need for permanent and structured international cooperation in an increasing number of areas that could no longer be regulated effectively by individual States alone. The law of IOs has evolved into a separate discipline, in particular since World War II. The brief overview above has highlighted some important steps in this evolution. It has not only demonstrated that IOs are generally established as separate international legal persons, having their own *status*, with the necessary privileges and immunities, in order to be able to perform their functions independently from their Members. It has also shown that, particularly following the significant increase in their activities since the end of the Cold War,

24 For examples, see *The Privileges and Immunities of International Organizations in Domestic Courts*, ed. August Reinisch (Oxford: OUP, 2013); and the contributions to the Forum on Immunity of International Organizations in *IOLR* 11 (2014).

25 Examples are the cases relating to the 1999 NATO military action against Yugoslavia: the *Use of Force* cases brought against ten NATO Member States before the ICJ, and the *Bankovic* case brought before the ECtHR (Appl. No. 52207/99). Other well-known ECtHR cases are *Waite and Kennedy*, *Behrami and Saramati*, *Nada* (see further Schermers and Blokker, *International Institutional Law*, Sections 1562 *et seq.*). In the much discussed *Kadi* cases before the Court of Justice of the EU, the Court essentially reviewed indirectly decisions of a sanctions committee of the UN Security Council; see the variety of opinions published in *IOLR* 5 (2008): 323–379.

independence goes hand in hand with responsibility and accountability. There is an increased call for checks and balances, for judicial or quasi-judicial scrutiny of the acts and activities of IOs. In cases where IOs and their Members do not respond to this call, it is likely to become more difficult for IOs to perform their functions. At the same time, if such checks and balances and (quasi-)judicial scrutiny are not properly shaped, they may hinder the effective performance of the organization's functions. It is a current dilemma that, on the one hand, national courts will not normally be well-placed to scrutinize the acts and activities of IOs, but that, on the other hand, there is reluctance to create or to further develop existing institutions or mechanisms capable of such scrutiny at the international level.

PART 1

Evolutions in the Models of International Organizations – Recent Developments

CHAPTER 1

The Intergovernmental Organization and the Institutionalization of International Relations

The Modelling of International Organization at Stake

Marie-Clotilde Runavot

> For a considerable number of years following the end of the Second World War an international organization was established almost automatically as soon as an international problem and the need to cooperate were identified. In more recent years however, …, the opposite attitude has become predominant[1]

1 Introduction

Written by Henry G. Schemers and Niels M. Blokker, this practice review clearly sheds light on the stakes in the 'evolution of the law of international organizations' ('IOs'): international problems remain but ways to deal with it have evolved, while the need to cooperate definitely increases with globalisation. Mentioning an evolution of the international organization law consequently is problematic as such. It rests on a need, if not a necessity; the one to *re-evaluate* law of international organization and accordingly, the concept of IOs. Why does a necessity exist?

Because, at least as a public international law branch, the international organizations law was born with the Advisory Opinion on *Reparation for Injuries* of 11 Apr. 1949.[2] And this 'certificate of birth' seems to be marked by its times. Indeed, the ICJ mainly reasoned from an interstate international society which comprised – and the ICJ itself highlighted it – fifty States or so. In the wake of this opinion, the law of international organizations tended to be reduced to the law of the United Nations, that is to say the law of *one and only* international organization. Given the number and diversity of international

1 Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (5th edn. Leiden: Martinus Nijhoff, 2011), vi.

2 *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion: *ICJ Reports* 1949, 174.

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organizations nowadays, it however seems obvious that we should speak of a law of international organizations if, for that matter, it is possible to speak about one and unique body of law. Thus, some refers to international organizations *laws* reflecting the more general 'fragmented' sake of the international order.[3] If it is not the matter here to debate about, this emphasis on a fragmented international order is significant of the need to assess the evolutions of IOs law since the *Reparation for injuries* opinion. More precisely, it seems necessary to determine the extent of those evolutions. Does it correspond to a mere adaptation, a mutation or does it amount to a revolution?[4]

To answer this question, we should first turn to the object of this law – international organizations – to ascertain if it has itself evolved and, if so, to which extent. But we still need to agree upon the meaning of IO. What is referred to when speaking about 'IO'? The answer is not easy since it is an evolving concept, characterized by pragmatism. In this paper, the expression 'IO' designs a personified mode of institutionalizing international relations. Even if such an approach seems obvious nowadays, it was not always the case and one of the most famous French theorist of the concept of institution recalled that there are different stages within the process of institutionalization and that it does not necessarily imply a legal personality.[5]

In its modern sense, the expression 'IO' seemed to appear in 1867 only in international doctrinal writings. It is namely James Lorimer who made plain the expression when he proposed to create a permanent Congress of nations which aimed at satisfying the great desideratum of a legislative and executive international power vested with its own authority.[6] For his part, Paul C. Szasz

3 About the concept of fragmentation, see especially: Pierre-Marie Dupuy *et al.*, *L'influence des sources sur l'unité et la fragmentation du droit international* (Bruxelles: Bruylant, 2006), xxii–280; Georges Abi-Saab, "Fragmentation or Unification: Some Concluding Remarks," *Symposium NYU*, 927–928 (www.pict-pcti.org).

4 For such a problematic, see SFDI, *Les organisations internationales contemporaines: crise, mutation, développement* (Paris: Pedone, 1988), x–386. More recently and in a larger perspective, encompassing but surpassing international organizations endowed with international personality, see Laurence Dubin and Marie-Clotilde Runavot, "Représentativité, efficacité, légitimité: des organisations internationales en crises?" in *Traité de droit des organisations internationales*, eds. Evelyne Lagrange and Jean-Marc Sorel (Paris: LGDJ, 2013), 77 *et seq.*; *Le phénomène institutionnel international dans tous ses états: transformation, déformation, reformation*, eds. Laurence Dubin and Marie-Clotilde Runavot (Paris: Pedone, 2014), *passim*.

5 Maurice Hauriou, "La théorie de l'institution et de la fondation – La cité moderne, les transformations du droit," *4ème Cahier de la Nouvelle Journée* (1925): 1–45.

6 James Lorimer, "Proposition d'un congrès international basé sur le principe *de facto*," *Rev. de droit international et de législation comparée* 3 (1871): 8–11. For these historical data, see Pitman B. Potter, "Origin of the Term International Organization," *AJIL* 39 (1945): 805.

places the first '*establishment of an* Operational *International Inter-Governmental Organization*' in Thomas Jefferson's proposal of convention against pirate States he made in Versailles in 1786.[7] But this point of view is mainly retrospective and, at that time, such a qualification was not even hinted at. In fact, until the 20th century, the expression 'IO' only beard a material sense devoid of any significant institutional dimension.[8] Even the experience of European Directory was not more than an informal coalition of States, linked together by a treaty alliance and used to meet periodically in order to define common trends of their exterior politic. The reason why is that the degree of development of interstates' relations made it impossible to conceive further institutionalization (until the legal personification level). Eventually, the turning point is the League of Nations Covenant if not the Advisory Opinion on *Reparation for Injuries*. Since then, the concept of international organization has not been associated neither with international juridical personality, nor with an organic institutionalization. The federate element between the States group was reduced to a common purpose to achieve.

In a curious reversal of situation, the expression then flourished in the international legal instruments and jurisprudence to describe an institution, that is to say, 'an organic complex of rules of law', characterized by its permanence, an 'own goal to achieve' and which is necessarily endowed with legal personality.[9] At the same time – the mid-20th century – new analyses of the phenomenon of international organization which were based in particular on the thought of the French author Maurice Hauriou[10] appeared. Beyond an institution, however, there are *international* institutions.

The criterion of internationality is also difficult to determine. Should an organization dealing with activities relating to international relations be considered as international or should its creation rest on an international act? Due to the context of apparition of first IOs and especially to the pragmatism that

7 Paul C. Szasz, "Thomas Jefferson Conceives an International Organization," *AJIL* 75 (1981): 138–140.

8 For examples, see Charles Dupuis, "Les antécédents de la SdN," *RdC* 60-II (1937): 23.

9 'un complexe organique de règles de droit…but propre à réaliser': Paul Roubier, *Théorie générale du droit – Histoire des doctrines juridiques et philosophie des valeurs sociales* (2nd edn. Paris: Dalloz, 2005), 22–23 (We translate).

10 Hauriou, "La théorie," 1–45. See also: Suzanne Bastid-Burdeau, "Place de la notion d'institution dans une théorie générale des organisations internationales," in *L'évolution du Droit public – Etudes en l'honneur d'Achille Mestre* (Paris: Sirey, 1956), 44–51 (45–46); Paul Reuter, *Institutions internationales* (1st edn. Paris: Puf, 1955), 292.

led to their emergence, 'international' first designated the interstate and, more precisely, intergovernmental character of the entity in question. In the late 19th and early 20th centuries, international representation of the State still was the Members of national governments' monopoly. The institutionalization of international relations was then reduced to an alternative: whether or not there was a personification of the common interstate action. Thus, the intergovernmental organization (IGO) was distinguished from the non-governmental organization (NGO), while IGO and IO had tended to become synonymous. That may be why the Basdevant's dictionary defines the 'intergovernmental' as 'implying that what it applies to (agreement, institution, organization…) exists, was or will be established, operates between States and through their action, in contrast with which exists, was or will be established, operates through actions of individuals or private groupments'.[11]

Ultimately, this vision results from the very notion of subject of international law. Given that it was the prerogative of sovereign States to be an international law subject, non-State entities were sparingly recognized as international legal persons. Anyway, a link – even potential or indirect – must be established between these latter and one or more primary subjects of the international order. Otherwise, the quality of 'IO' is denied and the entity concerned falls *ipso jure* in the heterogeneous group of NGOs. If the goal of European integration seemed to call to temper the absolutism of that reasoning,[12] it only led to create a new subdivision in the traditional categories. Thus, the integration organization has been distinguished from the organization of cooperation, but the intergovernmental model is not directly challenged. The assumption remains that the notion of IGO encompasses all secondary subjects of international law, hence maintaining the gap between the diversification of actors of the international community and the immobility that suffers the quality of subject of international law. But it is true that the practice has contributed to the confusion between IO and IGO.

11 'Impliquant que ce à quoi il s'applique (accord, institution, organisation…) existe, a été ou doit être établi, fonctionne entre Etats et par leur action, par opposition à ce qui existe, a été ou doit être établi, fonctionne par l'action de particuliers ou de groupements privés': Jules Basdevant, *Dictionnaire de la terminologie du droit international* (Paris: Sirey, 1960), 343 (We translate). For its part, the dictionary directed by Professor Jean Salmon notes that 'intergovernmental' is often used as a synonymous of 'interstate' but that the reverse is not always true: Jean Salmon, *Dictionnaire de droit international public* (Bruxelles: Bruylant, 2001), 600.

12 In 1957 yet, the Preamble of the Rome Treaty aimed 'to lay the foundations of an ever closer union among the peoples of Europe' (eur-lex.europa.eu).

Thus, the *International* Maritime Organization was originally established as an *Inter-Governmental* Maritime Consultative Organization before it was renamed on 22 May 1982.[13] Above all, the work of the International Law Commission (ILC) is the one which must draw attention. Between codification and progressive developments, the ILC retains two definitions of the IO. The comparison of these two definitions enables to assess the extent to which the concept has evolved.

In the two Vienna Conventions on the law of treaties, respectively of 1969 and of 1986, the ILC firstly states that, 'for the purpose of [those conventions], "international organization" means an intergovernmental organization'.[14] As noted by Professors Daillier, Pellet and Forteau, this acceptation reflects the traditional approach that only States are represented in organizations, only delegates named by their governments being able to express their will.[15] Despite the diversification of international actors, such an assimilation of IO to IGO remains the generally accepted principle. It is in this very sense that we use the idea of 'intergovernmental model' of IO. As a result, we propose to (re) evaluate the relevance of this formula in order to comprehend the reality of institutionalized international action. This intergovernmental model eventually reaffirms Sir Gerald Fitzmaurice's IO definition: 'a collectivity of States established by treaty, with a constitution and common organs, having a personality distinct from that of its member-States, and being a subject of international law with treaty-making capacity'.[16]

However, in its Draft Articles on the Responsibility of International Organizations in 2011, the ILC defines the IO as 'an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities'.[17] It seems that in those terms, the ILC now calls into question the assimilation of IO to IGO even though it does not *a priori* and absolutely reject the intergovernmental approach. The ILC may more simply refuse to reduce the concept of IO to it. Given this evolution, it appears possible

13 Convention of the Intergovernmental Maritime Consultative Organization, Geneva, 6 Mar. 1948 (untreaty.un.org).

14 Art. 2(1)(i), Vienna Convention on the Law of Treaties, 1969. Art. 1 of the Vienna Convention on the Representation of States in their relations with international Organizations of a universal character 1975 uses the same words (untreaty.un.org).

15 P. Daillier *et al.*, *Droit International Public* (8th edn. Paris: LGDJ, 2009), 650.

16 Gerald G. Fitzmaurice (Special Reporter), Report on the Law of Treaties, UN Doc. A/CN.4/101, in *YbILC* II (1956): 108.

17 Art. 2 (untreaty.un.org).

to consider that IGO ceased to be a model in the sense of an 'archetype', i.e. a perfect example to reproduce, but rather amounts to a 'prototype', i.e. a pattern to improve rather than to reproduce as such. To play with words, the model models itself with the development of international relations.

Far from remaining the exclusive way of institutionalizing international action, IGO merely represents one of its particularly sophisticated variations.[18] Because of time and organic and material development of the international order, the outlines of the IO become confused. Without ousting the State, the institutionalization of international relations is diversifying. In a first stage of analysis, intergovernmental model of IO, while maintaining, seems to have been shaped, and sometimes overtaken, to secure the effectiveness of international relations (2). But, in a second stage of analysis, it appears that the institutionalization of international relations no longer requires the systematic establishment of an IGO. More, recourse to IGOs seems to be deliberately set aside, meaning that the intergovernmental formula is not merely completed by but really challenged by the emergence of new models of IO (3).

2 The Adjustment of a Ductile Model

In cases considered in that section, the formula of the IGO is at least formally retained. This formula is however softened, tailored, precisely because of developments that have affected the international legal order. In particular, two trends of public international law appear as the two main factors leading to adjust the intergovernmental model of IO. Firstly, the State is not the only subject neither even the only actor of international law. Secondly and correspondingly, international law sources are diversifying. Some personified organizations thus try, sometimes through the diversification of their Members (a), sometimes by means of their normative production (b), to get rid of the shackles of the IGO under which they were however constituted.

a *Straightening the Model through Membership*

To appreciate the true value of membership diversification in the first stage of the evolution of the intergovernmental model, the State's participation in the strict sense is to be precised and notably compared with its representation within an IO (a.1). It is then possible to see that the State governmental representation comes flooding back whereas the participation of the State is still, in principle as in practice, essential (a.2).

18 See also: Marie-Clotilde Runavot, "L'avenir du 'modèle intergouvernemental' de l'organisation internationale," *RGDIP* 115 (2011): 675–709.

a.1. Participation in the strict sense means to participate *to* the organization. It corresponds to membership, being originate or resulting from an admission procedure. Representation seems to have a quite different meaning. Etymologically, 'to represent' is to make present what is absent. It seems rather to refer to the participation *in* the operation of the organization and can therefore be achieved by the mere observer status. In addition, participation is holistic; it is for the IO *in toto* while the representation may be limited to certain organs of the IO. In that sense, but it can be discussed,[19] Members are not the only ones to be represented within the several organs of the organization. Hence, several modes, said 'participation', are in fact no more than formulas standing for representation. Such is the case of observer status, 'associate' Members and equivalent names which exclude holders of institutional 'governance'.[20]

To sum up, the use of the adjective intergovernmental to characterize any international organization is based on a double amalgam between, on the one hand, member and organ and, on the other hand, representation and participation. Bearing in mind that the intergovernmental model has always admitted non-State representation, only the nature of participation is indicative of a possible overrun of the intergovernmental model, a model that involves a State monopoly of participation through the exclusive medium of their executive organs.

a.2. Concerning the non-State representation in IGOs, the phenomenon is not new even though its rationale seems to have evolved. For a long time, non autonomous territories representation has been performed though participation to the delegation of the administrator State, whether it is provided in the founding charter of the organization or unilaterally imposed by a Member State. The representation of these territories is even more precarious that their delegates remain subordinate to government representatives in national delegations.[21]

19 Evelyne Lagrange, *La représentation institutionnelle dans l'ordre international – Une contribution à la théorie de la personnalité morale des organisations internationales* (The Hague: Kluwer, 2002), *passim*.

20 See among others: Art. II(11–12) of the FAO Constitution (www.fao.org); Art. II(3) of the UNESCO Constitution (portal.unesco.org); Arts. 8 and 9 of the IMO Constitution (www.imo.org). Each time, the status of Associate Member recognized to non-State entities *associates* them with the operation of the organization without ensuring their *participation*.

21 Robert Kovar, "La participation des territoires non autonomes aux organisations internationales," *AFDI* (1969): 529.

Anyway, without disappearing, the representation of some non-State territories has generally changed of perspective. It is now used to reflect either the decentralized administrative organization of a State or specificities of a territory (insularity, population density, economic wealth…) or of a human group. The issue mainly concerns regional organizations such as the Association of Caribbean States[22] and the Pacific Islands Forum.[23] In 2006, New Caledonia and French Polynesia became Associate Members of this Forum. In the same perspective is the traditional French practice of involving overseas communities in the government delegation to the International Labour Conference.[24] Moreover, technical specialization of administrative Unions had already made aware of another representation concern. To ensure the effectiveness of institutionalized international action, such specialization requires representatives who are experts in addition to government delegates.[25] With the proliferation of specialized agencies and the growing complexity of international relations, the trend accelerated as shows the example of the World Tourism Organization, IGO born from the transformation of a NGO following the adoption of its constitutive act on 17 and 18 Sept. 1970.[26] In addition to 'Full Members' (the category was limited to States) and 'Associate Members' (for non-sovereign territories), the 1970 Charter of the World Tourism Organization initially allowed to open the organization to 'international, intergovernmental and non-governmental…and [to] trade organizations and associations'.[27] But being an 'Affiliate Members' was clearly disadvantageous in the functioning of the Organization.

22 In addition to the 25 Member States (Art. IV.2), this organization also includes countries and territories of the Caribbean as Associate Members or Observers (Art. V). See also: Annex 2 of the Convention establishing the Association of Caribbean States (www.acs-aec.org).

23 We do not enter here the controversy about the nature of this entity, established on 5 Aug. 1971 in Willington without adopting any international treaty (www.forumsec.org).

24 See Kovar, "La Participation," 529–530.

25 About UPU, see George Arthur Codding, *The Universal Postal Union* (New York: New York University Press, 1964), 35–36 and 80–85; about International Telegraph Union see George Arthur Codding, *The International Telecommunication Union* (Leiden: Brill, 1952), 38 (about Telegraphic International Union) and 161–162 (about ITU itself).

26 It was the International Union of Official Travel Organizations and it is the General Assembly of this NGO which adopted the said Statutes while Art. 36 required approval by 51 States: Laurent Klein, "L'Organisation mondiale du tourisme," *AFDI* 20 (1974): 659–662.

27 Statutes of the World Tourism Organization, adopted on 17–18 Sept. 1970 and entered into force on 2 Jan. 1975: Art. 5 ('Full Members'); Art. 6 ('Associate Members'); Art. 7 ('Affiliate Members') (www2.unwto.org).

> In 2005, the General Assembly of the World Tourism Organization finally adopted an amendment deleting the category of 'Affiliate Members' and ensuring the promotion of its components to the rank of 'Associate Members'.

Beyond non-State representation, the complexity and globalization of international relations have led to renew and diversify not only State's representation within IO but also institutional participation whose State character is nevertheless softened. In those two hypotheses, the intergovernmental model is clearly altered.

One first observation, quite briefly: subject marginal participation of IGO, States remain the key Members of IO and membership remains today at least partially state. The possibility for an IO not to include any State in its composition is quite new and marginal: the only example is given by the Joint Vienna Institute. Thus, the Bank of International Settlements (BIS), the European Bank for Reconstruction and Development (EBRD), the International Bank for Reconstruction and Development (IBRD), the International Monetary Fund (IMF) and the Organisation for Economic Cooperation and Development (OECD) adopted a Treaty establishing the Joint Vienna Institute as an 'international organization with full juridical personality'.[28] If some authors emphasize that the creation of the Institute remained under indirect State control since it has been 'approved by the governing bodies of the founding organizations where States are represented',[29] such a point of view tends to overshadow the own will of secondary subjects of international law. More relevant seem to be the isolated nature of this experience and the reluctance toward such a practice. According to the Secretariat of the United Nations: 'The capacity to establish international intergovernmental organizations having separate legal personality is, under international law, conferred upon States through the conclusion of agreements. International intergovernmental organizations which are the creation of States cannot in and of themselves create new international organizations, endowed with the same international legal personality'.[30]

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28 Art. 1 of the Agreement for the establishment of the Joint Vienna Institute, 19 Aug. 1994, *UNTS* 2029, 398–403.

29 François Rousseau, "'Joint Vienna Institute' – Brèves remarques relatives à la création de l'Institut commun de Vienne," *RGDIP* 99 (1995): 645.

30 The fact that the opinion is for a mere subsidiary body (UNDP) explains certainly the severity of the judgment: 'Legal capacity of international governmental organizations to establish other international organizations – Legal capacity of the United Nations Development Program to participate in the establishment of other international organizations or to establish its own subsidiary organs', Opinion of the UN Secretary-General, 1 Nov. 1991, *UNJY* (1991): 297, Section 4.

In fact, the institutional participation of IO is practically limited to the EU, which is almost always combined – without excluding it – with the participation of its Member States. This is the case in the World Trade Organization (WTO) or in the FAO.[31] Hence, 'interstate is undoubtedly the first specific nature of the international organization'.[32] However, over time, the statement has been relativized. Because the IO is an empirical phenomenon mainly driven by the needs shown by the practice of international relations, its evolution has not been neither linear nor rational. Always essential to characterize the IO, State participation is not absolute anymore. It does not necessarily imply direct involvement of governmental authority either.

One second, often less known, observation then: States' participation can now be confined to a particular organ of the State distinct from the government. In other words, the participation in the IO does not change its nature: it remains State-participation. But its shape changes since it does not necessarily involve the government body. This trend seems then to reveal the flow of the holistic approach of the State in the international order. This holistic approach assimilated the primary and sovereign subject to its governmental body. Among the organizations expressly qualified of 'IGO', assumptions multiply. This is first the case of Interpol.[33] Succeeding in 1946 to the International Criminal Police Commission – an 'association of individuals' founded in 1923 – its statutes were adopted by delegates who were not endowed with the capacity to represent their government.[34] Nevertheless, Art. 4 of this document states that Members are exclusively national police services provided their admission has been 'submitted to the Secretary-General by the appropriate governmental authority'. Even more, States have never protested 'against information revealing constant attitude to make progressively recognized Interpol as an intergovernmental

31 See Art. XI(1) of the Agreement establishing the WTO (Marrakech: 14 Apr. 1995); Art. 2(3) of the Constitution of the FAO.

32 'Le premier caractère spécifique de l'organisation internationale est indubitablement l'interétatisme': Denis Alland, *Droit international public* (Paris: Puf, 2000), 169, Section 143 (We translate).

33 For a reverse opinion, see François Guérin, *La qualité de membre d'une organisation internationale*, Thesis for the PhD in Law (1998), 44–45.

34 Claude Valleix, "Interpol," *RGDIP* 88 (1984): 621–628: Olivier Beauvallet, "Organisation internationale de police criminelle (Interpol)," *Juris-classeur de droit international* 409-10 (2011): Sections 1–2; Alice Pezard, "L'Organisation internationale de police criminelle et son nouvel accord de siège," *AFDI* 29 (1983): 564–565.

organization'.[35] Indeed, the intergovernmental quality of Interpol was expressly recognized in a decision of the Economic and Social Council of the United Nations (ECOSOC) on 23 Jul. 1975.[36] The case of the Inter-Parliamentary Union (IPU) is even clearer since it is its Charter which states that it is an 'international organization bringing together representatives of parliaments of sovereign States'.[37] Professors Brownlie and Goodwin-Gill recall that 'initially an organization of individual parliamentarians, [IPU] has evolved over the last one hundred and ten years into an organization of parliaments. Indeed, it is the Parliament itself which takes a formal decision to adhere to the IPU and the norm is for the parliament as an institution to seek affiliation'.[38]

Other examples could be developed.[39] In every case, participation is not mediated by the executive while remaining State. Indeed, if a Member of one of these organizations – parliament or police service – infringed a statutory obligation of the organization, no doubt it would be the responsibility of the State which would be internationally engaged. But is it still possible to speak of *intergovernmental* organizations? The question arises especially when, on examination, institutional international law said 'derivative' announces the exceeding of the intergovernmental model.

b *Overtaking the Model by Derived Law Making*

As well known, IGO are reputed to enable cooperation between the executive branches of Member States. More precisely, 'decision-making powers are in fact exercised by representatives of governments' and, when binding, decisions must enjoy 'unanimous approval of members'.[40] Conceived as a 'pure

35 'à l'égard d'informations révélant la ligne de conduite constante de faire reconnaître peu à peu Interpol comme une Organisation intergouvernementale': Guérin, *La qualité*, 45 (We translate).

36 ECOSOC, "Participation of Intergovernmental Organizations in the Work of the Council," Decision 109 (LIX).

37 Art. 1(1). See also: Art. 3(1): "Statutes of the Inter-Parliamentary Union," adopted in 1976, as revised and ultimately amended in 2011, Geneva (www.ipu.org).

38 Ian Brownlie and Guy S. Goodwin-Gill, "Joint Opinion Prepared on the Instructions of Mr. Anders B. Johnsson Secretary General Inter-Parliamentary Union," Geneva, 31 May 1999, Section 9 (www.ipu.org).

39 We can also refer to the Bank for International Settlements (BIS) whose Members are Central Banks. See, *infra*.

40 Schermers and Blokker, *International*, Section 59. See also Michel Virally, "De la classification des organisations internationales," in *Miscellanea W.J. Ganshof van der Meersch* (Bruxelles/Paris: Bruylant/LGDJ, 1972), 365–382.

type', an IGO 'is ultimately nothing other than the 'personification of an intergovernmental representative system'.[41] From this assertion, the purpose here is to show how an organization instituted on the intergovernmental model will emancipate from it through its normative production. Apart from the specific case of the EU (b.1), the attention focuses on the OECD (b.2).

b.1. If EU formally remains an IGO according to Sir Gerald Fitzmaurice's definition,[42] developments of its secondary legislation have nevertheless confirmed that the EU is something more than an IGO. It is not only an association of States *but also* of their people. This specificity of the EU gained its normative production and grew in size during the course of the European integration. The claimed ambition is thus to associate more closely European citizens with the lawmaking process. It is the so called 'parliamentarization of the EU law',[43] that is to say both the strengthening of the European Parliament among the European institutions (on equal terms with the Council) and the emergence of State parliaments in the operation of the EU. In particular, new Art. 12 TEU resulting from the Lisbon Treaty states that 'National Parliaments contribute actively to the good functioning of the Union'. Combined with Protocol No. 2 on the application of the principles of subsidiarity and proportionality, this disposition has the ambition to secure, beyond their governments gathered in the Council, a direct involvement of State parliaments – and through them of citizens – in decision-making process of the EU. Not only this pretention must be and has been criticized,[44] but the example of the EU is not determining for our purpose since it is the founding treaties themselves that provide this specificity. Reversely, the OECD enlarges its ability to product norms beyond the letter of its Charter.

b.2. No one disputes that the OECD was established as an IGO of the most conventional type. Under the Convention of 14 Dec. 1960, it succeeded to the OEEC while 34 States formally constitute its Members.[45] However, by the

41 'n'est en définitive rien d'autre que la "personnification d'un système représentatif intergouvernemental'": Jean-Pierre Quéneudec, "Préface," in Lagrange, *La représentation*, 5–6 (We translate).

42 See *supra*. As it relates to the former EEC, see the ECCJ position in the *AETR* case: 31 Mar. 1971, *Commission v. Council*, case 22/70, pts. 13–32.

43 Sébastien Roland, "La parlementarisation du droit de l'Union," in *Le phénomène*.

44 Sébastien Roland, "Quand le performatif tient lieu d'argumentatif: la contribution des parlements nationaux au bon fonctionnement de l'Union," *Rev. UE* 556 (2012): 178–184; Sébastien Roland, "De la démocratie en Europe? Réflexions sur la morphologie du pouvoir dans l'Union européenne après l'entrée en vigueur du traité de Lisbonne," *ADE 7* (2009): 289–355.

45 See notably Art. 4 of the Convention on the OECD, Paris, 14 Dec. 1960, www.oecd.org.

mean of the law it has secreted, the OECD took the guise of a 'global regulator'.[46] In fact, the provisions of the 1960 Convention do not, by themselves, explain the diversity of standards resulting from the activity of this organization.[47] Thus, Arts. 9 to 11 classically deal with internal acts while Arts. 5 and 12 concern external acts addressed at Members or non Members States and organizations.[48] It is namely through its external normative production, albeit non-binding, that OECD has emancipated from the intergovernmental model shaped by its charter. The process of developing and revising the Guidelines for Multinational Enterprises in particular is to be considered.

Firstly, this dual process seems to have, if not exceeded, in any case considerably relaxed the principle of specialization that characterizes the status of IGO. Whereas the 1960 Convention wording reveals that its Member States have designed primarily OECD as an instrument for the promotion and protection of international investments, the Guidelines raise the Organization to the status of a global player for the regulation of multinational enterprises' behaviour. This gap between what we could name the 'constitutional' function of OECD and the purpose of the Guidelines was also obvious when the revision of the latter introduced an explicit reference to the elaboration of the so called 'Ruggie's Principles' related to business and human rights principles.[49] This reference confirms, if were needed, that the goal of the Guidelines does not come naturally to the OECD or, at least, places it beyond its original purpose as formulated by the Member States in its Charter. It anyway reveals a new method of normative production – the network production – which suggests the surpassing of the intergovernmental model since decisions and standards are

46 Laurence Dubin, "L'élaboration des principes à l'intention des entreprises multinationales par l'OCDE ou comment globaliser la régulation du comportement d'un acteur global?" in *Le pouvoir normatif de l'OCDE*, ed. SFDI (Paris: Pedone, 2013), 113 *et seq*.

47 See also: Hervé Ascensio, "Les normes produites à l'OCDE et les formes de normativité," in *Le pouvoir*, 7 *et seq*.

48 Art. 5: 'In order to achieve its aims, the Organisation may: (a) take decisions which, except as otherwise provided, shall be binding on all the Members; (b) make recommendations to Members; and (c) enter into agreements with Members, non-member States and international organisations'. Art. 12: 'Upon such terms and conditions as the Council may determine, the Organisation may: (a) address communications to non-member States or organisations; (b) establish and maintain relations with non-member States or organisations; and (c) invite non-member Governments or organisations to participate in activities of the Organisation'.

49 OECD Guidelines for Multinational Enterprises, 2001 edn., Foreword, 3 and Part 1, Section IV (www.oecd.org). See also: Guiding Principles on Business and Human Rights (www.ohchr.org).

made by several organizations together rather than within the sole intergovernmental organ of the OECD (here the Council).[50]

Secondly and correlatively, the Guidelines are the only of the fourth components[51] that together form the Declaration on International Investment which departs from the unilateral and Member States-focused logic. Beyond the fact that, in accordance with Art. 12 of the OECD Charter, the Guidelines were adopted by 42 'adhering Governments',[52] that is to say the 34 Member States plus 8 non Member States, this document not only addresses non-State actors but also subordinates its effectiveness to their goodwill.[53] Moreover, the elaboration and the revision of the Guidelines are practical implementations of what is generally referred to as the 'theory' of stakeholders.[54] And this formula seems to have flourished and begun to gradually reach the UN. According to the Working Group on the relationship between the United Nations and civil society, this Organization 'must become a more outward-looking, or networking, organization. It should explicitly convene and foster multi-stakeholder partnerships and global policy networks, reaching to constituencies beyond Member States'.[55]

This is how non-State actors, namely NGO and multinational companies, directly contribute to the 'normative making', even though 'adhering' States and more generally public authorities ultimately retain control of the process especially through the 'Terms of reference' adopted within the scheme of the Working Group of the investment Comity in Mar. 2010.[56] It is hence significant to note with Professor Laurence Dubin that 'the participation of stakeholders

50 Art. 7: 'A Council composed of all the Members shall be the body from which all acts of the Organisation derive. The Council may meet in sessions of Ministers or of Permanent Representatives'.

51 The other three components are: National treatment; Conflicting requirements; International investment incentives and disincentives (www.oecd.org).

52 In the words of the OECD Guidelines.

53 See Chapter 1 'Concepts and Principles', Section 1 of the OECD Guidelines aforementioned; Dubin, "L'élaboration."

54 Thomas Donaldson and Lee E. Preston, "The Stakeholder Theory of the Corporation, Concepts, Evidence and Implications," *Academy of Management Review* 20 (1995): 65–91.

55 "Strengthening of the United Nations System," Note by the Secretary-General, UN Doc. A/58/817, Section 185, www.undemocracy.com.

56 These include nonadhering States that are interested, particularly emerging countries (China, India, Indonesia, Saudi Arabia and South Africa), international organizations (intergovernmental and private) involved in the regulation of multinational enterprises (ILO, UN Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Global Compact, IFC, and ISO).

in the regulation can [reversely] lead to trivialize the public actor'[57] as showed the elaboration process of the standard 26,000 of the International Organization for Standardisation (ISO), that is to say an institution deprived of any international personality. Hence remaining an IGO and clearly retaining its interstate essence, it seems nevertheless that OECD seeks to circumvent the formalism of the intergovernmental formula through its modes of normative production. In the same vein, Professor Dubos notes that European integration forged a new institutional paradigm he calls 'multi-level governance' debt to political science.[58] At this level, the model is definitely more challenged than plainly reshaped.

3 The Avoidance of a Challenged Model

Despite its usefulness to establish international organizations as key players of the international society of the 20th century, the intergovernmental model fails nowadays to comprehend the protean institutionalization of international relations. Thus reducing the category 'IO' to IGO could lead to a dead-end. We note indeed that the institutionalization of international relations uses more and more formulas, sometimes old, which are less formal than IGO (a). Without commenting here on the existence of a possible 'crisis' of the concept,[59] this avoidance strategy is not without drawbacks and paradoxes (b).

a *The Trend towards More Flexible Methods for Institutionalizing International Relations*

Art. 2 of the Draft Articles on the Responsibility of International Organizations admits that an IO is not necessarily instituted by a treaty (a.1).[60] It thus fortunately suggests that IO can exist without IGO, partly reconciling theory with practice of institutionalizing international relations (a.2).

a.1. As far as an IGO is concerned, an interstate treaty is required. In other words, all constituent operation of an IGO can be reduced to the process

57 'la participation des parties prenantes à la régulation peut conduire à banaliser l'acteur public': Dubin, "L'élaboration" (We translate).

58 Olivier Dubos, "Le paradigme du 'multi-level governance' est-il soluble en droit?" *Rev. UE* 556 (2012): 145.

59 Dubin and Runavot, "Représentativité."

60 Art. 2, aforementioned.

of adoption of an international convention subject to some accommodations.[61] Considering that the Status of Interpol could never be adopted by means of a treaty neither in 1946 nor in 1994, François Guérin concludes that Interpol is not an IGO.[62] The assertion is not wrong but it does not necessarily mean that there is neither international organization nor secondary subject of international law. It is so if one admits that IO is governed by more flexible criteria than IGO especially for its constituting act. A note from the General Secretariat of the United Nations already considered in 1982 that 'the content of the constitution or status of an organization can be more important than form in which it was created when it comes to decide its…nature'.[63] In separate areas and through different ways, subsequent international practice has reinforced the need for a pragmatic definition of the international organization.[64]

As for the BIS, the ambiguity arises from the both mixed and plural nature of its constituting act. Indeed, an international convention is not the only formal source at its origin. Established by the Convention adopted on 20 Jan. 1930 to which are attached its Charter and Statutes,[65] the BIS is also a limited company under Swiss law, that is the law of its host State. Although long discussed,[66] the BIS is nowadays generally recognized as an IO endowed with international

61 Thus, Art. 5 of the aforementioned Vienna Convention on the Law of Treaties of 1969 states that: 'The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization'.

62 Guérin, *La qualité*, 45. *A contrario*: Valleix, "L'organisation," 628–651; Budimir Babovic, "A propos de l'article 7 du Statut de l'OIPC-Interpol," *Rev. int. police crim*. 452–453 (1995), 5–6.

63 "Note of the UN Secretary-General," Dec. 1982, quoted in Beauvallet, "Organisation internationale," Section 18.

64 Enable to be exhausted here, we refer to examples aforementioned (WTO, IPU). It may also be mentioned: the Nordic Council created by parallel unilateral acts of national parliaments, Eurofima whose establishment by law of the host State was merely approved by the Berne Convention of 20 Oct. 1955, or the Organization of the Petroleum Exporting Countries, which was established by a resolution of an intergovernmental conference; see Mathieu Cardon, "Droit de la concurrence: une action contre l'OPEP? L'immunité en question (1ère partie)," *Revue Lamy de la concurrence* 2 (2005): 103–111.

65 *Convention Respecting the Bank for International Settlements; Constituent Charter of Bank for International Settlements*; *Statutes of the Bank for International Settlements*, 20 Jan. 1930, *LNTS*, 104: 441–470. For an updated version of these texts, see www.bis.org.

66 Frederick A. Mann, "The Law Governing States Contracts," *BYIL* 21 (1944): 16; Berthold Goldman, "Le droit des sociétés internationales," *JDI* 90 (1963): 320–389 (322).

personality. It was again confirmed by an award of the international arbitral Tribunal, which was instituted to deal with the Jan. 2001 decision of the Special Meeting of the BIS aiming at excluding private persons from its capital: the BIS is 'a *sui generis* creation which is an international organization'.[67] It is true that, in this case, the solution was made easier by the possibility of establishing a link with a traditional international treaty. Likewise the case of the United Nations Industrial Development Organization (UNIDO) is not decisive since the transformation of this subsidiary body of the UNGA[68] into a UN specialized agency rests upon an interstate agreement which came into force on 21 Jun. 1985. But such a link does not always exist and the creation of an IO, i.e. an entity endowed with international personality, may happen by other mean than a 'classical' treaty. Two significant examples can be given.

First, neither the Final Act of Helsinki nor the Charter of Paris for a New Europe are treaties in the formal sense. The same applies to the Document of Budapest which renamed the Conference on Security and Co-operation in Europe (CSCE) into Organization for Security and Co-operation in Europe (OSCE) since 1 Jan. 1995. Indeed, this Document itself states that 'it is not eligible for registration under Article 102 of the Charter of the United Nations'.[69] Resulting from a combination of 'gentlemen's agreements', the OSCE is nevertheless widely recognized as an institution with international legal personality.[70]

Second, the Financial Stability Board (FSB) was established in Apr. 2009 as the successor to the Financial Stability Forum (FSF) through a Declaration of Heads of State and Government of the G20 meeting in London. The Charter, added to this Declaration and agreed between its Members, claims not to 'create any legal rights or obligations'.[71] Beyond, it

67 Permanent Court of Arbitration, *Horst Reineccius et alli c. Bank of International Settlements*, partial Award, 22 Nov. 2002, Section 118 (www.pca-cpa.org). The solution is repeated in the rest of the award (Sections 150–151, 154, 172, 178); Philippe Weckel, "Horst Reineccius et alli c. BRI," *RGDIP* 107 (2003): 179–182; Paul Lagarde, "Autour de l'arbitrage concernant la Banque des règlements internationaux (sentences des 22 Nov. 2002 et 19 Sept. 2003)," in *Le droit international économique à l'aube du XXIème siècle: en hommage aux Professeurs Dominique Carreau et Patrick Julliard*, ed. Jean-Marc Sorel (Paris: Pedone, 2009), 159–165.

68 See UNGA Res. 2152 (XXI), 17 Dec. 1966.

69 *Towards a Genuine Partnership in a New Area*, Budapest Document, 6 Dec. 1994. See also: *Conference on Security and Co-operation in Europe, Final Act*, Helsinki, 1 Aug. 1975; *Charter of Paris for a New Europe*, Paris, 21 Nov. 1990 (www.osce.org).

70 Daillier *et al.*, *Droit International*, 646. For an isolated counter-example, see Guérin, *La qualité*, 47 and 52.

71 "Declaration on Strengthening the Financial System," G20 London Summit, 2 Apr. 2009, notably Art. 16. See also "FSB Charter," adopted on 25 Sept. 2009, then amended, restated

is true that the monetary and financial sector is certainly the area in which the atypical forms of institutionalization of international relations have the most proliferated.

a.2. In addition to the FSB, the Basel Committee on Banking Supervision (BCBS), the International Organization of Securities Commissions (IOSCO) and the International Association of Insurance Supervisors (IAIS) led the doctrine to search alternative approaches to account for what can be referred to in terms of 'regulation'[72] of the international concerted public action. As Régis Bismuth perfectly notes, these institutions 'symbolize indeed a spontaneous form of institutionalized cooperation' which has its roots in the increasing trend of functional decentralization in the State.[73] 'Thinking international regulation assumes that one stands out of old patterns'[74] since positive law does not provide for appropriate instruments. The 'neofunctionalism' theory, coined in the 1960s on the American continent and adopted by David Zaring,[75] then makes it possible to reveal technical cooperation phenomena that develop at the international level between sub-State entities that are autonomous at the national level. However, the method does not provide for a legal framework to comprehend such 'interregulation bodies' whose appearance, according to Professor Ascensio, 'marks…a shift towards a both informal and incomplete multilateralism in the form of "clubs"'.[76] If it is indeed difficult to describe the Members of these four institutions as State 'organs' – for example the BCBS gathers only representatives of central banks and other supervisory authorities of the banking sector in the

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and endorsed by the Heads of State and Government of the G20 at their Los Cabos Summit on 19 Jun. 2012 (www.financialstabilityboard.org).

72 See Régis Bismuth, *La coopération internationale des autorités de régulation du secteur financier et le droit international public* (Bruxelles: Bruylant, 2011), 29–34, Sections 43–50.

73 'symbolisent en effet une forme spontanée de l'institutionnalisation de la coopération': Bismuth, *La coopération*, 43, Section 65 (We translate).

74 'Penser la régulation internationale suppose que l'on se détache des vieux schémas': Gérard Timsit, "Les deux corps du droit. Essai sur la notion de régulation," *Rev. fr. administr. pub.* 78 (1996): 383 (We translate).

75 David Zaring, "International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations," *Tex. Int'l L.J.* 33 (1998): 312–325.

76 'marque…une évolution vers un multilatéralisme à la fois informel et inachevé prenant la forme de "clubs"': Hervé Ascensio, "L'interrégulation et les régulations internationales entre Etats," in *Les risques de la regulation*, ed. Marie-Anne Frison-Roche (Paris: Presses de Sciences-Po/Dalloz, 2005), 100 (We translate).

different internal orders – these institutions seem however to express 'a form of cooperation of interstate nature while other bodies aspiring to produce international financial standards are private'.[77] In other words, the internationalization of activities related to the financial sector does not completely escape the primary subjects of international order. In the same vein, another particularly significant development in the field of space and telecommunications should be emphasized: the one of privatization of three of the most influential 'intergovernmental satellite Organizations'[78] – the International Maritime Satellite Organization (INMARSAT), the International Telecommunications Satellite Organization (INTELSAT) and the European Telecommunications Satellite Organization (EUTELSAT). Completed in Apr. 1999 for INMARSAT, the process achieved in Jul. 2001 for the other two. These organizations have certainly always distinguished themselves by bringing together, on the one hand, governments – parties to their founding charter – and, on the other hand, national administrations or operators (public or private) which are designed by governments and signatories of an operating contract. Nevertheless, their creation logic remained clearly expressed by UNGA Res. 1721 (XVI) of 20 Dec. 1961 recalling that 'the exploration and use of outer space should be only for the betterment of mankind and to the benefit of States irrespective of the stage of their economic or scientific development'. It is from this original design that the practice has clearly moved away, notably because of the technological breakthroughs. Indeed, founding treaties of these three organizations were amended to 'delegate' the responsibility of the telecommunications business to private companies while the intergovernmental component, without disappearing, became residual. More precisely, the latter is reduced to a structure of supervision, simply ensuring that private entities conform with public international law principles, which are laid down in the founding charter and also included in the 'Public Services Agreement' it has concluded with them.[79]

77 'une forme de coopération de nature interétatique là où d'autres instances ayant vocation à produire des standards financiers internationaux sont de nature privée': Bismuth, *La coopération internationale*, 44, Section 66 (We translate).

78 David Sagar, "Privatisation of the Intergovernmental Satellite Organizations," in *Le droit de l'espace et la privatisation des activités spatiales*, ed. Armel Kerrest (Paris: Pedone, 2003), 43–61.

79 On these points, see also: Alan Auckenthaler, "Legal Issues of Expanding Global Satellite Communications services and Global Navigation Satellite Services, with Special Emphasis on the Development of Telecommunications and E-commerce in Asia," *Singapore JICL* 5 (2001): 246–252.

All these evolutions invite to modernize the definition of 'IO' so that international law could restore its control over these atypical entities. The same statement and the same consequences apply in the environmental field which has certainly been a pioneer in term of informal institutionalization of intestate relations. Since the 1970s, several multilateral conventions have established international institutions whose flexible operation or State creators' willingness do not allow to rise to the rank of an international organization of an intergovernmental essence. Conversely, institutionalization is much more advanced than in the context of a simple diplomatic conference. Introduced in 1971 by the treaty known as the Ramsar Convention,[80] the technique of 'autonomous institutional arrangements in multilateral environmental agreements'[81] has spawned imitation and been perfected over time. At the institutional level, the main body – usually called 'Conference of Parties' (COP)[82] – is a plenary one that meets periodically without specific seat. It is assisted by a permanent secretariat and a network of subsidiary organs that are not necessarily specified in the constitutive treaty. Ensuring the permanence of the institutional mechanism without raising the costs inherent to the maintenance of premises, the process has taken over the formalism of the intergovernmental organization in the environmental field. On the occasion of its 19th special session – 'Earth Summit + 5' – UNGA has valued the flexibility of such institutional arrangements as well as encouraged their rationalization. Above all, it dismissed the possibility of creating any new intergovernmental organization.[83] In fact, 'these institutional arrangements demonstrate that international cooperation may take innovative forms designed for specific needs, presenting challenges to international lawyers'.[84]

80 Convention on Wetlands of International Importance especially as Waterfowl Habitat. Ramsar (Iran), 2 Feb. 1971, *UNTS* 14583, as amended by the Paris Protocol, 3 Dec. 1982, and Regina Amendments, 28 May 1987 (www.ramsar.org).

81 For example: Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, 3 Mar. 1973 (www.cites.org); Vienna Convention for the Protection of the Ozone Layer, 22 Mar. 1985 (www.unep.org); UN Framework Convention on Climate Change, Rio de Janeiro, 9 May 1992, together with the Kyoto Protocol, 10 Dec. 1997 (unfccc.int). For more examples, see Robin R. Churchill and Geir Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law," *AJIL* 94 (2000): 623–625.

82 Aurélie Tardieu, "Les conférences des parties," *AFDI* 57 (2011): 111–143.

83 Programme for the further implementation of Agenda 21, UNGA Res. S-19/2, Sections 117–121.

84 Churchill and Ulfstein, "Autonomous," 659.

In the analysis, what Professor Carreau named the 'joint exercise of State authority'[85] is now experiencing a range of variations sometimes very closed to the 'relational Law model'.[86] And it is certainly too simplistic to draw a linear description of the different techniques of institutionalizing international relations with the personified international organization at the term. Because the concept of 'IO' is marked by its intergovernmental origin, it seems that States and other international actors are searching elsewhere the means to effectively conduct a joint action. The variety and pragmatism are the key words here. As argued by Professor Eisemann regarding commodity agreements, 'the effectiveness of an international organization depends more on its cohesion than on its degree of institutionalization'.[87] In the name of efficiency, this trend to establish international cooperation outside the formal framework of the IO, or more precisely, outside its intergovernmental declination, may nevertheless suffer from inconsistencies.

b ***The Drawbacks of the Avoidance Strategy***

Paradoxically, the avoidance of the intergovernmental model gave rise to new ways of institutionalizing interstate relations that exclude international personification but maintain an intergovernmental working (b.1). In addition, several well-established intergovernmental Organizations have chosen to exploit the trend of institutional unformalism rather than to undergo this change (b.2).

b.1. On the grounds of securing efficiency, States promote the institution of entities explicitly deprived of any distinct international personality but whose operation is fundamentally intergovernmental. Thus, States aim to keep control over the institutionalization process but do not always allow avoiding the heaviness of the intergovernmental method inherent to IGO. Beyond the nature of such entities, this practice also raises questions related to the decisions adopted in their framework. Above all, because the law of international organizations remains anchored on the

85 'l'exercice conjoint des compétences étatiques': Dominique Carreau, *Droit international* (10th edn. Paris: Pedone, 2009), 340, Section 924 (We translate).

86 According to René-Jean Dupuis' famous distinction between international relation law and international institutional law: René-Jean Dupuis, *Dialectiques du droit international – Souveraineté des Etats, Communauté internationale et droits de l'humanité* (Paris: Pedone, 1999), 23.

87 'l'efficacité d'une organisation internationale dépend plus de sa cohésion que de son degré d'institutionnalisation': Pierre Michel Eisemann, *L'Organisation internationale des produits de base. Droit des accords intergouvernementaux producteurs-consommateurs* (Paris/Bruxelles: Faculté de droit de Paris V/Bruylant, 1982), 368 (We translate).

Reparation for injuries opinion, this practice leads to exempt some major actors of the international order from the grip of international law. One thinks immediately at the notorious and yet well studied case of 'G'.[88] Two less known examples seem to be equally revealing.

It is first the Belgo-Luxembourg Economic Union (BLEU) and the Benelux Union that illustrate the paradox of 'intergovernmental organizations' in their composition and functioning, but devoid of international personality. The BLEU was established by a Convention signed in 1921, entered into force on 6 Mar. 1922 and renewed on 18 Dec. 2002. The Benelux Union was established by the Treaty of 3 Feb. 1958 and supplemented by a 'Aide-Mémoire' of the Governments parties that highlighted that: 'The Union has not received the personality of international law. Art. 95(2), clearly states that the Union is only endowed with personality of domestic law'.[89] The BLEU as the Benelux are nevertheless formulas of deep integration of economic relations between their Member States. Originally limited, their institutional dimension has also significantly expanded and improved over time, while continuing to be characterized by intergovernmentalism.[90] The nature of these organizations is clearly ambiguous as doctrinal analysis confirmed.[91] Specifically, their contribution to the international normative order is mediated by their Member States who,

88 Lucie Delabie, "Gouvernance mondiale: G8 et G20 comme modes de coopération interétatiques informels," *AFDI* 55 (2009): 629–664; Alain Dejammet, "Les 'G': G 7, G, 8, G 20," *RGDIP* 116 (2012): 511–518.

89 Document available in: Jacques Karelle and Fritz De Kemmeter, *Le Benelux commenté* (Bruxelles: Bruylant, 1961), 158. If Art. 26 of the Treaty of 17 Jun. 2008 amending the Treaty establishing the Benelux Economic Union still reserves the conclusion of external agreements to the Contracting Parties, the main impetus has always been placed in the Committee of Ministers of the Union in matter of external relations. See Arts. 24 and 25 of the Treaty of 2008 and Arts. 72 and 73 of the Treaty of 1958 (www.benelux.be).

90 Johannes Wilhelmus Schneider, "The Netherlands and Benelux," in *International Law in the Netherlands*, eds. Haro Frederik van Panhuys *et al.* (The Hague: Sijthoff & Noordhoff, II-1979), 75; Panayotis Soldatos, "L'UEBL au lendemain de sa reconduction: les contours et les enseignements politico-institutionnels d'une réussite discrète," *Studia Diplomatica* 37 (1984): 612–622.

91 On its website, Benelux is referred as 'a cooperation that transcends the boundaries between the Belgian, Dutch and Luxembourg' (www.benelux.be) (We translate). For its part, BLEU has been defined as an 'associative experience…which, inspired by contemporary structure of international organizations…maintains, regarding the composition of its bodies and their decision-making, an outstanding flexibility': Soldatos, "L'UELB," 593–594 (We translate).

among others, jointly or separately conclude agreements whose object falls within the scope of these economic unions. However, Member States do so 'on behalf' of each union.[92] It is interesting to notice the analogy with the 'mandate theory' used to account the international activity of the EU under the empire of the Maastricht Treaty. But this time, it is for the benefit of the institution and not of the Member States.[93] If the Treaties establishing the BLEU and the Benelux Union clearly deprived them of any treaty-making power, it does not however exclude that they enjoy a limited international status. It must be noticed that Art. 28 of the Treaty of 17 Jun. 2008 revising the treaty establishing the Benelux Economic Union provides that '[t]he Benelux Union shall enjoy international legal personality for the purposes of granting privileges and immunities'.

Secondly, the Latin-American continent has in recent years experienced some original formulas to institutionalize relations between States,[94] like the Bolivarian Alliance for the Peoples of our America (ALBA).[95] The ideological project set aside, ALBA amounts from a juridical point of view to an unusual economic association of States that meet with varying frequency, at the level of Heads of State and Government. Its creation was more precisely initiated by the Venezuelan Head of State Hugo Rafael Chávez Frías at the third summit of the Heads of State and Government of the Association of Caribbean States on 11–12 Dec. 2001. After several meetings and summits, enlargements and adoptions of texts,[96] it is at the seventh extraordinary summit in 2009 that was adopted the official name ALBA-TCP. Since then, the Agreement for the

92 See Art. 31 of the Consolidated Convention Instituting the Belgo-Luxembourg Economic Union, *UNTS* 547, or Art. 26 of the Treaty Revising the Treaty Establishing the Benelux Economic Union (available in English here: www.wipo.int).

93 In the same vein, see Schermers and Blokker, *International*, 987, Section 1562. Under the Maastricht Treaty, the EU concluded international agreements only as a representative of its Member States; for example, see the Memorandum of Understanding on the administration of the city of Mostar signed in Geneva on 5 Jul. 1994; Fabrizio Pagani, 'L'administration de Mostar par l'Union européenne', *AFDI* 42 (1996): 234–254.

94 Farid Fernandez "ALBA-TCP et CELAC: instruments d'une politique indépendante et souveraine," *RGDIP* 116 (2012): 557–563; Carlo Santulli, "Retour à la théorie de l'organe commun – Réflexions sur la nature juridique de l'ALBA et de la CELAC," *RGDIP* 116 (2012): 565–578.

95 See www.alianzabolivariana.org.

96 Especially in Dec. 2004, a first meeting of the Heads of State and government of Cuba and Venezuela led to the adoption of the joint Declaration establishing ALBA and the Agreement for the ALBA application. Later, in 2006, Bolivia joined ALBA which was enriched with the Peoples' Trade Treaty (TCP).

creation of the economic space of ALBA-TCP was concluded at the summit of Caracas in Feb. 2012. Regarding its origin and functioning, ALBA-TCP looks very similar to 'G' and even more so, in itself, it is deprived of international personality.

But the analogy does not seem to be pushed further. What is unique about the ALBA is that, notwithstanding the absence of international personality, it catalyzes the conclusion of agreements establishing entities with a proper international personality. For example, Art. 3 of the Treaty of 16 Oct. 2009 instituting the 'Unified System for Regional Compensation' (SUCRE), states that the Regional Monetary Council of the SUCRE is 'a body of international law with its own legal personality'.[97] Moreover, the Member States of ALBA are not necessarily parties to all and every agreement concluded within ALBA, hence drawing a swing-wing institutionalization between Latin-American States.[98]

Does the existence of an organic structure headed by a Council of Presidents – that is to say 'the Heads of State and Government's body and the highest instance of deliberation, decision and political orientation of the Alliance'[99] – and including a permanent Secretariat make an analogy between ALBA and a COP more relevant? Given the 2012 Advisory Opinion of the ICJ, it is possible to doubt about it. Even if the ICJ does not qualify as an IO the Conference of Parties of the *Convention to combat desertification in those Countries experiencing serious drought and/or desertification, particularly in Africa* (CCD), it seems however to admit the own international personality of this Conference beyond that of its Member States. But this Advisory Opinion is especially interesting in that it sheds light on a second paradoxical consequence of avoiding IGO when it comes to institutionalize international relations. In this case indeed, the International Fund for Agricultural Development (IFAD) – i.e. a specialized agency of the UN family matching the intergovernmental model of IO – offered its structure and staff to the Global Mechanism – i.e. a non-personified entity established by the CCD under the authority of its Conference of the Parties. This is the said phenomenon of 'institutional hosting' that reveals the capture of informal modes of institutionalization of international relations by IGOs themselves.

97 'el Consejo Monetario Regional del SUCRE como un organismo de derecho internacional público con personalidad jurídica propia': www.sucrealba.org (We translate).

98 For example, only 5 out of the 8 Members of ALBA are also Members of SUCRE.

99 See www.alba-tcp.org.

b.2. Beyond the need to rationalize international institutional relations that first aroused the proliferation of IO personified,[100] IGO have to face a new challenge: the competition of informal institutions. Because their constituent charters largely ignore non personified modes of institutionalization of international relations, IGO developed two main practices in parallel.

First, some sought to preserve their functional coherence in a globalized environment by giving voice to those 'informal law-making bodies' deprived of international personality.[101] On that point, 'Decision for greater coherence in economic policy at the global level', adopted in Marrakesh in April 1994, is totally silent and the official website of the WTO only considers cooperation with other IGO. WTO relationships with informal institutions are however a reality. At the occasion of the 34th General Assembly of ISO on 21 Sept. 2011, the Director General of the WTO thus qualified as 'essential' cooperation between the two organizations. In this respect, pragmatism is simply the rule as evidenced by the experience of the Committee on Trade in Financial Services, a subsidiary body established in March 1995 by the Council for Trade in Services. Not only this body urged Member States to refer to the work 'of other international organizations, most notably the…IOSCO, IAIS and G30',[102] but it above all also developed informal cooperation with these entities in the absence of consensus for their representation within it. Thus, the refusal of developing States to grant observer status to the IAIS[103] led to organize an 'informal briefing session' open to other regulatory authorities. The representativeness of these latter – such as the Basel Committee – could however be questioned. Through its practice, WTO somehow 'anoints' the activity of informal institutions and confirms that, in order to pursue their goals, IGOs cannot ignore the efforts already made elsewhere by other bodies vested with similar goals, be they personified or not.

Secondly, the IGOs tend more and more to 'capture' the trend of unformalism to address the crisis of legitimacy that fuel cases of functional

100 UN Member States notably asked the Secretary-General to prepare a report on the review of mandates established by resolutions of the General Assembly and other UN bodies, considering that 'the study and recommendations on system-wide coherence will chart a path towards a more effective delivery mechanism for the United Nations system as a whole' (A/60/733, 30 Mar. 2006, pt. 7).

101 Ayelet Berman and Ramses Wessel, "The International Legal Status of International Law-making Bodies: Consequences for Accountability," 2012, www.utwente.nl.

102 See WTO, S/C/W/72, 2 Dec. 1998, Section 3.

103 See Note by the Secretariat of the WTO S/FIN/M/27, 20 Nov. 2000, Sections 30–39.

inconsistencies and disorders between them. From an organic point of view, it is reflected in the practice of institutional hosting by which some personified organizations put their structure available to an informal entity in order to perform one or more of their own tasks. But it mainly occurs on a normative level so that Professor Ascensio spoke about unusual expressions of normative 'interregulation',[104] which are not without inspiring the disciplinary project formed around the GAL (Global Administrative Law). This project reveals the relations that exist between the institutions in charge of administering matters of common interest (hastily named 'global administrations') and shows how organizations capable to produce unilateral and external acts mix with other institutions generating a more flexible normative production, like standardization bodies and regulatory authorities whether national or private.[105]

Practice offers several illustrations, especially with the 'Directory of international best practices, codes and standards' recommended for the implementation of the Res. 1373 (2001). Prepared on the request of the Security Council by the Committee against Terrorism, this document takes up a number of standards resulting from the activity of the Basel Committee, the IAIS or the IOSCO. Although as nonbinding as the standards it enshrines, it has nevertheless placed them under the UN 'patronage'. Likewise, the WTO provides for the receipt of heterogeneous standards but, this time, through compulsory rules. It is the example of Art. 3 of the Agreement on the application of sanitary and phytosanitary measures. This text establishes a presumption of compatibility with the WTO law for Members' measures that would comply with the standards developed by the 'the relevant international organizations and their subsidiary bodies, in particular the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention'. Similarly, Art. 2 of the Agreement on Technical Barriers to Trade 'receives' standards elaborated within 'appropriate international standardizing bodies'. Eventually, Yoshiko Naiki highlights that the practice of IMF also demonstrates a form of 'vertical allocation of authority' for the benefit of informal modes of normative production, most notably the Basel Committee.[106]

104 Ascensio, "L'interrégulation," 93–114.

105 Laurence Dubin, "Analyse critique du GAL et de son articulation avec le droit international public," in *Un droit administratif global?*, ed. Clémentine Bories (Paris: Pedone, 2012), 95–113.

106 Yoshiko Naiki, "Accountability and Legitimacy in Global Health and Safety Governance: The WTO, the SPS Committee, and International Standard-Setting Organizations," *JWT* 43 (2009): 1257.

The consequences of this phenomenon of 'normative interregulation', which runs counter to the one of fragmentation, are multiple and sometimes paradoxical. First, the concern of IGO to counter the blame of inefficiency by taking into account existing relevant standards within their sphere of activity may expose them to another kind of criticism: providing legitimacy to entities deprived of representativeness. Second, by receiving the soft normative production of non-personified entities, these organizations contribute to undermine what was their own gain, namely their ability to produce some derivative law which is binding on their Members. This practice in effect blurs the line between, on the one hand, mandatory standards and ability to produce external acts and, on the other hand, soft law instruments and ability to produce swing-ring acts which, without being attributable to a separate entity, can in case be relied upon as against the community Members.

Definitely, with practice, the intergovernmental model is modelling if not un-modelling… It certainly remains marked by an essential paradox: it appears at the same time as the most developed form of institutionalization of international relations – to the extent that it is crowned by the personification of the community Members – and as the bastion of voluntarism since its operation continues to secure the primacy of intergovernmental bodies.[107]

107 Lagrange, *La représentation*, 25, 40, 50–51, 200.

CHAPTER 2

About Soft International Organizations
An Open Question

Angela Di Stasi

1 Soft International Organizations and Soft Law: Preliminary Remarks

As is well known, in recent decades several countries have often chosen to use 'informal' (or soft) international organizations (IOs) rather than creating IOs in the traditional sense ('formal' or hard IOs).[1] Soft IOs, despite their informal structure, implement goals and values that are sometimes very important for their Member States and, in some cases, also for other States or groups of States of the international community.[2]

1 See, among others, Angela Di Stasi, "Le soft international organizations: una sfida per le nostre categorie giuridiche?" *CI* 69 (2014): 39–64; and José A. Alvarez, "International Organizations: Then and Now," *AJIL* 100 (2006): 324; Anne-Marie Slaughter, *A New World Order* (New Jersey: Princeton University Press, 2004), 6; Nicholas Bayne, "Hard and Soft Organizations in International Institutions: Complements not Alternatives," in *Hard Choices, Soft Law*, eds. John J. Kirton and Michael J. Trebilcock (Aldershot: Ashgate, 2004), 347; Jan Klabbers, "Institutional Ambivalence by Design: Soft Organizations in International Law," *Nord. J. Int'l L.* 70 (2001): 403–421; Jan Klabbers, "The Life and Times of Law of International Organisations," *Nord. J. Int'l L.* 70 (2001): 287; Chaterine Brölmann, "Flat Earth? International Organizations in the System of International Law," *Nord. J. Int'l L.* 70 (2001): 319. With reference to specific soft IOs see Alison Duxbury, "ASEAN Feature. Moving towards on Turning away from Institutions? The Future of International Organizations in Asia and the Pacific," *Singapore YB Int'l L* 11 (2007): 177–193; we dare also referring to Angela Di Stasi, "Il contributo del G20 e del G8 alla definizione di nuove *regulae* dell'ordine internazionale fra effettività pseudo-istituzionale e partnership di gruppo," *RGCI* 32 (2009): 28; Angela Di Stasi, "La OSCE: effettività istituzionale e 'processo normativo'," *CI* 54 (1999): 237–270. For a general outline of the new trends concerning the phenomenon of the international organization, with reference to the variety of the organization forms used, see Raphaéle Rivier, "L'utilisation d'autre formes d'«organisation internationale»," *RGDIP* 116 (2012): 483–510, and Serge Sur, "Les organisations internationales: dynamiques et désenchantements," *RGDIP* 116 (2012): 667–674.

2 This may depend both on the number of States participating in soft IOs or on the more or less systematic direct involvement of States or groups of States. Let us remember here the so-called Outreach Initiatives taken within the Group of Eight/G8. See Angela Di Stasi, "L'Outreach' del G8. G20 e sub-sistemi regionali ed interregionali," in *L'Euro-G8. Contributo alla teoria dello Stato euro-globale*, eds. Massimo Panebianco and Angela Di Stasi (2nd edn. Torino: Giappichelli, 2006), 163 *et seq*. See also their indirect involvement as it occurs, for

Why Do States Also Act through Informal IOs?[3]

The reasons for this choice are many: countries choose soft IOs when they value rapid decision-making and confidentiality, when they prefer to have a broad range of issues on which the body's activity can be centred according to subjective and/or objective changing circumstances, when they want to start an activity of soft cooperation representing the first step in the creation of a formal international organization, *etc.* Some commentators have argued that there has been a real move away from IOs to a more informal mode of cooperation;[4] they have also noted that international cooperation has increasingly been organized through mechanisms 'that were deliberately kept at the fringes of international law'.[5] In them the lack of elements traditionally characterizing formal IOs (treaties or other instruments governed by international law as the individual constitution, international legal personality, autonomous will, separate permanent organs, a secretariat, *etc.*)[6] emerges; *vice versa*, the functions assigned to them by the States can be identical or similar to those carried out by formal IOs.

Is this a Case of a Tertium Generis *between Institutionalized Unions and Simple Unions?*[7]

The 'constellation' of soft IOs also includes very heterogeneous forms of association. They are ordered along an increasing scale including a much wider spectrum of institutional forms 'that vary significantly in their level of

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example, within the G8 and Group of Twenty/G20, according to the responsibility of the partner States towards the international community as a whole.

3 On the other hand, with reference to the reasons justifying the use by States of IOs and not of an alternative form of institutionalization see Kenneth W. Abbott and Duncan Snidal, "Why States Act through Formal International Organizations," *JCR* 1 (1998): 3–32. For a politological point of view of soft IOs see Thomas J. Volgy *et al.*, "Identifying Formal Intergovernmental Organizations," *JPR* 6 (2008): 837.

4 This issue was discussed at the annual meeting of the American Society of International Law (ASIL) within a panel entitled "A Move from Institutions?" See *American Society of International Law Proceedings* 100 (2006): 287–302.

5 See Klabbers, "Institutional," 405.

6 See, as a classical reference, the general characteristics of an international organization in Riccardo Monaco, "Organizzazione internazionale," *Novissimo Digesto* XII (1965), 196; Riccardo Monaco, "Organizzazione internazionale," *Novissimo Digesto. Appendice* V (1984), 589; Massimo Panebianco, "Organizzazioni internazionali. (1) Profili generali," *EG* XXII (1991), as well as in Kirsten Schmalenbach, "International Organizations or Institutions, General Aspects," *MPEPIL* (2006).

7 So Massimo Panebianco, *Diritto internazionale pubblico* (4th edn. Napoli: Editoriale Scientifica, 2012), 237. See Franco Florio, "Unione di Stati," *EG* XXXIII (1990), also for references. For the classical distinction between simple unions and institutionalized unions see Antonio Malintoppi, "Organizzazione e diritto internazionale," *AG* 44 (1968): 314 *et seq.*

formality',[8] and range between the so-called Groups of States, only working according to an international practice,[9] to more advance forms of institutionalization. The latter generally find their origin in political declarations that fall within the range of an institutional procedure based generally on soft law acts.[10] Such heterogeneity complicates the already lively doctrinal debate[11] on the evolution of the law and practice of IOs, since it still represents a field of investigation that is open to further development.[12] While no one will rule out that the phenomenon exists and authors generally admit the functional importance of soft IOs, plenty of

8 See Felicity Vabulas and Duncan Snidal, "Organization without Delegation: Informal Intergovernental Organizations (IIGOs) and the Spectrum of Intergovernmental Arrangements," *Rev. Internat. Org*. 8 (2013): 193–220.

9 Among them there is, then, a wide typology of entities: ranging between States of the G7 (Group of Seven), G8 (Group of Eight), G20 (Group of Twenty) and 'contact groups' having the function of helping to resolve a situation liable to represent a danger to international peace and security or that has already caused an international conflict. Another significant example is the BRICS group of States (Brazil, Russia, India, China and South Africa) whose economic and political growth has increased their power in various international forums.

10 With reference to some of the most famous cases see ASEAN Declaration, Bangkok, 8 Aug. 1967 and Conference on Security and Cooperation in Europe-Final Act, Helsinki 1 Aug. 1975.

11 As is known, the term 'international organization' has only recently begun to be used. On this late inclusion of the study of the law of IOs within the field of international law see, among others, Volker Rittberger, Bernhard Zangl and Andreas Kruck, *International Organization* (2nd edn. Basingstoke: Palgrave Macmillan, 2012), 3, and Chittharanjan Felix Amerasinghe, "The Law of International Organizations: A Subject which Needs Exploration and Analysis," *IOLR* 1 (2004): 9–21. See, also, Jan Klabbers, "The Paradox of International Institutional Law," *IOLR* 5 (2008): 151–173. Within the framework of a fundamental contribution based on a critical approach see Joe Martin Rochester, "The Rise and Fall of International Organization as a Field of Study," *IO* 40 (1986): 777–813. From a different perspective, addressing the difficulties of working out an exhaustive classification of IOs, see Anna Caffarena, *Le organizzazioni internazionali* (Bologna: Il Mulino, 2009), 30. On the development of the law of IOs (distinguishing three stages) see Klabbers, "The Life," 287–317.

12 Paul Reuter, "Principes de droit international public," *RdC* 103 (1961): 525–526 has for long maintained that there is no 'law' of international organization but there are 'laws' of IOs with the implication that there can be neither general law nor general principles of law applicable to all or several organizations. Such theory enhances the individual constitution and other legislative texts of each organization which govern its corporate structure and its operations.

doubts exist as to the possibility of referring such a varied phenomenon to juridical categories similar to those used for classical (or formal) IOs.

A typical example of such difficulty of reconstruction is the terminological variety we use when referring to a particularly heterogeneous whole of types of organizations between States which, in their different typologies, show themselves to be characterized by elements different from those we can observe in formal IOs:[13] besides soft IOs or *tout court* soft organizations,[14] there are

13 The International Law Commission's Draft Articles on the Responsibility of International Organizations – which was adopted by the Commission in 2011 – gives a definition of an international organization as 'an organization established by treaty or other instrument governed by international law and possessing its own international legal personality. IOs may include as members, in addition to States, other entities' (UN, Report of the International Law Commission, GAOR, 66th Sess., Supp. 10A/66/10, 2011, 54). If the Commission does qualify its definition as 'not intended as a definition for all purposes' the tenor of this may be more broadly useful and perhaps it might provide a more settled definition than the one which has existed in the literature to date. See, for the difficulty in finding a final definition of international organization, Manuel Diez de Velasco Vallejo, *Las organizaciones internacionales* (16th edn., coordinada por José Manuel Sobrino Heredia, Madrid: Tecnos, 2010), 43, and, in a similar sense, Josè E. Alvarez, *International Organizations as Law-makers* (Oxford: OUP, 2006), 1. Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (5th edn. Leiden: Martinus Nijhoff, 2011), Sections 32–35, classify IOs as forms of cooperation including the following three elements: 'founded on an international agreement, having at least one organ with a will of its own and established under international law'. In the Italian doctrine see the definition given by Angela Del Vecchio, "Analisi introduttiva ed evoluzione storica del fenomeno delle organizzazioni internazionali," in *Diritto delle organizzazioni internazionali*, ed. Angela Del Vecchio (Napoli: ESI, 2012), 25, who identifies (our translation) the elements characterizing an international organization as the two following ones: '(a) to have been instituted by a treaty or another international act; (b) to own a juridical international entity and to be able to express an autonomous will as compared with that of the Member States'. Michel Virally, "Definition and Classification of International Organizations: A Legal Approach," in *The Concept of International Organization*, ed. Georges Abi-Saab (Paris: Unesco, 1981), 50–66, at 51 was one of the first scholars to adopt a systematic approach to IOs. He presented an international organization with five core traits as: 'an association of States, established by agreement among its members and possessing a permanent system or set of organs, whose task is to pursue objectives of common interests, by means of cooperation among its members'.

14 See Klabbers, "Institutional." Among others, this essay also contains the denomination of *de facto* international organization (with reference to the General Agreement on Tariff and Trade/GATT).

in statu nascendi organizations,[15] pseudo-organizations,[16] softer law bodies,[17] *organisations de 'fait'*,[18] *sui generis* organizations, and others.

Scholars working in diverse areas (of political and economic sciences) have agreed on giving importance to what IOs (in a broader sense) do and how IOs work. Some authors argue that it is impossible to understand how international governance works simply by focusing on legal texts and formal rules. Others, on the other hand, wonder to what extent it is possible to depart from the law's 'empire' in order to ensure a meaningful existence to such entities.

It is indisputable that the theoretical models of IOs, based on their formal attributes rather than on the way in which they function, find it hard to take into consideration the increased differentiation in types of IOs together with the growing complexity of institutional regimes. The analysis of soft IOs in terms of technical-juridical investigation has showed such an ambiguity,[19] since most authors have avoided addressing this topic in their excellent works on the law of IOs.[20]

The only criterion which does not cause any difficulty is the formal-institutional classification of IOs in a broader sense into two categories with the *summa divisio* separating those inspired by a model of so-called hard organization (of a conventional nature) from those inspired by a model of so-called soft organization (of a political-diplomatic nature). Nevertheless, the so-called much wider 'spectrum' of institutional forms characterizing the constellation of soft IOs in some cases makes their inclusion in the category of hard or soft IOs uncertain.[21]

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15 See Theodor Schweisfurth, "Die juristiche Mutation der KSZE: Eine internationale Organisation in statu nascendi," in *Recht zwischen Umbruch und Bewahrung: Festschrift für Rudolf Bernhardt*, eds. Ulrich Beyerlin *et al.* (Berlin: Springer, 1995), 213–228.

16 Our translation of '*pseudo-organizzazioni*' in Massimo Panebianco, "Organizzazioni e pseudo-organizzazioni internazionali per la governance delle relazioni internazionali," in *L'Euro-G8. La nuova Unione europea nel Gruppo degli Otto*, eds. Massimo Panebianco and Angela Di Stasi (Torino: Giappichelli, 2001), 65 *et seq.*; but also Massimo Panebianco and Gerardo Martino, *Elementi di Diritto dell'organizzazione internazionale* (Milano: Giuffrè, 1997), 12, now in Panebianco, *Diritto Internazionale*, 82–85 and 236 *et seq*. The expression "pseudo-organizzazioni" is also used in the handbook by Claudio Zanghì, *Diritto delle Organizzazioni internazionali* (3rd edn. Torino: Giappichelli, 2013), 1, 17.

17 In this sense, as regards the G8 and the OECD (Organization for Economic Co-operation and Development) see *Hard Choices*, Section 1, 7.

18 See Rivier, "L'utilisation," 492.

19 In this sense see Klabbers, "Institutional," 419–421.

20 For example, they do not fall within the definition of international organization accepted in the 5th edition of the work by Schermers and Blokker, *International*, Sections 32–35.

21 The leading example is the Organization for Security and Cooperation in Europe (OSCE) about which for further references see below. The *OSCE Handbook* underlines its 'unique status' as follows: 'On the one hand, it has no legal status under international law and all

The attention devoted in the legal literature to soft IOs is, from some points of view, peculiar to the *querelle* concerning the possible existence of law-making processes of a soft kind, to which not only international non-institutional unions but – as we will discuss below – institutional unions also refer.[22]

As is the case for soft IOs, the debate on soft law starts from underlining an element of difference from hard law: the lack of binding juridical effects of such rules, notwithstanding their similarity to binding rules, as regards their logical structure.[23] It is well known that, in the definition of the concept of soft law, some scholars have attributed to the consent showed by these 'meta-juridical' forms the role of 'pre-law',[24] thus specifying their normative function before transmogrifying them into juridically binding forms, as mere regulation of social living. Other authors, by putting forward their admissibility, just consider these forms as "precursors" of new customary international law, where no basis for the formation of norms of this kind exists. In this sense,

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its decisions are politically but not legally binding. Nevertheless, it possesses most of the normal attributes of an international organization: standing decision-making bodies, permanent headquarters and institutions, permanent staff, regular financial resources and field offices. Most of its instruments, decisions and commitments are framed in legal language and their interpretation requires an understanding on the principles of international law and the standard techniques of the law of treaties. Furthermore, the fact that OSCE commitments are not legally binding does not detract from their efficacy. Having been signed at the highest political level, they have an authority that is arguably as strong as any legal statute under international law'. See Organization for Security and Co-operation in Europe, *The OSCE Handbook* (Vienna, 2000), www.osce.org.

22 See Charles Lipson, "Why are Some International Agreements Informal?" *IO* 45 (1991): 495–538. For another critical survey of the doctrine approaches to the concept of *international soft law* see Jean d'Aspremont, "Softness in International Law: A Self-Serving Quest for New Legal Materials," *EJIL* 18 (2008): 1075–1093, and Matthias Goldmann, "We Need to Cut off the Head of the King: Past, Present, and Future Approaches to International Soft Law," *LJIL* 25 (2012): 335–368. See also Anna Di Robilant, "Genealogies of Soft Law," *AJCL* 54 (2006): 499–554. With reference to the European Organizations see Peter Christian Müller Graff, "Das 'Soft Law' der europäischen Organisationen," *Europarecht* 47 (2012): 18–33, and Julia Iliopoulos-Strangas, *Das soft law der europäischen Organisationen* (Baden-Baden: Societas Iuris Publici Europaei-SIPE, 2012).

23 See Riccardo Luzzatto, "Il diritto internazionale generale e le sue fonti," in *Istituzioni di Diritto Internazionale*, eds. Sergio M. Carbone, Riccardo Luzzatto and Alberto Santamaria (4th edn. Torino: Giappichelli, 2011), 83–84. See also the definition of *soft law* provided by Francis Snyder, "The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques," *Modern L.R.* 56 (1993): 19–56: 'rules of conduct which, in principle, have no legally force but which, nevertheless, may have practical effects'.

24 See in this sense, *Commitment and Compliance: The Role of non-Binding Norms in the International Legal System*, ed. Dinah Shelton (Oxford: OUP, 2000).

soft law would represent a significant element both for the formulation of *opinio iuris* and, with reference to the existence of a shared conduct, of the practice of States.[25]

There are also authors who emphasize the relationship existing between acts of soft law and international treaties, which is sometimes alternative and sometimes complementary, and those who emphasize the existence, in some binding agreements, of non-binding contents (as parts or clauses which, because of the parties' will, do not have binding effect) and *vice versa*, also those who emphasize the possibility of the transformation of pledges into contracts.[26] The importance and utility of soft law in the interpretation and application of international law are also noteworthy. In this context, there are those who point out that the 'soft quality' of a commitment does not depend on the kind of agreement providing it, but instead depends on its characteristics[27] and that the 'hardness' or 'softness' of rules cannot derive from formal elements.[28]

Such debate is uninfluential also with reference to the wider *querelle* existing today concerning the possibility of 'soft' law-making processes being implemented by IOs (soft IOs and Groups of States included). Now it has been observed that just the general gradual *de facto* consolidation of soft IOs and the development of their action within the regional and supraregional framework has further inspired doctrinal theories on the subject of soft law. This has led to increasing importance being given to reconstruction investigations based on the relationship between form and substance in international relations[29] while IOs, in a broader sense, show themselves to be instruments of multilateral governance.[30]

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25 See on this point Daniel Thürer, "Soft Law," *EPIL* IV (2000): 452 *et seq*., and Daniel Thürer, "Soft Law," *MPEPIL* (2009).

26 On the relationship between treaties and *soft law* see Alan E. Boyle, "Some Reflections on the Relationship of Treaty and Soft Law," *ICLQ* 48 (1999): 901–913.

27 See Pierre Marie Dupuy, "Soft Law and International Law of the Environment," *Mich. J. Int'l L.* 12 (1991): 420, but also Sia Spiliopoulou Åkermark, "Soft Law and International Financial Institutions: Issues of Hard and Soft Law From a Lawyer's Perspective," in *Soft Law in Governance and Regulation: An Interdisciplinary Analysis*, ed. Ulrika Mörth (Cheltenham: Edward Elgar, 2004).

28 See Friedrich V. Kratochwil, *Rules, Norms and Decisions* (Cambridge: CUP, 1989).

29 See, with specific reference to international agreements, Kal Raustalia, "Form and Substance in International Agreements," *AJIL* 99 (2005): 581 *et seq*.

30 See *Le organizzazioni internazionali come strumento di governo multilaterale*, ed. Lucia Serena Rossi (Milano: Giuffré, 2006).

For the above mentioned reasons in this study we do not want to examine the possibility of ascribing soft IOs to the more or less generally accepted notion of international organization[31] and not even to the 'model/models' of international organization worked out by the specialized literature.[32]

The purpose of this study – falling within a very dynamic field of research – is to raise the question of a possible systematic classification of soft IOs, rather than to resolve it. Our investigation, since it cannot be exhaustive, will focus on only some examples of soft IOs.

2 The Reasons for Raising the Question

In our opinion, the reasons for raising the above question are based on three elements:

a *A Quantitative Element*

As stated above, practice in the recent decades has developed many forms of cooperation between States of a flexible, informal, soft kind, which function, at least from certain points of view, like classical IOs.

Such international practice, as the following examples show, concerns more or less large international regions (like the so-called Pan Europe of the Conference on Security and Co-operation in Europe/CSCE, later to become Organization for Security and Cooperation in Europe/OSCE);[33] sometimes it

31 As is well known we can hardly discern a generally accepted definition of international organization.

32 The increasing differentiation of the forms of organization of relations between States within an association makes it difficult to refer them to one model of international organization and leads us today to identify an institutionalized union among States. See Rudolf Bindschedler, "International Organizations, General Aspects," *EPIL* II (1999), 1289–1309. There (at 1294) it is stated that: 'The character of an international organization depends on the nature of the organs'. Among others, see Jan Klabbers, "Two Concepts of International Organizations," *IOLR* 2 (2005): 277–293.

33 The CSCE was created with the purpose of constituting a multilateral forum for dialogue and negotiation between East and West during the *détente* phase of the early 1970s. The Helsinki Final Act contained some key commitments on politico-military, economic, environmental and human rights issues. It also established ten fundamental principles governing the behaviour of States. Until 1990, the CSCE functioned mainly as a series of meetings and conferences that built on and extended the participating States' commitments, while periodically reviewing their implementation. However, with the end of the Cold War, the Paris Summit of Nov. 1990 set the CSCE on a new course. In the Charter of

concerns interregional areas (like that to which the Asia-Pacific Economic Cooperation/APEC refers)[34] or it assumes a global dimension (Group of Eight/G8, Group of Twenty/G20).[35]

Nevertheless in some international regions (like the Asia-Pacific area) – contrary to the trend of avoiding formal IOs which we find in other parts of the world – there has been a growing move towards the institutionalization of international conferences.[36]

Such practice has followed different stages according to the different continents. It is quite widespread in Europe, it is almost non-existent in Africa,[37] it

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Paris for a New Europe, the CSCE was called upon to play its part in managing the historic change taking place in Europe and responding to the new challenges of the post-Cold War period, which led to its acquiring operational capabilities and permanent institutions. As part of this institutionalization process, the name was changed from the CSCE to the OSCE by a decision of the Budapest Summit of Heads of State or Government in Dec. 1994.

34 The idea of APEC was firstly launched by a former Prime Minister of Australia during a speech in Seoul (Korea) in Jan. 1989. Later that year, 12 Asia-Pacific economies met in Canberra (Australia) to establish APEC. The founding States were: Australia, Brunei Darussalam, Canada, Indonesia, Japan, Korea, Malaysia, New Zealand, the Philippines, Singapore, Thailand and the United States. Hong Kong, China and Chinese Taipei joined in 1991. Mexico and Papua New Guinea followed in 1993. Chile acceded in 1994 and in 1998, Peru, Russia and Viet Nam joined. Between 1989 and 1992, APEC met as an informal senior official and Ministerial level dialogue. In 1993 an annual APEC Economic Leaders' Meeting was established. Today APEC is the premier Asia-Pacific economic forum and pursues as its primary goal supporting sustainable economic growth and prosperity in the Asia-Pacific region.

35 They can also characterize special geo-space regions, as an answer to distinct needs of *soft-law cooperation*. See, in this regard, with specific reference to the Arctic region and the material sub-sector of climatic change, Md. Waliul Hasanat, "Diverse Soft-Law Cooperation Forms in the Arctic. Do They Complement or Contradict Each Other?" *ICLR* 14 (2012): 273–299. In general, 'about the forms of institutionalized cooperation of a political-diplomatic kind within the larger framework of regional international organizations' see Piero Pennetta, "Organizzazioni internazionali regionali," *Enciclopedia del diritto, Annali* IV (2011), 844–908, in particular 849. With specific reference to the CSCE-OSCE we refer to Di Stasi, "La OSCE," while, with reference to the G8 and G20, to Di Stasi, "G20 versus G8? Concertazione al vertice nel quadro di una partnership-membership di gruppo," in *Il G8 2009. Sistema multi-regionale di Stati*, ed. Massimo Panebianco (Napoli: Editoriale Scientifica, 2009), 39–85.

36 On this contrary trend see Duxbury, "ASEAN Feature."

37 A significant example of this is the Southern African Development Coordination Conference (SADCC), which was established as a development coordinating conference in 1980 (in Lusaka, Zambia); later (at a Summit held in Windhoek, Namibia in 1992) it was transformed

is starting to be widespread in Latin America[38] and it is almost a rule (at least as regards the first stage of the creation of IOs) in Asia[39] and in the former socialist countries.[40]

(by the SADC Declaration and Treaty) into a development community and became the Southern African Devolopment Community (SADC). SADC members are Angola, Botswana, Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. About this transformation see Angela Di Stasi, "Southern African Development Community (S.A.D.C.)," in *Le organizzazioni economiche regionali africane*, eds. Piero Pennetta and Angela Di Stasi (Napoli: ESI, 1995), 119–217. Following the establishment of the SADC Treaty, SADC started a process of institutional reform and at an extra-ordinary Summit on 9 Mar. 2001 in Namibia, the SADC Treaty Amendment (2001) was adopted.

38 See the Grupo de Rio, the Mecanismo de díalogo y concertación de Tuxtla and the Foro del Arco Pacifico Latinoamericano. Of great importance is the recent creation of the Comunidad de Estados Latinoamericanos y Caribeños (CELAC), by the Declaration of Caracas within the 3rd Cumbre de la América Latina y del Caribe sobre Integración y Desarrollo (CALC) and the 22nd Cumbre del Grupo de Río (2–3 Dec. 2011). In this Declaration CELAC is defined as 'mecanismo representativo de concertación política, cooperación e integración de los Estados latinoamericanos y caribeños y como un espacio común que garantice la unidad e integración de nuestra región'.

39 Besides ASEAN (about which see note 43 below) see, as regards the Asian continent, the South Asian Regional Council (SARC), later to become the South Asian Association for Regional Cooperation (SAARC). With reference to the Bangladeshi proposal for the creation of a trade bloc consisting of South Asian countries which was accepted by India, Pakistan and Sri Lanka during a meeting held in Colombo in 1981. In Aug. 1983, the Leaders adopted the Declaration on South Asian Regional Cooperation during a Summit which was held in New Delhi. The Heads of Seven South Asian Countries of SAARC (Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka) signed the Charter to establish the South Asian Association for Regional Cooperation (SAARC) on 8 Dec. 1985. Afghanistan joined the SAARC as a Member at the Fourteenth SAARC Summit (Delhi, Apr. 2007). See, as regards the Asian continent again, the Regional Cooperation for Development (RCD) which remained in existence from 1964 to 1979 and has been transformed into the Economic Cooperation Organization (ECO Charter). ECO is an intergovernmental regional organization established in 1985 by Iran, Pakistan and Turkey for the purpose of promoting economic, technical and cultural cooperation among the Member States. In 1992, the Organization was expanded to include seven new members, namely: the Islamic Republic of Afghanistan, the Republic of Azerbaijan, the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan and the Republic of Uzbekistan.

40 As regards the former Socialist countries see the transformation of the GUAM Group (between Azerbaijan, Georgia, Moldavia, Ukraine) into an international regional organization called the Organization for Democracy and Economic Development (GUAM/ODED) which took place with the signing of the special Charter dated 23 May 2006. See

On the other hand, the phenomenon of the so-called proliferation of IOs[41] – that has been characterizing the trend of international relations in recent decades – is also linked to the creation of several soft IOs. If then the legitimacy of such bodies to produce legal (more or less heterogeneous) rules[42] seems to be controversial, the extent and size of such a weak level of institutionalization of the cooperation between member States is however worth being taken into consideration.

b ***An 'Evolutionary' Element***

Soft IOs may dissolve over time or they may gradually lose their *raison d'être* (perhaps leaving behind some norms and practices), but they sometimes become more formal and there is often no simple bright line between informal and formal organizations. The transformation of such forms of soft cooperation into an expression of hard cooperation (let us refer to the Association of South east Asian Nations/ASEAN),[43] being at least characterized by more

also the Shanghai Cooperation Organisation (SCO) which is a permanent international organization. Its origin inside the Shanghai Five mechanism dates back to 15 Jun. 2001 and on the initiative of the Republic of Kazakhstan, the People's Republic of China, the Kyrgyz Republic, the Russian Federation, the Republic of Tajikistan and the Republic of Uzbekistan. The main goals of the SCO are strengthening mutual confidence and good neighbourly relations among the member countries; promoting effective cooperation in politics, trade and economy, science and technology, culture as well as education, energy, transportation, tourism, environmental protection *etc.*; making efforts to maintain peace, security and stability in the region, moving towards the establishment of a new political and economic international order.

41 The legal issues were deeply studied in *Proliferation of International Organizations*, eds. Henry G. Schermers and Niels M. Blokker (The Hague: Kluwer, 2001).

42 See Jan Hurd, "Legitimacy and Authority in International Politics," *IO* 53 (1999): 379–408. The problem is sometimes linked to that of the power of representativity of soft IOs themselves.

43 The ASEAN was established on 8 Aug. 1967 in Bangkok (Thailand) with the signing of the ASEAN Declaration (Bangkok Declaration) by Indonesia, Malaysia, Philippines, Singapore and Thailand. They were joined by: Brunei Darussalam on Jan. 1984, Viet Nam on Jul. 1995, Lao PDR and Myanmar on Jul. 1997, and Cambodia on Apr. 1999, making up what is today the ten Member States of ASEAN. It was institutionalized by the enforcement, on 15 Dec. 2008, of the ASEAN Charter (Treaty of Singapore dated 20 Nov. 2007). The ASEAN Charter serves as a firm foundation in achieving the ASEAN Community by providing the legal status and institutional framework for ASEAN; it also codifies ASEAN norms, rules and values and deals with accountability and compliance. With the entry into force of the ASEAN Charter, ASEAN operates under a new legal framework and establishes a number of new organs in order to carry out its community-building process.

structured cooperation, seems to be quite frequent (emblematic in this regard is the evolution of the CSCE into the OSCE).

In all these hypotheses (transformation of expressions of 'soft cooperation' into forms of 'hard cooperation' or, at least, of more structured cooperation) the classical way to conciliate the interests of a variety of sovereign and independent entities – represented by the international conference – makes soft IOs a kind of 'historical antecedent of the international organization'.[44] In this sense soft IOs, besides being relevant for their own activity, are also important as a 'phase' in the development of formal IOs. Such 'phase' can also be preliminary as regards the attainment of the status of member within an international organization, by only some States belonging to the soft international organization. Let us refer, for example, to the contribution made in this field by the regional and subregional cooperation created within the Central European Region by the Central European Initiative (CEI)[45] and by the Visegrad Group.[46]

See, among others, Bob Reinalda, "ASEAN as an Informal Organization: Does It Exist and Does It Have Agency? The Emergence of the ASEAN Secretariat," in *International Organizations as Self-directed Actors*, ed. Ioel E. Oestrreich (London: Routledge, 2012).

44 For this definition (our translation) see Augusto Sinagra, "Conferenze internazionali, I (Profili generali)," *EG* VIII (1988), 5. For a general outline see also Robbie Sabel, "Conferences and Congresses, International," *MPEPIL* (2008).

45 The Central European Initiative (CEI) is the largest intergovernmental forum for regional cooperation in Europe. Its origin lies in the creation of the Quadrangolare in Budapest on 11 Nov. 1989 by Austria, Hungary, Italy and the Socialist Federal Republic of Yugoslavia. On that occasion, the Ministers for Foreign Affairs of the four founding members adopted a Joint Declaration stating the readiness of their Governments to strengthen good neighbourly relations and to develop cooperation among their respective countries. In 1990, Czechoslovakia was admitted and the Initiative was renamed the Pentagonale; in 1991, with the admission of Poland, it became the Hexagonale. A number of new countries were admitted in 1992, at which time it was decided to rename the organisation the Central European Initiative. The expansion of the Initiative between 1993 and 2006 with the admission of Montenegro increased the number of Member States to eighteen. As is well known, in the meantime, several CEI Member States became EU Member States.

46 The Visegrad Group (also known as the 'Visegrad Four' or 'V4') was formed on 15 Feb. 1991 by the Czech Republic, Hungary, Poland and Slovakia. It reflects the efforts of the countries of the Central European region to work together in some fields of common interest. All the V4 countries aspired to become members of the EU and they achieved this aim on 1 May 2004. The V4 was not created as an alternative to the pan-European integration efforts, nor does it try to compete with the existing functional Central European structures. In the initial period of its existence the Visegrad Group played its most important role during talks with NATO and the EU, and the activities of the Group were aimed at increasing stability in the Central European region. In the following years, the intensity of cooperation between the V4 countries began to decrease.

It is appropriate here to underline that in the different development stages of the international community, juridical cooperation between States has often existed before institutional cooperation between them,[47] the transformation of a soft international organization into a hard international organization (when it takes place) does not cause a succession in a technical-juridical sense. The absolute heterogeneity between the characters of the (old) soft international organization compared with the (new) hard international organization indeed causes a 'succession' from only a substantial point of view.

But also when such evolution takes place only in part, we can often observe the assumption by some kinds of associations of soft cooperation of some operational characteristics which make them partially similar to the ways in which formal IOs function.[48]

It is worth pointing out that, in such evolutionary ways, soft IOs provide different procedures compared with those falling within the physiological dynamism of formal IOs.[49] Moreover it is often hard to identify the moment at which the international organization has started to be a real international organization. In this regard, if its denomination as an organization (as happens, for example, in the OSCE), in the place of a conference (CSCE) can be a sign of its willing to transform, it surely does not represent a decisive factor of transformation.[50]

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47 When bilateral relationships between States were found to be unfit for solving more complex situations involving more than two States, *ad hoc* temporary international conferences were used to create a forum where all States concerned could declare their interests. See in this regard Mario Giuliano, Tullio Scovazzi and Tullio Treves, *Diritto internazionale* (Milano: Giuffré 1991), 117. Let us remember here European cooperation and the practice of multilateral conferences that, between 1850 and 1914, represented the fundamental instrument of cooperation between Kings and Heads of States for the solution of the main issues of the 'old' Europe.

48 Let us think of the creation of permanent secretariats or of the periodical call for meetings with the establishment of their seat or the provision of mechanisms for checking the so-called *follow up* of the commitments undertaken: as an example in this regard, we refer to the G8 and the G20 mentioned below.

49 In it, evolution in a formal, institutional sense is based on treaties or complementary instruments modifying or integrating the instituting treaties or on new treaties replacing the foregoing one.

50 On the meaning of the new denomination we refer to Di Stasi, "La OSCE," 244, and "La prima 'organizzazione' paneuropea: la OSCE," in *Il nuovo diritto dell'Unione Europea*, eds. Massimo Panebianco and Cosimo Risi (Napoli: Editoriale Scientifica, 1999), 235–268. See Christine Bertrand, "La nature juridique de l'Organisation pour la sécurité et la coopération en Europe," *RGDIP* 102 (1998): 365–405.

c *A Normative Element*

As is well known, the creation of norms is the most important function of all IOs. Both 'hard' and 'soft' IOs carry out a norm-creating activity. There are no rules of general international law which determine *a priori* the kind of norms that each organization can produce; consequently the only determinative instrument in this respect remains the constitutive treaty of the organization (which, of course, as will be specified below, does not exist in soft IOs).

In soft IOs, as the logical consequence of the structural characteristics of these unions of States, the normative function is mainly linked to the adoption of soft law acts.

However the practice of IOs, in a broader sense, shows a mixed use of acts of soft law and hard law which gives place to a further element of 'affinity' between soft and hard IOs.[51]

On the one hand, we emphasize the recourse, also by classical IOs, to soft law instruments[52] with the coexistence of non-binding norms with legal obligations. The use of acts of soft law also by formal IOs – which could, instead, avail themselves of 'classical' normative acts – confirms that the planning, productive activity of 'soft law' acts is not only a kind of integration which has less power because it is used by non-institutionalized unions. Let us think of the possible use, also by hard IOs, of soft-law forms of legislation. This is proved, for example, by a wide range of soft-law instruments existing in the European Union (EU) together with formal legal acts such as regulations, directives and decisions (Art. 288 TFEU) to which must be added, in certain fields of the case law of the European Court of Justice, the recourse to acts of soft law:[53] the consequence of this is a kind of 'graft' of soft normative products also on the hard law of the classical IOs.

On the other hand, a practice developed in different areas illustrates the reference, also by soft IOs, to hard law instruments. Let us here remember, as an

51 Armin Schäfer, "Resolving Deadlock: Why International Organisations Introduce Soft Law," *ELR* 31 (2006): 194–208.

52 See Ugo Draetta, *Principi di diritto delle organizzazioni internazionali* (Milano: Giuffrè, 2010), 168–169. See also Schäfer, "Resolving," 194–208.

53 In the by now significant doctrine on the subject see among others, Linda Senden, *Soft law in European Community Law* (Oxford: Hart, 2004), and Gerda Falkner, *Complying With Europe: EU Harmonisation and Soft Law in the Member States* (Cambridge: CUP, 2005). In the case law of the European Court of Human Rights which determines a 'phénomène de métissage juridique', a reference to soft law can be observed. See, for such definition, the work by Françoise Tulkens, Sébastien Van Drooghenbroeck and Frédéric Krench, "Le soft law et la Cour Européenne des droits de l'homme: questions de légitimité et de method," *RTDH* 91 (2012): 433–490.

example, in the ASEAN, the recourse to the conventional instrument even before institutionalization was completed.

If then hard law and soft law are, from a general point of view, each the conceptual antithesis of the other, in the present practice of IOs they may be more complementary and, sometimes, even convergent.

Therefore if having recourse to acts of soft law is the 'physiological' way for soft IOs to assume the acts themselves (as said below), however the circumstance for which they also adopt binding instruments is a further element helping them to be taken into consideration.

Moreover such abovementioned elements also permanently confirm that the borderline between soft IOs and non-soft (or formal) IOs is much less marked than a formal and not functional consideration could let us suppose.

Therefore these principal elements show, as a whole, the impossibility of excluding *a priori* the 'conceptualization' of soft IOs. It seems to be useful, then, to take them into consideration, even if only *ad excludendum*, as an expression of the evolution of the law and, above all, of the practice of IOs, but also of the many models of international organization.[54]

Therefore the task of the jurist is not just that of 'packing reality into the already existing juridical categories', but of adjusting 'such categories to the events of reality'.[55] Therefore the brief following considerations have the purpose of analysng soft IOs in the light of a 'changing image'[56] of IOs, in the sense of the meaningful choice by the States of kinds of associations favouring their functions over the ways of their 'formalization'.[57]

3 Some Common Elements Shared by Soft International Organizations

Starting from the difficulty of reducing the variety of forms of international association to one model of international organization, we can try to identify

54 On the Latin-American and Caribbean models of integration in the place of the European mainly unitary model see Piero Pennetta, *Integración e integraciones* (Bogotà: Planeta, 2011).

55 With reference to soft law acts see Draetta, *Principi*, 169.

56 See such expression in Jan Klabbers, "The Changing Image of International Organizations," in *The Legitimacy of International Organizations*, eds. Jean Marc Coicaud and Veijo Heiskanen (Tokyo: UN University Press, 2001), who also emphasizes 'the lack of a convincing theoretical framework regarding international organizations' (at 4).

57 For an efficient classification of the different doctrine trends about the phenomenon of IOs see, among others, Alvarez, *International Organizations*, 1–63.

not a common denominator, but only some common elements shared by soft IOs. Some of them are in opposition to formal IOs; others are not typical of soft IOs, since they can be found even in hard IOs.

They are the following: absence of an international treaty as a constituent instrument (a); operativity and institutional effectiveness as evidence of their existence (b); wide recourse to acts of 'soft law' (c); frequent adoption of a top-down procedure (at the highest level) in decision-making activities (d).

a ***Constitutive Instrument***

With reference to the first characteristic, it is evident that the birth of 'soft international organizations' does not seem to be based on the classical source of international law, made up of the treaty as 'an international agreement between States in written form and governed by the international law',[58] as the Vienna Convention on the Law of Treaties says, which, as is known, 'applies to any treaty that is the constituent instrument of an international organization'.[59] It is, as regards classical IOs, the juridical source, thus representing, in a broader sense, the 'constitution' of the organization, while in more recent legal writings it is mentioned as constitutional act of the organization.[60]

Vice versa, in soft IOs, such birth identifies with the undertaking of unusual kinds of commitment or collective commitments, as well as with the adoption of behaviours permitted by the States following non-binding agreements.[61]

58 According to Art. 2(1)(a) of the Vienna Convention (23 May 1969). In the same Article see the frugal definition of 'international organization' as 'intergovernmental organization'.

59 So Art. 5 of the Vienna Convention. On the origin of the international organization referred to an international treaty see, among others, Eric David, *Droit des organisations internationales* (Bruxelles: PUB, 2002), 8 *et seq*. See the expression used by Amerasinghe, *The Law*, 20, when he affirms that: 'In general, the law relating to a particular organization will flow basically from conventional law, namely the constitution of that organization'. It is well known that international practice reveals a limited number of cases of IOs created by instruments which cannot be referred to the international treaty. Let us think, among others, of the creation of COMECON by the decision of an international conference.

60 See Catherin Brölmann, *The Institutional Veil in Public International Law. International Organizations and the Law of Treaties* (Oxford: Hart, 2007), 17 *et seq*.

61 With special reference, for example, to the juridical nature of the Declaration of Barcelona, which instituted the Euro-Mediterranean Partnership, see Sergio Marchisio, "La Dichiarazione di Barcellona sul partenariato euro-mediterraneo," *AE* 109 (1996): 136 who defines it 'a document having a non-binding character', and Paolo Fois, "Il partenariato euro-mediterraneo e il processo di Barcellona," in *Studi in onore di Umberto Leanza*. (Napoli: Editoriale Scientifica, 2008), II, 1079–1081, who in the light of the following practice, calls for the application, 'within certain limits', of the principle *pacta sunt servanda* also as regards the non-binding agreements.

Such kinds of association, however, transcend the functioning procedures of temporary international conferences and the lack of an internationally recognized treaty, on which they should be based, is a *vulnus* compared with the correct formation of the *voluntas obligandi* by the States, and this happens because in many juridical systems parliamentary approval is required before the ratification of the institutional treaty of the body. The voluntary element of States, then, does not succeed in becoming the autonomous will of a soft international organization (or it becomes this only partially), and this is a big difference in comparison with classical IOs.[62]

b ***Institutional Effectiveness***

As regards the second characteristic it cannot but be admitted that the definition and possible consolidation of the institutional architecture of soft IOs will be strictly linked to the process of follow up to and compliance with collective commitments,[63] since the carrying out of the commitments undertaken, through customary practice, will function as partial 'compensation' for the lack of original juridical *vis*.[64]

Many soft IOs are less institutionalized (with imprecisely defined or open-ended purposes or membership); other soft IOs are more institutionalized (with a written agreement or rudimentary secretariat). International practice in this regard reveals a variable typology of more or less institutionalized conferences, in which the consolidation of the institutional structure has taken place even after a long period of functioning according to institutions without a real institutional structure (see, for example, the Charter of Paris for a New Europe of the CSCE dated 21 Nov. 1990).[65] Rather frequently the States have started, in the service of the soft international organization – also by non-binding instruments – to put in place the creation of a 'minimal' institutional structure, which in its essential elements

62 Paul Reuter, *Institutions internationales* (Paris: PUF, 1975), 199, identifies the existence of an international organization only where it, by an organization being distinguished from the member States, succeeds in showing the single will of each member State. In the other cases it must be conceived as a mere State instrument, since it is deprived of its basic element.

63 See, more in general, *Commitment*.

64 To be considered in the light of an 'effective' prospect of enhancement not of the formal character of the rule, but, on the contrary, of its substance, with reference to its influence on the global system of international relations.

65 It consolidates the institutional structure (Council of the Ministries of Foreign Affairs, Committee of top officers, Secretariat) and it includes provision for the creation of a Parliamentary Assembly.

is based on a secretariat.[66] On the other hand, the necessity for operational and institutional efficiency as evidence of the existence of the body is shown, for example, by the Union for the Mediterranean.[67] It is in lasting stalemate, notwithstanding the adoption of the joint Declaration of the Summit for the Mediterranean held in Paris in 2008 (Section 15 *et seq*.) and the Final Statement of the Ministry Meeting held in Marseilles[68] which set out an institutional architecture structured according to a variety of levels compared with the 'light' institutional model of the Euro-Mediterranean Partnership.[69]

Generally speaking, the follow-ups, by joining together in an *unicum* the *prius* and *posterius*, come to be not only an undertaking of new 'commitments' by the entities belonging to soft IOs, but also the moment of evaluation of the implementation of foregoing commitments.

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66 The ways in which a Secretariat is created are different, and they can also be based on acts which can be assumed as being typical of treaties. In the ASEAN, for example, in the period between 1976 and 2009, a Secretariat worked; it was created according to the Agreement on the establishment of the ASEAN Secretariat.

67 The Union for the Mediterranean (UfM) was launched on 13 Jul. 2008 at the Paris Summit as a continuation of the Euro-Mediterranean Partnership (Euro-Med), also known as the Barcelona Process, established in 1995. The UfM constitutes a framework for political, economic and social relations between the EU and the Southern and Eastern Mediterranean countries. It is inspired by the goals set out in the Barcelona Declaration: the creation of an area of peace, stability, security and shared economic prosperity, as well as full respect for democratic principles, human rights and fundamental freedoms to which the promotion of understanding between cultures and civilizations in the Euro-Mediterranean region was to be added. The Secretariat of the UfM was established by a decision of Heads of State and Government of the UfM and its Statutes were adopted on 3 Mar. 2010 by a decision of the Senior Officials of the Member States. We refer to Angela Di Stasi, "Il Processo di Barcellona e l'Unione per il Mediterraneo: brevi considerazioni alla luce delle attuali tendenze del regionalismo organizzato," in *Scritti in onore di Ugo Draetta*, eds. Nicoletta Parisi *et al.* (Napoli: Editoriale Scientifica, 2011), 209–235.

68 Particularly the Guidelines of the First Part devoted to Institutional Structures.

69 For more references we refer to Angela Di Stasi, "L'Unione per il Mediterraneo: quale «modello» di organizzazione delle relazioni tra Stati?" in *Europa e Mediterraneo. Le regole per la costruzione di una società integrata*, ed. Ennio Triggiani (Napoli: Editoriale Scientifica, 2010), 561–583; Angela Di Stasi, "La sécurité régionale dans l'espace euro-méditerranéen. Brèves considérations sur le Processus de Barcelone et l'Union pour la Méditerranée," in *International Conflicts and Human Rights: Caucasus, Balkans, Middle East and Horn of Africa*, eds. Giancarlo Guarino and Ilaria D'Anna (Napoli: Satura, 2010), 813–830.

The succession of regular meetings of the bodies in the soft IOs, with the resultant serial character of final declarations, represents, in the light of the principle of effectiveness, a meaningful element of proof of the existence of the organization. In this way it supercedes the minimum association form in the relationships between States, represented by simple unions (which use the organs of a State, in the absence of common organs shared by the organization)[70] and this, however, without fully referring as regards soft IOs, to the notion of the classical international organization.

On the other hand, the lack of a shared political *vis* underlying the development and completion of the institutional structure of soft IOs is evidence of institutional or pseudo-institutional 'ineffectiveness'.

c *Typology of Acts*

With reference to the third characteristic we must point out the typology of the acts being used.

The normative acts produced by soft IOs seem to be rather heterogeneous and, in many cases, it is difficult to include them in the classical hierarchy of the sources of international law.[71] They are often soft law instruments[72] (resolutions, recommendations, opinions, declarations, papers, charters, codes of practices, working plans, guidelines, *etc.*) and they do not *per se* have legally binding force. The result is that they do not have a *voluntas obligandi* and, on the contrary, they represent a *voluntas agendi* or *operandi*.[73] As a whole, they

70 In the Euro-Mediterranean Partnership they were, for example, organs of the EU.

71 See Dinah Shelton, "Normative Hierarchy in International Law," *AJIL* 100 (2006): 291–323.

72 Among the most significant works on soft law see Christopher J. Brummer, *Soft Law and the Global Financial System: Rule-Making in the Twenty-First Century* (Cambridge: CUP, 2012); Edmondo Mostacci, *La soft law nel sistema delle fonti* (Padova: Cedam, 2008); Salem Hikmat Nasser, *Sources and Norms of International Law. A study on soft law* (Berlin: Glienicke, 2008); *Legitimacy in International Law*, ed. Rüdiger Wolfrum (Berlin: Springer, 2008). See also Mauricio Iván, "El fenómeno del soft law y las nuevas perspectivas del derecho internacional," *Anu. Mex. Der. Int.* 6 (2006): 513–549; Francesco Sindico, "Soft law and the elusive quest for sustainable global governance," *LJIL* 19 (2006): 829–846. On the relationship between *soft law* and *hard law* see, among others, Christine M. Chinkin, "The Challenge of Soft Law: Development and Change in International Law," *ICLQ* 38 (1989): 850 *et seq.*; Karl Zemanek, "Is the Term 'Soft Law' Convenient?" in *Liber amicorum Professor Seidl-Hohenveldern in honour of his 80th birthday* (London: Kluwer, 1998), 843 *et seq.*; Francesco Francioni, "International Soft Law: A Contemporary Assessment," in *Fifty years of International Court of Justice. Essays in honour of Sir Robert Jennings*, eds. Vaughan Lowe and Malgosia Fitzmaurice (Cambridge: CUP, 1996), 167 *et seq*.

73 See Ignaz Seidl-Hohenveldern, "The Attitude of States towards the Proliferation of International Organisations," in *Proliferation*, 57, affirms that: 'Soft law depends on the voluntary acceptance by the States having accepted it'.

contain political or moral commitments; they are not intended to create legal rights and legal obligations but only to produce 'soft obligations' and are characterized by a so-called 'relative normativity'.[74] Therefore, in the light of an objectivist-functional approach to IOs and their normative 'products', they seem to be important for the channelling and consolidation of international relations.

As is well known, within the doctrinal framework of the *summa divisio* between 'actes unilatéraux', being referable only to one subject of international law (States or IOs) and 'instruments concertés conventionnels', as a consequence of the unification process of the wills of a variety of entities of international law, a part of the doctrine has found the existence of a sub-category.[75] It is that of 'instruments concertés non conventionnels', the consequence of a systematic classification of a whole group of instruments which, even if it accompanies all the history of interstate relationships, become further developed and differentiated within the present context of the international community system. The double connotation on which such definition is based ('instruments concertés' and 'non conventionnels') appears to be evident, for example, in the final declarations of G8 and G20 Summits.[76]

In this regard we cannot forget that the wide doctrinal debate about the problems of the existence of soft law as a category opposed to the classical hard law, immediately followed the adoption of the Final Act of Helsinki (by the first CSCE Summit) which, as is well known, founded the CSCE. It is right

74 The expression, which is not free from criticism, is that of of Patrick Weil, "Towards Relative Normativity in International Law," *AJIL* 77 (1983): 413 *et seq.*

75 See Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public* (Paris: LGDJ, 2009), 422–431, and Jean Combacau and Serge Sur, *Droit international public* (Paris: Montchrestien, 2010), 86–92. With specific reference to G20 and G8 see also Di Stasi, "Il contributo," 20–57, in particular 28–29. As a *pendant* of the definition taken from the French doctrine (which uses the expression *instruments concertés non conventionnels*), we find the expression *gentlemen's agreements* or *non-binding agreements*, as they are defined by the Anglo-American doctrine, or *acuerdos no normativos o extrajurídicos o pactos entre caballeros*, as the Spanish doctrine defines them. Such different terminological versions, which cannot always be perfectly substituted for each other, all tend to the recognition of a whole of manifestations of State wills, characterized both by the lack of the main element of qualification of the unilateral act (that is the unilateralism) and the lack of the character of conventionalism as a basic element of *instruments concertés conventionnels*.

76 See Roberto Virzo, "Vertici internazionali," *Enciclopedia del diritto*, *Annali* V (2012), 1436–1437.

to say that the increasing recourse by States to soft IOs makes the debate on the law produced by them even more topical.

On the other hand sharp criticism has been levelled by some scholars who have interpreted the double element of non-bindingness and non-enforceability, being attributes of the acts of soft law, as a denial of international law itself.[77]

We have discussed the prevalence and non- exclusiveness of the recourse to acts of soft law, since soft IOs can sometimes adopt even binding norms, as we said above, as they refer in a complementary and not alternative way to instruments both of hard and soft law.[78]

d *Decision-Making Procedures*

Summit meetings (at the level of the Heads of State and Government or Heads of Governments and Other Senior Officials) are, for several soft IOs, the *locus* of much high-level interaction among participating states followed by the adoption of acts. In them Leaders meet to decide on broad political priorities and major initiatives,[79] and the fact that their *voluntas agendi aut operandi* is 'at the highest level' increases the *vis* of the non-binding agreements adopted as well as their probable follow-ups (also at lower levels).

It is worth pointing out that summit meetings do not represent a new phenomenon, since they also characterize the system of the League of Nations.[80] It is also the case to stress that they are also used by formal IOs. With the birth of the United Nations, they become a privileged forum (sometimes of world importance) for the development of an activity in many sectors (environment, disarmament, sustainable development) also open to the contribution of representatives of Non-Governmental Organizations.[81] Finally high level agreement activity also characterizes, in different ways, integration and cooperation

77 On *non-binding agreements* as part of the *soft law* see Philippe Gautier, "Non-Binding Agreements," *MPEPIL* (2006). See also Hans-Konrad Ress "Non-binding Agreements," *EPIL* III (1997), 607–612.

78 See Bayne, "Hard."

79 See Christine M. Chinkin and Ina Gätzschmann, "Summit Meetings," in *MPEPIL* (2013), and Virzo, "Vertici."

80 Let us think of the World Conference on disarmament (1932) or the World Economic Conferences (1927–1933) but also of the informal meetings held after World War II between the so-called Big Powers (France, Great Britain, Russia and the United States) to discuss political-military issues and developed in the early '70s in the margin of wider summits (like the Group of 10 or the Committee of 20).

81 Let us remember the United Conference on Sustainable Development (Rio de Janeiro, 20–22 Jun. 2012) and particularly the Res. 66/288 "The Future we want."

organizations (European Council of the EU, Conferencia de Jefes de Govierno in the Caribbean Community/CARICOM, Cumbre de los Presidentes in the MERCOSUR, *etc.*).[82]

A meeting at the highest level can take place within 'horizontal' groups, in which the activity is broadly based on heterogeneous entities. An example of this activity is that of the Group of 77, which is a loose coalition of developing nations designed to promote its members' collective economic interests and create an improved joint negotiating capacity in the UN.

Concerted activity at the highest level can take place within groupings having a restricted membership (as happens in the G8 but also in the G20 summit meetings in particular) in which the satisfaction of some requirements is the condition for partnership, that is participation as partners in the Group.[83]

In the G8 (but also before in the G7)[84] and in the G20 (in the leader format since 2008)[85] the oligarchical structure meant for the adoption of acts at a presidential level has for example always been applied in the carrying out of the concerted activity, thus characterizing the final moment of the undertaking of collective commitments, even from the point of view of a multilevel process of the adoption of acts.

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82 In the EU we have observed a remarkable shift from an informal forum to rather institutionalized summit meetings. See Nicoletta Parisi, "Conferenze al vertice e Consiglio europeo: un tentativo di sistemazione giuridica," *Riv. Dir. Eu.* 17 (1977): 25 *et seq*.

83 See Di Stasi "Il contributo."

84 The summit meetings of the G7 (G8 excluding Russia) have taken place since 1976. The G8 has developed, as is known, a real organizational structure and a *corpus* of procedure rules on the annual rotation of the Presidency and the assignment to the provisional President of the task of organizing the *summit* as well as the ministerial meetings of experts and working teams, and more generally, of coordinating all the routine activities of the Group. The summit is only the final event of a complex sequence, besides the ministerial meetings, of the activities carried out by a group of experts or *sherpa*, top officers in the member States and "personal" representatives of *leaders*, who are entrusted with the task of following the activities of *follow up* and of preparing the following summit, by the preparation of the Agenda and the project of Final Summit Document. Lucie Delabie, "Gouvernance mondiale: G8 et G20 comme modes de cooperation interétatique informels," *AFDI* 55 (2009): 64, speaks of a 'quasi-institutionnalisation'. On the value of 'summit law' see, in a wider contribution, Hartmut Hillgenberg, "A Fresh look at Soft Law," *EJIL* 10 (1999): 499–515.

85 The G20 was created in response to the financial crisis in the late 1990s. It represents a forum for informal dialogue among a group of countries representing both developed and emerging countries from every region of the globe whose size or strategic importance gives them a particularly crucial role in the global economy.

Sometimes within soft IOs summit meetings represent an 'exceptional' event for defining priorities and general guidelines at the highest political level: in the case of the CSCE/OSCE, since the Final Act of Helsinki[86] there have been only five Summits of Heads of State or Government of OSCE participating States, compared with an annual meeting of ministerial councils.[87]

It is just worth pointing out that the acts adopted by the summit meetings of groups with restricted partnerships (as the G8 or the G20) cause, even if with some problems because of the eliterian kind of participation, an effect that is considered permissive or of a recommendatory kind, vis-à-vis the behaviours provided in those acts.[88]

4 Relationship between Soft and Hard International Organizations

Starting from our assumption of the variety and heterogeneity of soft IOs and from the difficulty of identifying a common denominator between them, it is to be pointed out that their birth can have different functions: are they to be considered as complement, counter or substitute for formal IOs?[89]

In the second half of the '70s, in a time of global crisis of the international order, the G7 was born as an answer to the difficult functioning of the Bretton Woods system, while the political-diplomatic crisis of the UN system became a reason to justify the birth of the CSCE, and to foster cooperation and *détente* between the East and the West.

Besides substituting for formal IOs, soft IOs can play the role of complement to such organizations.[90]

Let us mention in this regard the case of the G8 and, above all, of the G20 that provide an important set of examples.

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86 In the following 15 years, the multilateral process initiated in Helsinki was further developed at three follow-up meetings, known as Review Conferences.

87 The second CSCE Summit, held in Paris in Nov. 1990, laid the foundations for the institutionalization process. Four subsequent Summits were held in Helsinki (1992), Budapest (1994), Lisbon (1996), Istanbul (1999) and Astana (2010). During periods between summits decision-making and governing powers lie with the Ministerial Council.

88 See, among others, Martin Zobl, Daniel Thürer and Kern Alexander, "Die Legitimation der G-20," *AVR* 51 (2013): 143–169.

89 See Vabulas and Snidal, "Organization," 3.

90 Andrew Baker, *The Group of Seven. Finance Ministries, Central Banks and Global Financial Governance* (London: Routledge, 2006), 63, underlines that "[t]he G7 cannot simply impose themselves on existing international institutions and bodies…but rather they *have to engage in a continuous process of persuasion*" (emphasis added).

The coordination relationship of such groupings of States with formal IOs is shown by four aspects:

- 'institutionalized' participation of the EU in the G8 and the G20, together with the representatives of the International Monetary Fund (IMF) and of the World Bank (WB);[91]
- invitation to the G8 and G20 Summits (within the framework of an intense 'relationship') of the representatives of a variety of international fora or organizations such as the International Monetary Fund (IMF), the World Bank (WB), the Financial Stability Board (FSB), the Organization for Economic Cooperation and Development (OECD), the World Trade Organization (WTO), the United Nations and International Labour Organization (ILO). They become involved to a different extent in the activities of the two groupings with special reference to the drawing up of draft reports, position papers and proposals concerning the summit Agenda;
- acting as a 'stimulus' for the IOs normative production, with a variety of references, within the final official statements, to the action of the UN and of other international institutions;[92]
- the constant impulse given within the G8 and G20 to the start-up of revision processes within the same IOs (let us think of the reformation of the so-called Bretton Woods system being strongly promoted within the G20).

As regards the creation of international norms, the possibility of finding cases in which the binding acts of formal IOs reproduce acts of soft law adopted within the G8[93] or directly linked to them exists as well.

As a whole, soft IOs can also be considered as complementary or subsidiary discussion forums, as compared to IOs, considered as performing the function

91 See Massimo Panebianco, "L'Unione europea come sistema di integrazione costituzionale ed internazionale e come 'polo' di organizzazione globale," in *L'Euro-G8*, 13–85.

92 See Section 8 of the final Declaration of G8 (Camp David Summit, 18–19 May 2012) where it is stated: 'We will honor our commitment to refrain from protectionist measures, protect investments and pursue bilateral, plurilateral, and multilateral efforts, consistent with and supportive of the WTO framework, to reduce barriers to trade and investment and maintain open markets'. See also Section 15 of the final Declaration of G8 (Lough Erne Summit, 17–18 Jun. 2013) where it is stated: 'We reiterate our support for the central role of the WTO in setting the rules that underpin global trade'.

93 In the enclosure I of Res. 1244 of the UN SC on the principles to be applied to the crisis of Kosovo there is a reference to the Declaration of the President of the G8 Foreign Ministry Board held on 6 May 1999.

of 'arena'[94] or as 'agora', that is of 'a public realm in which international issues can be debated and, perhaps, decided'.[95]

5 Conclusion

The size and specificity of the increasing choice by States of models of organization of their relationships which are more flexible and less structured, also providing the coexistence of forms of soft cooperation and of closer cooperation,[96] make it impossible for us to include them within a complete system. At the same time, the definition of the contribution of soft IOs to the process of law-making and of the development of international law by soft law instruments[97] implies the discussion of a number of critical points.

As has been said, soft IOs are 'children of their time',[98] and as such they reflect the paradoxes of an international society dealing with the possible forms of enlargement of the subjects and also of the sources of law production. They represent a response to the renewed need for interstate cooperation as a consequence of the more general process of re-interpretation of State sovereignty; they also try to resolve the tension between formal independence among States and substantial interdependence between them, which leads to cooperation.[99]

The emerging importance of soft IOs and their contribution to the global governance of the international community are witnessed by the use that both great powers and weaker States make of them for interaction and international governance, thus covering some of the most important economic, financial and security issues.

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94 In this regard see Ian Hurd, *International Organizations: Politics, Law* (Cambridge: CUP, 2011), and Andrea Hasenclever, Peter Mayer and Volker Rittberger, *Theories of International Regimes* (Cambridge: CUP, 1997).

95 See Klabbers, "Two Concepts," 282.

96 On a model of mixed international union see Panebianco, *Organizzazioni internazionali*, 7.

97 See Volker Röben, "International Law, Development through International Organizations Policies and Practices," *MPEPIL* (2010).

98 See, among others, Klabbers, "Institutional," 421.

99 See Schermers and Blokker, *International*, 1. For other references see Klabbers, "Two Concepts," 279. On the effects of a new 'interpretation' of sovereignty in the associated life of the States see, among others, Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge: Harvard University Press, 1995), 27.

In the light of an objectivist-functional conception of IOs, unusual or original forms of commitment undertakings and acquisition of rights become important as well as the adoption of legitimate behaviours by the States. We could here adopt conceptual prospect of enhancement not of the formal character of the union of States (and of the normative product) but, on the contrary, of its substance, with reference to the whole system of international relations, being inclined to represent a system of values (and then of legitimate behaviours), within the context of relations being agreed upon by international authorities.[100] A reconstruction prospect that can also recover the 'functional' vision of international organization finds its *raison d'être* in the 'management of common problems'[101] despite any formal consideration.

The inescapable conclusion is this: a dichotomous opposition between soft IOs and non-soft organizations (hard IOs) would end up by reproducing the sterile opposition between soft law and hard law. Therefore, even without advocating for a revision of the more or less consolidated concept of international organization,[102] we think that the sole existence of soft IOs continues to challenge our juridical categories.

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100 From this point of view, that we could call 'effective', we could wonder whether a commitment, being initially non-juridical, could get a certain coefficient of juridical authority because of the spontaneous acceptance of contents in the course of a process of "follow up," in which it is also hard to identify the moment when it passes from the political compulsory to the juridical compulsory. See, with reference to G8 on these aspects, Di Stasi, "Il contributo," 20–57, in particular 32.

101 See Klabbers, "Two Concepts," in particular 278. The concept that dominates in the literature is a concept of an international organization as an entity created by States to perform some tasks. About the 'logique fonctionelle pour laquelle leur légitimité réside dans leur utilité' see Sur, "Les organisations," 669. See also Jan Klabbers "Contending approach to international organizations: Between functionalism and constitutionalism," in *Research Handbook on the Law of International Organizations*, eds. Jan Klabbers and Åsa Wallendahl (Cheltenham: Edward Elgar, 2011).

102 On the exclusion of the existence of a new juridical category see Zanghì, *Diritto*, 17. On the 'enlargement of the circle of the organized international bodies' see Panebianco, *Diritto Internazionale*.

CHAPTER 3

International Regional Organizations
Problems and Issues

Piero Pennetta

1 Introductory Considerations

Handbooks of International Organization are necessarily the point of departure for a legal study of international regional organizations. In their introductory pages, the various *Handbooks* typically emphasize the increasing development and spread of partial and/or regional organizations, noting that their number is most certainly greater than the number of States (about two hundred). In this regard, 'different numbers' are quoted. Some authors maintain that there are several hundred (about 500), others that there are as many as a thousand, and others still say as many as three thousand; so that, paradoxically, in a systematic study of international organizations (IOs) it is not possible to objectively define the subject under study with due precision.

Within this context, the traditional idea about IOs, the general public and many scholars have, tends to identify them with universal organizations (or better, tendentially universal organizations). As a rule, the reference is to the United Nations (UN) and its specialized institutions, at times seen as having a 'saving role', while at others as being structurally incapable of 'dealing with' world problems such as peace-keeping, economic development, environmental issues, human rights protection, *etc.* Since the end of the last millennium, there has been growing interest for the World Trade Organization (WTO), which for critics of globalization takes on 'an almost diabolical guise', while its admirers glorify it as the 'engine' of development for the global economy.

From a methodological point of view, the inductive method is used. Therefore, despite the 'numbers', there is an almost surreptitious tendency to base the study and very notion of international organization on organizational typologies that have universal scale or which tend in that direction. There are about thirty such organizations which, as is natural, take on tremendous 'qualitative' importance. It will suffice to think of the regulations and practices that have developed within the UN and WTO.

All 'other' organizations, which are not universal in nature, are evidently 'partial' – that is, their membership is restricted to a limited number of States – since these types of organizations do 'not' aspire to universalism. The great

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majority of 'partial' organizations have technical-functional characteristics, insofar as, within this typology, States perform a specific function with limited scope and tasks of a technical nature.

Institutionalized cooperation of partial dimension aims to achieve objectives which can be quite diverse. States can be united by a common linguistic-cultural[1] or religious identity, as in the OIC,[2] or they may want to cooperate in the management and exploitation of natural resources such as land, rivers, lakes, *etc.* (the Mekong, the Nile, Senegal, Chad, the Amazon, Cuenca del Plata, *etc.*). There can thus be a common exercise of different functions, for the most diverse ends, and, frequently, the organization proves to be at once technical-functional and territorially limited. Evidently, these very numerous partial organizations of a technical-functional nature remain unknown to even the most diligent of scholars.[3] While on the 'quantitative' level they are extremely numerous, they often appear to be 'qualitatively' of little significance, even though in some cases partial organizations, such as the OECD and OPEC, have taken on particular political and economic relevance.[4]

Among the partial organizations with limited membership, particular importance is taken on by 'regional' organizations, so defined insofar as their Member States – generally neighbouring countries – belong to a specific

1 One may think of the political, cultural and linguistic cooperation formalized in the Charte de la Francophonie adoptée par la Conférence ministerielle de la Francophonie (Antananarivo, 23 Nov. 2005) and in the Estatuto da Comunidade dos Países de Língua Portuguesa (Lisboa, 17 Jul. 1996). At times, cooperation is realized without establishing specific treaties, as in the case of the British Commonwealth (Statute of Westminster, 11 Dec. 1931) or of the Turkish speaking area (starting with the Turkish-speaking States Summit Meeting held in Ankara on 30–31 Oct. 1992).

2 See the Charter of the Organization of the Islamic Cooperation (Dakar, 14.3.2008), which replaced the Charter of the Organization of the Islamic Conference (Jeddah, 4.3.1972).

3 Just to give one example, one might mention the Intergovernmental Institution for the Use of Micro-algae Spirulina Against Malnutrition (IIMSAM). The Organization has a small number of Member States and develops its activities in collaboration with the UN and, of course, FAO; however, it is not easy to locate the founding agreement on the Organization's website. Its functioning rules (principles, objectives, competences, institutional set-up, official documents, *etc.*) remain largely unknown.

4 That is, the Organization for Economic Co-operation and Development and the Organization of the Petroleum Exporting Countries, whose prominence as organizations of industrialized countries and petroleum-producing countries is self-evident. In a way, partial organizations with a plurality of technical-functional competences also include soft organizations such as the G 7/8 and the G 20, which de facto exert a strong influence on the behaviour of both States and international universal and regional organizations.

geographical and territorial area.[5] Such organizations may allow for the membership of the States of an entire continent or sub-continent (for example OAS,[6] AU,[7] AEC,[8] UNASUR,[9] CoE,[10] EU).[11] The regional organization can also operate over a limited area of a continent, and thus have a sub-regional dimension, or consist of States fronting on marine areas: OBSEC,[12] APEC,[13] IOR-ARC (now IORA),[14] Foro del Pacífico,[15] GCC,[16] CBSS,[17] *etc.*

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5 The very spatial/territorial definition of 'region' appears problematic, although, from the legal point of view, the reference to States adhering to a specific regional organization is clear. From the perspective of political science, it is possible to observe that 'Our regional images are often based on unexamined and outdated metageographical conceptions of the world…that assume discrete, sharply bounded, static continental units fit together in an unambiguous way. Yet the world is not structured in such a near manner; to the contrary, regions disappear and reappear as they are transformed by various economic, political, and cultural factors', as Raimo Värynen, "Regionalism: Old and New," *International Studies Review* 5 (2003): 25, puts it. For an analysis in terms of political science, see the contribution of Rick Fawn, "Regions and Their Study: Wherefrom, what for and whereto?" *Rev. Internat. Stud*. 35 (2009), 5; for an economic viewpoint, see Gerald C. Berg, "The Economics of Transnational Regions: Meaning and Measure," *International Trade Journal* 22 (2008), 63; Carlos Murillo Zamora, "Aproximación a los regimens de integración regional," *Revista Electrónica de Estudios Internationales* 8 (2004), 1.

6 Charter of the Organization of the American States, Bogotá, 30 Apr. 1948 (as amended Buenos Aires 27 Feb. 1967, Cartagena 5 Dec. 1985, Washington 14 Dec. 1992, Managua 10 Jun. 1993).

7 Constitutive Act of African Union, Lomé, 11 Jul. 2000.

8 Treaty of the African Economic Community, Abuja, 3 Jun. 1991.

9 Tratado constitutivo de la Unión de Naciones Suramericanas, Brasilia, 23 May 2008.

10 Statute of the Council of Europe, London, 5 May 1949.

11 The Treaty of Lisbon, signed on 13 Dec. 2007, comprises the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and a number of Protocols and Declarations, either common or pertaining to one or more specific States.

12 Charter of the Organization of Black Sea Economic Cooperation, Yalta, 5 Jun. 1998.

13 APEC Ministerial Meeting Statement (Canberra, 7 Nov. 1989), elevated to Summit level by the APEC Leaders Economic Vision Statement (Seattle, 20 Nov. 1993).

14 Resolution on the Adoption of the Charter of the Indian Ocean Rim – Association for Regional Cooperation, Mauritius, 7 Mar. 1997. The name of the Association was modified in Indian Ocean Rim Association (IORA) at the 13rd Meeting of Council of Ministers, Perth, 1 Nov. 2013, Perth Communiqué.

15 Foro del Arco del Pacifíco Lationoamericano, Declaración de Cali, 30 Jan. 2007.

16 Charter of the Cooperation Council of the Arab States of the Gulf, Abu-Dhabi City, 25 May 1981.

17 Council of Baltic Sea States First Ministerial Session – Copenhagen Declaration, Copenhagen, 5–6 Mar. 1992.

At times, the associative-voluntary element in regional organizations appears with particular force and the definition of their attributed competences ('competence d'attribution'), which are multiple and coordinated, takes on special importance, since the States aspire to define a 'multi-functional cooperation' strategy, often with regard to political-economic issues ('regional economic multipurpose cooperation'). In this regard, it may be observed that regional organizations with 'competence d'attribution' of a political or political-military nature[18] are not particularly numerous: more often, the charters provide for powers in economic and commercial areas. Traditionally, and especially in the past, States have aimed at encouraging such cooperation with the creation of free-trade zones or customs unions and, at times, their goal has been to create common markets. Moreover, it should be emphasized that, with the significant reductions in customs duties implemented within the WTO, cooperation in the commercial sphere does not now constitute the only and the most significant tool for integrating the economies of the States of a particular geographical area.[19] And vice versa, competences regarding infrastructures (IIRSA in Latin America) or the legal sphere (OHADA in Sub-Saharan Africa) can take on particular importance.[20] It may also be observed that – again within a limited territory – regional organizations with powers in economic and monetary matters[21] can operate alongside Development Banks and

18 That is, political organizations which – when a political-military competence is at play – are to be understood as agreements for collective self-defence, in accordance with Art. 51 of the UN Charter. The number of such organizations, which are the special object of political science studies, is relatively small.

19 The term 'integration' must be understood in a broad sense here. It does not refer to the kind of technical-legal integration pursued by the European Community (now European Union).

20 In light of the current well-developed multilateral commercial system, a regional integration aiming mainly at the free circulation of goods may not be the best tool to implement economic integration; on the relevance of customs regulations, see the data provided by Carsten Weerth, "Tariffs of the World: Are Customs Duties Really Growing Unimportant?" *Global Trade and Customs Journal* 2 (2009), 53. Thus, cooperation between States may operate just as profitably by concentrating on infrastructural elements, as in the case of the Iniciativa para la Integración de la Infraestructura Regional Suraméricana, or by pursuing legislative harmonization, as in that of the Organisation pour l'Harmonisation du Droit des Affaires en Afrique.

21 See András Inotai and Ivanka Petkova, "Monetary Integrations: Experience, Current Situations and Perspectives," in *Elements of Regional Integration*, eds. Ariane Kösler and Martin Zimmek (Baden-Baden: Nomos, 2008), 115; Leonie Guder, "Monetary Unions and Monetary Zones," *MPEPIL*, Aug. 2011.

Funds.[22] Such initiatives can be completely autonomous or directly or indirectly linked with IOs aiming to achieve regional economic multi-purpose cooperation.

Within the regional sphere, the safeguarding of human rights and fundamental freedoms is also becoming increasingly important. Europe has placed itself in the vanguard on such issues with the creation of the CoE. Such organization is characterized by political and legal powers, conferred on it especially by the Rome Convention for the Protection of Human Rights and Fundamental Freedoms, which provides for the effective jurisdictional protection of individuals.[23] The initiative has been imitated in variously differentiated forms, such as the Inter-American Charter[24] on the American continent and the African Charter on Human and Peoples' Rights[25] in Africa, while the protection of human rights takes on partially different and particular significance within the Arab-Islamic world.[26]

It is also important to note that the protection of human rights, the expansion of good governance-related regional provisions across time and space, and the respect of the rule of law and democracy are to be found with ever-greater frequency in various regional economic multipurpose organizations.[27] Examples include the significant in-depth studies carried out within the European Community (now European Union) which led to the Charter of Fundamental Rights, now legally binding (Art. 6.1 TEU). In addition, albeit

22 Besides the *atypical* case of Europe, see, among many other examples African Development Bank, Asian Development Bank, Banco Centroamericano de Integración Económica, Banco del Sur, Banque Ouest-Africaine de Développement, Banque de Développement des Etats de l'Afrique Centrale, Black Sea Trade and Development Bank, Caribbean Development Bank, Corporación Andina de Fomento now Banco de Desarrollo de América Latina, Eastern and Southern African Trade & Development Bank, ECOWAS Bank for Investment and Development, Euroasian Development Bank, Interamerican Development Bank, Islamic Development Bank; on this topic, see Susanna Cafaro, "Le Banche regionali di sviluppo," in *Studi in onore di Claudio Zanghì*, eds. Lina Panella and Ersiliagrazia Spatafora (Torino: Giappichelli, 2011), III, 105.

23 European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 Nov. 1950, as amended. Moreover, the CoE also operates in other areas of particular importance, such as welfare policies and the protection of minorities.

24 Convención Americana de Derechos Humanos, San Josè, 22 Nov. 1969.

25 African Charter on Human and People's Rights, Nairobi, 27 Jun. 1981, as amended by the Protocol establishing the African Court of Justice and Human Rights.

26 Charte Arabe des Droits de l'Homme, adopted in 1994 and amended in 2004.

27 See the optimistic – and not wholly convincing – analysis by Tania A. Börzel, Vera van Hüllen and Mathis Lohaus, *Governance Transfer by Regional Organizations. Following a Global Script*?, Berlin: SFB-Governance Working Paper Series No. 42, Jan. 2013.

with partial and at times contradictory developments, these tendencies seem to be taking hold in some regional and sub-regional organizations belonging to other geographic areas, especially Africa,[28] Latin America[29] and, to a lesser extent, Asia.[30]

In particular, since the end of the last millennium, there has been an increase in the number of regional economic integration organizations upon which the charters confer broad, multiple and coordinated competences in political-economic matters. At times, in exercising such powers, sometimes the organization can proceed to issue regulatory acts with different juridical value which apply not only to their Member States, but also, directly or indirectly, to private persons. Such regional economic integration organizations (about 50) operate in the most diverse geographical areas, due to the globalization which has followed the end of the Cold War. This 'regionalism' has developed in a non-uniform and non-linear manner, differing according to the historical, political, economic and, of course, juridical characteristics of the various cases.[31] In actual fact, while an imitative tendency undoubtedly exists, there is no evidence of regional organizations defined according to a sort of historical neo-determinism, but only regional organizations individually and concretely defined on the basis of the actual interests of which their Member States are the bearers.

28 With regard to the SADC, the problematic issues which arose before the SADC Tribunal starting with the *Campbell* case, which caused the States to challenge the jurisdiction of the Tribunal itself, are well known. A significant body of jurisprudence on the subject of human rights protection has been produced by the ECOWAS Tribunal as a result of the *Hadijatou Mani Koraou* case and by the EAC Court of Justice as a result of the *Katabazi* judgment.

29 Within the CAn, the Carta Andina para la promoción y protección de los derechos humanos was approved in Guayaquil on 26 Jul. 2002; at present, it is only recommendatory in nature. Problematic issues in the safeguarding of human rights and democracy were posed in the MERCOSUR region concerning the respect of the Protocolo de Ushuaia, which brought about the suspension of the Member State of Paraguay, followed by a highly debatable arbitration award by the Tribunal Permanente de Revisión.

30 See the ASEAN Human Rights Declaration, Phnom Penh, 18 Dec. 2012. In the literature, see Matthew Davies, "The ASEAN Synthesis: Human Rights, Non-Intervention, and the ASEAN Human Rights Declaration," *Geo. J. Int'l Aff.* 14 (2013), No. 3: 51.

31 Timo Behr and Juha Jokela, *Regionalism & Global Governance: The Emerging Agenda*, Notre Europe Study & Research No. 85, 2011, underline the great heterogeneity of regional organizations, noting that political science distinguishes '…between regionalism *tout court* and the process of regionalization'.

A great deal of literature on 'regionalism' has been produced, especially in the field of political science,[32] while legal studies have been relatively scarce.[33] There is often a tendency for studies of regionalism to refer only to some specific types of organizations, correctly considered to be of particular 'qualitative' importance. Obviously, the reference here is to the 'European Community/Union', which is traditionally considered as the 'model' for regional organizations – both from a political-economic and, for our purposes, technical-juridical

32 The literature on regionalism is extremely heterogeneous and, depending on the cases in question, studies have adopted different perspectives – not only juridical but also economic, historical, and pertaining to political science. In my view, political science studies, even the ones broadest in scope and most focused on security regionalism, are at times repetitive and often merely descriptive. Among the most recent contributions, see Fred H. Lawson, *Comparative Regionalism* (Aldershot: Ashgate, 2009); *Comparative Regional Integration: Europe and Beyond*, ed. Finn Laursen (Aldershot: Ashgate, 2010); *Region Building*, ed. Ludwig Kühunhardt (New York: Berghahn, 2010); *Roads to Regionalism: Genesis, Design, and Effects of Regional Organizations*, eds. Tania A. Börzel *et al.* (Aldershot: Ashgate, 2012); *Regionalism*, eds. Philippe De Lombaerde and Söderbaum Fredrik, IV vol. (Sage: Los Angeles, 2013) and the broad scientific production to which Fawn, *Regions*, refers. See also, among others, Shaun Breslin, *Does Function Matter? Researching Comparative Regional Governance*, GR: EEN Working Paper, No. 33, 2013, and Louise Fawcett, *The History and Concept of Regionalism*, Brugge: UNU-CRIS Working Paper W-2013/5, who, however, limits the scope of enquiry to 'Peace operations, Terrorism and Weapons and Mass Destruction'. Among the handbooks which evaluate the phenomenon of international organization from the point of view of international relations, see, among others, Guillame Devin et Marie-Claude Smouts, *Les organisations internationales* (Paris: Armand Colin, 2012) and Volker Rittberger, Bernhard Zangl and Andreas Kruck, *International Organization* (2nd edn. Basingstoke: Palgrave Macmillan, 2012).

33 There are fewer contributions of a technical-juridical nature – see, among the most recent, *Direito da integração*, eds. Paulo Casella Borba and Vera Lúcia Viegas Liquidato (São Paulo: Editora Quartier Latino do Brasil, 2006); Catherine Flaesch-Mougin and Joel Lebullenger, *Regards croisés sur les intégrations régionales: Europe. Amériques, Afrique* (Bruxelles: Bruylant, 2010); Judith G. Kelley, *The Role of Membership Rules in Regional Organizations*, Manila: ADB Working Paper Series in Regional Economic Integration No. 53, Jun. 2010; Piero Pennetta, "Organizzazioni Internazionali Regionali," *Enciclopedia del Diritto, Annali* IV (2011), 844; Alfredo M. Soto and Flavio F. González, *Manual de derecho de la integración* (Buenos Aires: La Ley, 2011); *European Yearbook of International Economic Law 2010*, eds. Christoph Herrmann and Jörg Philipp Terhechte (Heidelberg: Springer, 2012), II: *Regional Integration*; *Derecho de la Integración. Manual*, ed. Sandra Negro (Buenos Aires-Montevideo: BDEF, 2012); Mwayila Tshiyembe, *Régionalisme et problèmes d'intégration économique: Alena, Mercosur, Union européene, Union africaine* (Paris: L'Harmattan, 2012); *Repensando la integración y las integraciones*, ed. Eric Tremolada Álvarez (Bogotá: Universidad Externado de Colombia, 2013).

point of view.[34] This 'successful' model seems to be widely observed and imitated 'elsewhere', one of the reasons being that the European Community/Union has long supported comparable processes of regional integration in other geographic areas. Nevertheless, there is no lack of studies of varying

34 On the comparison between the EU and individual regional organizations, see – within the vast literature and with no pretence to exhaustiveness – Santiago Deluca, *Unión Europea y Mercosur. Los efectos del derecho comunitario sobre las legislaciones nacionales* (Buenos Aires: Rubizal, 2003); *Retos e interrelaciones de la integración regional: Europa y América*, eds. Joaquín Roy, Roberto Domínguez and Rafael Velázquez Flores (México: Plaza y Valdes, 2003); Deisy Ventura *Les asymétries entre le Mercosur et l'Union Européenne. Les enjeux d'une association interrégionale* (Paris: L'Harmattan, 2003, in spanish Berlín: KAS, 2005); Pascal Kauffmann and Bernard Yvars, *Intégration européenne et régionalisme dans les pays en développement* (Paris: L'Harmattan, 2004); Heber Arbuet-Vignali, *Las claves jurídicas de la integración en los sistemas del MERCOSUR y la Unión europea* (Buenos Aires: Rubinzal, 2004); *The European Union and Regional Integration. A Comparative Perspective and Lessons for the Americas*, eds. Joaquín Roy and Roberto Domínguez (Jean Monnet/University of Miami, 2005, in spanish Buenos Aires: Edutref, 2005); *Federalismi e integrazioni sopranazionali nell'era della globalizzazione: Unione Europea e Mercosur*, ed. Paola Bilancia (Milano: Giuffrè, 2006); Eduardo Biacchi Gomes and Tarcisio Hardmanreis, *A Integração Regional no Direito Internacional. O futuro do Mercosul e da União Européia* (São Paulo: Lex Editora, 2006); *Integración política en Europa y en América Latina. Analogías y contradiciones*, ed. Antonio Colomer Viadel (Valencia: Instituto de Iberoamerica y el Mediterraneo, 2007); Orlando José Mejía Herrera, *La Unión Europea como modelo de integración: análisis comparativo del Sistema de la Integración Centroamericana* (León: Editorial UNAN-León, 2008); *Direito Público Econômico Supranacional*, ed. André Saddy (Rio de Janeiro: Lumen juris, 2009); *MERCOSUR y Unión Europea*, eds. Zlata Drnas de Clément and Waldemar Hummer (Cordoba: Lerner, 2009); Christian Franck, Jean Chistophe Defraigne and Virginie de Mariamé, *L'Union européenne et la montée du régionalisme: exemplarité et partenariats* (Bruxelles: Bruylant, 2009); Piero Pennetta, *Integrazione europea ed integrazioni Latino-americane e caraibiche: modelli e rapporti* (Bari: Cacucci, 2009); Pedro Caldentey del Pozo and José J. Romero Rodriguez, *El SICA y la UE: la integración regional en una perspectiva comparada* (Córdoba: ETEA, 2010); *Evolución histórica y jurídica de los procesos de integración en la Unión Europea y en el Mercosur*, ed. Carlos Francisco Molina del Pozo (Buenos Aires: Eudeba, 2011); Piero Pennetta, *Integración e integraciones Europea, America Latina y el Caribe* (Bogotá: Planeta, 2011); *Organizzazioni regionali, modello sovranazionale e metodo intergovernativo: i casi dell'Unione europea e del Mercosur*, ed. Marcello Di Filippo (Torino: Giappichelli, 2012). See also, among the many shorter contributions, and at times dealing with heterogeneous comparisons, Mark Beeson and Kanishka Jayasuriya, "The Political Rationalities of Regionalism: APEC and the EU in Comparative Perspective," *Pacific Review* 11 (1998), 311; Rolf J. Langhammer, "Regional Integration APEC Style. Lessons from Regional Integration

breadth dealing with a comparison of 'other' regional organizations, especially those operating in developing countries.[35]

In this regard, it should be noted that, depending on their nationality and cultural experiences, individual authors also refer (in legal manuals as well as in specific papers) to regional organizations different to the EU. Thus, African authors obviously refer to the AU, AEC and other regional organizations existing on their continent.[36] Similarly, Latin-American studies traditionally

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EU Style," *ASEAN Economic Bulletin* 16 (1999), No. 1, 1; Craig Jackson, "Constitutional Structure and Governance Stategies for Economic Integration in Africa and Europe," Transnat'l L. & Contemp. Problems 13 (2003), 139; Laurence Henry, "The ASEAN Way and Community Integration: Two Different Models of Regionalism," *ELJ* 13 (2007), 857; Patricía Luíza Kegel and Mohamed Amal, "Institições, Direito e Soberania: a efetividade jurídica nos processos de integração regional nos exemplos da União Européia e do Mercosul," *Revista Brasileira de Politica Internacional* 52 (2009), 53; Rajendra K. Jain, "The European Union and SAARC. The First Enlargement and After," in *Regional Integration in Europe and Asia*, eds. Sung-Hoon Park and Heungchong Kim (Baden-Baden: Nomos, 2009), 211; Jens-Uwe Wunderlich, "Comparing Regional Organisations in Global Multilateral Institutions: ASEAN, the EU and the UN," *Asia Europe Journal* 10 (2012), 127.

35 Within an extremely heterogeneous literature, see Anthoni van Nieuwkerk, "Regionalism into Globalism? War into Peace? SADC and ECOWAS Compared," *African Security Review* 10 (2001), 1; Zhenis Kembayev, "Integration Processes in South America and in the post-Soviet Area: A Comparative Analysis," *Southwestern Journal of Law and Trade in the Americas* 12 (2005), 25; Yake Yu, "Theory and Practice of Regional Integration: A Comparative Study on the Cases of Gulf Cooperation Council and ASEAN," *Südostasien aktuell* 27 (2008), No. 2, 41; Etel Solingen, "The Genesis, Design and Effects of Regional Institutions: Lessons from East Asia and the Middle East," *ISQ* 52 (2008), 261; Azzam Mahjoub, *L'intégration régionale sud-sud une perspective comparative Monde arabe-Amérique du Sud*, Barcelone, PapersieMed., Mar. 2008; Mario J. Filadoro, *Incidencia de las Secretarías del MERCOSUR y de la CAN en los respectivos procesos de integración regional. Un análisis comparado*, Brugge: UNU-CRIS Working Paper W-2009/10; Uttara Sahasrabuddhe, "SAARC and ASEAN: A Comparative Study," *Pakistan Horizon* 63 (2010), 35; Linda Low and Lorraine Carlos Salazar, *The Gulf Cooperation Council: A Rising Power and Lessons for ASEAN* (Singapore: ISEAS, 2011); Chistopher König, *The Environment in the Andean Community and Mercosur*, Brugge: UNU-CRIS Working Paper W-2013/3; Simon-Pierre Zogo Nkada, "La libre circulation des personnes: réflexions sur l'expérience de la C.E.M.A.C. et de la C.E.D.E.A.O.," *RIDE* 25 (2011), No. 3, 138; Silvanus Kwaku Afesorgbor and Peter A.G. von Bergeijk, *Multi-membership and the Effectiveness of Regional Trade Agreements in Western and Southern Africa. A Comparative Study of ECOWAS and SADC*, The Hague: ISS Working Paper No. 520, Mar. 2011.

36 Among African authors, see Benjamin Mulamba Mbuyi, *Droit des organisations internationales: notes de cours...* (Paris: L'Harmattan, 2011) and Mwayila Tshiyembe, *Organisations internationales. Théorie générale et etude de cas* (Paris: L'Harmattan, 2012).

include – in addition to the EU – the many American and Latin-American organizations: OAS, UNASUR, MERCOSUR, *etc.*[37] Relatively minor but growing attention by legal scholarship to the theme of regionalism can be found in other geographical-cultural areas and in the United States.[38] This different approach appears to be directly connected to the reduced importance which regionalism has had in North America, in the large and heterogeneous Asiatic continent[39] and in the Arab world (apart from the historic but not very significant experience of the Arab League).[40] The same can be said of the more recent institutionalized regional cooperation which developed in the formerly socialist countries at the end of the Cold War.[41]

37 Among Latin American authors, see René Urueña, *Derecho de las organizaciones internacionales* (Bogotá: Ediciones Uniandes, 2008); Adherbal Mattos Meira, *Direito das organizações internacionais e direito de integração* (Rio de Janeiro: Renovar, 2008); José Cretella Neto, *Teoria geral das organizações internacionais* (Saraiva: São Paulo, 2008); Ricardo Seitenfus, *Manual das organizações internacionais* (5th edn. Porto Alegre: Livraria do Advogado, 2012); Antonio Augusto Cançado Trindade, *Direito das organizações internacionais* (5th edn. Belo Horizonte: Del Rey, 2012).

38 The literature of English-speaking countries – particularly the US – is often of very high quality – think of José E. Alvarez' contributions, *International Organizations as Law-Makers* (Oxford: OUP, 2005) and "International Organizations: Then and Now," *AJIL* 100 (2006), 324. The relevant legal theory is characterized by a particular focus on the political science aspect and a thorough knowledge of global practices, while, understandably, less attention is paid to the practice and doctrine of other geographic areas. Most recently, see Andrew T. Guzman's stimulating contribution *Doctor Frankenstein's International Organizations* (2 Mar. 2012): works.bepress.com/andrew_guzman/58.

39 Legal studies by authors of the Asiatic continent do not seem to exist, with the exception of Chittharanjam Felix Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn. Cambridge: CUP, 2005), a result of the author's professional experience within the World Bank. On the other hand, Asiatic authors have published numerous and often highly qualified contributions which adopt an economic and/or political science perspective in such journals as *Indonesian Quarterly*, *Pacific Review*, *ASEAN Economic Bullettin*, *Contemporary South East Asia*, *etc.*

40 With regard to scientific studies conducted in the Arab world, I am aware only of the work of Ahmad Abou El-Wafa, *A Manual on the Law of International Organizations* (3rd edn. Cairo: Dar-Al-Nahda Al Arabia, 2005). In actual fact, the only 'efficient' organization in the Arab world is the GCC, which I will often refer to throughout this chapter.

41 In the Soviet area, the experience of regional organizations was limited to the Council of Mutual Economic Assistance (CMEA) and to the Warsaw Pact, as a political-military organization. On the current regionalism of the former Soviet countries, see Zhenis Kembayev, *Legal Aspects of the Regional Integration Processes in the Post-Soviet Area* (Berlin: Springer, 2009).

A study which rightly aims to include 'other', non-EU regional organizations must necessarily take note that they have often been substantially neglected by international law studies and that, at times, there are significant inaccuracies with regard to fundamental rules and regulations. Moreover, when dealing with 'other' regional organizations, both European and non-European authors interpret the phenomenon within a comparative perspective which seems to suggest (more often implicitly than explicitly) the 'prevalence/supremacy' of the EU over 'other' models. The latter are evaluated somewhat negatively because of their 'non' resemblance to the more developed European model. While acknowledging the exceptional importance of the European Union experience, I do not believe such an approach can be fully endorsed. This perspective is inevitably partial and does not offer a complete picture of the phenomenon of IOs, especially regional ones.[42]

Starting from these (perhaps rather obvious) considerations, this chapter simply intends to show that there is a great deal of scope for legal research on the plurality of regional economic integration organizations other than the EU.[43] To this end, I will limit myself to underlining some issues and posing some questions, thus in all modesty encouraging critical thought on some aspects of the wider phenomenon of IOs.

2 Models of Regional Cooperation

We have just noted the plurality of 'multipurpose' regional organizations which, particularly since the end of the last millennium, have led to different forms of regional economic integration organizations.[44] These are institutionalized

42 In my view, the most important among the many merits of the classic book by Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (5th edn. Leiden: Martinus Nijhoff, 2011), is precisely that it proceeds through an inductive method to reconstruct the phenomenon of international organization by taking into account a larger number of cases, no longer mainly of a universal nature but also of regional dimension – and not always the 'usual', well-known ones.

43 In Pennetta "*Organizzazioni,*" 845–846, I 'dared' to consider the European Community/Union experience as a well-known one.

44 Among the not numerous regional organizations with prevalently political competences, see, for example, the LAS, OAS, OAU (now AU) and, more recently, UNASUR and SCO (founded on the Charter of the Shanghai Cooperation Organization, Saint-Petersburg, 7 Jun. 2002). On political and security organizations that at times *also* have competences for economic subjects, see, Emil Joseph Kirchner E.J. and Roberto Domínguez, *The Security Governance of Regional Organizations* (London: Routledge, 2011).

forms of association characterized by specific and relatively homogeneous competences in political and economic matters, as well as by a limited number of usually geographically adjacent Member States. Such competences are exercised in a generally consistent manner and coordinated by the organization's institutional structure on the basis of principles, aims and time schedules[45] that are traditionally indicated by the States in the Preamble and initial articles of the constituent instrument. As stated above, regional organizations have been established in a wide variety of geographical areas, albeit, evidently, with varying intensity, depth and political and legal characteristics. In this regard, it has been noted that, in today's world, there is no longer room for 'solitary adventures' on the part of individual States: the creation of integrated regional areas seems to be the 'postmodern passport to globalization'.[46]

It is just as evident that the phenomena of globalization and regionalism are strictly connected, and a matter for intense political and academic debate. In particular, in economic studies, it is not clear whether regionalism can be considered as a stepping-stone or a stumbling block for multilateral economic interdependence.[47] In this regard, if the process of integration seems to some extent 'politically' irreversible in Europe, a similar integrationist desire is also found 'elsewhere', especially in developing countries, even though it often appears fragile, confused and contradictory, and frequently does not manage to go beyond the level of rhetorical proclamation.[48]

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45 As I will highlight further on, founding treaties often establish principles, objectives, and competences together with the institutional structure, but they very rarely indicate the time frames which competent institutions and Member States are bound to respect.

46 Luk Van Langenhove, *The EU as a Global Actor in Multipolar World and Multilateral 2.0 Environment*, Brussels: Egmont Paper No. 36, Mar. 2010. At present, only the USA and China are operating in a 'unilateral' perspective, and, significantly, their participation to regional economic integration organizations is marginal; see Luk Van Langenhove, "The Transformation of Multilateralism Mode 1.0 to Mode 2.0," *Global Policy* 1 (2010): 263. On this point, see also Mario Telò, *State and Multilateralism: Past, Present and Future*, GR: EEN Working Paper, No. 12, FP7 research project/European Commission, 2011.

47 See, within a very vast literature, *Preferential Trade Agreements – A Law and Economic Analysis*, eds. Kyle W. Bagwell and Petros C. Mavrodis (New York: CUP, 2011); Gonzalo Villalta Puig and Omiunu Ohiocheoya, "Regional Trade Agreements and the Neo-Colonialism of the United States of America and the European Union: A Review of the Principle of Competitive Imperialism," *Liverpool Law Review* 32 (2011): 225.

48 Currently all the different geographic areas are touched by the phenomenon of regionalism, including the Pacific, where, besides the aforementioned APEC, 'minor' organizations are active, such as the (South) Pacific Islands Forum (Apia, 17 Apr. 1973) and the Pacific Community (Canberra 1947 as amended 1976, 1980, 1984).

As stated above, regional cooperation in its various facets is the subject not only of legal studies, but also of multidisciplinary investigation[49] and research in the economic[50] and political[51] sciences. Within the latter perspective, an intermediate level of collective representation at regional level has been hypothesized – positioned between the individual plane of the single State and the global sphere of universal organizations.[52] While undoubtedly of great interest, this interpretive tendency does not seem to be entirely convincing, for reasons which will be explained later.

By considering the phenomenon of regionalism in function of the economic policy 'model', it becomes apparent that several 'models' have developed over time, defining different 'generations' of regional organizations.

The model inspiring the 'first' generation, which appeared in the 1950s and 1960s, is that of liberal economic development based on competition: it provided for a regulatory system that set out a programme and the creation, as medium and long-term objectives, of free trade zones, customs unions and, in some cases, common markets.[53] In this model, cooperation seems rather

49 See, *Elements of Regional*, *passim*.

50 Economic regional organizations are often directly and acritically linked to a paradigm inspired by economic theory (Balassa, Viner), in which a linear evolution is posited: preferential trade agreement, free trade area, customs union, common market, economic and monetary union, political union. The truth is that practical experience shows that such a linear development has been realized (and imperfectly at that) only in the experience of the European Union (the so-called 'Euro-zone'), and the 'political' objective is explicitly stated only in the EAC in Eastern Africa. More often than not, regional cooperation does not manage to go beyond the phase of the free trade area, and at times – as in the case of the MERCOSUR and the Caribbean Community – the customs union is still imperfect. In the Union Economique et Monétaire Ouest Africaine and in the Communauté Economique et Monétaire de l'Afrique Centrale, the economic and monetary union preceded, and did not follow, trade liberalization (which has never been realized). In other cases, such as the GCC, the realization of a complete customs union has not been followed by the creation of a common market, but by the economic and monetary union. In other cases, as for the Southern African Customs Union, the creation of a customs union, which has now been complete for quite some time (1910/1969), has not seen significant economic cooperation development as a result.

51 Behr and Jokela, "*Regionalism,*" 9–10.

52 This position has been supported, among others, by Luk Van Langenhove: see, for instance, his *Multilateralism 2.0* (Bruges: EU-GRASP Working Paper No. 21, Aug. 2010) and *Building Regions. The Regionalization of the World Order* (Aldershot: Ashgate, 2011).

53 The best-known cases can be found in a European context, with the EEC (1958) and EFTA (1960) (formerly with the OEEC), but similar examples exist in other countries: in Latin America, the Asociación Latino Americana de Libre Comercio (1960), the Organización

limited in scope, since there is no significant density of regulations in the institutional framework, and the pursuit of institutional objectives seems rather reduced, with the exception of the European case. Many such – not numerous – first generation organizations, in particular those in developing countries, were later to be dissolved or, at times, transformed in more or less significant ways.

The 'second' generation of regional organizations started to develop in the late 1960s, above all in developing countries. In this case, the underlying model was that of 'third-world regionalism', implemented with the adoption of new treaties characterized by multiple economic competences and either replacing or coexisting with previous experiences of association. This model was developed within the Comisión Económica para América Latina (CEPAL)[54] with the aim of achieving collective self-sustained development, or 'Integración hacia dentro'. By means of the so-called economy of substitution, a strong tie was established between regional cooperation and the joint economic development of the Member countries. The CEPAL model took on concrete form in Latin America with ALADI,[55] SELA,[56] the Andean Pact[57] and, in part, CARICOM;[58] while in Africa it inspired the ECOWAS (1975),[59] PTA,[60] ECCAS[61] and SADCC.[62] On the other hand, third-world

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des Estados Centroamericanos (1951), and the related Mercado Común Centroamericano (1958–1962); in the Caribbean, the Caribbean Free Trade Area (1968). In the African continent the liberal model inspired the monolingual organizations which developed out of previous 'colonial organizations', such as the Southern African Customs Union (1969), East African Community (1967–1977), Communauté Economique de l'Afrique de l'Ouest (1959–1994), Union Douaniere et Economique de l'Afrique Centrale (1964–1994), as well as the Council of Arab Economic Unity (1962–1964) in the Arab world; see Pennetta, "Organizzazioni," 853–854.

54 See *The Legacy of Raoúl Prebisch*, ed. Enrique V. Iglesias (Washington: IADB, 1993).

55 Tratado de Montevideo istitutivo dell'Asociación Latino Americana de Integración, Montevideo, 10 Aug. 1980.

56 Convenio de Panamá costitutivo del Sistema Economico Latino Americano, Panamá, 17 Oct. 1975.

57 Acuerdo de Integración subregional andino, Cartagena de Indias, 26 May 1969.

58 Treaty Establishing the Caribbean Community and Common Market, Chaguaramas, 4 Jul. 1973.

59 Treaty Establishing the Economic Community of Western African States, Lagos, 28 May 1975.

60 Treaty Establishing the Preferential Trade Area for Eastern and Southern Africa, Lusaka, 21 Dec. 1981.

61 Treaty Establishing the Economic Community of Central African States, Libreville, 8 Aug. 1983.

62 Southern Africa: Towards Economic Liberation. A Declaration by the Independent States of Southern Africa, Lusaka 1 Apr. 1980. See Pennetta, "Organizzazioni," 854–855.

regionalism is less widespread in Asia, due to the 'extrovert' economic choices made by the governments of the countries of that continent. More specifically, Asian examples include feeble initiatives such as ASEAN[63] and SAARC,[64] both characterized by a particular political significance.

On the whole, the results achieved by such second generation organizations did not meet the needs and expectations of their Member States, and in Latin America this led to the acknowledgement of the so-called 'decada perdida'. Epoch-making historical events followed, such as the end of the Cold War, and a new era began with continents opening up to the affirmation of the non-discriminatory multilateralism of the WTO. Thus, once again within the ambit of CEPAL, a 'third' generation inspired by the neoliberal model known as 'open regionalism'[65] developed. This model united – not without difficulty – the universal multilateralism of the WTO with regional economic cooperation, which by definition tends to be discriminatory. The current *proliferation* of regional organizations thus appeared and new forms of association were created, either as additions to or replacements of previous experiences.

In particular, MERCOSUR[66] was created in Latin America and there was a re-interpretation of the experience of association of the Andean Pact, which became

63 Bangkok Declaration (8 Aug. 1967), followed by the Declaration of ASEAN Concord, the Treaty of Amity and Cooperation in South East Asia, Agreement on the Establishment of the ASEAN Secretariat, Bali, 24 Feb. 1976. ASEAN facilitated both institutional and substantive developments until 2007, when the ASEAN Charter was signed.

64 Charter of the Southern Asian Association for Regional Cooperation, Dhaka, 8 Dec. 1985. The SAARC Charter was preceded by the Declaration on South Asian Regional Cooperation, New Delhi, 2 Aug. 1983.

65 *El regionalismo abierto en América Latina y el Caribe, La Integración económica al servicio de la transformación productiva con equidad*, CEPAL, LC/G.1801/Rev,1.P, Santiago de Chile, 1994. For a critical evaluation, see Eduardo Gudynas, *El "regionalismo abierto" de la CEPAL; Insuficiente y confuso* (Silver City: Observatorio Hemisférico, Programa de las Américas, 28 Sept. 2005) and Josè Briceño Ruiz and Raquel Álvarez de Flores, "Modelos de desarrollo y estrategias de Integración en América Latina: una revisión critica," *Cuadernos Sobre Relaciones Internacionales, Regionalismo y Desarrollo* 1 (2006): 64. For a further discussion, in the current historical context, of the choice between *Integración hacia dentro* (*no aperturista*) and *Integración hacia fuera* (*aperturista*), see Márcio Bobik Braga, "Integração Economica Regional na América Latina: Uma Interpretação das Contribuçoes da CEPAL," *Cadernos PROLAM/USP* 1 (2002): 1, and Rodrigo Alves Teixeira and Walter Antonio Desiderá Neto, "La recuperación del desarrollismo en el regionalismo latinoamericano," in *Perspectivas para la integración de América Latina*, eds. Rodrigo Alves Teixeira and Walter Antonio Desiderá Neto (Brasília: Ipea, 2012), 1.

66 Tratado para la constitución de un mercado común…, Asunción, 23 Jun. 1991.

the Andean Community.[67] In addition, the historical experience of ODECA in the 1990s was reorganized into SICA[68] and SIECA,[69] while in the Caribbean, besides the extensive and scarcely significant experience of the ACS,[70] the CARICOM[71] treaty and – more recently – the sub-regional OECS treaty were re-written.[72]

On the African continent, within a complex multi-level regionalism, the 'twin' AEC treaty was signed in 1991 at continental level, followed by the transformation of the OAU into the AU. In addition, the former ECOWAS,[73] COMESA[74] and SADC[75] regional treaties, along with the CEMAC[76] and SACU[77] sub-regional ones, were all rewritten. Agreements of lesser breadth were also signed in various areas of Africa, in a confused tendency towards integration. These included the MRU, CEPGL and COI[78] as well as the so-called

67 The current regulation of the Comunidad Andina, which has been repeatedly amended, is now contained in the Décision No. 563, Codificación del Acuerdo de integración subregional andino, Recinto Quirama, 25 Jun. 2003.

68 In the Sistema de Integración Centroamericana, the Protocolo de Tegucigalpa a la Carta de los Estados Centroamericanos (Tegucigalpa, 13 Dec. 1991) integrates the preceding Carta ODECA of 1951/1962.

69 In the Sub-sistema de Integración Economica Centroamericana, the Protocolo al Tratado General de Integración Economica Centroamerica (Guatemala, 29 Mar. 1993) integrates the Tratado of 1958 as amended and implemented since 1960.

70 Convention Establishing the Association of Caribbean States, Cartagena de Indias, 24 Jul. 1993.

71 Revised Treaty of Chaguaramas Establishing the Caribbean Community, Including the CARICOM Single Market and Economy, Nassau, 5 Jul. 2001.

72 Revised Treaty of Basseterre Establishing the Organization of Eastern Caribbean States – Economic Union, St. Lucia, 18 Jun. 2010, which followed the Treaty of Basseterre, 18 Jun. 1981.

73 Economic Community of West African States Revised Treaty, Cotonou, 24 Jun. 1993.

74 Treaty Establishing the Common Market for Eastern and Southern Africa, Kampala, 5 Nov. 1993.

75 Treaty Establishing the Southern African Development Community, Windhoek, 17 Aug. 1992 (as amended Blantyre, 14 Aug. 2001).

76 The rules and regulations, originally provided in the Traité instituant la CEMAC, N'Djamena, 16 Mar. 1994, and by four Additif au Traité, Libreville, 5 Jul. 1996, are now defined by the Traité revisé de la CEMAC as well as the Convention régissant la Union Economique de l'Afrique Centrale and the Convention régissant la Union Monétaire de l'Afrique Centrale, Yaounde, 25 Jun. 2008.

77 Southern African Customs Union Agreement between the Governments of the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia, the Republic of South Africa and the Kingdom of Swaziland, Gaborone, 21 Oct. 2002.

78 That is the Mano River Union (Malema, 1973), Communauté Economique des Pays des Grands Lacs (Gisenyi 1976) and Commission de l'Océan Indien (Port Louis, 1982/Victoria 1984).

CEN-SAD,[79] created on the initiative of Libya, and IGAD.[80] Finally, taking up previous experiences, UEMOA[81] and EAC[82] were also created – organizations characterized by a greater political coherence of the Member States, as well as by specific juridical features supporting integration.

With the end of the Cold War, many organizations of former Socialist countries came into being, starting with the well-known CIS.[83] These are sometimes characterized by a marked political significance. Such post-Soviet forms of association can be divided into two different groups: those guided by Russia, such as the CIS itself, CSTO,[84] EURASEC[85] and within it the Eurasian Economic Union;[86] and those where the role of Russia appears to be 'counter-balanced' by other States, such as OBSEC and SCO.[87] Only rarely Russia is as significantly absent as in ODED-GUAM.[88]

In Asia, third generation regional cooperation was established according to different models, at times with soft organizations such as BIMST-EC,[89] IORA and APEC, at others with agreements creating regional organizations such as

79 An interesting experience, directly linked to the role played by Lybia, is that of the Traité portant creation de la Communauté des Etats Sahélo-Sahariens, Tripoli, 1998, also known as CEN-SAD. Morocco is currently aspiring to its leadership and a new Treaty was signed in N'Djamena, 15 Feb. 2013.

80 Agreement establishing the Inter-Governmental Authority on Development, Nairobi, 21 Mar. 1996.

81 Traité de l'Union Economique et Monétaire Ouest Africaine, Dakar, 11 Jan. 1994, as amended and integrated by the Traité modifié de l'UEMOA, Dakar, 29 Jan. 2004.

82 Treaty for the Establishment of the East African Community, Arusha, 30 Nov. 1999, as amended on 14 Dec. 2006 and 20 Aug. 2007.

83 Agreement on the Establishment of the Commonwealth of Independent States, Minsk, 8 Dec. 1991, and Charter of the Commonwealth of Independent States, Minsk, 22 Jan. 1993.

84 Charter of the Collective Security Treaty Organization, Chisinau, 7 Oct. 2002.

85 Treaty on the Establishment of the Eurasian Economic Community, Astana 10 Oct. 2000 (as amended on 25 Jan. 2006 and 6 Oct. 2007).

86 The tripartite customs union of Russia, Kazakhstan and Belarus operates within the Eurasec and was formalized through agreements made in 2007, and, subsequently, with the Treaty on the Creation of a Customs Union, Minsk, 27 Nov. 2009 and the Treaty establishing the Eurasian Economic Union, Astana, 29 May 2014.

87 Charter of the Shanghai Cooperation Organization.

88 The Charter of Organization for Democracy and Economic Development (Kiev, 23 May 2006) formalized cooperation activities existing since 1996 among Georgia, Ukraine, Azerbaijan and Moldova.

89 Declaration on the establishment of the Bangladesh-India-Sri Lanka-Thailand Economic Cooperation, Bangkok, 6 Jun. 1997, renamed in 2004 Bay of Bengal Initiative for Multi-sectorial Economic Cooperation.

ECO[90] or the recent formalization of ASEAN.[91] Third generation regional cooperation in the Arab world is quite tenuous. Some relatively insignificant progress has been made within the broad-ranging League of Arab States (LAS)[92] while on the sub-regional level the UMA[93] founding treaty has been signed and the GCC has been strengthened.[94]

In what may seem to be an attempt to go beyond open regionalism, the idea of a 'fourth' generation – 'post-liberal regionalism' – has been recently put forward. This would involve forms of cooperation which, starting from the open regionalism model, would appear to focus on structural and/or social issues as well. Thus, following the Latin American approach, the organizations would operate proactively in a collective manner to reduce the so-called 'asymmetries' (inequalities of an economic, social, developmental, infrastructural nature, *etc.*)[95] among and within the States. This fourth generation, which also foresees the involvement of actors (s.c. stakeholders) other than States, has so far produced contradictory results.[96] Indeed, while it is necessary to introduce

90 ECO Charter of the Economic Cooperation Organization, Izmir, 12 Mar. 1997 (as amended). This agreement stems from a preceding political-diplomatic experience (see footnote 132).

91 Charter of the Association of South East Asian Nations, Singapore, 20 Nov. 2007.

92 'Open regionalism' was developed also within the historic pan-Arab experience following the Pact of the League of Arab States (Cairo, 25 Mar. 1945) and the creation of the so-called Pan-Arab Free Trade Area, adopted with the Declaration of Cairo of 19 Feb. 1997, No. 1317-O.S. This strengthening of pan-Arab cooperation led to an attempt, so far only marginally realized, to modify the statute of LAS through the institution of the Arab Peace and Security Council.

93 Traité instituant l'Union du Maghreb Arabe, Marrakech, 17 Feb. 1989. The Organization appears to be virtually inactive because of political conflict among its Member States.

94 Within the GCC, the only 'active' Arab organization, the Economic Agreement Between the GCC States (Manama, 31 Dec. 2001) replaced the previous Unified Economic Agreement Between the GCC States (Riyadh, 11 Nov. 1981).

95 'Post-liberal regionalism' presupposes a partial replacement of the *Open regionalism* model, and provides for the intervention of the organization, its Member States and 'civil society' at large, in order to contribute to the resolution of social, territorial or structural problems. This social approach arose in Europe with the introduction of the regional policy, redefined as 'economic, social and territorial cohesion' policy under Art. 4 TEU.

96 'Post-liberal regionalism' is being defined within MERCOSUR through the institution, *inter alia*, of the Fondo para la Convergencia Estructural del MERCOSUR, within CARICOM through the CARICOM Development Fund, within SICA through the Fondo Común de Crédito Económico y Financero and within ECOWAS through the ECOWAS Regional Development Fund. In the current historical context the fight against 'asymmetries', or inequalities, is an essential aspect of the activities of UNASUR, SELA and CAn.

instruments of 'positive' action, not all Member States are willing to contribute in any substantial way – in economic-financial terms – to correct the asymmetries of the 'others'.[97]

A minor issue can be found with regard to technical-legal aspects, that is, in the *legal models* of regional organizations. Apart from the question of 'soft organizations' ('organizzazioni di concertazione', 'informal international intergovernmental organizations', which will be discussed below), there is substantial consent in the literature on identifying the two classic categories of organizations of 'cooperation' and organizations of 'integration' which are founded with an international treaty and that needs ratification by the competent authorities of the State.[98]

Very briefly, we can observe that organizations of cooperation are directly connected to the joint exercise of sovereignty by the Member States, with essential respect for the will of each. Thus, both the fundamental principles and the rules regarding the institutional structure and its functions tend to provide for a strong reliance on the classic principles of international law,[99]

Such a model seems to be developing to a lesser extent within the Asiatic organizations – due to the traditional extroverted nature of their economies, open as they are to the global market – and the African ones as well, in which marked economic and financial difficulties hinder the realization of such a model even when it is explicitly provided for. See Pennetta, "Organizzazioni," 860–861, and *Deepening the Social Dimension of Regional Integration*, UNU-CRIS Working Paper W-2008/3. The Alianza Bolivariana para los Pueblos de Nuestra América constitutes a peculiar and atypical expression of the so-called fourth generation.

97 The 'fourth' generation is developing with some difficulty, both due to limited consent among the Member States of individual organizations and the lack of necessary funds, which tend to be provided – and to a limited extent – only by some of the Member States or by international development cooperation. On this topic, see José Antonio Sanahuja, "Del «Regionalismo abierto» al «regionalismo post-liberal»; Crisis y cambio en la integración regional en América Latina," and Laynedi Martinez Alfonso, "Politicas económicas para la integración en América Latina: el dilema coyuntura-estrutura en el analisis de sus principales barreras económicas," *Anuario de la Integración Regional de América Latina y Gran Caribe* (Buenos Aires: CRIES, 2008–09): 11 and 69; "El regionalismo «post-liberal» en América Latina y el Caribe: Nuevos actores, nuevos temas, nuevos desafios," *Anuario de la Integración de América Latina y el Gran Caribe 2012*, eds. Andrés Serbin, Laneydi Martinez and Haroldo Ramanzini jr. (Buenos Aires: CRIES, 2012).

98 The only exception is the GCC Charter, whose Art. 19(1) establishes that: 'The Charter shall go into effect as of the date it is signed by the Heads of States…'.

99 See, along with the classic contributions of Michel Virally, "La notion de fonction dans la théorie de l'organisation internationale," in *Mélanges offerts à Charles Rousseau* (Paris: Pedone, 1974), 277, and "Etat et organisation internationale," in *Manuel sur les*

starting with the principle of equality and with the consent among the Member States.[100] Another principle underlying such organizations, more often implicitly than explicitly, concerns the 'dualism' existing between the organization's law and the law of the Member States.[101] In addition, in the definition of the institutional structure, the role assigned to intergovernmental organs is clearly prevalent, while bodies representing interests 'different' to those of the Member States are of minor importance, starting with the Secretariats themselves, which often lack real and autonomous power. Equally rare are provisions relating to interpretation and settlement of disputes.[102]

The founding agreements of organizations of cooperation are often extremely short,[103] as almost 'Framework treaties' of a planning nature lacking in 'regulatory density'. They limit themselves to establishing the principles and aims of cooperation and the institutional apparatus, which is at times only briefly defined,[104] and contain vague formulas regarding the future activities of

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organisations internationales, ed. René-Jean Dupuy (2nd edn. Dordrecht: Martinus Nijhoff, 1998), 13, the equally classic institutional manual by Schermers and Blokker, *International*, 55 *et seq*. (Section 58 *et seq*.).

100 At times, founding treaties (especially in the Preamble and Principles of the cooperation) explicitly refer to the fundamental principles of international law: sovereign equality, non-intervention in internal affairs, respect for national identity, respect for national integrity, consent of States; see, among others, Art. III of the ECO Charter, Art. II of the SAARC Charter, and Art. 3 of the AEC Treaty.

101 Often the founding treaty does not specify any technical-legal instrument with which the organization and its organs will proceed to realize institutional objectives, but simply indicates decision-making modalities; see Art. XII on Decision making of the ECO Charter, Art. X(1) of the SAARC Charter, and Art. 9 of the GCC Charter.

102 There are often no provisions on dispute resolution, not even with reference to negotiation mechanisms to which States or institutional organs are parties. Sometimes the founding charter provides for the referral to the highest institutional level (Presidents Summit, Foreign Affairs Ministers), but it rarely provides for the creation of a specific Court or Arbitration mechanism, whose actual institution is often postponed and subjected to the voluntary adhesion to future instruments.

103 As an extremely succinct example, see the SAARC Charter (which is made up of only 10 Arts.) or the GCC Charter (21 Arts.). Charters of wider breadth usually provide with a certain precision for principles, objectives, institutional structure and decision-making processes, while substantive rules and regulations are limited to provisions of a programmatic nature.

104 Sometimes only interstate bodies are defined, while the creation of organs representing other interests, starting with Secretariats, is subject to the approval of subsequent protocols; thus, for example, Art. VIII of the SAARC Charter simply provides that 'There shall be a Secretariat of the Association'.

the organization in question, its organs and, of course, of its Member States.[105] Moreover, as will be seen, there is often no definition whatsoever of the legal instruments to be used for the achievement of the organizations' aims and the founding treaty is limited exclusively to the regulation of the 'decision-making process'. Often there is (explicit or implicit) reference to acts which are merely recommended, and at times the 'binding nature' of the act approved by the intergovernmental organs is indicated in a very general way, but no enforcement mechanisms are foreseen. In such types of founding agreements, the so-called variable geometry regulation is relatively frequent. Each act, produced within the institutional apparatus in order to pursue the organization's aims, is 'submitted' for consideration to the Member States, who are 'free to accept it' and, then, to incorporate it into the national legal system with a further approval given in accordance with domestic law.[106]

Essentially, in regional organizations of cooperation, norms lack in regulatory density while national sovereignty has an absolute importance. Thus, the achievement of organization aims appears to be strictly connected to the willingness of States to take on further specific legal obligations (unanimously or through the variable geometry system) for matters for which the organization has competence and, then, to implement them. Indeed, in a dualistic vision of relations between legal systems, it is the responsibility of the States to incorporate such obligations into the national systems. In this type of organizations, the will – 'political' in the first place – of the States is of primary importance and, significantly, there is reference to a 'power oriented process', defined as the explicit 'political' consent on the part of the States. Such consent is required over the organization's lifespan for all expression of intent, even when these are related to matters of secondary importance. In keeping with the tendency to respect State sovereignty, only rarely are there provisions for any kind of judicial mechanisms to settle disputes which may arise within the organization in connection with its normative activity.[107]

105 In this sense, typical expressions used include: 'The organization shall adopt measures to…; shall promote the development of…; The Member States shall establish and maintain a regime for the free movement of goods and services…'.

106 Only the internal laws of the organization may be regulated by acts that do not necessarily require procedures of incorporation. That is the case, for example, of MERCOSUR.

107 It must be noted that the number and quality of 'third-party' (arbitral or jurisdictional) dispute resolution mechanisms provided for within the context of cooperation organizations are increasing. This phenomenon seems to be directly linked to the 'success' of substantive regulation. In particular, the establishment of a free trade area and a customs union (inevitably) entail the creation of jurisdictional mechanisms that are directly or indirectly related to the need for a uniform interpretation of law. In this sense, it is significant

This model of cooperation seems almost contrary to a 'rules oriented process', which is based on legal provisions implying a fully conscious political will for the medium to long term. In that case, the repeated, multiple consent of the States with regard to each and every expression of will by the organization is not always or necessarily required.[108]

Outcomes achieved within the cooperation model are often contradictory and reference is often made to 'shallow cooperation' – traditionally contrasted to 'deep cooperation' which, it is claimed, characterizes the process of European Union integration, considered as the archetype of regional organization. This view is often surreptitiously present in both academic and political discussions, and is the consequence of a 'Euro-centric' vision of regional cooperation processes. However, in evaluating individual cases, it would be more proper to give absolute importance to a more fully informed assessment of the cultural, historical, political, economic and, of course, legal context within which each organization actually operates.[109] Each organization exists within its own context, operates within a particular temporal and historical dynamic, and can achieve significant outcomes independently of the technical-legal cooperation instrument relied upon by the States.

It follows, then, that a different approach characterizes organizations of integration, or 'supranational' organizations. To put it briefly, we may say that

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that, within MERCOSUR, there appears to be a close relation between the completion of a perfect customs union and the institution of a permanent court to substitute the current arbitration system. On the topic, see Yoram Z. Haftel, "Commerce and Institutions: Trade, Scope, and the Design of Regional Economic Organizations," *Rev. Internat. Org*. 8 (2013): 389.

108 In this regard, see Felix Peña, *Algunos desafíos políticos que platea la globalizatión de la integración: el caso de los países socios del Mercosur*, Barcelona, Fundaciò CIDOB, 1–2 Apr. 2004, who extends the brilliant analysis on the WTO to regional experiences conducted by John H. Jackson, *The World Trade System* (2nd edn. Cambridge: MIT Press, 1997), 107–112.

109 With regard to the EU, Armin Von Bogdandy, "I principi costituzionali dell'Unione europea," *DPCE* 7 (2005), 10, observes how the Community integration process is founded on 'national States that are evolved and aware of their identity, States which certainly desire common European institutions but have no intention of being downgraded to the subordinate level of federal entities in a European federal State' (We translate). Such full awareness is not to be found in the associative forms existing in developing countries. At the same time, to imagine the European Union model as the only benchmark of success for integration processes is to ignore both the historical specificity of the European area and the peculiarities – above all cultural – of similar processes realized 'elsewhere'; see Nikki Slocum-Bradley, "Regional Integration, Identity and Culture," in *Elements of Regional*, 241.

this type of organizations is defined by a strong political and legal dynamism as well as by a tendency to restrict, under certain (strictly defined) conditions and with regard to specific competencies, the exercise of State sovereignty. The institutional machinery is quite complex and represents interests which may be different from those of individual States. This is the so-called 'complex multilateralism' where, together with the Member States, political representation bodies – whether denominated as parliamentary assemblies or otherwise – play a fundamental role. In this model, the States at times act according to the traditional principle of sovereign equality, while at others according to the principle of the weighting of votes.[110] The law-making, aimed at the pursuit of institutional objectives, occurs through complex procedural rules and regulations which 'involve' both State and institutional elements, starting with the power of initiative itself. In particular, in the European Union system, the possibility exists (even though, in actual fact, such cases are not very frequent)[111] that an act which is directly binding for the Member States and, at times, also for individuals, may be approved even when one or more Member States vote against it (or abstain). Moreover, since the Treaty of Lisbon, it has been established that also the political component representing the peoples of European States – i.e., the European Parliament – must participate in the decision-making process. Thus, within the close relationship established between the legal order of the organization and that of the States, art. 288 TFEU issues

110 As a matter of fact, weighted systems different from the one adopted in the EU are exceptions. The only other system now in use is (to my knowledge) that provided for in Art. 13(2) of the Eurasian Treaty, which concerns the Procedure for the adoption of resolutions by the Integration Committee at ministerial level. In this case, 40 votes are attributed to Russia, 15 votes each to Belarus, Kazakhstan and Uzbekistan, and 7,5 votes each to Kyrgyzstan and Tajikistan. The required majority is thus of two thirds, which de facto attributes veto power to Russia. The principle of the weighting of votes seems established in the recent Tripartite customs union and in Art. 5 of the Free Trade Agreement between Ukraine, Belarus, Kazakhstan and Russian Federation, Agreement on the Establishment of the Common Economic Zone, Yalta, 19 Sept. 2003, which specifies that: '…The number of votes of each of the Parties shall be determined with allowance for its economic potential. The distribution of votes shall be established on the basis of agreement of the Parties'. Such an agreement does not seem to have been signed, due to the basic inactivity of the organization.

111 On the use, in practice, of unanimity and the 'non' utilization of the majority, even when provided, see Jonathan Golub, "In the Shadow of the Vote? Decisions Making in European Communities," *IO* 53 (1999): 733; Dorothee Heisenberg, "The Institution of 'Consensus' in the European Union: Formal versus Informal Decision-making in the Council," *European Journal of Political Research* 44 (2005), 65–90; Thomas König and Dirk Junge, "Why Don't Veto Players Use Their Power?" *European Union Politics* 10 (2011), 567.

'Regulations' – the atypical characteristic typologies of which are well known – but also 'Directives' which in part conform to the classic principles of international law.[112] This leads, for Regulations, to the interrelated notions of 'direct applicability' and 'supremacy',[113] that is, distinctive qualities which characterize the supranational organization of integration and the EU law.

This atypical regulatory system is guaranteed by a well-defined mechanism of judicial protection which has the task of ensuring 'that in the interpretation and application of the Treaties the law is observed' (Art. 19 TEU), and which includes as actors not only States and institutions, but also private persons. In addition, the teleological interpretation of European Union law adopted by the Court of Justice has, as is well known, made a significant contribution to the success of this model.[114]

For the most part, within the organizations of integration, the common political intent of the States is integrated with the 'principle of legality'.[115] In fact, it can be seen that the 'success' of the process of European Community integration is made up of a synthesis of solid political intent and a refined and atypical legal framework. In this regard, it is important to note that the respect of the rule of law takes on greater importance in the EU than it does in organizations of cooperation and national legal systems. This is especially because

112 Concerning the legislative act known as 'Decision', already listed in Art. 189 of the Treaty of Rome, its current definition under Art. 288(4) TFEU has given rise to 'an extremely heterogeneous and quite confusing state of affairs' (We translate), as Ugo Villani, *Istituzioni di Diritto dell'Unione europea* (3rd edn. Bari: Cacucci, 2013), 292, states.

113 On the supranational character of the EU, see especially Villani, *Istituzioni*, 8–14. The term 'supranational' was already used in Art. 9 of the Treaty establishing the European Coal and Steel Community (Paris, 18 Apr. 1951) with regard to the competences of the High Authority. The expression 'supranational' may also take on a negative value when the States do not intend to limit their sovereign powers in any way; thus, Art. 1(3) of the CIS Charter specifies that: 'The Commonwealth shall not be a State and not be supranational'.

114 On the subject, see *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (The Hague: Asser Press, 2013). On the 'acceptance' of the ECJ's interpretation method by the Courts of 'other' regional organizations, see, in this volume, Ch. 18: Elisa Tino, "Settlement of Disputes by International Courts and Tribunals of Regional International Organizations."

115 On the meta-legal element in the process of European integration, see the substantial article by Biagio De Giovanni, "Il contributo della politica al processo di integrazione europeo," in *Il processo di integrazione europeo: un bilancio 50 anni dopo i trattati di Roma*, ed. Antonio Tizzano (Torino: Giappichelli, 2008), 3. More generally on the relations between law and international politics, see Judith Goldstein *et al.*, *Legalization and World Politics* (Cambridge: MIT Press, 2001).

the founding of the EU was established by a very particular international treaty, and also because in the European Union other factors of integration, such as a common language, history and culture – which traditionally characterize national States – are not present.[116]

Finally, it should be emphasized that in the two typologies under consideration (cooperation and integration) the relationship between the organization's law and the national law of the member countries is quite different. While the organization of cooperation finds its constitutional legitimacy in laws and norms that are common to 'international law', the constitutional foundation for the organization of integration is different, since the latter 'produces' legislation that affects not only Member States and institutions, but also – and in a significant way – private individuals (on whom, at times, it has direct effect). Such modifications in the sources of law involve a different and atypical constitutional basis, expressed in particular or special rules which are the subject of interpretative rulings by national supreme courts.[117]

3 Problematic Aspects of Regional Organizations

Several interesting observations can be made on the brief outline provided above, which has included also 'other' regional organizations.

The 'first' observation relates to the traditionally conventional basis for the establishment of IOs. A broad study of regional organizations in relation to the historical dialectical relationship between hard law and soft law[118] reveals

116 On the subject, see Joseph H.H. Weiler, "The Political and Legal Culture of European Integration: An Exploratory Essay," *Int'l J. Const. L* 9 (2011), 678.

117 In the European countries there is a different constitutional basis for the process of Community integration, which is expressed in amendments, additions and re-interpretations of constitutional texts. In Italy, a 'broad' interpretation was applied to Art. 11 of the Constitution before the amendment of its Title V (Constitutional Law No. 3 dated 18 Oct. 2001), which was carried out 'in a confused manner which had no significant impact'.

118 On the relationship between soft law and hard law, see Nicholas Bane, "Hard and Soft Organizations in International Institutions: Complements not Alternatives," in *Hard Choices, Soft Law*, eds. John J. Kirton and Michel J. Trebilcock (Aldershot: Ashgate, 2004): 347; Gregory C. Scheffer and Mark A. Pollack, "Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance," *Minnesota Law Review* 94 (2010): 706 Gregory C. Scheffer and Mark A. Pollack, "Hard versus Soft Law in International Security," *Boston College Law Review* 52 (2011), 1147, and Christopher Marcoux and Johannes Urpelainen, "Non-compliance by Design: Moribund Hard Law in International Institutions," *Rev. Internat. Org*. 8 (2013) 163.

the widespread presence of the so-called 'soft organization'.[119] In these types of organizations, the foundation of institutionalized cooperation does not consist of a founding treaty (or of norms of international law); instead, the States resort to one or more 'declarations of a political-diplomatic nature'. It follows that the 'political' (rather than legal) legitimacy of the common action of the Member States is manifested in the practices – that is, in the behaviour – that they adopt over time. The States thus progressively reinforce the functional legitimization of the 'concerted' process through a complex, well-defined and commonly accepted practices relating to both institutional and substantive aspects (the so-called 'follow-ups', according to the expression developed within the CSCE, now OSCE).[120] Logically, it is the very political-diplomatic nature of cooperation that permits States acting collectively to have great freedom in defining the institutional apparatus. Thus, intergovernmental bodies that consist of a plurality of State organs, both at political and bureaucratic level, assume a distinctly prominent (albeit not exclusive) role. Often, within 'successful' organizations, there are provisions for the creation of Summits of Heads of States and Governments which have a clear function as political catalysts.[121] Nevertheless, the intergovernmental character of cooperation is not

119 On soft organizations, see, in the literature, Jan Klabbers, "The Life and Times of the Law of International Organizations," *Nord. J. Int'l L.* 70 (2001): 286; Jan Klabbers, "Institutional Ambivalence by Design: Soft Organizations in International Law," *Nord. J. Int'l L.* 70 (2001): 403; Catherine Brölmann, "A Flat Earth? International Organizations in the System of International Law," *Nord. J. Int'l L.* 70 (2001): 319: Angela Di Stasi, "About Soft International Organizations: An Open Question," Ch. 2 of this volume. See also Thomas J. Volgy *et al.*, "Identifying Formal Intergovernmental Organizations," *JPR* 45 (2008): 837; Felicity Vabulas and Duncan Snidal, *Informal Intergovernmental Organizations* (*IIGOs*), paper prepared for submission to the PEIO Conference, Villanova University, 22–28 Jan. 2012, and Special Issue No. 8 of 2013 *Rev. Internat. Org.*: in particular, Randall W. Stone, "Informal Governance in International Organizations: Introduction to the Special Issue," 121, and Felicity Vabulas and Duncan Snidal, "Organization without Delegation: Informal Intergovernmental Organizations (IIGOs) and the Spectrum of Intergovernmental Arrangements," 193.

120 See Conference on Security and Cooperation in Europe Final Act (Helsinki, 1 Aug. 1975) and Charter of Paris for a New Europe (Paris, 21 Nov. 1990). The Budapest Review Conference in Dec. 1994 transformed the CSCE in OSCE with effect from 1 Jan. 1995.
The various types of 'follow-ups' may differ in terms of their legal nature, and they may be implemented both with the approval of further non-conventional acts of soft law and with the signing of various kinds of international treaties (Agreements, Protocols, Memorandum of Understanding, *etc.*).

121 The highest organ in the OSCE, Grupo de Río (now CELAC), Visegrad Group and ASEAN (even prior to the ASEAN Charter), is the Summit of Heads of State or Government, while

exclusive and, at times, the institutional structure includes also organs that represent interests other than those of the Member States. Secretariats and consultative bodies representing economic and, in exceptional cases, cultural interests[122] may thus be established on further manifestations of intent of a conventional[123] or political-diplomatic nature.[124] As far as substantive aspects are concerned, the Member States of soft organizations obviously enjoy broad autonomy and usually proceed to approve various kinds of soft law instruments (such as Declarations, Joint Statements, Guidelines, Non-Binding Principles, Reports, Plans of Action, *etc.*). These are 'improper' sources of secondary law, that is, concerted acts ('instruments concertés non conventionels') which are clearly of a recommendatory, non-binding nature.[125] Of course, the above-mentioned autonomy also permits States to sign what are in fact genuine international agreements, clearly in order to achieve institutional objectives.[126]

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in APEC it is known as 'Economic Leaders'. At times, the highest level of the organization is of ministerial nature, as in the case of CBSS, IORA, BIMSTEC and some other minor organizations.

122 As regards the representation of other non-State interests in Europe, there are provisions for organs of political-parliamentary representation in OSCE and CEI, while in Asia there are provisions for the creation of bodies representing economic interests, such as the APEC Business Advisory Council, the BIMST-EC Economic Forum, the IOR Business Forum and the IOR Academic Group.

123 For the ASEAN, see the Agreement on the Establishment of the ASEAN Secretariat (amended several times); for the SADCC, the Memorandum of Understanding of the Institutions (Harare, 20 Jul. 198); and for the CBSS, the Establishing Agreement of the CBSS Secretariat (Nyborg, 29 Jan. 1998).

124 The APEC Secretariat, which was not originally foreseen, was created with the Bangkok Declaration on APEC Institutional Arrangements (Bangkok, 11 Sept. 1992); the IORA Secretariat, briefly mentioned in Art. 7 of the IOR-ARC Charter, was established after the Maputo Meeting of 30–31 Mar. 1999. In Europe, the Permanent Secretariat of the Council of Baltic Sea States was created during the 7th Ministerial Session in Nyborg (22–23 Jun. 1998), while for CSCE/OSCE the role of Secretary-General was created at the Third Meeting of the CSCE Council of Ministers of Foreign Affairs (Stockholm, 14 Dec. 1992) and subsequently confirmed.

125 Acts of a political-diplomatic nature can refer both to high level political matters (for example, Declarations made by Summits) and technical-functional matters (for example, general or specific Plans of Action and Guidelines issued at ministerial level). On 'concerted', non-binding acts, see Joe Verhoeven, "Les activités normatives et quasi normatives," in *Manuel*, 430–431.

126 With regard to treaties relating to substantive aspects, we may here recall the great amount of rules established within the ASEAN prior to its transformation with the signing of the ASEAN Charter (see the Schedule of ratification of ASEAN treaties/agreements

The soft organization 'model' has become widespread on the Asiatic continent[127] and in the formerly Socialist countries where a progressive institutionalization has occurred over time.[128] The phenomenon has also had a certain wide appeal in Latin America, where soft organizations operate to integrate the 'numerous' existing treaty-based organizations.[129] In this area, CELAC seems to have assumed a particular role as political and economic catalyst for regional and sub-regional forms of cooperation.[130] In Europe, this typology first took on concrete form in the CSCE (now OSCE), to be later embodied in several minor forms of association.[131] As we have just seen, the soft organization model has

available at www.aseansec.org). The same practice is to be found also in the SADCC and GUAM before their institutionalization, as well as in the BIMST-EC with regard to commercial regulations.

127 Soft organizations are widespread in Asia, due to the historical experience and the political and legal culture which developed on that continent. In this regard, see Piero Pennetta, *Il regionalismo multipolare asiatico* (Torino: Giappichelli, 2003), where I observed that all existing organizations, with the sole exception of the Arab GCC, were established, and at times continue to function, as soft organizations.

128 The same process is found in the socialist countries, where numerous soft organizations have signed constituent instruments of 'cooperation'. Thus the Black Sea Economic Cooperation, founded with the Summit Declaration (Istanbul, 25 Jun. 1992), became OBSEC; and the Shanghai Forum (Shanghai, 1996) became the SCO. See also the informal cooperation between Georgia, Ukraine, Azerbaijan and Moldova known as GUAM, which was announced with the 1997 Joint Communiqué (Strasbourg, 10 Oct. 1997) and then formalized with the GUAM-ODED Charter.

129 In Latin America, soft organizations include the Mecanismo de díalogo y concertación de Tuxtla, the above-mentioned initiatives of the Foro del Arco del Pacífico Latinoamericano and the so-called Grupo de Río (Mecanismo Permanente de Consulta y Concertación Política), now CELAC. On the other hand, the Alianza del Pacífico, which came into being in 2011, takes the form of a soft organization and, in 2012, of a trade agreement. Within a broader historical perspective, it may be seen that the OAS which came into being with the first Pan-american conference of 1889–1890, also developed from a previous experience, namely that of the Pan-American Union.

130 The same practice was taken by the Comunidad des Estados Latinoamericanos y del Caribe, established with the Declaración de Caracas (3 Dec. 2011), which developed from both the Grupo de Río and the more recent Cumbre de América Latina y del Caribe sobre Integración. In the literature, see Oscar César Benítez, *Los nuevos procesos y organizaciones en el sistema interamericano* (*UNASUR y CELAC*)*, y sus implicaciones en relación con la OEA*, Paper presented to XXIV Congreso Argentino de Derecho Internacional, "Dr. Julio Barberis," Rosario, 15–17 Nov. 2012, 2–4. From the viewpoint of individual participation, CELAC is characterized by the 'conspicuous' exclusion of the United States and Canada.

131 In Central-Eastern Europe and the Balkans, different soft organizations operate in direct or indirect connection with the European Union and are strongly committed to the

acquired particular importance in Asia, where there are several examples (APEC, IORA, BIMST-EC, RCD/ECO), the best-known of which is the ASEAN.[132] Its Member States – which have been actively cooperating for about 40 years, since the 1967 Declaration of Bangkok – signed the ASEAN Charter[133] in 2007, following developments of an institutional as well as substantive nature. On the other hand, soft organizations appear to be very rare in Africa[134] and the Arab-Islamic world.[135]

With regard to this vast experience, it ought to be stressed that the 'soft organization' often represents the genetic stage of cooperation, a preparatory phase for a formal agreement. 'Satisfied' with the outcomes achieved, the States eventually sign a founding treaty which presupposes, develops and, as a rule, incorporates their prior common activities.[136] This marks a change in the legal nature of the association, since the soft organization is 'transformed' into an organization of cooperation. That is why, in my view, a study of IOs cannot

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pursuit of a balance between national, sub-regional and pan-European identity. These include Central European Initiative (1989); Visegrad Group (1991); Council of Baltic Sea States (1992); Southeast European Cooperative Initiative (1996); Stability Pact (1996), now Regional Cooperation Council (2008); Adriatic and Ionian Initiative (2000).

132 APEC, IORA and BIMST-EC maintain their characteristics as soft organizations. The same may be said of the broader pan-Asiatic cooperation realized within the context of the Asian Cooperation Dialogue, which came into being at ministerial level at Petcheburi (Thailand) on 19 Jun. 1992 and was raised to top level on the occasion of the First ACD Summit (State of Kuwait, 15–17 Oct. 2012). On the other hand, the ASEAN Charter and the ECO Charter (preceded by the Joint Statement by the Heads of State of Iran, Pakistan and Turkey, Regional Cooperation for Development issued in Istanbul on 21 Jul. 1964) represent cases in which an organization has been transformed with the signing of an agreement.

133 The ASEAN has traditionally been considered a 'successful' organization among developing countries and, in addition to its intense 'internal' activities, it is active in 'external' relations within bilateral as well as multilateral contexts, in particular through the ASEAN Regional Forum, the ASEAN *plus three* and the ASEAN *plus six*.

134 The soft organization model is less common in Africa, where the well-known SADCC became active in 1980 and was transformed into SADC in 1992. On the other hand, if the earlier-founded Conseil de l'Entente (Abidjan, 29 May 1959) is still active, its significance is prevalently political and its results are essentially irrelevant. The G5 du Sahel was established recently; see Communiqé final du Sommet des Chefs d'Etat du G5 du Sahel: Création d'un cadre institutionnel de coordination et de suivi de la coopération régional dénomme G5 du Sahel (Nouakchott, 16 Feb. 2014).

135 In the Arab-Islamic world, the soft organization model represents the genetic impulse of the Islamic Conference (Rabat, 25 Sept. 1969), formalized in the founding Charter of 4 Mar. 1972 and revised in 2008 with the above-mentioned OIC Charter.

136 As a rule, following this transformation the new legal entity retains the institutional and material regulations of the previous association. For example, see Art. 38 of the SADC Treaty, that leaves the preceding regulations in force 'if not inconsistent with the provisions of this Treaty', and Art. 52 of the ASEAN Charter.

ignore these forms of association, which should be the subject of a more comprehensive and detailed analysis.[137]

The 'second' observation arising from the study of regional organizations concerns the diffusion of the model of integration which is traditionally identified with the European Community/Union. In actual fact, other organizations currently active in different geographic areas may be said to reflect that model and, in particular, a diachronic study can trace them back to the Community rules set out in the 1957 Treaty of Rome establishing the European Economic Community.[138]

Thus, in Latin America, the historic experience of the Andean Pact – now CAn[139] – follows the supranational model of integration, while in francophone sub-Saharan Africa this model is represented by CEMAC and UEMOA. These two organizations are characterized by an imitation – quite literal at times – of the European Community model and by the fact that the economic and monetary union has already been achieved. In the case of two other examples – EAC in Africa and OECS in the Caribbean – their exact juridical qualification is not easy to determine, due to their founding treaties which are not clear and to legal, administrative and jurisdictional practices that are not yet developed.[140]

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137 The question of the legal nature of the OSCE has been particularly debated in the literature; see, among many others Christine Bertrand, "La nature juridique de l'Organisation pour la securité et la coopération en Europe," *RGDIP* 103 (1998): 365–405; Ivan Ingravallo, "L'OSCE 35 anni dopo Helsinki: ascesa (e declino) di un'organizzazione internazionale *sui generis,*" in *Studi Zanghì*, III, 221.

138 See Laurence Burgorgue-Larsen, "Prendre les droits communitaires au sérieux ou la force d'attraction de l'expérience communitaire européenne en Afrique et Amérique Latine," in *Les dymaniques du droit européen en début de siècle. Etudes en l'honneur de Jean-Claude Gautron,* eds. Claude Blumann *et al.* (Paris: Pedone, 2004), 563; Guillame Fouda, "Les mécanismes juridiques d'intégration régionale en Afrique noire: une application originale du modèle européen," in *Intégration*, 29.

139 For a complete understanding of the CAn, in addition to the above-mentioned Décision No. 563, refer to Tratado de creación del Tribunal de Justicia de la Comunidad Andina, codified by Decisión No. 472, Lima, 16 Sept. 1999; Tratado constitutivo del Parlamento Andino, La Paz, 25 Oct. 1979 (as amended); Protocolo adicional al Tratado constitutivo del Parlamento Andino sobre eleciones directas y universales de sus representantes, Sucre, 23 Jul. 1997. The majority rule was confirmed by the TJCA in the Proceso No. 01-AN-2010, 19 Jun. 2013, *Bolivia c. Comissión*.

140 Within the Euro-Asiatic world, the EURASEC may fall within the same tendency, particularly since the weighting of votes is contemplated along with, to some extent, the binding nature and the 'declared' direct applicability of some norms. A concrete and well-informed evaluation cannot be made since many elements of its regulations and practices, whether legal or otherwise, are not known.

Essentially, all the organizations just mentioned include significant elements imitating the Community model and, it should be emphasized, legislation is produced in subsequent, increasingly focused steps, starting from the establishing treaty.[141] Within the space of this chapter, it will not be possible to examine in detail each organization. However it is still possible to note that, while the study of the organization of integration – or 'supranational' organization – ought to be developed starting from the more significant example of the European Community, it should also deal with non-European cases. In particular, it is important to note that these organizations (CAn, UEMOA, CEMAC) adopt a dispute resolution mechanism (Court of Justice) which is substantially similar to that adopted by the EU.[142] Moreover, the case law of their courts tends to be inspired by the approach developed by the EU Court of Justice as concerns both the method of teleological interpretation and the affirmation of fundamental principles such as the supremacy and direct applicability of 'Community' law.[143] In this regard, it might be observed that scholars do not always give an adequate account of the different types of organizations of integration.[144] So, for instance, the weighting of Member States' votes in the intergovernmental decision-making body, which is considered as an element of the 'Community model', is in fact to be found only in EU legal system.

The 'third' and more complex observation concerns the dynamic nature of the historical development of some regional organizations.[145] In the first place,

141 See for the CAn footnotes 67 and 139, for UEMOA footnote 81, for CEMAC footnote 76.

142 The different dispute resolution mechanisms provided for in the recent OECS treaty are the only significant exception. In complete contrast with the rest of the rules and regulations, which are widely inspired by the European Union model, Art. 18 and the Annex on settlement of disputes, provide for the following systems of dispute resolution: good offices, consultation, conciliation, arbitration and adjudication by the Court of Appeal of the Eastern Caribbean Supreme Court.

143 See Tino, "Settlement," referring to the case law on the fundamental principles of 'supremacy' and 'direct applicability'.

144 In addition to the types clearly inspired by the European Union model, in different cooperation organizations (discussed in this section), elements of integration are included over time. For an opposite point of view, see Guzman, *Doctor*, 24 where "Nothing similar (to the EU) exists elsewhere, and there is little indication that we should expect the EU model be followed in other places"; Achilles Skordas, "Supranational Law," in *MPEPIL*, Mar. 2012 who, however, overlooks supranational organizations such as UEMOA and CEMAC.

145 The dynamic nature of regional cooperation is considered a fundamental element of integration organizations and it is a commonplace that the European Community is a 'process'. Vice versa, cooperation organizations have traditionally been considered static, but, as we shall see, in some organizations there are elements of pronounced dynamism, both institutional and substantive. See Werner Schroeder and Andreas T. Müller,

this dynamism may take the form of a succession of stages that, in organizations of cooperation, lead to the 'generational' changes discussed above. Moreover, this evolution of the economic policy model does not seem to have brought about a change in terms of legal nature, which remains substantially the same as when the organization of cooperation was created. This holds true with regard to the evolution of ALALC into ALADI, ODECA into SICA/SIECA, PTA into COMESA, ECOWAS 1975 into ECOWAS 1993, SACU 1969 into SACU 2002,[146] CARICOM 1973 into CARICOM 2001, *etc.* Also interesting is the so-called 'improper succession' or 'transformation' which occurs, as mentioned above, when a 'soft organization' has been transformed into an agreement-based organization of cooperation.

The 'dynamism' of the organization of cooperation may be reflected, with regard to its institutional aspects, in the approval over time of Protocols concerning bodies which are merely mentioned in the founding agreement (among others, examples include: AU, UNASUR, SADC, ECOWAS, UMA, COMESA, CEMAC, UEMOA, EURASEC, OBSEC, *etc.*).[147]

A practice of greater importance which characterizes some regional organizations is, of course, the creation of new subsidiary bodies that were 'not' originally foreseen. In this way, the States aim to strengthen cooperation by adapting the institutional structure to political and juridical needs arising over time. This involves 'further' protocols introducing parliamentary assemblies or

"Elements of Supranationality in the Law of International Organizations," in *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford: OUP, 2011), 358–378. For lack of space, the present chapter will limit its attention to institutional aspects.

146 In the SACU a 'minor' evolution may be perceived between the 1969 Treaty, which can properly be defined as a multilateral agreement on commercial matters, and the 2002 Treaty which created a true international organization. Moreover, while the 1969 Treaty was in force, the practice led to a partial institutionalization.

147 See AU Act, whose Art. 18 provides that 'A Court of Justice shall be established', and the Tratado UNASUR, 23 May 2008, in which Art. 17 establishes the signing of a Protocol Adicional relating to the Parlamento Suramericano. The same can be said of the SADC Tribunal Protocol and the Rules of Procedures Thereof, Windhoek, 7 Aug. 2000 established in Art. 9 of the SADC Treaty (now Protocol on the Tribunal in Southern African Development Community, Victoria Falls, 18 Aug. 2014, not yet into force). Similarly, in the Revised ECOWAS Treaty, Arts. 13 and 14 establish the Community Parliament and the Economic and Social Council, which were subsequently institutionalized, while in the Traité UMA Arts. 12 and 13 provide for the creation of a Conseil Consultatif and an Instance Judiciaire. Similarly, Art. 18 of the COMESA Treaty concerns the Consultative Committee of the Business Community.

consultative bodies dealing with economic and social matters, as well as courts of justice called upon to exercise the jurisdictional function within the organization; at times, there may be also provisions for the introduction of new and more stringent regulations on legislative acts. In this regard, it is of great interest that, under the laws of some organizations, Member States are free to sign the protocols concerning these new institutions. As a consequence, such institutional modifications or additions apply solely to the Member States of the organization that have agreed to sign and ratify the corresponding treaties. This approach involves the emergence of a variable geometry in institutional matters, so that 'all' the Member States are bound only by the institutional regulations originally set out in the basic treaty, while the 'new' bodies provide that only the 'willing' States which have concretely undertaken binding agreements become members.

Examples of such institutional dynamism are now quite numerous in Latin America, the Caribbean and Africa. Thus, in MERCOSUR the modifications and additions effected over time define a complex regulatory system which is partially different to that provided for in the original Tratado de Asunción, although the legal nature of the organization does not seem to have been changed. The complex institutional structure now in effect also includes an arbitration mechanism for resolving disputes – which has already been modified once (with future plans for a Court) – and a Parliament, endowed with its own powers as well as clearly-defined rules for the creation of secondary law (decisiones, resoluciones, directivas).[148] A similar tendency has characterized the process of Central American integration, where the regulation of the Central American Court of Justice has been defined along with the Central American Parliament and various advisory organs.[149] In addition, there have

148 Regarding MERCOSUR, the most significant institutional additions are represented, among others, by: Protocolo adicional al Tratado de Asunción sobre la estructura institutional del MERCOSUR, Ouro Preto, 17 Dec. 1994; Protocolo de Olivos para la solución de controversias en el MERCOSUR, Olivos, 18 Feb. 2002; Protocolo constitutivo del Parlamento del MERCOSUR, Montevideo, 8 Dec. 2005. In the MERCOSUR system all the institutional modifications and integrations go into effect only once the Protocols have been ratified by all the Member States. Further modifications and additions of an institutional character have been realized through decisions of the organization, such as the creation of the Alto Representante General del Mercosur (Mercosur/CMC/DEC. No. 63/10).

149 Convenio del Estatudo de la Corte Centroamericana de Justicia, Panama City, 10 Dec. 1992 amended several times and to which only four States are parties. With regard to the Central American Parliament, the current system is established by the Protocolo institutivo del Parlamento Centroamericano, 20 Feb. 2008, to which seven States are parties.

been provisions, some very recent, for a well-structured system of legislative acts which seems partially, but significantly, inspired by the European Community system with regard to the act known as 'regulation'.[150] Again in Latin America, the same practice has been established in the CAn, where over time a complex institutional structure has been developed, called Sistema andino de Integración, which includes among other things the Court of Justice, the Andean Parliament and various subsidiary organs.[151] This holds true also for CARICOM, which now has not only its Court of Justice, but also a Parliamentary Assembly (which, however, is of lesser importance).

Institutional dynamism has developed similarly on the African continent in what are now well-established organizations such as ECOWAS, where, after the adoption of the 1993 Revised Treaty and the Protocols on the Court of Justice[152] and Community Parliament,[153] the Executive Secretariat was

150 In the first place, this refers to the Reglamento de los actos normativos del Sistema de Integración Centroamericana, Managua, 1 Dec. 2005 and the Reglamento de organización y funcionamento de los Consejos…. Aprovado con Resolución no. 16–98 (Comieco V) of 19 Jan. 1998 (amended several times). Recently, with the Reglamento para la adopción de decisiones del SICA, San José, 24 Jun. 2013 the preceding 'paracommunitarian' approach was substantially confirmed. In particular, Art. 9 specifies: 'Los reglamentos tendran carácter general, obligatoriedad en todos sus elementos y serán directamente aplicables en todos los Estados que forman parte del SICA'. On the other hand, a Central American act resembling the European Union directive seems to be lacking.

151 In addition to intergovernmental organs (Consejo Presidencial, Consejo Andino de Ministros de Relaciones Exteriores, Comisión), currently the Sistema andino de Integración consists of communitarian organs (Tribunal de Justicia, Parlamento Andino, Secretaria General, CAF, Fondo Latinoamerica de Reservas, Organismo Andino de la Salud, Universidad Andina Simón Bolívar) and advisory bodies of civil society (Consejo Consultivo Empresarial, Consejo Consultivo Laboral, Consejo Consultivo de Pueblos Indigenos, Mesa Andina para la Defensa de los Derechos del Consumidor). Recently, for budgetary reasons and with institutional reforms planned, the abolition of the Andean Parliament has been proposed, with its tasks to be taken over by the UNASUR Parliament, now in the process of being established.

152 The act constituting the ECOWAS Court of Justice is the Revised ECOWAS Treaty (Art. 15), while that regulating it is Protocol A/P.1/7/91 (Abuja, 6 Jul. 1991), as amended by the Supplementary Protocol A/SP/01/05 (Abuja, 7 Jan. 2005). The 1991 Protocol is ratified only by 12 States and the Supplementary Protocol entered in force provisionally upon signature, pending ratification.

153 The act constituting the Community Parliament is the Revised ECOWAS Treaty (Art. 13), while that regulating it is the Protocol A/P.2/8/94 relating to the Community Parliament, as amended.

replaced with the Commission[154] and a new regulation on legislative acts was approved.[155] The same can be said – albeit to an almost marginal extent – of the other forms of association in the area, such as IGAD[156] and ECCAS,[157] in relation to the Parliamentary Assembly. This relatively widespread process is an expression of the broad autonomy proper to every form of association which, at times, extends to the establishment of institutions of a subsidiary nature with technical characteristics. Thus, the cooperation between Southern and Eastern African States has led to the creation the COMESA Monetary Institute, which is of course responsible for monetary affairs.[158]

In other geographic areas, institutional dynamism is weaker, but growing. On the Asian continent, for instance, bodies which represent economic interests seem to be taking on a significant role. This is true especially of organizations such as ECO, SAARC and APEC,[159] while in the case of ASEAN, after numerous institutional additions (including a Secretariat and the definition of

154 The transformation of the Secretariat into a Commission, a collective body, was decided on the occasion of the 29th Summit held at Niamey on 12 Jan. 2005 and confirmed at the 30th Summit held in Abuja on 14 Jun. 2006: Supplementary Protocol A/SP.1/06/06.

155 With regard to normative acts, the Revised ECOWAS Treaty (Art. 1) refers first of all to the instrument of the Protocol agreed by the Member States, while lesser importance is assigned (not only in written instruments, but also in actual practice) to the Decisions of the Authority (Art. 9) and the Regulations of the Council of Ministers (Art. 12). In connection with the creation of the Commission replacing the Secretariat, new rules and regulations on the organization's legislative acts were approved, which introduced elements of supra-nationality and a legal framework which tended to resemble that of the European Community. It should be noted that the text of regulations related to the Commission and the normative acts are not easily accessible.

156 See Protocol establishing IGAD Inter-Parliamentary Union, Addis Ababa, 22 Feb. 2005 signed by only some Member States.

157 Protocole instituant le Réseau des Parlamentaires de la Communauté Economique des Etats de l'Afrique Centrale, Malabo, 17 Jun. 2002.

158 Charter establishing the COMESA Monetary Institute (Legal Notice number 210 published by Order of the Council and Authority), 8 Dec. 2009. The Monetary Institute started operating in 2011 following the ratification by the national monetary authorities.

159 The rare and relatively insignificant examples of institutional dynamism in Asia include the ECO Business Forum created within the ECO, while within SAARC the involvement of the so-called civil society was demonstrated with the recognition of the Regional Apex Bodies and SAARC Recognised Bodies, which include consultative organs on economic matters for the business world, see Pennetta, *Il regionalismo*, 226–228. Stronger institutional dynamism is found in APEC, in which – despite its being a soft organization – the APEC Business Advisory Group was introduced in 1995, thus including business involvement in the activities of the organization.

an arbitration mechanism for resolving disputes), its transformation into an actual regional organization was achieved with the signing of the ASEAN Charter. As for the organizations of formerly socialist countries, there is a certain 'prudence' in their institutional developments, such as the Black Sea Trade and Development Bank[160] created within the OBSEC. The same very cautious approach has been adopted in the Arab-Islamic world, particularly in the GCC and LAS.[161]

With regard to institutional dynamism as described above (even though substantive aspects should also be examined), one may wonder if it somehow confirms the theory, long proposed in the literature, of the so-called 'inverse function'. According to this theory, an international organization operates dynamically throughout its life span, but in a manner inverse to its nature.[162] Thus, when created as an organization of integration, it develops and functions over time as an organization of cooperation; whereas, when originally constituted as an organization of cooperation, it operates dynamically as an organization of integration. The issue is undoubtedly of interest, but the application of the theory to practice is, however, contradictory in the case of the European Community/Union.[163] On the other hand, the theory seems confirmed when we turn to the most active among the organizations of cooperation mentioned above (MERCOSUR, ECOWAS, SICA and, among soft organizations, ASEAN). In my view, this is particularly important and implies a dynamic vision of the processes of regional cooperation. One can observe empirically that institutional structures are actually reinforced – and sometimes consistently – where the cooperation process is supported by a conscious political will (*animus cooperandi*) as well as by positive material outcomes that are (equally) shared by all the Member States.

The 'fourth' and final observation is directly linked to what we have just noted about inverse function and the dynamics of regional organizations. The

160 Agreement Establishing the Black Sea Trade and Development Bank, Tbilisi, 30 Jun. 1994.

161 Examples of institutional dynamism in the Arab-Islamic world are constituted by GCC, with the introduction of the Advisory Board of the Supreme Council in 1997, as well as, at least in part, the League of Arab States, with the creation of the Arab Peace and Security Council (Summit resolution 18/330, adopted on 29 Mar. 2006).

162 René-Jean Dupuy, "Etat et organisation internationale," in *Manuel*, 22: 'chacune (catégorie d'organisation) est travaillée par un principe inverse à celui sur le quel elle repose'.

163 Confirmation of the 'inverse function' theory may be seen in the gradual broadening of the EU's competences, as well as the increased legislative power taken on by the European Parliament. On the other hand, it must be noted that the majority vote is used very cautiously by the Council of Ministers, which, in fact, proceeds by unanimous consent even when it could 'decide' by qualified majority vote (see *supra*, footnote 111).

precondition for the creation of a regional form of association, whatever its legal nature, is the existence of a political will, which tends to be stronger where the organization has a limited number of members.[164] In direct relation to such political will, in integration organizations (real or potential) restrictions of State sovereignty can be established in favour of the organization's institutional structure. On the one hand, such *voluntas cooperandi* is formal and represents the 'legitimacy of origin' of the organization at its creation,[165] but on the other, and most importantly, it takes on meta-juridical value. This is the *animus cooperandi*,[166] the group identity constitutes the 'political and meta-juridical' element which, of course, is not limited to the signing, ratification and coming into force of the founding treaty, but must be manifested over time, taking on fundamental importance for the success of the cooperation. Therefore, there must be legitimacy of origin throughout the life span of the organization, in the performance of the legislative activities aimed at achieving the organization's institutional aims ('legitimation of exercise' or 'fragmentation of consent').[167] This is a medium to long period strategic option by the States in a particular geographical area for conferring particular competences to a *single* organization. Such a decision, *unique* and tendentially 'irreversible', should logically require the *non*-membership of the same States in competing forms of cooperation which have competences in the same areas. This 'irreversibility' is clearly of a political – and certainly not juridical – nature. Such political irreversibility is a fundamental element in the process of European integration, but is not found in other geographical areas where the 'integrationist desire' is dispersed in a plurality of competing and contradictory initiatives.

164 In a regional organization, what is lost due to limited expansion is gained in terms of functional dynamism and institutional development, as observed by Dupuy, "Etat," 15. On the other hand, it must be noted that there are many regional organizations with a limited number of Member States in which no significant results have been achieved.

165 Eric De Brabandere, "The Impact of «Supranationalism» on State Sovereignty from the Perspective of the Legitimacy of International Organizations," in *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law*, ed. Duncan French (Cambridge: CUP, 2013), 450–470.

166 Group identity, or political intent in the communitarian system is almost formalized and crystallized in the 'sincere cooperation' formula (Art. 4 TEU), which regards not only States but also the entire institutional system.

167 Jean d'Aspremont and Eric De Brabandere, "The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise," *Fordham Int'l L. J.* 34 (2011): 190.

In my view, the 'meta-juridical' element is decisive in regional organizations, and its intensity proves to be, on the one hand, independent of the legal model defined at the creation of the organization and, on the other, directly connected with the capacity of the organization itself to achieve its institutional aims. In this regard, a clear example *a contrario* is the Andean Community which, despite provisions for a refined system of rules and regulations inspired by the European Community model, has not achieved expected outcomes. This 'failure' seems to be connected with the evident lack of political homogeneity of the Member States – that is, the absence of a strong and fully shared group identity.[168] Vice versa, in other cases, even when the constituent rules are extremely respectful of national sovereignty, the results appear noteworthy. Thus, MERCOSUR can be considered a successful organization, even though its approach is typically intergovernmental, based as it is on the principle of the so-called 'vigencia simultanea'.[169] Within an entirely different political and legal context, the same positive development occurred in ASEAN, where an institutional and substantial evolution was realized starting from the Declaration of Bangkok in 1967, the original founding instrument, up to the current ASEAN Charter.

The existence (or lack) of a shared identity directly reflects on the abovementioned proliferation and 'co-existence' of a plurality of competing forms of association. An analysis of regionalisms active in different geographical areas makes it possible to perceive a clear difference – first of all in the outcomes – between the regional experience in Europe and 'elsewhere'. In particular, in Europe a univocal political will has arisen which has brought the Community/Union to a 'victory' over other forms of ideologically different

168 The choice of a particular legal model of regional cooperation does not seem to be directly connected, *per se*, to (hypothetical and necessary) positive results for the States in the absence of the meta-juridical element of political intent. Although, of course, foreseeing a legal framework pursuing the integration process can be nothing but 'useful'. Such is the practice of MERCOSUR, a cooperation organization in which few elements of integration have been introduced over time, as well as ASEAN, which, after beginning as a 'soft organization', developed into a treaty-based cooperation organization. In both cases, the material results achieved over time appear to be significant, particularly for developing countries.

169 MERCOSUR requires the consent of all Member States and the subsequent 'incorporación', and applies the principle of 'vigencia simultánea' (Art. 40 del Protocolo di Ouro Preto), that is the simultaneous coming into force of an act (decisión, resolución, directiva) in all national legal systems. The rare exceptions to this principle are possible only in some external protocols agreed among the Member States, in cases where there is an explicit provision for the protocol coming into force in a smaller number of States.

(CMEA)[170] or simply competing (EFTA) associations. There is also a differentiation, both *ratione materiae* and *ratione personarum*, of the Community/Union with respect to other forms of association operating in the area (NATO, CoE, OSCE). From the point of view of the organizations, 'elsewhere' – outside Europe – there is a 'pluralism of associations' – that is, 'several' organizations operating within the same territorial area and having the same or similar competences. From the point of view of the States, we have 'participatory pluralism' with an evident 'overlapping membership'. The reference here is to the membership of a State in a plurality of organizations which have competences over the same matters and operate in the same or bordering geographical areas.

In essence, outside Europe, the States often appear to be incapable of making univocal choices – first political and then legal – in favour of a 'single' organization with specific attributed competences: they often become members of several forms of associations at once, organizations which coexist, overlap and – for this and other reasons – are unable to fully achieve the objectives set out in their charters. Such cases are particularly frequent on the African continent,[171] but also to a significant extent in Latin America and the Caribbean,[172] the Arab world[173] and the formerly socialist countries.[174] The two above-mentioned

170 It should be said that the CMEA was formally characterized by a substantial respect for the national sovereignty of the individual Member States, but in practice there was a 'strong' leading State (URSS), which constituted the antithesis of the supranational experience.

171 Despite political statements and legislative provisions to the contrary, Africa is a dramatic example of the two phenomena referred to. Going against Art. 1(d) of the AEC Treaty, which provides for the division of AEC into 5 *Regional Economic Communities*, as many as 8 organizations have been officially defined as such: in addition to UMA, ECOWAS, COMESA, ECCAS, SADC there are also IGAD, SIN-SAD and EAC. There are evident multiple memberships of one State in two or more RECs. Moreover, a second level of the sub-regional type provided for in Art. 1(e) of the AEC Treaty is active and includes not fewer than 6 Sub-Regional Economic Communities (MRU, UEMOA, CEPGL, CEMAC, SACU, COI) and an unspecified number of technical-functional organizations.

172 On this subject, see Piero Pennetta, "Consideraciones sobre los procesos de integración regional en Europa y América Latina," *Cultura Latinoamericana* 15 (2012), 181; Fernández Reyes Jorge, "La pertenencia simultánea de los estados en los acuerdos de integración en América Latina," *Revista de la Secretaria del Tribunal Permanente de Revisión* 1 (2013), No. 2, 129.

173 Phenomena of associative pluralism and participatory pluralism in the Arab world are less pronounced. Within the LAS, forms of partial cooperation expressed in the GCC, UMA and CAEU (Council of Asian Economic Unity) are considered legitimate. Moreover, LAS Member States are also members of COMESA, CEN-SAD and the so-called Agadir Agreement of 5 Feb. 2001, subsequently formalized with the Agreement for the Establishment of a Free Trade Zone between the Arabic Mediterranean Nations, Rabat, 25 Feb. 2004.

174 See Kembayev, *Legal*.

phenomena are of marginal importance in Asia, which I believe is due to a fundamental difference in the historical approach to regional cooperation on that continent.

From the objective existence of associative pluralism and participatory pluralism in different geographical areas, it follows that the reconstruction proposed in the literature – that is, the emergence of an intermediate 'regional' level between the individual State and the universal dimension of institutionalized cooperation – does not fully correspond to reality, taking into account only one of several tendencies at play. Moreover, since in many cases no 'significant' competences are conferred on individual organizations, the common institutions of an organization are often unable to exercise adequate powers at global level. Only the EU and its complex institutional machinery are capable of representing Member States at universal level in a unified way – albeit solely with regard to some matters and not without difficulty – according to the fascinating but far from realistic formula of the EU as 'global actor'. A similar possibility to 'represent' the political-economic interests of a particular region or sub-region in international *fora* exists to a very small extent where the organizations, on the one hand, compete with each other within the phenomena of associative pluralism and participatory pluralism mentioned above, and, on the other, prove to be institutionally 'fragile', both at internal and external level. Essentially, the reconstruction proposed in political science studies describes a tendency, and perhaps a desirable one. However, at the moment a comprehensive analysis of the 'other' regional organizations different to the EU does not make it possible to precisely identify 'who' (which organization) represents 'whom' (which States) and for 'what' (what competences).

4 Contribution of Regional Organizations to the Study of International Organizations

In the light of the above analysis of the proliferation of regional organizations, it seems now appropriate to examine some aspects which have largely been considered essential in the study of IOs. We will here refer to: (i) the constituent instrument, (ii) international legal personality and (iii) the attribution of acts performed by the organization. In this cases also, I think it will be wiser and more prudent to pose questions rather than venture to provide answers.

The 'first' point has already been mentioned but is worthwhile returning to. In European and extra-European regionalism there is a great number of 'soft organizations' whose charters are not international treaties. Soft organizations regularly operate both in the context of domestic relations among the Member

States and in that of international relations with third countries, sometimes taking on both political and juridical significance. On the other hand, we have observed that many treaty-based cooperation organizations have regulatory provisions which are merely programmatic and exhortative in nature. These quite numerous organizations lack 'dense' juridical-regulatory provisions so that, apart from a few scant basic regulations, the definition of the institutional and substantive legal framework is directly related to future legislative activity to be carried out by the prevalently inter-governmental institutional apparatus, according to the principle of State consent. Quite clearly, this future legislative activity is directly connected to the expression of the will of the Member States which must be reiterated from time to time in the intergovernmental institutional structure. One gathers from this that in concrete terms there is a very small difference between 'soft organizations' and many of the 'organizations of cooperation'.[175] We can thus legitimately question the very notion of international organization and, in this regard, it may be useful to refer to the broad category of *soft* organizations as well. Unbiased reflection on the theme could be useful in relation to what will be said on international legal personality and legislative acts.[176]

The 'second' critical aspect concerns the historic issue of international legal personality, according to which the international organization is (or would be) a subject having legal title to rights and obligations under international law.[177]

Very briefly, it will be observed that for the purpose of affirming/recognizing international legal personality, we traditionally refer to the case law of the International Court of Justice, starting from the well-known *Bernadotte* case

175 Pennetta, *Il regionalismo*, 315–369.

176 On this question, French scholars appear interested in a scientific-dogmatic reconstruction, rather than a pragmatic analysis, of 'few' albeit qualified organizations. See, among others Marie-Clotilde Runavot, "L'avenir du «modèle intergouvernemental» de l'organisation internationale," *RGDIP* 115 (2011): 675–709; Raphaël Rivier, "L'utilisation d'autres formes d' «organisation internationale»," *RGDIP* 116 (2012): 483–509; Carlo Santulli, "Retour a la théorie de l'organe commune," *RGDIP* 116 (2012): 565–578. French scholars significantly recall the contractual theory of the 'common organ' developed in Italian doctrine since the study by Dionisio Anzilotti.

177 For a reconstruction of the question of international legal personality, see Schermers and Blokker, *International*, 985 *et seq*. (Section 1559 *et seq*.), Tarcisio Gazzini, "Personality of International Organizations," in *Research Handbook on the Law of International Organizations*, eds. Jan Klabbers and Åsa Wallendahl (Cheltenham: Edward Elgar, 2011), 33, and Jean-Louis De Baillenx and Yves Nouvel, "La personalité des organisationes internationales au crible de son enonciation," *RGDIP* 116 (2012): 579–604.

regarding the UN.[178] According to the interpretation of such practice provided in the literature, it can be inductively reasoned that the UN (and, generally, its Specialized Agencies) have international legal personality. Moreover, on the basis of the same practice, it can be deemed that international legal personality can be conferred not only upon States, but also IOs, defined as a general abstract legal category. It follows that, when assessing if an organization is entitled to international legal personality, the attribution of international legal personality must be considered in direct relation to that specific organization. To summarize, we may say that, to this end, two simultaneous elements are necessary. The first is a 'subjective' element: the so-called 'treaty-making power', or the organization's rules and regulations, as set out in the founding treaty or developed over time, concerning the (actual or potential) establishment of international legal relations with other 'subjects' belonging to the same legal system. The second is an *objective* element: the practice connected to the relationship to other subjects of international law, in the first place States which – obviously – are *not* members. Such third parties recognize the specific organization (under consideration) as 'another' subject of international law with which to 'deal' – that is, with which 'to establish bilateral and multilateral relations' as an 'equal subject' within the international legal system.

Therefore, when the practice of the 'other' regional non-EU organizations is considered, it is easy to see the presence of a (more or less intense) 'external activity or action'. Nevertheless, such practice does not appear to be attributable to the organization as such, both with regard to the subjective element (within the organization) and the objective one (outside the organization). Concerning the first aspect, the objective limits found in the concrete definition of 'treaty-making power' lead us to doubt the 'confidence' which Member States themselves actually have in the regional organization of which they are members.[179] With regard to the second aspect, even third parties seem to show

178 This is the well-known *Bernadotte* case, regarding *Reparation for injuries suffered in the service of the United Nations,* Advisory Opinion, 11 Apr. 1949, *ICJ Reports* 1949, subsequently followed by the case related to the *Interpretation of the Agreement of 25 May 1951 between the WHO and Egypt*, Advisory Opinion, 20 Dec. 1980, *ICJ Reports* 1980.

179 Such doubts can subsist also in organizations of integration such as the CAn, where with relation to the so-called *treaty making* power, there is a provision for an external common activity of the organization only 'where it is possible'; see Decisión No. 598 Relaciones comerciales con terceros países, Quito, 11 Jul. 2004. The same can be said for UEMOA and CEMAC where the external relations of the two organizations 'merge' with those of the Member States and with those of the larger organizations in the area, respectively ECOWAS and ECCAS.

a 'certain, at times evident, lack of confidence' in many regional organizations and prefer to establish a relationship with the Member States rather than with the organization and its institutional apparatus. This practice emerges in particular in the signing of international treaties. An evident example can be found in the practice of MERCOSUR, where treaties are signed at once by 'contracting parties', a term which refers to the organization, and by 'signatory parties', that is, the Member States of MERCOSUR.[180] The same can be said of the sub-regional Latin American organizations SICA and CAn, as well as of cases in other areas which cannot be discussed here for lack of space, and where either no significant practice has developed or no negotiating phase has yet been reached.[181]

Thus, an analysis starting from 'traditional' parameters could actually lead to the 'non'-recognition of international legal personality – 'non'-recognition both for many (or a great many) regional IOs and, obviously, for technical-functional organizations. Thus, proceeding by induction from the study of 'other' regional organizations, it may be that international legal personality, defined in the classic sense, does not constitute an essential element in the notion of international organization.

One last issue I wish to emphasize concerns the attribution of acts performed by the organization. The phrase 'acts of the organization' traditionally refers to the expressions of will (decisions) performed by the institutions of the organization according to its rules and regulations. Such acts are to be attributed to the organization as such and, clearly, not to its Member States. Thus, particularly in relation to regional organizations, reference is made to the fundamental or basic law of the organization, set out at its creation and sometimes amended or integrated. Vice versa, secondary law is produced by the organization through the law-making activity of its institutions and, as such, is imputable to the organization, which holds a normative power.

180 Such is the case of Preferential Trade Agreement between the Southern Common Market (MERCOSUR) and the Southern African Customs Union (SACU), Belo Horizonte, 16 Dec. 2004.

181 One might recall the difficulties experienced in concluding the Economic Partnership Agreement between the EU and the organizations of the ACP countries provided for in the Cotonou Agreement. The only one concluded was that between the EU and the Caribbean countries which, nevertheless, are not represented by CARICOM but by CARIFORUM, that is by the ACP countries of the Caribbean, which work together collectively as a group of States. The question of the four areas of sub-Saharan Africa appears to be even more complex, since despite consolidated relations of the EU with some organizations (ECOWAS, SADC, *etc.*), only partial agreements with some States have been concluded.

A study of the practice of the 'other' regional organizations will show that often no specific instrument of action is established in the statute of the organization and, therefore, the treaty 'implicitly and naturally' becomes the legal instrument upon which to rely in order to achieve institutional objectives. These are agreements concluded by the Member States following the initiative or request of the institutional bodies of the organization ('sponsoring international treaties').[182] Moreover, in some organizations, the conventional instrument is explicitly indicated in the statute as the instrument of action, often the only one and at times, but not necessarily, supplemented by institutional acts of different juridical value.[183]

In essence, these conventional acts, which I like to call 'external protocols' in that they are concluded after the birth of the organization,[184] are clearly not imputable to the organization as such, but to the States that sign and ratify them and for whom they go into effect. The organization takes on the role of facilitator for Member States in concluding treaties to which the organization itself is not a party (although it can at times be charged with secondary roles, such as the deposit of the ratifications).

Moreover, the statute of some organizations may at times require all the Member States to sign and ratify each external Protocol, so that the latter may go into effect for all of them at the same time. More frequently, the variable geometry or opting-out possibility is foreseen, which permits Member States to choose whether or not to sign each external Protocol.[185] As has already been

182 Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge: CUP, 2002), 217, notes that often the international organization restricts its normative activity to 'sponsoring the conclusion of treaties' on the part of its Member States. On the issue see also Manuel Diez de Velasco Vallejo, *Las organizaciones internationales* (16th edn., coordinada par José Manuel Sobrino Heredia, Madrid: Tecnos, 2010), 129–147.

183 Art. 33(f) of the Tratado ALADI assigns the Conferencia, made up of the representatives of the Member States, the competence of 'Propiciar la negociación y concertación de acuerdos…'. See as well Art. 22 'Protocols' of the SADC Treaty; Art. 3 Convention CEPGL; Art. 4 Pact of the Arab League.

184 On the contrary, agreements concluded at the signing of the establishing treaty and relating to particular aspects of both institutional and substantive regulations are defined as 'internal protocols'.

185 The freedom to accede to a treaty (or external protocol) concluded within an organization, is traditionally provided for in universal organizations. An example is the practice of ILO. The analysis of the 'other' regional organizations allows us to observe that the variable geometry system (the alternative of opting out) is almost the 'rule'. Furthermore, the freedom of the States to be parties to an external institutional/substantive protocol implies that the legal framework of the organization, common to all Member States, is reduced to the original founding treaty and the protocols (to be defined case by case) in effect for all the Member States.

observed, the States legitimate the origin of the powers of the organization by formally expressing their will in a conventional instrument when the organization is created. In order to achieve the objectives set out in the statute, during the lifetime of the organization it will be necessary for the States to repeat such expression of will for each 'external protocol' they intend to conclude. This means that there will be a constant, necessary confirmation of consent on the part of the States in the exercise of their sovereignty.

Thus, the 'external protocols', even though often the only or principal instrument of action, cannot qualify as institutional acts of the organization and cannot be attributed to it. These are international treaties concluded within the scope of treaty law, as amended or integrated by the statutory rules of the organization or by its practices. The organization is not a party to the 'external protocols' and it is quite possible, because of the autonomy of the contracting States, that they remain in force among the parties even after the organization has ceased to exist or a State has withdrawn from it.

A further observation ought to be made with respect to institutional acts imputable to the organization, about which we have already noted that often the statute only provides for the 'decision-making procedure'. In such cases, nothing is said about the legal value of such expressions of will which, in fact, frequently are simply recommendations. Provisions relating to the binding nature of an act are exceptions, and the meaning of that act is not always clear, since it is only exceptionally connected with the provision of political and/or jurisdictional methods of enforcement. Within this perspective, only rarely are dispute resolution mechanisms available, and individuals can only exceptionally bring claims before a regional Court.[186] In essence, examining the practices of 'other' regional organizations, different to the EU, may lead to a critical analysis also of the organizations' expressions of intent, their attribution and their legal value. Moreover, the issue of the attribution of acts – whether conventional or institutional – is connected to the problem of the responsibility of IOs, which I will only briefly mention here, and which the International Law Commission has long been considering.

There are obviously many other questions that are connected with the quantitative and qualitative growth of regional organizations, and one new discipline of study is especially worthy of notice: inter-regionalism, that is, the definition of 'horizontal' legal relations among groups of countries or regional organizations which are active in different geographical areas. I would like to

186 On the possibility of individuals to take legal action, see Elisa Tino, "L'accesso diretto dei soggetti privati alla giustizia nelle organizzazioni regionali dei Paesi in via di sviluppo," *DUDI* 7 (2013): 3.

refer not only to the relatively well-known North–South inter-regionalism, established in particular through the actions of the UE and EFTA, but also to South-South inter-regionalism, which is for the most part largely unknown.[187]

In conclusion, I believe that a more wide-ranging and in-depth study of regional organizations, extending beyond the paradigmatic example of the European Union, would be very useful. It would contribute to a critical consideration of the reconstruction so far provided of the phenomenon of the international organization. Perhaps there is an excessive complacency (and, permit me to say, intellectual indolence) in the study, reconstruction and, finally, theory of IOs, which seem to be developed inductively, starting from the 'extremely' qualified practice of universal organizations and including only few or very few regional organizations. This paper humbly suggests that wider and more rigorous research in the field is possible.

187 Inter-regionalism has developed first and for some time in a North–South direction, but has recently taken a new South-South direction. This new relationship takes the form of political-diplomatic relations among macro-areas (or between groups of States) including, among others, Forum for East Asia and Latin American Cooperation (FEALAC/FOCALAE); South American and Arab Countries Summit (ASPA); Cumbre América del Sur – Africa as well as of political-diplomatic relationships and agreements among the more active regional and sub-regional organizations in different Southern areas (MERCOSUR, SACU, GCC, ASEAN).

CHAPTER 4

Universalism and Regionalism in the History of the United Nations and of Specialized Agencies

Alessandro Polsi

1 Introduction

The birth of international organizations (IOs) in the 20th century had to cope with the dichotomy between 'regionalism' (and regional affiliation) and 'universalism'. The way in which regional organizations could relate themselves to and integrate into the international organization can be analysed either according to a functionalist perspective, or by looking at a cultural dimension that focuses on integration and/or a cultural clash between different regional identities. The cultural approach was mainly discussed in the 1990s and today it has become less relevant, due to its strong ideological dimension, which can easily lead to political manipulations.

In 1992, when the euphoria following the end of the Cold War reached its climax, and before a new series of regional crises in the Balkans and in Africa broke out, the political scientist Francis Fukuyama published his famous book *The End of History and the Last Man*. In that volume the author provocatively identified the end of Cold War as the conclusion of a long historical process of universal affirmation of Western democracies' values and institutions. According to him, western civilization could be considered the development paradigm for the entire world.

A year later, the International Relations scholar Samuel Huntington published in the journal *Foreign Affairs* the essay *The Clash of Civilizations*, which would later gain great popularity and longevity thanks to its rediscovery in the aftermath of the terrorist attacks of 11 Sept. 2001.[1]

Both texts were widely discussed – even though sometimes sketchily, – because they were shedding light on the main problem concerning the way IOs developed in the last century: is it possible to identify a set of values which are universally shared and which represent the basis of an international organization?

1 Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992); Samuel Huntington, "The Clash of Civilizations?" *Foreign Aff.* 73 (1993): 3.

The authors addressed this question in opposing ways. According to Fukuyama, the story ended in 1989 with the triumph of the liberal democracies' values. On the other hand, Huntington stated that there was no way to harmonize Islam and the Western democratic tradition; for this reason, the world was doomed to an inevitable clash of civilizations.

Anybody is able easily to understand the difference and the relationship between States and a universal international organization such as the United Nations (UN), which is composed of States, and the aim of which is at the same time to preserve peace among them and to guarantee each State's sovereignty. Actually, the meaning of regional agreements and/or organizations is more difficult to understand If we take a list of existing regional organizations, they range from strong levels of administrative and political supranational power, such as the European Union, to a light organization such as the Latin Union, which is composed of 36 countries that use Romance languages and was created in 1954 in order to promote cultural exchanges and preserve the cultural identity of Latin peoples.

Regionalism can include both States that associate themselves on the basis of geographical contiguity and membership of military alliances of States that are located in different areas of the globe and are connected by common interests and ideological visions (for example, the North Atlantic Treaty Organization-NATO alliance).[2]

From the point of view of cultural identity, the distinction is clearer: universalism aims at including all existing States within a single universal structure and on an equal basis, and at creating a multilateral decision-making centre. At the same time, a universalist approach postulates the rightness of applying the same policies and institutional formulas all over the world. It assumes to a certain extent the existence of a core of universal values that are shared globally.[3]

On the other hand, in the 'muscular' meaning that Huntington suggested, regionalism is the institutional recognition of different cultural identities and ethics that are neither immediately reconcilable, nor classifiable in a hierarchical order. When a 'regional' vision arises in a universal perspective, the clash – a clash of civilizations – seems unavoidable.

The fluctuation between universalism and regionalism and the apparent shift from a functional approach to a cultural one are the background upon which IOs developed up in the 20th century.

2 Christopher Hemmer and Peter J. Katzenstein, "Why Is There no Nato in Asia? Collective Identity, Regionalism, and the Origins of Multilateralism," *IO* 56 (2002), 575–607.

3 *Imperialism and Internationalism in the Discipline of International Relations*, eds. David Long and Brian C. Schmidt (New York: State University of New York, 2005).

2 The Beginning: Functionalism and Universalism

The initial stage of IOs developed according to a strong universalist approach. International law arose as a new academic discipline in the mid-18th century. Its foundations were built both on positive law, created by the treaties signed by the most important European countries, and on the academic contributions of noted scholars from Europe and United States. The Treaty establishing the Red Cross in 1864 was the paradigm of a new approach to international relations: the Treaty was universal in its purpose and in its nature and was open to all countries which were willing to adhere to it.

In the same period two major intellectual circles promoted the development of and a systemic approach to international law: a European circle, composed of scholars who finally met at the *Institut de droit international* founded in Ghent in 1873; and an English-American circle, composed of scholars belonging to the International Law Association – also founded in 1873 — that before the World War I numbered many American politicians such as US President Taft.

Both circles shared the goal of identifying universal principles of international law, even suggesting the possibility of writing a general code of public international law that all nations could adopt. In their opinion the epistemological basis of international law was the ability to define the entire universe of international relations as if they were based on legal nature. The more extreme wing among the first internationalists foresaw that, in case of need, a supranational organization or a coalition of States might be created and legally invested with the power to sanction any illegal conduct by States.[4]

The universalist utopia of these intellectual elites was boosted by their belonging to the white minority that on the eve of the 20th century ruled over all the richest and most powerful nations of the globe and, through colonial rule, had the power to govern and exercise rights of sovereignty over almost four-fifths of the planet.

This universalist aspiration clashed with a big political constraint, i.e. the Monroe Doctrine. While the US political elite managed to combine internationalism and international legalism with the claim of protecting (and dominating) the other American countries, the Latin American elites perceived the emergence of an internationalist utopia as a way to disengage – at least partially – from the weighty protection of such a powerful neighbour. This shift

4 Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960* (Cambridge: CUP, 2001); Francis A. Boyle, *Foundations of World Order. The Legalist Approach to International Relations, 1898–1922* (Durham: Duke University Press, 1999).

took place in the early years of the 20th century: in 1899 the majority of Latin American countries had not been invited to the first international peace conference convened in The Hague by the Tsar of Russia. In 1907, when the second conference was convened, almost all American States sent diplomats to the Hague, their status as fully sovereign and independent countries thus being recognized. It was no coincidence that one of the most important results of the conference was the acknowledgment of the so-called 'Drago doctrine', according to which European countries agreed not to make any use of force while persuading South-American countries to pay back their debts.[5]

It was the foreign policy of 'pacification' with Latin American countries – carried out by President Wilson – to pave the way towards the acceptance of a universal order based on the recognition of a world community composed of equal sovereign States. This order would result at the end of the World War I with the establishment of the League of Nations (LoN), the International Labour Organization (ILO) and the Permanent Court of International Justice.

The involvement of Latin American countries was crucial in giving a true universalist imprint to the institutions that were born out of the Peace conference at Versailles.

Nevertheless, Art. 21 of the Covenant, at Wilson's specific request, retained the peculiarity of American regionalism and allowed the existence of regional arrangements aimed at maintaining peace.[6] According to Wilson, the Monroe Doctrine could be inserted into the structure of the League, which could represent its further development. This view was not shared by many members of the US Senate: some of whom believed that Art. 21 was in conflict with another principle of the Covenant, expressed by Art. 10, which guaranteed the territorial integrity of each Member State. In their opinion this Article could undermine the basis of the Monroe Doctrine, which allowed American States to manage their own collective security. By accepting this different interpretation, the Senate ended up rejecting US membership of the League.

Most probably, the US senators were right: when in 1920 the Bolivian government asked the Assembly of the League to rule on its request to revise the Treaty of 1904 which had established the Bolivian boundaries with Chile, many diplomats stated that the LoN was not competent to deal with matters relating to American States' internal affairs. A committee of jurists was appointed to

5 Luis Maria Drago, Argentine Ministry of Foreign Affairs, formulated the request to forbid the use of force to collect debts from South American nations.

6 LoN Covenant, Art. 21: 'Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace'.

discuss the issue of jurisdiction. It finally ruled for the incompetence of the League; yet, not on the basis of the Monroe Doctrine as Art. 21 would require, but according to the principle that an international treaty between two States could be changed only by those same States.[7]

The League's competence in American affairs was newly reaffirmed during the Chaco War, when contenders turned to Geneva looking for a solution to the conflict. It was no surprise that the most loyal supporters of a universalistic approach to the international organization were South American countries, which perceived it as a way to mitigate the US hegemony.

The Treaty of Versailles included social provisions as well. These foresaw the creation of an International Labour Organization that was supposed to include all League Members, and could also accept non-Member States. Despite enjoying extensive autonomy, the ILO was to work in close coordination with the League while pursuing its goals.[8]

The League tried to adopt this model of coordination in other already existing international agencies, such as the Universal Postal Union and the International Institute of Agriculture; but these organizations refused to be too close to the League. Member States' governments were afraid of giving too much emphasis to the League, fearing that Geneva could take on supra-State functions over time. Moreover, the USA constantly threatened to withdraw from organizations if they were placed under direct or indirect control of the League.

Nevertheless, even if the political environment was not so favourable, in accordance with Arts. 23 and 24 of the Covenant several technical bodies and standing committees were established, some of which were heirs to the international unions that had been operating since the late 19th century.[9]

The United States' decision not to belong to the LoN had important consequences on its (low) universalist approach, mainly because the League lost one of the most influential countries in the world. In the 1920s, the USA once again limited its interest and intervention to the American space and focused its foreign policy on strengthening the system of Pan-American conferences, an institution that was based on periodical meetings among all American States and had been operating since 1889 with a permanent office in Washington. After the conference held in Havana in 1928, the Pan-American Conference

7 Percy A. Martin, "Latin America and the League of Nations," *APSR* 20 (1926): 14–30.

8 George N. Barnes, *History of the International Labour Office* (London: Williams and Norgate, 1926).

9 Among them were Economic and Financial Organization, Health Organization, International Commission for Intellectual Cooperation, Permanent Central Opium Board, Committee on the Traffic in Women and Children.

evolved into a more formalized structure. The name was changed to the Pan-American Union and the institution, although its explicit goals were also political, limited its activity to cooperation in the economic field, quickly assuming a leading role in both the political sphere and the codification of international economic issues. This evolution sparked fears about a possible lack of coordination between the League and the Union and led to some debate in Geneva, since 17 Latin American countries belonged to two institutions at same time.[10]

Some commentators who wished to insert the United States back into the system of collective security advanced the extreme hypothesis of reorganizing the League on a regional basis by integrating the Union as an American segment of the League. Some others suggested transforming the Pan-American Union into an American League, but such a proposal obtained even less support.

Actually, the problem was never considered acute, and it remained confined to the sphere of mere academic debate. Both organizations were composed of and ruled by countries and elites which largely shared the same cultural and political values. Finally, in the late 1930s the US President F.D. Roosevelt ended the isolationist period and brought about a season of informal political collaboration between the US Government and the LoN.

The same behaviour applied to the Commonwealth countries that were included in the 1931 Statute of Westminster: they were already Members of the League and had been since its foundation (including India, the only not yet independent nation to be admitted to Geneva), they did not aspire to form a regional group and were able to manage the double membership without trouble.

3 The Second Start. The Universalism Victory

1943 was a key year in the political debate concerning universalism and regionalism. The discussion on the new post-war international order marked the victory of a universalistic approach within the US administration, an approach that was shared by Roosevelt, Henry Wallace and the deputy Secretary of State Cordell Hull. But publicist Walter Lippmann[11] and Republican leaders Arthur H. Vandenberg and John Foster Dulles also agreed on the United States' need to meet the political responsibility that its leading role in the world required.

10 Claude. A. Swanson, "The Pan American Union," *The Advocate of Peace through Justice* 87 (1925): 676–680; Arthur K. Kuhn, "Coordination between the League and the Pan American Union in Regard to Codification," *AJIL* 22 (1928): 590–592.

11 Walter Lipmann, *U.S. Foreign Policy: Shield of the Republic* (New York: Little Brown, 1943); Townsend Hoopes and Douglas Brinkley, *FDR and the Creation of the U.N.* (New Haven: Yale University Press, 1997).

The alliance of the United Nations that fought against Nazi rule was based on a set of universal values: human rights, freedom of expression, political and religious freedom asserted in the United Nations Declaration of Jan. 1942[12] and signed by 47 governments by the end of the war. Such a Declaration did not allow for the recognition of regional attitudes. In the 1940s, regionalism seemed to match well with European realism, an approach to international relations that did not enjoy much credit at that time.

The structure of the UN organization was shaped by the four Great Powers (USA, USSR, GB and China) during the Dumbarton Oaks Conference in 1944 and it was established at the San Francisco Conference in Jun. 1945. The organization was designed to be universal, multilateral in its decision-making mechanisms (the veto was like a sort of stronger weighted voting) and collective in its inspiration: countries that wanted to become Members had to be peaceful and comply with the basic principles of the UN (Art. 4). The States that did not meet these criteria not only were kept outside the Organization, but they were looked on with concern and were threatened with international sanctions, as in the case of fascist Spain. International law had to be consistent and well coordinated in its various sources: its codification had to be promoted by a special Commission of jurists; every country was asked to deposit a copy of the international treaties it had signed; the International Court of Justice (ICJ) was recognized as the judicial organ of the UN, and access to its advisory opinions was open for the first time to specialized international agencies.

Between 1945 and 1948 also many of the oldest international agencies were placed under the control of the UN, in the name of an institutional architecture that aimed to establish a hierarchical order with its centre in the Security Council (SC).[13]

Roosevelt was a committed universalist: he believed that it was possible to overcome the differences with the USSR once Moscow had been secured a strong leadership position within the new institution and its 'security needs' had been granted. The American President's concession to political realism could not be accepted by a fully rationalistic jurist such as Kelsen,[14] who strongly criticized the draft statute of the UN issued during the meeting at

12 'Complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands, and that they are now engaged in a common struggle against savage and brutal forces seeking to subjugate the world'.

13 In its first months of activity the UN defined the status of 'international clerk' that was applied also to the specialized agencies.

14 Hans Kelsen, "The Old and the New League: The Covenant and the Dumbarton Oaks Proposals," *AJIL* 39 (1945): 45–83.

Dumbarton Oaks in 1944. Yet, despite everything, the political project of the UN represented a huge step forward towards a stronger international organization, in comparison with the diplomatic caution that had ruled the LoN.

Ch. 8 of the UN Charter (Arts. 51–53) still envisaged the existence of regional bodies, and considered them as strictly subordinated to UN directives. Art. 52 specifically states: 'Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations'.

The article summarized in a more generic and light way the content of Art. 23 of the Covenant of the LoN, but it is evident from what has been previously stated that the existence of regional organizations was neither favoured by the UN Charter, nor considered crucial in the architecture of the new institution, i.e. regionalism was not perceived by the UN's founders as a relevant articulation in the resettlement of international order. Anyway, regional organizations had to conform to the SC's authority.[15]

The real challenge to the universalist approach came from anthropology, one of the academic disciplines that were shaping the cultural background of the UN. On a scientific basis, anthropology validated both the existence and the equal dignity of different cultures, each of which expressed different values. This new awareness was brought to light by the process of decolonization, even though it would take a few decades to be broadly accepted.

South African Prime Minister Jan Smuts, who would later be President, was the main drafter of the UN Charter's lyrical preamble. This one was written referring only to the white civilization's universal values, but it would fit extremely well also with a multicultural reading of those values. So, when in Jun. 1946 the South African Parliament approved the South African Asiatic Land Tenure and Representation Act, which would discriminate against Asian citizens in terms of property and in the field of political representation, the government of India decided to appeal to the UN, asking for respect for the UN's values that had been solemnly proclaimed.[16] On the one hand, this

15 UN Charter, Art. 54: 'The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security'.

16 Mark Mazower, *No Enchanted Palace. The End of Empire and the Ideological Origins of the United Nations* (Princeton: Princeton University Press, 2009). Mazower is also the author of the more recent book on internationalism: *Governing the World. The History of an Idea* (London: Allen Lane 2012).

conflict was a step towards universalism because, by appealing to the UN, India broke up with the Commonwealth, which inhibited its Members from seeking external political entities in order to resolve internal disputes. On the other hand, it revealed the hypocrisy of 'white universalism' when it challenged the official diplomatic position of the United States and other Western countries that aimed to reduce that controversy to a political problem involving only those two States. Actually, the controversy was also the subject of a contested ICJ ruling in the 1960s, which rejected using formalist arguments two African States' complaints against South Africa.

During the writing of the Universal Declaration of Human Rights (UDHR), the need to recognize and accommodate different cultural identities clearly emerged when, in addition to Western countries' liberal rights, the socialist bloc added a set of social rights and the representatives of Asian countries (China and India) underlined the importance of recognizing the role of family and of community values. The UDHR approved in Dec. 1948 was a sort of catalogue of all those instances, and even today each country is able to choose the principles that better represent its political and cultural beliefs.

The UDHR would be improved in the following years at a 'regional' level, for example through the adoption of the European Convention on Human Rights (1950). In fact, the European Convention recognized the UDHR's general principles and reinforced their protection by creating the European Court of Human Rights, to which States, non-governmental organizations and even individuals could resort.

4 Regionalism in the Cold War

The Cold War resulted in a revival of regionalism despite – or thanks to – the UN universal scope. It was precisely the UN that started a regional articulation of its role in the field of economic consulting and assistance. In Mar. 1947, the Economic and Social Council (ECOSOC) – after many hesitations – established the Economic Commission for Europe, which would be a model for regional decentralization in Asia and Africa a few years later.

Its main goal was fostering recovery and economic cooperation among all European countries, and officially it had no political tasks. Nevertheless, the Economic Commission for Europe happened to be in competition with the institutions of the Marshall Plan that would be launched by the USA a few months later. Eastern European countries and the Soviet Union were part of the Economic Commission, but they never joined the Marshall Plan. The latter was in the end composed of only 16 capitalist countries, which would later

become Members of the OECD. Furthermore, while the UN regional Commission had to report directly to the ECOSOC, the OECD reports were discussed only by its Council and, of course, by the government of the United States.

In 1948 the UN Conference on International Trade in Havana failed to draft a general agreement on trade, and a few months later the US strongly supported the creation of the GATT, a general agreement among capitalist countries. Obviously the GATT operated outside the UN system.

The United States moved towards regional agreements also in international politics, renouncing the universalist approach of the UN, paralysed by the Soviet veto. In 1948 the Pan-American Union evolved into a more formalized and politically relevant body, the Organization of American States (OAS), a regional organization composed of all the American countries that accepted the Western civilization's values. The foundation of the OAS represented a relevant change in the USA's international strategy. The fight against communism made Washington abandon any form of isolationism: the USA decided to confront the enemy by fostering new supranational political bodies, which would aim at resolving regional political problems and fostering economic cooperation. Apart from the Marshall Plan, the more evident result was the NATO Treaty in 1949,[17] but the creation of the Council of Europe in 1950 was even more relevant from an institutional and political point of view. The Council was an institution that brought together all European democratic countries from Norway to Greece, thus drawing a new continent that had as its boundaries the socialist countries on one side and the Iberian dictatorships on the other. Actually, the Council was a pale institutional imitation of the OAS. At the beginning it raised great hopes that were quickly dashed by its political irrelevance. The most important decision it was able to carry out was the draft of the European Convention on Human Rights: it represented the last step in an important trajectory in the global promotion of human rights, which had begun with the Charter of the Rights of American States in the spring of 1948, had proceeded with the UDHR of Dec. 1948, and had ended with the European Convention in 1950.

The Pan-American Union (later OAS) can be considered as a model for the creation of both the Arab League and the Organization of African Unity. These two bodies were actually quite weak, since they were crossed by the fault lines of the Cold War and were undermined by huge nationalistic divisions.

17 NATO Treaty, Art. 7: 'The Treaty does not affect, and shall not be interpreted as affecting, in any way the rights and obligations under the Charter of the Parties which are members of the United Nations, or the primary responsibility of the Security Council for the maintenance of international peace and security'.

To some extent, even the European Economic Community (EEC) was a product of the Cold War, which made France, Italy, Germany and the Benelux countries revise downward the federalist utopias born in the aftermath of the war. France's decision not to be completely dependent on a political and military alliance with the USA made the new organization a potential political counterbalance to the Atlantic Alliance.

5 Regional Cultures and Representation at the United Nations

The worsening of Cold War tensions favoured a strict subdivision of representatives of the most relevant western States in the leading international agencies' governing councils. The United States' goal was maintaining western control in the main agencies in order to avoid as far as possible UN political control over those agencies. This increased the overall autonomy of the specialized agencies and caused a lack of coordination between their strategies.

The ICJ also suffered the consequences of the Cold War, since it quickly became a marginalized institution, with little work to carry out and almost no advisory opinions to deliver. Even specialized agencies decided not to request any advisory opinions from the Court for many years, fearing that international judges could interfere with their strategies, which were determined by western directors. In this way, the Court was not in a condition to evolve into a main source of international law and to become the centre of legal coordination between the international agencies, as was foreseen by its founders.

The distribution of IOs appointments among Western countries was severely questioned by the process of decolonization. The newly independent countries were calling for a larger presence in the political and administrative bodies of the UN. Their request was ambiguously sponsored by both superpowers, anxious to win over new allies in the General Assembly (GA) bodies and within specialized agencies, even though this could lead to a reduction in their power, especially as regards the Western bloc.

At the beginning of the 1960s, the UN Charter was reformed and the number of SC Members was increased to 15, with 10 non-permanent Members compared to the previous 6, while the ECOSOC almost doubled its Members. Since then, an informal partition scheme has been adopted in order to cope with the problem of the fair regional representation of non-permanent Members (the seats were divided among Europe, Latin America, Socialist countries, Asia and Africa). Also the ICJ gave more attention to the geographical origin of its 15 judges by adopting the same criteria followed by the SC.

Art. 17 of the Charter provided the GA with the power to vote on the financial budget of the organization, and the ability to create new bureaucratic bodies, funds and agencies. By using this leverage, the poorest countries succeeded – especially during the 1970s – in creating new offices and committees within the Secretariat. These mainly dealt with issues of economic development and cooperation that were considered relevant by Third World countries, i.e. supervising multinational companies, imposing regulations on international trade, and developing technical and economic assistance to poor countries. The office's growth was accompanied by an equal increase in the staff.

The respect for a regional quota while recruiting new staff was strongly requested by Third World countries, in recognition of the right to fair representation in the institutions. This confirmed the principle of representing different cultural identities through the physical presence of clerks coming from countries all over the world. This claim was widely accepted in the policies of staff recruiting, but it generated a dangerous trade-off between expertise and representation. Moreover Western countries preferred to increase offices and seats considerably instead of reducing the number of their national staff.

In this way, the staff working at the UN headquarters in New York, Geneva and Vienna – this one was actually added in 1979 – grew in the early 1980s to more than 13,000 people, although this number is difficult to quantify because of the increasingly complex procedures in recruiting both temporary and permanent personnel.[18] This evolution did not improve the efficiency of the UN, which in the mid-1980s was accused of being incompetent and corrupt by US President Reagan.

In the international agencies the ability to deal with the issue of regional representation was heavily affected by the power of donor countries, which easily got their candidates appointed to fulfill executive positions. The only exception to this trend was UNESCO President Amadou-Mahtar M'Bow, a diplomat from Senegal, who was in charge of the Organization from 1974 to 1987.[19]

18 Theodor Meron, *The United Nations Secretariat. The Rules and the Practice* (Lexington: Lexington Books, 1977). More recently Alessandro Polsi, "Changing the United Nations. The Key Role of Governance and Managerial Reform," in *Democracy at the United Nations. Un Reform in the Age of Globalization*, eds. Giovanni Finizio and Ernesto Gallo (Bruxelles: Peter Lang, 2013).

19 The harsh criticism of its conduct led to the dramatic withdrawal of the USA and GB from UNESCO and strengthened among western countries the conviction of the general mismanagement of the entire UN system. The battle for radical reform of the UN management exploded during the Assembly of 1985, which ironically was convened to celebrate the forty years of the UN.

In the early 1970s, violent and fierce debates emerged on the issues of representation and competence. It is worth mentioning the sarcastic opinion of Gerald Fitzmaurice, a member of the ICJ, who stated that the Court judges who were competent in international law were 'a minority, maybe less than one third'. Even though it is no longer possible to agree with his opinion, it is certainly true that he pointed out a real problem of competence.

During the Cold War the issue of regional representation was often used as a pretext by the great powers, which supported their own candidates coming from African and Asian allied countries. Nowadays, some authors underline the positive consequences of a strongly formalized regional representation in the UN in terms of efficiency, reduction of conflicts in the selection of applicants, and credibility of the organizations themselves. Currently, the choice of a candidate is delegated to the regional groups, which can more easily find a compromise between competence and representation of the States. Moreover, small States are more guaranteed and are more likely to get some representatives if such a procedure is used.[20]

6 Universalism and Regionalism in the Last Twenty Years

The 1990s marked an 'explosion' of the phenomenon of regionalism. On the one hand, already existing regional organizations played the role of protagonists. Starting with its involvement in the former Yugoslavia, NATO undertook a complex evolution and today is looking for a more defined role in international affairs. At the same time, the transformation of the EEC into the European Union (EU) testified to the achievement of a stronger and more self-conscious regional dimension for European countries, and represented a relevant political and economic model for regionalism in other continents. For example, the Mercosur seems to be inspired by the institutional model of the EU, which it tried to imitate to a certain extent. Argentina, Brazil, Paraguay and Uruguay have created a MERCOSUR Parliament, which started to operate in 2007 and includes 90 representatives equally distributed among the Member States. Moreover, in 2015 a general and simultaneous election of the MERCOSUR Parliament by popular vote is scheduled. On the contrary, Asian cooperation seems to go on according to a model of merely intergovernmental governance: ASEAN does not conceive of any parliamentary assembly, and the organization works

20 Jacob Katz Cogan, "Representation and Power in International Organization: The Operational Constitution and its Critics," *AJIL* 103 (2009): 209.

through annual meetings among heads of government and/or conferences of ministers.[21] Therefore, ASEAN is developing according to a model of intergovernmental organization with two opposite poles (China and Japan), which seem to be invoking, in their appeals for reciprocal respect of their national sovereignty, the old 'principles of peaceful coexistence' expressed by Nehru in the early 1950s and confirmed during the Bandung Conference.

On the other hand, the 1990s have also witnessed the birth and the sharp success of two new universal organizations, the World Trade Organization (WTO) and the International Seabed Authority. The Authority was born at the end of a long political negotiation led by the UN, while the creation of the WTO took place totally outside the UN system. These two organizations confirm a new taxonomy, since they are at the same time universal and sectoral: in fact, they have the task of managing and suggesting rules in order to regulate respectively international trade and the exploitation of sea resources. They are relatively autonomous and are invested with a relevant power, since they deal with vital issues of the adherent countries' economies and engage with States' sovereignty; moreover, both of them are equipped with international tribunals or dispute settlement bodies.

The WTO agreement is going to revive the dichotomy between universalism and regionalism in the economic field: the proliferation of regional agreements among contiguous economic areas, especially in Asia, led some commentators to question the risks that the new economic regionalism might in the long run undermine the WTO's universalistic approach.[22]

Some scholars have recently envisaged a world that is politically divided into multiple layers: a global superpower, some great powers, regional powers and/or regional political agreements, which could articulate a possible global international framework of reciprocal relations. This approach does not seem entirely convincing because of the obvious divergence between different types of regionalism; for example, the basic difference between a regionalism that tend towards federalism (the EU, despite all its limitations) and a regionalism that derives from an intergovernmental agreement that does not have any bearing on the Member States' sovereignty (for instance the ASEAN or the North American Free Trade Agreement).[23]

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21 *Contracting States: Sovereign Transfers in International Relations*, eds. Alexander Cooley and Hendrik Spruyt (Princeton: Princeton University Press, 2009).

22 Filippo Di Mauro, Stéphane Dees, and Warwick J. McKibbin, *Globalization, Regionalism and Economic Interdependence* (Cambridge: CUP, 2011); Jens-Uwe Wunderlich, *Regionalism, Globalization and International Order. Europe and Southeast Asia* (Farnham: Ashgate, 2007).

23 Barry Buzan and Ole Waever, *Regions and Powers: The Structure of International Security* (Cambridge: CUP, 2004).

In this scenario the UN is at the stake: in the last years it has been broadly recognized as the more relevant peacekeeping agency worldwide, as an important political forum, and as a good environment for diplomatic bargain. But it has failed to reform the SC, neither increasing the number of permanent Members so as to include new emerging States (India, Brazil, South Africa and other candidates), nor recognizing the status of regional actors such as the EU, due to the gear of the United Kingdom and France of losing their special status as permanent Members. At the same time, Africa is evidently under-represented.

In fact, all the proposals to reform the SC that have been presented in the last ten years have failed because of the opposition of its permanent Members. The main risk is that the UN might slowly shift towards political irrelevance, despite maintaining a universal competence in peacekeeping: an evolution which Henry Kissinger envisaged some decades ago.

Regionalism arises as a complex issue concerning the international jurisdictions as well. The UN, due to the opposition of the great powers, has not been able to revitalize the ICJ: neither has its competence been enlarged, nor has it been transformed into an International Court of Appeal or into a sort of Supreme Court for the new international legal environment, which has recently witnessed the birth of new sectoral universal courts, criminal courts ad hoc and the new International Criminal Court.

At the moment, the main IOs behave as if they were a system of communicating vessels, each with its own different nature (universal, regional, transnational, sectoral). A significant change to one of those vessels has an impact on the others. This may partly be explained by the rhythms and forms of so-called globalization. But we must always remember that a fragmented and ungoverned situation favours the great powers, which seek to preserve their own political and economic interests.

7 The End of Old Universalism

The issue of an equilibrium among different regional cultural identities, as well as that of the relations between universal organizations, regional organizations and national States, is a fluctuating matter that shifts according to different solutions and depending on the context.

A typical case is the quickly changing relationship between peacekeeping, on the one hand, and managing of regional and international crisis, on the other. In recent years the UN has favoured a cooperation approach with regional organizations in order to reduce the peacekeeping operations' financial costs, but also in order to take advantage of cultural affinity so as to achieve

better performances and to avoid the accusation of cultural imperialism. At the same time, the UN has to improve the training of peacekeeping staff in order to meet the basic rules of correct behaviour by the international military and civilian personnel.

Despite the existence of 'regional values' now being accepted or at least tolerated, the debate concerning the universal promotion of basic human rights remains strong. On the one hand, there are still positions that invoke respect for cultural traditions and accuse western countries of developing a human rights imperialism. Yet, they seem more interested in defending political autocratic regimes than in preserving real cultural identities, which are flexible and change over time.[24] On the other hand, the rhetoric that calls on free nations to export values such as 'democracy' and 'human rights' using – if necessary – enforcement operations seems to give way to more mature reflections.

The idea of a universal jurisdiction is also threatened: some international lawyers have envisaged that the proliferation of international courts might undermine the principle of unity of the international law and the uniformity of the law of IOs, leading to a fragmentation of jurisdictions and to a potential conflict between courts.

The different assessments concerning Serbia's responsibility for the genocide in Srebrenica delivered by the International Criminal Tribunal for the former Yugoslavia and the ICJ are well known, and recently fears for the emergence of a legal pluralism in criminal matters have emerged within the procedures of the international tribunals in Sub-Saharan Africa.[25]

Legal pluralism may be an artificial and formalized representation of the dialectical process of values that are today competing and mixing worldwide. In any case, it seems that President Roosevelt's suggestion for a world government is definitively over.

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24 For the case of Africa see Bonny Ibhavoh, *Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in African History* (New York: State University of New York, 2008).

25 Kamari M. Clarke, *Fiction of Justice. The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge: CUP, 2009).

CHAPTER 5

The Activities for the Maintenance of International Peace in the Relationship between the United Nations and Regional Organizations*

Giovanni Cellamare

1 The Regulatory Framework

The well-known Ch. 8 of the Charter of the United Nations (UN) deals with relations between the UN and regional organizations as regards the maintenance of international peace and security.[1] The principles or purposes of the UN and Ch. 8 are sometimes mentioned in the constitutive acts of other organizations, thus recognizing their role as a benchmark framework in the area in question.[2]

In this respect it is helpful to look at the effects of the provision contained in Art. 103 of the Charter. This provision directs the conduct of the Member States, which are parts of other international organizations, in a way consistent with the same provision, i.e. to prevent the application of the rules of those entities that are or might in the future clash with the obligations under the Charter.[3]

Let us now move on to Ch. 8. In short, Art. 52 provides that the parties to a local dispute must make every effort to reach a peaceful solution to their dispute by regional arrangements or agencies before referring it to the Security Council

* The present paper was written in Jun. 2013.

1 On the historical significance of Ch. 8 see Laurence Boisson de Chazournes, "Les relations entre organisations régionales et organisations universelles," *RdC* 347 (2010): 101 *et seq.*

2 See, among others, the Preamble to (Section 6) and Arts. 1 and 2 of the Treaty of the Organization of American States (OAS); Art. 5 of the Inter-American Treaty of Mutual Assistance; recital 1 of the Agreement on mutual assistance between States Parties of the Economic Community of Central African States (ECCAS); Art. 17(2) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (AU); Arts. 3(5) and 21(1 and 2) of the TEU. See also Ana Peyró Llopis, *Force, ONU et organisations régionales: Répartition des responsabilités en matière coercitive* (Brussels: Bruylant, 2012): 303 *et seq.*

3 Ugo Villani, "Les rapports entre l'ONU et les organisations régionales dans le domaine du maintien de la paix," *RdC* 290 (2001): 259 *et seq.*; Louis Balmond, "La sécurité collective, du droit des Nations Unies au droit regional," in *Sécurité collective entre légalité et défis à la légalité*, dirs. Maurizio Arcari and Louis Balmond (Milano: Giuffré, 2008): 74–75.

(SC); therefore, Art. 52 gives such arrangements or agencies a primary role in the resolution of disputes in order to facilitate the achievement of one of the purposes of the Charter.[4] Such a role is to be understood in the light of the customary international law principle of free choice for the peaceful settlement of international disputes. In effect, the Charter neither requires States to utilize primarily regional organizations and regional arrangements in the field in question,[5] nor delimits the powers between the universal Organization and regional organizations in that field. Furthermore, Art. 52 is not prejudicial to the application of Arts. 34 and 35(4). In other words, 'the Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security' (Art. 34). Moreover 'any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Art. 34, to the attention of the Security Council or of the General Assembly'.

Practice shows that the States have proceeded in a different way.[6] The foregoing observations do not exclude the usefulness of Art. 52. In effect, given the political and moral value of the recommendations of the SC, a SC recommendation to apply to a regional organization can help prevent cases of international *lis pendens* (*latu sensu*). In this regard, the proliferation of systems of settlement of international disputes is worth considering.[7]

On the other hand, the application of Art. 34 can be functional to the operativeness of Art. 53. The latter gives the SC the power to utilize regional (arrangements or) agencies to carry out enforcement action under its direction, and to authorize such actions 'taken under regional arrangements or by regional agencies'. As a matter of fact, 'no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council' (Art. 53.1).

4 In this regard see Waldemar Hummer and Michael Schweitzer, "Article 52," in *The Charter of the United Nations. A Commentary*, eds. Bruno Simma *et al.* (2nd edn. Oxford: OUP, 2002), II: 807 *et seq.;* Boisson de Chazournes, "Les relations," 258 *et seq.*

5 Alexander Orakhelashvili, "The Legal Framework of Peace Operations by Regional Organisations," *YbIPO* 11 (2006): 115.

6 Maurice Kamto, "Le rôle des 'accords and organisations régionaux' en matière de maintien de la paix et de la sécurité internationale à la lumière de la Charte des Nations Unies et de la pratique internationale," *RGDIP* 111 (2007): 789 *et seq.*; Boisson de Chazournes, "Les relations," 259 *et seq.*

7 Giovanni Cellamare, "Corte internazionale di giustizia," *Enciclopedia del diritto, Annali* IV (2012): 421–422.

The attribution to the SC of the powers indicated implies its control over the actions of regional organizations used or authorized by it.[8] Because of the absence of an express provision on such control, its components have been derived from the Charter's system of collective security. In fact, Ch. 8 is an integral part of that system. In Res. 2033, the SC, '[r]eaffirming its primary responsibility for the maintenance of international peace and security,' recalled, '[t]hat cooperation with regional and sub-regional Organizations in matters relating to the maintenance of peace and security and consistent with Ch. 8 of the Charter of the United Nations, can improve collective security' (recitals 2 and 3).[9] Also in the Statement of the President of the SC of 10 Dec. 2012, the Council 'reiterates its primary responsibility for the maintenance of international peace and security under the Charter of the United Nations and recalls that cooperation with regional and sub-regional Organizations, consistent with Chapter VIII of the Charter of the United Nations is an important pillar of collective security'.

As has been extensively noted, the activity of control by the Council presupposes that the controlled operations have clear objectives, i.e. suitable to define the scope of the operation. It seems to us that these objectives are to be understood in the light of the relevant acts that precede and drive the operations; that is, bearing in mind the relationship of cross reference and reciprocal presupposition which is established between the peace agreements, the acts of regional organizations and the resolutions of the SC.[10]

The need for clear objectives of the operation has been highlighted by the Council in Res. 2056 on Peace and Security in Africa: the Council '[t]akes note of the request of ECOWAS and the African Union for a United Nations Security Council mandate authorizing the deployment of an ECOWAS stabilization force in order to support the political process in Mali and assist in upholding the territorial integrity of Mali and in combating terrorism' (Section 17), '[e]xpresses its readiness to further examine the request of ECOWAS once additional information provided has been provided regarding the Objectives, means and modalities of the envisaged deployment and other possible measures…' (Section 18).

In Res. 2085, the SC noted the position of the AU and ECOWAS 'endorsing the Joint Strategic Concept of Operations for the International Military Force and the Malian Defense and Security Forces' (recital 9), and acting under Ch. 7 of the Charter decided to authorize an 'African-led International Support Mission in Mali (AFISMA)', which would take all necessary (utile) measures for

8 See Boisson de Chazournes, "Les relations," 101 *et seq.*

9 See also recital 3 of Res. 1809; and Section 10 of Res. 1862.

10 See *infra*, Section 4; Giovanni Cellamare, *Le operazioni di* peace-keeping *multifunzionali* (Torino: Giappichelli, 1999): 59 *et seq.*

the implementation of the tasks specified in the Resolution (Section 9). The temporal effect of that authorization was limited by the Council to an initial period of one year.

In fact, the duration of an operation is a component of it that weighs heavily in the Council's supervision. Rarely is the duration of the operation defined with certainty from its inception. Generally, the SC initially sets the term of the mandate without ruling out its renewal, as in fact often happens.[11]

The information provided by Art. 54 is functional to the supervision of the operations by the SC: that information allows for the subsequent control, by the Council, of the activities of the operation and, therefore, for the Council to take appropriate action by means of the regulatory activity falling within its competence. Art. 54 does not provide formal requirements for the modalities for informing the SC, so that the information could be imparted even orally during the meetings of the Council by the States that participate in those meetings. In principle, the information sent by the regional organizations to the SC is merely descriptive of the situation in question.[12] The foregoing does not exclude that, in the exercise of its responsibilities, the Council

11 See e.g. Section 9 of Res. 1464; and the Resolutions on the establishment of SFOR and EUFOR in Bosnia, as well as the operations in Afghanistan; see *infra*, Section 2.

12 Practice in the field (see Linos Alexander Sicilianos, "Entre multilateralism et unilatéralisme: l'autorisation par le Conseil de sécurité de recourir à la force," *RdC* 339 (2008): 154 *et seq.*) is not homogeneous, ranging from complete information (as in the experience of SFOR; EULEX in Kosovo: UN Doc. S/2012/818, Annex I) to vague and imprecise information. As mentioned in the text, it may happen that sometimes the regional organization has given information to the Council (such as the EU with reference to the Artemis operation: Solana, in UN Doc. S/PV.4790). The reports and information provided by regional organizations do not have the completeness of the information provided by the SG on UN operations. Therefore it can happen that the Council requests the SG to be informed of the situation in a given State. In particular, the information in question may be obtained from the SG, who provides it having regard to an action of the SC in collaboration with regional organizations; on the other hand (as for Darfur: Mesmer Gueuyou, "Article 54," in *La Charte des Nations Unies. Commentaire article par article*, eds. Cot *et al.* (2nd edn., Paris-Bruxelles: Economica-Bruylant, 2005), I: 1339), the reports of the SG to the Council (on the basis of the relations of the former with regional organizations) can be functional for the purposes of Art. 54. In its report of 22 Oct. 2012 (UN Doc. S/2012/787), the SG pointed out that '[t]he assessment and observations in the report are based on information provided by Member States and regional Organizations, in conformity with para 28 of Resolution 2020' (Section 1). There are examples of cases in which the Council has asked the regional organization to inform it through the SG (Res. 2036, Section 21, with detailed requests; see also Section 5 of Res. 2073). Yet, the request may be addressed to States and regional organizations, in favour of the SC and the SG: see Res. 1897, Section 16.

may require information about the profiles designated, and this prior to the deployment of the operation.[13]

Given the SC's nature as a political body, it is reasonable to conclude that the requirement of control by the SC can be satisfied if it exercises the political/regulatory control over the operations. In other words, operational and military control are not indispensable; in fact, as experience shows, such control can be lacking with respect to the operations created by the Council.[14]

That said, it is worth considering that the method of deployment of the Forces is not indifferent to the perception of the theatre of operations by the Council. As noted by the Secretary-General (SG) in the 'Supplement to an Agenda for Peace', collaboration between the UN and regional organizations on the maintenance of peace can manifest itself in several ways; by consultation, by diplomatic support, through operational support, by means of co-deployment and joint operation. On the other hand, it can happen that in the same operative area the UN mission follows – sometimes absorbing them – the peacekeeping operations set up by the regional organizations along the lines of the different operative models already known in the experience of the universal Organization. It can also happen that the operations of regional organizations, in particular peacebuilding operations, follow the operations of the UN (such as the operation of the OSCE in Eastern Slavonia, after UNTAES).[15]

Subsequent missions allow each of the organizations involved to make available to the others their experiences and operational capabilities; indeed, it may happen that an operation is absorbed into the next one (like the AMIB in the ONUB). The functioning of subsequent missions in the same operating environment presupposes partnership capacity and coordination among the interested organizations. But this does not affect the perception that one has of the theatre of operations.

On the other hand, the transition from one operation to another can be a part of a stage subsequent to the 'co-deployment': in Tchad and in the Central African Republic (CAR), for a certain period of time, the EUFOR and

13 Res. 2085, Section 10.

14 Paolo Picone, "Considerazioni sulla natura della risoluzione del Consiglio di sicurezza a favore di un intervento 'umanitario' in Libia," *DUDI* 5 (2011): 217.

15 On this subject and the comments which follow in the text see Markus Derblomt *et al.*, *UN-EU-AU Coordination in Peace Operations in Africa*, community.apan.org: 8. Furthermore, Res. 2030, on the activities of ECOWAS and the Community of Portuguese-speaking countries in Guinea Bissau, in conjunction with those of the relevant Bureau of the United Nations.

MINURCAT coexisted; the latter then replaced the EU Mission.[16] In general, co-deployment promotes the autonomy of the organizations involved in the financial and organizational control of their operations; the creation of a regional Force in co-deployment with a UN operation (e.g., KFOR, in co-deployment with UNMIK) gives legal and political-moral legitimacy to the former; in fact it is a Force that shares the values assumed to underlie the UN operation. Moreover, co-deployment is likely to facilitate the monitoring by the UN of the operative activities of regional Forces (e.g. between UNMIG/CIS), although autonomous.[17]

Interaction between the organizations is frequent in joint or hybrid operations, such as UNAMID of the UN and the African Union.[18] It is experience limited to the abovementioned operation, thus it is difficult to collect data for or against the joint activity. Moreover, in addition to facilitating the transmission of organizational and operational experiences by the UN to the regional organization (such as the AU), the hybrid mission lays the foundations for a more immediate and constant physical control of the theatre of operations.[19]

2 The Concept of Regional Organization in Ch. 8 of the UN Charter; the Tendency of the Entities Concerned to Assume Responsibilities for Maintaining International Peace and Security

As is well known, the end of the Cold War led to the evolution of the relationship between the UN and regional organizations as regards the maintenance of international peace; this is particularly true for the management of conflicts

16 Giovanni Cellamare, "Funzioni e caratteri dell'EUFOR in una situazione di emergenza umanitaria," in *Individual Rights and International Justice. Liber Fausto Pocar*, eds. Gabriella Venturini and Stefania Bariatti (Milano: Giuffré, 2009): 189.

17 For a table of the operations in co-deployment see Festus Aboagye, *The Hybrid Operation for Darfur: A Critical Review of the Concept of the Mechanism*, ISS Paper, Aug. 2007: 5.

18 Res. 1769, Section 1, based on the joint report by the UN SG and the Chairperson of the African Union Commission (African Union, PSC/PR/2 (LXXIX), Section 54).

19 See the reports of the SG on UNAMID; in particular UN Doc. S/2012/548; see also UN Doc. S/2011/805, Section 30 *et seq.*, containing data drawn from the experiences summarized in the text. But for a negative assessment of the hybrid mission see Christian Walter, "Hybrid Peacekeeping: Is UNAMID a New Model for Cooperation between the United Nations and Regional Organizations?" in *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum*, eds. Holger P. Hestemeier *et al.* (Leiden: Brill, 2012), II: 1339.

with destabilizing effects for the States concerned.[20] The development in question was also prompted by the absence of a predetermined notion of regional organization in Ch. 8 of the Charter. In fact, the rules set out earlier, other rules of the Charter that use similar expressions (Arts. 33 and 47) and the acts of the organs of the United Nations refrain from defining the meaning of 'regional (arrangements or) agencies', while requiring their conformity with the Charter.

On this basis, practice has established a broad definition of the expression in question, contrasting with the restrictive interpretations proposed, especially in the past, in the literature. First, the practice shows that the term 'regional' does not necessarily imply geographical proximity between the Member States of the organization; what is instead important is the sharing of interests and of policy objectives between those States.[21] On the other hand, in the Agenda for Peace, the SG gave importance to the actual operating capacity of an entity for the maintenance of international peace and security, and this regardless of the original general purposes of the organization in question.[22] In this sense, in particular, the broad practice of the relationship between the UN and the CSCE can be put forward, and, therefore, the OSCE and the role ascribed to the latter as to the maintenance of international

20 In this regard see Edmond Keller, *African Conflict Management and the New World Order*, Institute on Global Conflict and Cooperation, Policy Paper 13, 1995, repositories.cdlib.org; Hilaire McCoubrey and Justin Morris, *Regional Peacekeeping in the Post-Cold War Era* (The Hague: Kluver, 2000); Ademola Abass, *Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (Oxford: Hart, 2004); Orakhelashvili, "The Legal," 111.

21 Thus, for example, the Organization of the Islamic Conference: see Ugo Villani, "I rapporti tra Nazioni Unite e organizzazioni regionali: problemi e prospettive di attuazione del Capitolo VIII della Carta Nazioni Unite," in *Diplomazia preventiva e uso della forza nel nuovo scenario della sicurezza internazionale* (Napoli: Editoriale Scientifica, 2003): 72; Edem Kodjo and Habib Gherari, "Article 52," in *La Charte*, II, 1378 *et seq.*; Boisson de Chazournes, "*Les relations,*" 102 *et seq.*

22 An Agenda for Peace: Preventive diplomacy, peacemaking and peacekeeping, in UN Doc. A/47/277-S/24111, Section 61. Previously (in Res. 199, adopted on 30 Dec. 1964), the SC (having regard to the crisis in Congo) had focused its attention, in fact, on the ability ('should be able') of the OAU 'to find a peaceful solution to all problems and disputes affecting peace and security' in the African continent (recital 8). In the direction indicated by the SG, one can remember also the approach followed by the General Assembly (GA) at the first meeting with the regional organizations (1 Aug. 1994): at the meeting organizations with different characteristics and purposes were invited (ASEAN, CARICOM, ECOWAS, NATO, the OSCE, the WEU, the Organization of the Islamic Conference): Villani, "Les rapports," 271 *et seq.*; Kodjo and Gherari, "Article 52," 1376 *et seq.*

peace and security.[23] In the sense considered by the SG, the evolution of the activity of ECOWAS, established by the Treaty of Lagos, adopted on 23 May 1975 to promote economic cooperation between its Member States, is also worthy of note.[24]

I will return to the experience in the African continent in the pages that follow. As to the praxis in Europe, it is worth remembering the gradual acquisition of competences by the EU.[25]

In view of the application of Art. 53, it has been said that the organization's ability to engage in an action is relevant: to the same purpose, then, it is not necessary to distinguish the organizations of collective self-defense, such as

23 On this subject see Andrea Gioia, "The United Nations and Regional Organizations in the Maintenance of Peace and Security," in *The OSCE in the Maintenance of Peace and Security. Conflict Prevention, Crisis Management and Peaceful Settlement of Disputes*, eds. Michael Bothe *et al.* (The Hague: Kluver, 1997): 191; Natalino Ronzitti, "OSCE Peace-keeping," in *The OSCE*, 237; on OSCE activity, Victor-Yves Ghebali, "The Long-term OSCE Mission: A Tool under Creative Challenge," *Helsinki Monitor* 15 (2004): 202; Ulrich Fastenrath and Katja Weigelt, "Organization for Security and Cooperation in Europe (OSCE)," *MPEPIL* (2010), Section 47 *et seq.* For the OSCE, it suffices to remember the Missions in Kosovo (OMIK), from 1 Jul. 1999 (PC.DEC/305 of the OSCE Permanent Council, on the basis of the SC Res. 1244), in Moldova, as well as in cooperation with the EU in Bosnia (OSCEBIH). The relevant acts are at www.operationspaix.net.

24 In *ILM* 14 (1975): 1199. See the Protocol on Non-Aggression, signed in Lagos on 22 Apr. 1978, and the Protocol on Mutual Assistance in Defense, signed in Freetown on 29 May 1981; the Treaty of Lagos was revised (after the Liberian crisis that had seen the involvement of the Organization) in 1993 (Art. 58: *ILM* 35 (1996), 660 *et seq.*); the Protocol of 1999 relating to the 'Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security' (adopted after the experience in Sierra Leone and Guinea-Bissau). On the ECOWAS operations see, among others, Jeremy I. Levitt, "Pro-Democratic Intervention in Africa," *Wis. Int'l L.J.* 24 (2006), 785; Sicilianos, "Entre multilatéralisme," 190 *et seq.* On the functioning of the ECOWAS see Isaac Terwase Sampson, "The Responsibility to Protect and ECOWAS Mechanisms on Peace and Security: Assessing Their Convergence and Divergence on Intervention," *J. Conflict & Security L.* 16 (2011): 507 *et seq.*

25 As is well known, in addition to the so-called Petersberg Mission, the Treaty of Lisbon (Arts. 42 and 43 TEU) contains special provisions on the Common Security and Defense Policy. On the evolution of EU activities see the articles collected in *European Security Law*, eds. Martin Trybus and Nigel D. White (Oxford: OUP, 2007) and in *The EU, the UN and Collective Security: Making Effective Multilateralism*, eds. Joachim Krause and Natalino Ronzitti (London: Routledge, 2012). Among the most recent initiatives the 'bridging' model of the operation in Tchad/RCA is worth remembering, with a wide range of management by the regional organization (Section 6 of Res. 1778), as well as the creation of EUTM in Mali (2013/34/CFSP decision of the Council adopted on 17 Jan. 2013), which operate independently of the UN.

NATO, from other organizations.[26] Undoubtedly, sometimes NATO has not been considered a regional organization falling within Ch. 8 (very likely to remove it from the mechanism resulting from the combined provisions of Arts. 53 and 54).[27] However, this position does not correspond to the practice: let us think of the intervention in Libya, as well as those undertaken in the context of the Yugoslavian crisis.[28] The practice in question does not result in operational activities which can be properly described as self-defense. On the other hand, NATO's 'Strategic Concept' of Lisbon states that '[c]ooperation between NATO and the United Nations continues to make a substantial contribution to security in operations *around* the world'[29] (italics added).

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26 For the importance of the 'functionalist' criterion in identifying the concept of regional organization pursuant Art. 53 of the Charter see Robert Kolb, "Article 53," in *La Charte*, II: 1409 *et seq.* Especially in the past the question whether or not the organizations – precisely like NATO – formally functional, in the constituent acts, to the exercise of collective self-defense can be seen to fall within Ch. 8 has been widely debated. In argument, it is sufficient to recall that, according to some scholars, those alliances were established, in fact, for mutual collective defense (against aggression from third countries) pursuant to Art. 51 of the Charter. This rule is not listed in Ch. 7 of the Charter. Those alliances do not require an authorization pursuant to Art. 53 and cannot be confused with the entities referred to in the same rule (quotes in Kodjo and Gherari, "Article 52," 1382 *et seq.*; Kolb, "Article 53," 1402 *et seq.*; problematically, Paolo Picone, "La 'guerra del Kosovo' e il diritto internazionale generale," *RDI* 83 (2000): 332 *et seq.*). In the opposite direction it was considered that the provision of collective self-defense in Ch. 7 is not sufficient to exclude the possibility that the mutual defense organizations operate pursuant to Art. 53, and that, conversely, there are no logical and systematic barriers, based on the Charter, preventing regional organizations applying collective self-defense (Villani, "Les rapports," 286). Indeed, the SC decided to use NATO and the States organized in it (on this reference to the States Picone, "La 'guerra del Kosovo'," 319 *et seq.*). See also *infra*, Section 6.

27 See Kamto, "Le rôle," 785 *et seq.* It is worth remembering the ambiguous content of NATO's 'Strategic Concept' of 1999 (Section 31).

28 Indeed, Resolutions 781, 787 (Section 12: 'Acting under Chapters VII and VIII of the Charter of the United Nations, calls upon States, acting nationally or through regional agencies…') and 816 (with a similar reference) suggested the qualification of NATO as a regional organization under Ch. 8. In this regard see Marten Zwanenburg, "NATO, Its Member States and the Security Council," in *The Security Council and the Use of Force: Theory and Reality- A Need for Change?*, eds. Niels M. Blokker and Nico Schrijver (Leiden: Martinus Nijhoff, 2005): 193 *et seq.*

29 In this regard, even just for bibliographic references, see Enzo Cannizzaro, *Diritto internazionale* (Torino: Giappichelli, 2012): 92–100. About the intervention in Afghanistan (see below in the text) based on the 'Strategic Concept' see Picone, "La 'guerra del Kosovo'." In argument it is worth quoting a passage of the 'Concept' of 2010 (Section 31 *et seq.*).

The broad concept of regional organization resulting from the practice is by now further confirmed by the following observation: it is irrelevant whether the activity of any regional organization takes place within the boundaries its own geographical area. There often exist activities of regional organizations that concern non-member States. In this sense one can remember the activities of military contingents of NATO in the ISAF[30] under the 'Strategic Concept' of that Organization; the Ocean Shield operation (of the same Organization) off and along the coast of Somalia and the Horn of Africa;[31] the EU's operations, variously characterized, in the FYROM,[32] in Bosnia and Herzegovina,[33] in the Congo,[34] in Darfur,[35] in Afghanistan,[36] and, as already mentioned, in CAR and Tchad, as well as the EUNAVFOR-Atalanta Mission in Somalia (in conjunction with Ocean Shield), the EUCAP Sahel operation in Nigeria and the EUTM operation in Mali.[37]

From the foregoing it appears that there is a substantial reduction in the regional (*stricto sensu*) characterization of the organizations mentioned by Ch. 8 of the Charter; so the entities in question would emerge as partial organizations, as opposed to the universal ones, such as the UN.[38]

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30 Res. 1386.

31 See Res. 2020, *ex* Ch. 7, which recalls all previous relevant resolutions.

32 Concordia, operation not authorized but supported by the SC ('Welcomes, se félicite') with Res. 1371; EUPOL 'Proxima', the police Mission which replaced the NATO operation Allied Harmony.

33 The EUPM, the police Mission was created at the invitation of the host State (the SC gave its support to this Mission – 'Encourages coordination between UNMIBH, the EU…' – with Res. 1396); the operation of the European Union Force (EUFOR) 'Althéa', alternating with NATO's Stabilization Force – SFOR (which was supported by the SC in Res. 1551): acting under Ch. 7 of the Charter (Res. 1575), the Council authorized Member States to create the operation in partnership or through the EU.

34 Operation EUPOL 'Kinshasa', the predecessor of EUSEC; Operation Artemis, which was authorized, *ex* Ch. 7 of the Charter (Res. 1484). These operations are examined by Frederik Naert, "ESDP in Practice: Increasingly Varied and Ambitious EU Security and Defense Operations," in *European*, 61; and by Nicholas Tsagourias, "EU Peacekeeping Operations: Legal and Theoretical Issues," in *European*, 102.

35 Operation EUFOR: Joint Action 2005/556/CFSP adopted on 18 Jul. 2005.

36 With the EUPOL: Joint Action 2007/369/CFSP adopted on 30 May 2007.

37 See, respectively, decision 2012/392/CFSP of the Council of 16 Jul. 2012; and *supra* in footnote 25; see also the Council's decision 2011/210/CFSP (1 Apr. 2011) on the EU military operation in support of humanitarian assistance operations in response to the crisis situation in Libya (EUFOR Libya).

38 Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems. With Supplement* (London: Stevens & Sons, 1951): 318 *et seq.*; Villani, "I rapporti," 73; Orakhelashvili, "The Legal."

3 In Particular, the Rules Contained in the Constitutive Act of the African Union and in the Protocol Relating to the Establishment of the Peace and Security Council of the African Union

As has been held by the International Court of Justice (ICJ), 'international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations…are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them'.[39] Therefore, in view of the application of Ch. 8, the statutes or other documents on which regional agencies are founded must be taken into account; and this, in particular, in the case of coercive functions delegated to them by the SC pursuant to Art. 53, even though it is sometimes hard to keep these delegated functions distinct from the authorizations of actions decided by regional organization.[40] In other words, in the absence of the relevant competence, one could not speak of a regional organization for the purposes of Art. 53.[41]

To the treaties referred to in the preceding pages, we can add others.[42] Among them, it is worth reflecting on the Constitutive Act of the AU, adopted on 11 Jul.

39 ICJ, Advisory Opinion of 8 Jul. 1996, *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts*, *ICJ Reports* 1996, Section 25.

40 Villani, "I rapporti," 82 *et seq.*

41 See the judgment adopted by the ICJ on 11 Jun. 1998 in the case of *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections*, 275 (and Section 66 *et seq.*).

42 Briefly, one can remember Art. VI of the Statute of the League of Arab States, supplemented by the Joint Defense and Economic Co-operation Treaty (13 Mar. 1950) (Art. VI); the Inter-American Treaty of Mutual Assistance (combined provisions of Arts. 4 and 6, so that the OAS Charter of 1948, amended several times, contains a Ch. 6 on collective security as a guarantee of the 'integrity' of the territory or the sovereignty or political independence of any American State, where 'affected by an armed attack or by an act of aggression that is not an armed attack, or by an extra danger to the peace of America, the American States, in furtherance of the principles of continental solidarity or collective self-defense, shall apply the measures and procedures established in the special treaties on the subject': Art. 29); Art. 4(2)(a) of the Treaty establishing the Organization of Eastern Caribbean States (1981) revised on 18 Jun. 2010 (that rule lists among the organization's goals 'mutual defense and security'); the Commonwealth of Independent States (CIS) which has institutionalized collaboration for the maintenance of international peace and security within the territories of the Member States by the Agreement of 20 Mar. 1992, in Kiev, on groups of military observers and collective peacekeeping forces to prevent or resolve conflicts which may arise out of those territories. In the implementation of the Kiev Treaty, in May 1992 in Tashkent three protocols concerning the functioning of the system of peacekeeping were adopted, with the provision (in the Protocol on the status of observers and

2000; Art. 4 provides for '(d)...a common defense policy', '(h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of serious circumstances, namely: war crimes, genocide and crimes against humanity', and '(j) the right of Member States to request intervention from the Union in order to restore peace and security'. Similar stipulations have been included in the 2002 Protocol Relating to the Establishment of the Peace and Security Council of the Union.[43] Art. 6 gives the Council functions of peacemaking and peacebuilding, the power to create peace-support operations, to operate and prevent conflicts and policies that are likely to lead to genocide or crimes, to recommend to the Assembly intervention in the serious circumstances indicated in Art. 4 quoted above, as well as to implement the decisions of the Assembly, including intervention in a Member State. Such a rule gives the Council the power to create peacekeeping operations, which are kept distinct in Art. 7 from intervention on behalf of the Union.[44] Other provisions of the AU system provided for the establishment of an African Standby Force.

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forces) of recourse to the use of force in self-defense and to counter armed attempts aimed at preventing the holding of the mandate by the operation. To these acts must be added the Concept for the prevention and resolution of conflicts, *ILM* 24 (1996): 785 (Arts. 2 and 5).

43 Charles Majinge, "The Future of Peacekeeping in Africa and the Regulatory Role of the African Union," *Gottingen JIL* 2 (2010): 463.

44 Dana Michael Hollywood, "It Takes a Village...or at least in Region: Rethinking Peace Operations in the Twenty-first Century, The Hope and Promise of African Regional Institutions," *Fla. J. Int'l L.* 19 (2007): 75. If the amendments (adopted in 2003) to the Constitutive Act of the AU will come into force, there may be problems of reconciliation between that Act and the Protocol in question. In fact, the Protocol on amendments to the Act adds the following new subparagraphs to Art. 4 of the Act: '(h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of serious circumstances, namely: war crimes, genocide and crimes against humanity as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council; (q) restraint by any Member State from entering into any treaty or alliance that is incompatible with the principles and objectives of the Union; (r) prohibition of any Member State from allowing the use of its territory as a base for subversion against another Member State'. In particular, apart from the problems of interpretation placed by the expression 'threat to legitimate order' – see Jean Allain, "The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union," *MPUNYB* 8 (2004): 237, who points out the separation of the Act from the collective security system of the UN – it should be noted that the Protocol relating to the African Council (adopted prior to the Protocol on Amendments) does not include the power to make recommendations in support of an intervention in a Member State whose legitimate order is seriously threatened.

The rules laid down denote a departure from the principle of the absolute prohibition on interference in the internal affairs of the Member States, as provided by the Treaty establishing the OAU.

The framework of African organizations must be completed with the ECOWAS Treaties and Protocols already remembered; with the rules relating to SADC; with the rules of the Pact (24 Feb. 2000) of mutual assistance between States Parties to the ECCAS, and with the provisions of the IGAD.[45] The rules in question appear indicative of the acquisition by regional and sub-regional African organizations of competences relating to the maintenance of international peace and security; in particular, they denote the desire of Member States of those organizations to provide African solutions to the problems of peace and security on the African continent.[46]

This consideration applies in particular to the rules of the AU. These rules have been interpreted in several ways in relation to Ch. 8 of the Charter. It is a problem 'dismissed out of hand' in the course of the preparatory work of the Treaty establishing the AU.[47]

Briefly, a first approach tends to interpret those rules in the light of the UN Charter, i.e. subjecting to the universal Organization the exercise of the powers conferred on the African Council.[48] A second approach tends to emphasize the autonomy of the system created by those rules with respect to the system of collective security under the Charter of the United Nations. In particular, according to some authors, the rules in question show the assertion of the primacy of African regional organizations as to the maintenance of international peace and security, in coordination with the SC. In this respect the birth in the UN system of a customary rule which allows the intervention of those organizations until the SC acts has taken place: in fact, the SC has authorized *ex* post regional operations.[49]

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45 For the SADC see. Art. 11 of the Protocol on Politics, Defense and Security Co-operation.

46 See Jonathan D. Rechner, "From the OAU to the AU: A Normative Shift with Implications for Peacekeeping and Conflict Management, or Just a Name Change?" *VJTL* 39 (2006): 543 *et seq.*; Hollywood, "It Takes," 137 *et seq.*; Majinge, "The Future," 463 *et seq.*

47 The expression belongs to the Legal Adviser Ben Kioko, "The Right of Intervention under the African Union's Constitutive Act: From Non-interference to Non-intervention," *Int'l R. Red Cross* 85 (2003): 821.

48 Below, for the sake of exposition, I will refer only to the Peace and Security Council, without recalling the Assembly of the AU.

49 For an overview of the different thesis held in the doctrine, with ample bibliographical information, see Boisson de Chazournes, "Les relations," 289 *et seq.*; Suyash Paliwal, "The Primacy of Regional Organizations in International Peacekeeping: The African Example," *VJIL* 51 (2010): 185 *et seq.*; Olivier Corten, *L'Union Africaine, une organization régionale*

In addition, some authors allege considerations drawn from the combined provisions of Arts. 4 and 6 previously mentioned, as well as Art. 17(2) of the Protocol of the African Council ('Where Necessary, recourse will be made to the United Nations to Provide the necessary financial, logistical and military support for the African Union's activities in the promotion and maintenance of peace, security and stability in Africa, in keeping with the provisions of Chapter VIII of the UN Charter on the role of Regional Organizations in the maintenance of international peace and security'). In particular, it was noted that – although 'the Peace and Security Council shall cooperate and work closely with the United Nations Security Council, which has the primary responsibility for the maintenance of international peace and security' (Section 1) – the regional organization reserves for itself the right to intervene in Africa and the power to ask the universal Organization to become involved, 'when necessary'.[50] It has been observed that a regional customary rule on humanitarian intervention has come into being, codified in the Treaty of the AU and in the Protocol on its Council; and this is reflected in the fact that the SC has authorized *ex* post interventions by African organizations. Therefore, there is an exception to Art. 103 in favour of the rules of the Treaty and Protocol

susceptible de s'émanciper de l'autorité du Conseil de Sécurité? Opinio juris et pratique des Etats recente, ESIL Conference Paper No. 11/2012: 2 *et seq.*

50 Jeremy Levitt, "The Peace and Security of the African Union and the United Nations Security Council: The Case of Darfur, Sudan," in *The Security*: 229 (with the final specification – 235 *et seq.* – that 'in practice' the two independent systems, of the UN and of the AU, 'have proven to be complementary'). In addition, Peter E. Harrell, "Modern-Day 'Guarantee Clauses' and the Legal Authority of Multinational Organizations to Authorize the Use of Military Force," *Yale J. Int'l L.* 33 (2008): 417 *et seq.* (for the compatibility with Art. 53 of the Charter of the clauses of the treaties establishing regional organizations that provide the intervention); but see Michael Reisman, "Editorial, Termination of the USSR's Treaty Right of Intervention in Iran," *AJIL* 74 (1980): 151 *et seq*. Although with reference to "clause 'sans prejudice'," in relation to the responsibility of international organizations, see the interpretation proposed by the Rapporteur spécial Giorgio Gaja, Quatrième rapport sur la responsabilité des Organisations internationales (UN Doc. A/CN.4/564, Section 47); for a different opinion see Christian Walter, "Article 53," in *The Charter of the United Nations. A Commentary*, eds. Bruno Simma *et al.* (3rd edn., Oxford: OUP, 2012), II: 1491 (with subsequent clarification – at 1493 – that the provisions of the Constitutive Act of the AU 'may be read asserting a right to autonomous regional intervention in case of SC inaction', i.e. 'when the SC is unable or unwilling to exercise its responsibility to protect'). This opinion is based on a systematic interpretation of Arts. 2(4), 39 *et seq.* and 51 of the UN Charter and on 'the extension of Chapter VII to massive violations of human rights' (but one can observe that the exception to Art. 2.4, provided for in Art. 51, concerns exclusively the case of 'armed attack…against a Member of the United Nations').

concerned; indeed, Art. 103 does not operate with respect to customary law. Otherwise, it is observed, it must be admitted that the authorizations made *ex post facto* by the SC conflict with Art. 103.

First, in general, it may be noted that the opinions presented evoke 'authorizations' adopted by the SC after the entry into operation of a mission; thus, it seems to us, the primacy of the collective security system of the Charter which binds the Council is recognized implicitly but unmistakably. Now, if one considers that those authorizations are real, they can be taken as regularization of illegal activities: i.e. such activities, previously alien and incompatible with the UN system, are restored to that system by the authorizations.[51] Apart from that, it should be noted that the views in question refer also to the creation of a customary rule, in the sense indicated; however, this rule is based on poor practice, in which overall operations are taken into account and which, it seems to us, cannot be carried to unity. Indeed, the characteristics of the operations currently known and the objectives pursued by the same operations appear variable; so, in the literature uniformity of evaluation of the characteristics and objectives of these operations[52] is lacking. Therefore the experiences mentioned cannot be considered cumulatively; all the more, sometimes the operations were managed directly by some States.[53] Therefore obstacles exist to the recognition of the customary rule evoked.

Unlike the argument that relies on the formation of a customary rule, which legitimates the action concerned in the system of the Charter, it might be possible – according to an authoritative doctrine – that Art. 103 has assumed the value of a peremptory norm of international law. As is well known, this feature is also present in some of the obligations referred to by that rule, including, of course, the principle contained in Art. 2(4).[54] Therefore, by following this approach, the interventions allowed by the above customary rule contrast with a rule higher than the customary one. In other words, given that the Charter does not provide, in particular, for humanitarian intervention by Member States, we have a legally binding prohibition of such an intervention.

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51 Among other authors see Benedetto Conforti and Carlo Focarelli, *Le Nazioni Unite* (9th edn. Padova: Cedam, 2012): 347.

52 See also the observations of Levitt, "Pro-Democratic"; Sicilianos, "Entre multilateralism," 256 *et seq.*; Boisson de Chazournes, "Les relations," 264 *et seq.*

53 For the approach that focuses on the real characteristics of the operations and on the objectives actually pursued by each of them see Paolo Picone, "Le autorizzazioni all'uso della forza tra sistema delle Nazioni Unite e diritto internazionale generale," *RDI* 88 (2005), 5 *et seq.*, 36 *et seq.*

54 Benedetto Conforti, *Diritto internazionale* (9th edn. Napoli: Editoriale Scientifica, 2012): 97 and 187.

Mutatis mutandis, an order of analogous considerations may object to the opinion that builds the rules in question as the recognition (or the manifestation) of the existence of a rule on the responsibility to protect. Apart from the doubts widely manifested in the literature about the existence of such a rule, and apart from the considerations that hinder the recognition of a uniform concept of 'responsibility to protect' under the various regional organizations,[55] to the extent relevant, it can be observed that the opinion in question is not reflected in practice; and this is in consideration of the same reliefs earlier performed with respect to the scope of the practice considered to affirm the existence of a customary rule, in the sense already indicated. Furthermore, the attitude of the AU in the African crises denotes the propensity of this organization not to intervene in its Member States (against the governments in power): and this is not congruent with the operation of the doctrine of responsibility to protect, and then with the existence of a practice which brings the doctrine into question.[56]

As regards Art. 17 of the Protocol, that provision lends itself to an interpretation different from that reported earlier; once the obligation of the Council of the AU to 'cooperate and work closely with the United Nations Security Council' is affirmed, the rule provides that the 'African Union's activities' must comply with ('in keeping with') the 'provisions of Chapter VIII of the UN Charter on the role of regional Organizations in the maintenance of international peace and security' (Section 2). In other words, Art. 6 shall be without prejudice to the obligations arising from the 'provisions' in question; the request to the UN relates to the aid for the AU and not the authorization, which indeed the SC is not bound to give. Moreover, the Protocol has been drawn up 'mindful of the provisions of the Charter of the United Nations, conferring on the SC primary responsibility for the maintenance of international peace and security, as well as the provisions of the Charter on the role of regional arrangements or agencies in the maintenance of international peace and security, and

55 UN Doc. A/65/877-S/2011/393, Section 8.

56 The reference is to the crisis in Somalia, in Sudan and in Zimbabwe, as well as to the position of the AU with respect to the arrest warrant of the International Criminal Court against Al Bashir; see Kwesi Aning and Samuel Atuobi, "Responsibility to Protect in Africa: An analysis of the African Union's Peace and Security Architecture," *GR2P Journal* 1 (2009): 90 *et seq.* With reference to the caution of the AU in the Libyan crisis and the critical position with respect to the interpretation of Res. 1973 as a basis for the intervention in Libya see Eki Yemisi Omorogbe, "The African Union, Responsibility to Protect and the Libyan Crisis," *NILR* 59 (2012): 155 *et seq.* (with a broad indication of the relevant acts). In general, also for the bibliographical references, see Pietro Gargiulo, "Uso della Forza (diritto internazionale)," *Enciclopedia del diritto, Annali* V (2012): 1422 *et seq.*

the need to forge closer cooperation and partnership between the United Nations, other International Organizations and the African Union, in the promotion and maintenance of peace, security and stability in Africa' (recital 4).

In conclusion, the rules of the AU must be construed in accordance with Art. 103 of the Charter and not in isolation; i.e. Art. 103 requires that the rules in question be interpreted and applied by Member States of AU in accordance with the combined provisions of Arts. 2(4), 24, and 53 of the Charter. Thus, those rules will be interpreted and applied taking into account the well-known principle contained in Art. 2 (as well as in a customary rule, which is addressed also to the AU as international subject) and the attribution to the SC of the primary responsibility for the maintenance of international peace and security. Such a principle is true with reference to the rules provided by Art. 53 of the Charter.

It is worth quoting in this respect Res. 2033, in which the SC has provided general indications about its relations with the African Council: the former '[t]akes note of the respective strategic visions of the partnership between the African Union and the United Nations as contained in the reports of the Secretary-General of the United Nations…and the Chairperson of the African Union Commission and stresses that common and coordinated efforts Undertaken by the Security Council and the African Union Peace and Security Council in matters of peace and security, should be based on their *respective authorities*, *competencies and capacities*' (italics added).

Also in Res. 2063, 'without prejudice to the Security Council's primary responsibility for the maintenance of international peace and security, the importance of the partnership between the United Nations and the AU, *consistent with Chapter VIII* of the United Nations Charter, with regard to the maintenance of peace and security in Africa' was highlighted (recital 9; italics added).

The affirmation of the primacy of the SC has found significant application in Resolutions 2056 and, in the same context, 2071 and 2085.[57]

Certainly in the so-called 'Ezulwini Consensus', the AU 'with the Panel Agrees that the intervention of Regional Organizations should be with the approval of the Security Council; although in certain situations, such approval could be granted' after the fact 'in circumstances requiring urgent action. In such cases the UN should assume responsibility for financing such operation'.[58] Therefore, according to that document exceptionally it is possible to take action without the prior authorization of the Council; this authorization still being required *ex post*.

57 Section 18 of Res. 2056; Res. 2071, Section 7; for Res. 2085, see *supra*, Section 1. See also the report of the SG, in UN Doc. S/2011/805, Section 4.

58 *The Common African Position on the Proposed Reform of the United Nations* adopted by the AU in Addis Ababa during the seventh special session, on 8 Mar. 2005 (6).

Now, apart from the observation that the document in question assumes *sic et simpliciter* the admissibility under the Charter of a subsequent authorization to an ongoing operation,[59] it should be noted here that the passage above is indicative of the need for operational support of the UN in favour of missions undertaken by the regional organization.[60]

Moreover, the reference in Res. 2033 to the competences and capacities of the UN and regional organizations leads us to focus on the systems and operating mechanisms of the latter; these are aspects that can affect the relationships created with the UN. Now, as to the AU, the emerging partnership of the African Organization with the United Nations appears to be characterized by a relationship of dependence of the regional organization on the resources provided by the universal one, as well as from other regional organizations (such as the EU and NATO) and States.[61] From a practical point of view this pleads in an opposite direction to operational autonomy of the AU.[62] The request for the transformation of the AFISMA into a UN operation is worthy of note, in this respect: this request was made already before the complete deployment of the African Mission.

In short, the rejected interpretation of the rules of the AU has little practical effect in an area where it is necessary to operate. On the other hand, the fact that the SC authorizes an AU operation is not a sufficient reason to conclude

59 *Infra*, Section 7.

60 See the request made by the African Council at the UN to support the Initiative de Coopération régionale (ICR) conducted by the AU against the Armée de Résistance du Seigneur (LRA); the Initiative was initially limited to Uganda and extended subsequently to other States interested in the functions of the Mission against the terrorists (www.operationspaix.net). For the support given by the UN see Res. 2031; in anticipation of the operation inserted in the Initiative, see the report of the SG in UN Doc. S/2012/923.

61 Derblomt *et al.*, *UN*, 15 *et seq.* and 48 *et seq.* Financial and logistical contributions were given by the EU and France for the operation of MICOPAX (effective from 12 Jul. 2008 under the responsibility ECCAS) after the FOMUC (operation created on 25 Oct. 2002, by a decision of the Economic and Monetary Community of Africa Central-CEMAC). The EU contributions derived from the African Peace Facility (APF). Details of the operations are at www.operationspaix. On the relations between the EU and African organizations see also www.africa-eu-partnership.org.

62 UN Doc. S/2013/163, Annex, containing the request of the AU Council for the transformation of AFISMA in a robust UN operation (created by Res. 2100). In this respect, it is helpful to remember that there was no proper consultation by the SC of the AU Council in view of the deployment of the UN operation: appablog.wordpress.com (Giovanni Cellamare, "Caratteri e funzioni delle attività operative integrate per il Mali," *SIE* 8 (2013): 239 *et seq.*).

that the regional organization is able autonomously to carry out its mandate under Art. 53 of the Charter.[63]

In fact, it is helpful to look at Res. 1809 on Peace and Security in Africa, in connection with the same Resolution the AU-UN panel report on support to African peacekeeping,[64] the institutionalized forms of partnership with the UN ten-year capacity-building programme for the AU,[65] the creation of a support Team for the peace activities of the AU within the Department of Peacekeeping Operations, the Africa Contingency Operations Training & Assistance (ACOTA), the French Renforcement des Capacités Africaines de maintien de la Paix (RECAMP) programme.[66] On the other hand, the role of the UN has found a significant place in the development activities of peacebuilding, in which regional organizations are 'associated'.[67] The experience of AMIS, as well as the creation of UNAMID, the hybrid and therefore not entirely African mission, are examples indicating the non-self-sufficiency of the AU; this is due also to non-payment of contributions by its Member States.[68]

As in the experiences of ECOWAS and SADC, the foregoing considerations militate in favour of the poor capacity of the AU to mobilize its own resources for operations.[69]

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63 With reference to the most recent developments in the practice see Charles Majinge, "Regional Arrangements and the Maintenance of International Peace and Security: The Role of the African Union Peace and Security Council," *CYIL* 48 (2010): 97 *et seq.* On the effect of the voting system of the AU Assembly on its capacity to operate see Ntombizozuko Dyani-Mhango, "Reflections on the African Union's Right to Intervene," *Brooklyn J. Int'l L.* 38 (2012): 1 *et seq.*

64 UN Doc. A/63/666-S/2008/813, Section 35 *et seq.*

65 To start with the declaration annexed to UN Doc. A/61/630, the summary of the programme is at www.nepad.org.

66 Boisson de Chazournes, "Les relations," 190 *et seq.*; Franke Benedikt, *In Defense of Regional Peace Operations in Africa*, sites.tufts.edu; Hicaru Yamashita, "Peacekeeping Cooperation between the United Nations and Regional Organisations," *Rev. Internat. Stud.* 38 (2012), 165, 177 *et seq.*

67 Resolutions 1647, Section 7b, and 60/180, adopted respectively by the SC and the GA on 20 and 30 Dec. 2005.

68 Majinge, "Regional," 149; Krista Nerland, "Building a Regional Peace-keeping Capacity: The Challenges Facing the African Union in Darfur," in *Regional Security in the Post-Cold War Horn of Africa*, eds. Roba Sharamo and Berouk Mesffin (Pretoria: Institute for Security Studies, 2011): 407–412.

69 Majinge, "The Future," 470 *et seq.*

Therefore, on this basis, it should be noted that there is a gap between the ambitions for autonomy derived, in the sense mentioned earlier, from the rules of the Constitutive Acts of the AU and of other regional and sub-regional African organizations and the actual operating capacity of the organizations in question. However, this does not exclude the fact that those rules lead us to focus on the exceptionality of the African situation and on the relevant operational contexts.[70] This is reflected in the recent activities of the SC,[71] as well as in the work of the Special Committee on Peacekeeping operations. The Committee has examined the issue of 'Cooperation with regional arrangements', and has given independent relief to 'Enhancement of African peacekeeping capacities'.[72]

That being said, the rules of the Constitutive Act of the AU can be used as the basis of a partnership with the UN; this partnership is characterized by the primacy of the Council for Peace and Security compared to the bodies of other regional and sub-regional African organizations with responsibilities for maintaining international peace and security. Indeed, in accordance with Art. 16(1) of the Protocol on the Council of the AU, '[t]he Regional Mechanisms are part of the overall security architecture of the Union, which has the primary responsibility for promoting peace, security and stability in Africa. In this respect, the Peace and Security Council and the Chairperson of the Commission, shall: (a) Harmonize and coordinate the activities of Regional Mechanisms in the field of peace, security and stability to ensure that these activities are consistent with the objectives and principles of the Union, (b) work closely with Regional Mechanisms to ensure effective partnership between them and the Peace and Security Council in the promotion and maintenance of peace, security and stability. The modalities of partnership longer available shall be determined by the comparative advantage of each and the prevailing circumstances'.

It is worthy of note that the African Council has 'authorized ECOWAS, in collaboration, as appropriate with the core countries, …to put in place the required military and security arrangements towards' the objectives listed in the 'Strategic Concept' for resolving the crisis in Mali.[73]

70 Boisson de Chazournes, "Les relations," 289 *et seq.*

71 2011 Highlights of the Security Council Practice, 3, www.un.org.

72 Report on the 2012, in UN Doc. A/66/19; see also the Reports (2010) in UN Doc. A/64/19 and (2011) in UN Doc. A/65/19.

73 PSC/PR/3 (CCCXXXIX), Section 1 (24 Oct. 2012); at www.peaceau.org. See also the 'Memorandum of Understanding on Cooperation in the Area of Peace and Security between the African Union, the Regional Economic Communities and the Coordinating Mechanisms of the Regional standby Brigades of Eastern Africa and Northern Africa'.

4 The Coercive Peacekeeping Operations of Regional Organizations: The Relationship between the Consent to and the Authorization of the Operations by the Security Council of the United Nations

Art. 53 distinguishes between the operations carried out by the SC and those authorized by it; but this distinction is not fully reflected in the practice. In other words, it has happened that the Council, taking the initiative, has authorized regional actions, or that the Council has 'authorized' actions already started, thus subjecting them to its own authority.[74] Furthermore, practice shows that regional organizations have substantial independence in adopting coercive measures not involving the use of force, even though some authors, from time to time, have invoked the preparatory work of Art. 53(1) ('no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council') as meaning the opposite. These aspects are examined extensively in the literature, to which reference is made for the eligibility of that practice in the light of the meaning in which the expression 'enforcement action'('action coercitive', in the French text) needs to be interpreted.[75]

Moreover, this expression does not include traditional peacekeeping operations, i.e. consensual (and neutral) operations which are able to use force only in self-defense, given the scope of these operations.[76] In fact, those operations can be established with or without the institutional involvement of a universal (or regional) organization. In principle, an order of observations similar to those regarding the institution by consent of traditional peacekeeping operations can be carried out for robust peacekeeping operations, although initially not characterized as such; in the absence of the SC's authorization, the consent of the host State, as a circumstance precluding wrongfulness, may allow, from the point of view of that State, the setting up and conduct of these operations, even though the latter may resort to the use of force within the limits which will be reported shortly.[77]

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74 For examples of initiatives of the Council see Resolutions 779 (last recital), 816 (Section 4), 981 (Section 6); 1037 (Section 14); for examples of actions started by the organizations and then incurred by the SC see *supra*, Section 2, and *infra*, Section 7. For an example of a Mission (of EU) urged by the SC see *supra* in Section 1 (Resolutions on the situation in Mali).

75 Villani, "Les rapports," 325; Kolb, "Article 53," 1415 *et seq.*; Conforti and Focarelli, *Le Nazioni*, 346.

76 Cellamare, *Le operazioni*, 11 *et seq.*; Trevor Findlay, *The Use of Force in UN Peace Operations* (Oxford: OUP, 2002): 20 *et seq.*

77 As we will see shortly, the distinction between coercive and non-coercive operations has actual effect. For a large part of the doctrine the former, even if as consensual as the latter,

Moreover, it must be remembered that, in Res. 49/57 ('Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security') the GA states that regional organizations 'are encouraged to consider in their fields of competence' the possibility of creating, in particular, 'contingents of peacekeeping forces, for use as appropriate, in coordination with the United Nations and, when necessary, under the authority or with the authorization by the Security Council, in accordance with the Charter' (Annex, Section 10). From the point of view of the Assembly, the expression 'when necessary' must be attached to robust peacekeeping operations.[78] In fact the Resolution in question has made a general direct connection between the consensual foundation of the operations and their creation and deployment within the host State (States): 'peacekeeping activities undertaken by regional arrangements or agencies should be conducted with the consent of the State in the territory of which such activities are carried our' (Section 9).[79]

The foregoing leads us to focus on the relationship between the SC's consent to and authorization of the so-called coercive operations of regional organizations.

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requires the authorization of the SC under Art. 53 of the Charter (see for example Christian Walter, "Security Council Control over Regional Action," *MPUNYB* 1 (1997): 170 *et seq.*; and Ugo Villani, "La politica europea in materia di sicurezza e di difesa e i suoi rapporti con le Nazioni Unite," *CI* 59 (2004): 84 *et seq.*). Other authors emphasize the consensual nature of peacekeeping operations and doubt the need for such authorization for the deployment of operations even though coercive (Picone, "Le autorizzazioni," according to whom the authorization is 'required' to bring the operation to the UN system; Marten Zwanenburg, "Regional Organisations and the Maintenance of International Peace and Security: Three Recent Regional African Peace Operations," *J. Conflict & Security L.* 11 (2006): 483 *et seq.*; Harrell, "Modern-Day," 420 *et seq.*). About the coercive evolution of peacekeeping operations see the so-called 'Brahimi Report' (UN Doc. A/55/305-S/2000/809: 'Report of the Panel on United Nations Peace Operations'), Sections 48–50; Resolutions of the SC 1318, Part III, and 1327, Part II; moreover Cellamare, *Le operazioni*, 5 *et seq.*, 80 *et seq.*; *infra*, this Section and the next one.

78 Gioia, "The United," 409 (also for other bibliographic references).

79 See, for the past, David Wippman, "Military Interventions, Regional Organisations, and the Host-State Consent," *Duke J. Comp. & Int'l L.* 7 (1996–1997): 209; for the most recent actions Orakhelashvili, "The Legal," 112 *et seq.*; Micaela Frulli, *Le operazioni di* peacekeeping *delle Nazioni Unite: continuità di un modello normativo* (Napoli: Editoriale Scientifica, 2012): 25.

In this regard, it should be recalled that the main characteristics assumed in practice by UN peacekeeping operations are present also in the experience of the operations created by regional organizations.[80] And this is true first and foremost with regard to the fundamental consensual nature of the operations to which mention is made in the Res. 49/57.

80 On the experience of the UN see the following Resolutions: 1291, Section 8; 1493, Section 27; 1528, Section 8; 1545, Section 5; 1769, Section 15; 2062, Section 2 (with the specifications contained in Section 3 of Res. 2063); 2100. The relevant Resolutions show also that the use of force must be compatible with the relevant operational capabilities and that it is geographically limited (among those mentioned, see Res. 1291, Sections 7g and 8). The mandates of these operations have points of contact with those of multifunctional operations created over the last decade of the last century (Cellamare, *Le operazioni*, *passim*); but multifunctional operations are distinguished by robust peacekeeping operations in consideration of the authorization of the use of force given to the latter (Picone, "Le autorizzazioni," 33 *et seq.*). This is evident, for example, from the mandate of UNAMID, as outlined in the report (*supra*, footnote 18) mentioned in Section 1 of Res. 1769. The coercive character of the forces does not rule their amenability to the experience of peacekeeping, because of the empirical nature of such operations (Res. 1327, Part II; the report "'A More Secure World': Our shared responsibility," in UN Doc. A/59/565, Section 183 *et seq.*), and the flexibility of the tasks assigned to them according to the needs of each case. Indeed, because of the very nature of the operations, it is difficult to establish a formal definition of them (such a definition does not figure in the Proceedings of the UN Special Committee on peacekeeping: report of 22 Mar. 2006, in UN Doc. A/60/19, Sections 35–37, as well as those listed below). In particular the peacekeeping or peace building operations (even 'robust') cannot be confused with real enforcement actions: the use of force to which the former can have recourse is not aimed at imposing a solution to the conflict against the will of the government or other entity concerned; the use of force is incidental to the mandate received; i.e. is functional to the full implementation of the mandate, founded at least originally in the terms specified in the text, on the consent of the parties – Picone, "Le autorizzazioni"; Nicholas Tsagourias, "Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension," *J. Conflict & Security L.* 11 (2006): 465 *et seq.*; other bibliographic references in Conforti and Focarelli, *Le Nazioni*, 260 *et seq.*; see also the report of the SG on the implementation of the 'Brahimi Report', in UN Doc. A/55/502, Section 7. Therefore the maintenance of peace by means of robust operations cannot be equated with the responsibility to protect. Here it is sufficient to note that, as outlined at the 2005 Summit, the doctrine of the responsibility to protect refers to extreme situations (genocide, crimes and atrocities) in which the use of force is considered a last resort, since the State concerned does not have the capacity to protect (see the various steps considered in the report of the SG, in UN Doc. A/63/677). This is different from the situation in which there is an authorization to have recourse to the necessary means to protect civilians in accordance with the operational capabilities in the areas of the territories referred to in the acts concerning robust peacekeeping (for a different point of view see Susan C. Breau, "The Impact of the Responsibility to

Indeed, the practice shows the widespread search for consensus and that it does not exclude a possibly coercive characterization of operations: the Council authorized or supported, *ex* Ch. 7, the deployment of operations with coercive or fortified mandates by regional organizations or by States in the framework of the former; these operations are authorized to use the necessary measures for the purposes and within the limits specified in the relevant acts. In such situations, the consent and the approval of the Council constitute benchmarks in interpreting the mandate; in those situations, in the relations between the international organizations in question and the parties to the peace process, resolutions based on Ch. 7 are at stake, liable to overlap with the consent to the operations.[81] Indeed, the presence of the authorization by

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Protect on Peacekeeping," *J. Conflict & Security L.* 12 (2007): 429 *et seq.*); in this regard it is helpful to look at the statements in the Report of the Special Committee on Peacekeeping operations adopted in 2012 (New York, 21 Feb.-16 Mar. and 11 Sept. 2012, in UN Doc. A/66/19, Section 24). The foregoing is confirmed by Resolutions 2086 (recital 5–6) and 2098, recital 2 and Section 9. For a comparison between the mechanism of the ECOWAS and R2P (in the light of the primacy of the SC) see Sampson, "The Responsibility," 507 *et seq.*

81 The consent to the ECOWAS Monitoring Group (ECOMOG operation) in Liberia (ECOMIL) is detectable in the Cotonou Agreement of Aug. 1993 (UN Doc. S/26272); for the previous phase see the Bamako Agreement; ECOMIL has unequivocally taken a robust mandate (UN Doc. S/26422, Section 14), under the supervision of UNOMIL (Res. 866). The Liberian parties asked the UN the deployment, *ex* Ch. 7, of a new operation (UNMIL: Res. 1509; for the request of the Liberian parties see the Accra Comprehensive Peace Agreement, adopted on 18 Feb. 2003), which absorbed the ECOMOG Forces. On the basis of the Abuja Agreement (UN Doc. S/1998/825) the activities of the interposition Forces of ECOMOG were carried out in Guinea Bissau (approved by SC Res. 1216, Section 4; see also Res. 1233). As to the consent to ECOMOG Forces' presence in Côte d'Ivoire (partially resulting from President's Gbabo request: UN Doc. S/2002/1386, Sections 11 and 15) see the Linas-Marcoussis Agreement of 23 Jan. 2003 (UN Doc. S/2003/99). The deployment of forces (with an initial French presence on the basis of a preexisting Agreement) was supported by SC Res. 1464 (Section 1). As to the activity of the AU in Sudan see the N'djamena Agreement of 8 Apr. 2004 on the ceasefire in Darfur; the agreement of Addis Ababa (28 May 2006); the documents PSC/PR/Comm. (XVII), PSS AU, UN Doc. S/2004/767, Section 52, and UN Doc. S/2004/881, Section 54 (on the enlargement of the mandate of the AMIS); the Protocol of 9 Nov. 2004, 'On Improvement of the Humanitarian Situation in Darfur', Section 3. The deployment of the Operation in question was endorsed by the SC under Ch. 7 (Res. 1556, Section 2). Res. 1769 (recital 6) shows that the consensual foundation is also present in the UNAMID operation, with a single command (so following the request of the Council of the AU in PSC/PR/Comm. (LXXIX)). That foundation is detectable also for the planned IGAD Mission in Somalia-IGASOM (Res. 1725, Section 1). The mandate of the Mission was substantially annulled by that attributed to AMISOM, whose

the SC rules out any doubt about the possibility that the operation could proceed even though consent to the operation is withdrawn, or in situations where it is not possible to obtain the effective consent of all the entities concerned.[82] In this regard, we can recall some development which presided over the creation and behavior of EUFOR Tchad/CAR, as well as the events that accompanied the most recent creation of AFISMA.[83]

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constitution, by the AU and its Member States was preceded by meetings with representatives of the Transactional government (PSC/PR/Comm (LXIX)); the deployment of the AMISOM was authorized by the SC, *ex* Ch. 7 (Res. 1744, Section 4), as an operation designed to be absorbed, at the request of the AU (recital 6; PSC/PR/Comm. (XXX)). The consensual basis is detectable even for NATO's operations (and the operations of other organizations in the same area) conducted by IFOR, SFOR (in Bosnia and Herzegovina: see i.e. Res. 1575, Part I, Section 1; also Res. 1639) and KFOR, in co-deployment with UNMIK (the UN Mission including the activities of the OSCE and the EU-EUPT; for the expected role of EU with a large civilian mission see the Joint Action 2007/577/CFSP of 16 Jul. 2007). Operation Ocean Shield has received the consent of the Somali transitional authorities (which did not control the whole territory; see also Resolutions of the SC 1846, Sections 6 and 10, and 2020). For other examples of missions carried out with the consent of the host States, we can remember the activities of the EU in Bosnia and Herzegovina (replacing the operation of the UN with the EUPM: Joint action 2002/210/CFSP of 11 Mar. 2002 and the decision of the Council in 2002/845/CFSP of 30 Sept. 2002; in S/PRST/2003/33, the position of the SC, which, with Res. 1575, Part II, Section 7, authorized under Ch. 7 the creation of EUFOR, alternating with the SFOR), in the FYROM (Joint Action 2003/92/CFSP of 23 Jan. 2003, recital 5); in the Democratic Republic of the Congo by the EUPOL 'Kinshasa' (Global Agreement on the Transition, of 17 Dec. 2002: Joint Action 2004/847/CFSP, recital 5), Operation Artemis (Joint Action 2003/423/CFSP of 5 Jun. 2003), authorized by the SC, *ex* Ch. 7 (Res. 1484, also for reference to the consent expressed by the Congolese President and parties of Ituri region), to accomplish tasks shared with MONUC; and finally with EUFOR (UN Doc. S/2006/219, Annex II, Section 3; Joint Action 2006/319/CFSP of 27 Apr. 2006), authorized by the SC, with Res. 1671 of 25 Apr. 2006, to employ military activities, *ex* Ch. 7, in support of the MONUC during the election process. Consent to EUPOL Afghanistan (Council Joint Action 2007/369/CFSP of 30 May 2007) was inferred from the initiatives dating back to the Bonn Agreements (see the Resolutions of the SC, to support the initiative of the EU: 1746, 1806, 1869).

82 On this subject, see Picone, "Le autorizzazioni," 72 *et seq.*

83 For the EUFOR Tchad/CAR see Cellamare, "Funzioni," 189 *et seq.* The ECOMIB (authorized on 26 Apr. 2012 by ECOWAS after the coup d'état of 12 Apr. 2012) was accepted at first into the 'feuil de route' of the Junta; the latter subsequently opposed the mission because of the presence of Angolan soldiers, resulting in doubts about the neutrality of the execution of the mandate aimed at ensuring the abandonment of the territory by foreign troops (including Angolans). As to AFISMA (*supra*, Section 1), the Council has operated in the-concerned context: '[t]aking note of the letter of the Transitional Authorities of Mali… requesting the authorization of deployment through a Security Council resolution of an

Now, irrespective of any coercive developments in the operations in question, the authorizations given to them, even if deemed unnecessary, bear the (political) recognition of the value attributed to the operation by the SC, i.e. the authorization absorbs the authorized operation in the UN system.[84]

By way of example, the following regional operations lacked real coercive powers: the ECOMOG in Guinea Bissau, MISAB, AMIS I, IGASOM, EUPOL "Proxima" and "Concordia," EUBAM Moldova/Ukraine and EUBAM Rafah, the Multinational Force in Central Africa, FOMUC (instead of MINURCA) to which French support was given and to which observation duties on the border between the CAR and Tchad have been attributed. To this list, one may add the following regional operations: the AU Mission for the monitoring of elections in the Comoros (MUASEC), the Regional Assistance Mission to the Solomon Islands (RAMSI), based on the request of the host State to the Pacific Islands Forum.[85] The EUTM Mission to contribute to the training of the Malian army must also be remembered.[86]

Among the coercive operations one can remember those indicated below: AMISOM, with the authorization of Member States participating in the operation to take, *ex* Ch. 7, the necessary measures for the implementation of the mandate set out in Res. 1744 (20 Feb. 2007, Section 6); UNAMID, authorized *ex* Ch. 7 to take all the measures required for the effective implementation of the applicable Peace Agreement; to prevent armed attacks and protect civilians, without prejudice to the responsibility of the Sudanese government (Res. 1769, Section 15).

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international military force to assist the Armed Forces of Mali acting under Chapter VII' (Res. 2071, recital 8 *et seq.*; recital 7–10 of Res. 2085). The Council has deemed the request of the transitional authorities of the host State, although they have not maintained authority over the North of Mali (controlled by Islamist groups and terrorists, and in a minor part by the National Movement for the Liberation of Azauad which had declared the independence of Azuad); such approach of the SC is explained, it seems to us, considering the support given by the Council, ECOWAS and the AU to those authorities (with a presumption of the legality of the same authorities) and the prevailing presence in the North of those groups (which had marginalized the forces NMLA after the statement of independence, considered 'null and void' by the Council and regional organizations), including Ansar Dine, Al-Qaida in the Islamic Maghreb and the 'Movement of Unity and Jihad in Western Africa', included in the list of persons and entities subject to sanctions by the SC (Resolutions 1267 and 1989). See Cellamare, "Caratteri," 239 *et seq.*

84 In this respect see also *infra*, Sections 5–7.

85 The mandates and the relevant acts are published at www.operationspaix.net.

86 Decision 2013/34/CFSP, of the Council of 17 Jan. 2013 (recitals 3 and 6); the Council has accepted the SC's invitation (recital 2 *et seq.*).

Coercive powers are present in NATO operations in Bosnia-Herzegovina, FYROM, Kosovo, and in the context of ISAF; given what has already been observed,[87] the last operation must be distinguished from the others just mentioned.

For the EU, one can remember again EUFOR in Bosnia and Herzegovina, authorized *ex* Ch. 7, to adopt the necessary measures for the implementation of some parts of the Dayton Peace Agreement (Res. 1575, Section 14, resumed in Resolutions 1639 and 1722), the Artemis Operation (with authorization under Ch. 7 for the adoption of the necessary measures functional to the mandate: Res. 1484), EUFOR in the Congo (Force authorized under Res. 1671 to take, *ex* Ch. 7, the necessary measures, within the limits of its means, to support MONUC, to contribute to the protection of civilians in imminent danger, to carry out actions only to rescue individuals in danger: Section 8). EUFOR Tchad/CAR, whose deployment for a period of one year was decided and initiated by the EU Council in accordance with the mandate contained in Res. 1778. 'Offensive' powers, in support of the army of Mali can be inferred by Res. 2085 (Section 9 *et seq*.).

Of course, the division between coercive and non-coercive operations does not at all rule out that there may be uncertainties about the characteristics (coercive or not) of a given operation, as well as the effectiveness of the consensual basis and, in that connection, about the necessity and the function of the authorization by the SC in the particular situation in question. In this regard, we can recall the doubts about the initial operational experience in Liberia.[88]

87 See in footnote 81 and below, Section 6(c).

88 By Res. 788, the Council, '[r]ecalling the provisions of Chapter VIII of the Charter of the United Nations' (recital 6), '[c]ondemns the continuing armed attacks against the *peacekeeping forces* [italics added] of ECOWAS in Liberia by one of the parties to the conflict' (Section 4), '[d]ecides, under Chapter VII of the Charter of the United Nations' a general embargo 'on all deliveries of weapons and military equipment to Liberia...'. Subsequently, with Res. 886, the Council authorized the creation of its own observations Mission in Liberia (MONUL), excluding its participation in the enforcement operations of ECOMOG (Section 3.h); therefore the Council has qualified the Mission in question in a different way than in Res. 788. By Res. 1132 the clear support of the SC in favour of the ECOWAS in Sierra Leone is detectable. Even in that case the intervention of ECOWAS (anticipated by the forces of Nigeria and Guinea) appeared to be based on a request arising from a government which did not have effective control throughout the country. See, also for further bibliographical references, Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester: Manchester University Press, 2005), 68 *et seq.* and 112; Sicilianos, "Entre universalism," 190 *et seq.*; Harrell, "Modern-Day," text and footnotes 113 *et seq.*

It should be noted that the real characteristics of the operations do not affect the application of Art. 54 of the Charter.[89] In Res. 1631, the Council affirmed the obligation of regional organizations 'to keep the Security Council fully informed of their activities for the maintenance of international peace and security' (Section 9); moreover, the Council did not make the above obligations dependent on the characteristics of the activities (i.e. the operations) of the organizations. A similar affirmation is present in the Presidential Statement of 28 Mar. 2007,[90] and in Res. 2033 ('Cooperation between the United Nations and regional and sub-regional Organizations in maintaining international peace and security'); in effect in this resolution the Council recalled 'the need for sub-regional and regional organizations at all times to keep the Security Council fully informed of these efforts in a comprehensive and coordinated manner' (recital 8).

Such statements are easily understood if one considers that the information is for the exercise by the Council of its primary responsibility for the maintenance of international peace and security (Art. 24.1).[91] The duty to inform does not exclusively concern the actions planned or undertaken pursuant to Ch. 8; the same applies even in the case (as often happens and we will see shortly) of enforcement actions that the Council authorizes under Ch. 8 of the Charter, not applying directly to the organizations but to the States in the framework of the former (without explicitly mentioning Ch. 8). That is supported by the rationale behind Art. 54 and, as seen from the history of the UN Charter, by the consideration of Ch. 8 as a logical-systematic continuation of Ch. 7.[92]

5 The Trend of the Security Council to Authorize *ex* Ch. 7 Operations in the Framework of Regional Organizations

In the resolutions considered in the preceding pages it emerges that rarely has the Council drawn from Ch. 8, and that the Council acted under Ch. 7 having regard to operations of regional organizations or of States in the framework of these organizations. This occurred in the authorization of enforcement action

89 Villani, 'La politica', 80 *et seq.*

90 S/PRST 2007/7: 'Relationship between the United Nations and regional Organizations, in particular the African Union, in the maintenance of international peace and security'.

91 *Supra*, Section 1. See also the 'Supplement to an Agenda for Peace', Sections 27, 37, 39, 46 and 56.

92 Ademola Abass, "Extraterritorial Collective Security: The European Union and Operation Artemis," in *European*: 148 *et seq.*

for the purposes indicated (for example, Res. 1464), the authorization of the deployment of a force (for example, Resolutions 1484 and 2085) or, more frequently, the authorization of Member States of a regional organization to deploy a multifunctional operation with coercive powers (for example, Resolutions 1575, 1725 and 1744).

The reference to Ch. 7 rather than to Ch. 8 has been interpreted in several ways.[93] It was noted that this reference could find an explanation in the wish of some entities, which are available to carry out operations, not to be considered regional organizations subject to the application of Art. 54. Yet, given the role of the Council, the information requirement exists even if the operation is authorized under Ch. 7: in fact, as we have illustrated, the Council has asked to be informed about actions authorized under that Chapter.

According to other authors, authorizations issued under Ch. 8 operate as regards actions directed towards the member States of the organization involved, but not for actions (external to the organization) in a third State:[94] the latter are carried out under Art. 48 and thus require an authorization under Ch. 7.

Moreover, as has been observed, Ch. 8 presents no obstacles that prevent the Council from using/authorizing a regional organization for an operation in/against a State outside the same organization.[95]

It was argued also that Ch. 7 is more flexible than Ch. 8, and therefore more easily usable.[96] This is an observation that points out a very important aspect, but is rejected by other authors who support the opposite interpretation.[97]

Now, given its nature as a political body, in general, the fact that the SC on the whole invokes Ch. 7 for the purposes already indicated may be taken as a manifestation of the political commitment of the Council itself. As outlined in the so-called Capstone Doctrine, in the situations in question '[t]he Security Council's invocation of Chapter VII…can also be seen as a statement of firm political resolve and a means of reminding the parties to a conflict and the

93 For a comprehensive exposition of the question mentioned in the text see Boisson de Chazournes, "Les relations," 296.

94 Giorgio Gaja, "Use of Force Made or Authorized by the United Nations," in *The United Nations at Age Fifty. A Legal Perspective,* ed. Christian Tomuschat (The Hague: Martinus Nijhoff, 1995): 44; Christian Walter, "Regional Arrangements and the United Nations Charter," *MPEPIL* (2009). In addition Abass, "Extraterritorial," 136; but see Nigel D. White, "The EU as a Regional Security Actor within the International Legal Order," in *European*: 333.

95 For further bibliography see Boisson de Chazournes, "Les relations," 300.

96 See in general Derek W. Bowett, *Self-Defense in International Law* (New York: Praeger, 1958), 219 *et seq.*

97 Nigel D. White and Özlem Ulgen, "The Security Council and the Decentralised Military Option: Constitutionality and Function," *NILR* 44 (1997): 387.

wider United Nations membership of their obligation to give effect to Security Council decision' (Section 1.1).[98] In fact, we have regard actually to situations covered by Art. 39. It is important to mention that the authorizations given by the Council under the terms described appear to be immediately indicative for the parties and entities involved in the peace process of the possible overlap of the same authorizations with the consent; and this with the effects already indicated associated with such a possibility.

Moreover, the Resolutions in question do not have as their own specific or exclusive object the authorization of an operation of a regional organization. They have a wider scope;[99] they deal with situations classed by the Council as a threat or a violation of peace, in which the Council shall exercise the same powers that derive generally from the Charter applying to the Member within the framework of regional organizations. Acting under Ch. 7 (and not Ch. 8), the Council authorizes the deployment of an operation maintained by the States, as well as operational activities including, as we have seen, enforcement actions in the context of the operations; the latter, therefore, are placed in their context – just like an expression of the General Assembly reported earlier – 'under the authority' of the Council. As such, they perform tasks of various types contained in the constitutional acts and, consequently, guarantee regulatory principles implicitly or expressly referred to in those acts.

Of course, while acting under Ch. 7, the Council has sometimes addressed regional organizations. The indication of Ch. 7 suggests that the Council recalls the overall spirit of the system of collective security, of which Ch. 8 is an integral part.[100] Above all, the indication by the Council of Ch. 7 leads us to reject the idea that the Council addresses itself to regional organizations as entities to which to delegate an action (under Art. 53 of the Charter). Moreover, pursuant to Art. 48 of the Charter, the decisions of the SC 'shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members'. On that basis, it is to be envisaged that in the Resolutions in question the SC has taken into account the relevant regional organizations as entities instrumentally capable of coordinating, and thus strengthening, the forces and the activities of its Member States committed, *ex* Ch. 7, to the military component of the operation.[101]

98 Available online at www.effectivepeacekeeping.org.

99 Villani, "La politica," 86 *et seq.*

100 See *supra*, Section 1.

101 For general considerations regarding Art. 48 see Villani, "Les rapports," 269 *et seq.* See also the observations of the SG in UN Doc. S/2008/186, Section 71(d).

Above all, as mentioned earlier, the reference to Ch. 7 is indicative of the seriousness of the situation. Therefore, the Resolutions in questions are to be understood in the light of their contents and of the relevant operational context; on this basis it is possible to understand the effects of those Resolutions.[102] In other words, that reference should encourage us to focus on the reasoning of those authorizations,[103] on the rules of international law which come into play in the context in question, on the role played by the UN in dealing with such operations, characterized by the strong presence of Member States of the organizations concerned (e.g. Nigeria, compared to the operation of ECOWAS in Sierra Leone, France in Artemis in the Congo, in Tchad/CAR and in Mali) or States extraneous to the regional organization (e.g. the USA compared to the ECOWAS operation in Liberia, second phase; the initial large French presence in the operation in Côte d'Ivoire);[104] ultimately, about the reasons for authorizations on the basis of their operational contexts.

6 The Different Operational Contexts

These contexts can be broken down as follows.

a *The Contexts of Serious Violations of Human Rights*

We may notice first of all, especially in the African continent, the existence of situations in which, in the terms at the time indicated, the authorized use of force is recurrent in the presence of (and in reaction to) serious violations of values perceived as particularly important by the international community; these violations are treated by the Council as a threat to or breach of international peace.[105] Let us think of the reported authorizations of the use of force to protect civilians in operational areas characterized by armed conflict, humanitarian emergencies and violations of core fundamental human rights. These are situations most easily handled immediately by regional organizations together with States.[106]

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102 For the method followed here see Picone, "Le autorizzazioni," 36 *et seq.*

103 See Res. 1327, Part II.

104 Among other authors see Gazzini, *The Changing*, 64 *et seq.*; Majinge, "Regional Arrangements," 114 *et seq.* Also with reference to the experiences of SADC see Levitt, "Pro-democratic intervention."

105 Indication in section above and see Paolo Picone, "Il *peace-keeping* nel mondo attuale: tra militarizzazione e amministrazione fiduciaria," *RDI* 79 (1996): 26 *et seq.*; Picone, "Le autorizzazioni," 40 *et seq.*

106 E.g. see Res. 1625 and Res. 1778, establishing the EUFOR Tchad/RCA; the reports in UN Doc. 58/694, Section 84; UN Doc. A/59/591; UN Doc. A/60/19, Section 148; and the statements in S/PV.5649.

Experience shows that the Council has developed a 'practice'[107] which consists, precisely, in using, where possible, the peacekeeping system for the indicated purpose.

b ***The Contexts of Processes of National Reconciliation***

The introduction of the operations – on a consensual basis, sometimes, of dubious scope – in the management of processes of national reconciliation may also be noted. Those processes have their foundation in elections, already taking place or to be performed, inspired by the western principles of liberal democracy.[108] In the acts of the relevant regional organizations those principles are frequently represented as a factor of internal stability, which the operations therefore intend to ensure. As can be seen from the experiences in Haiti, Liberia, Sierra Leone, and Mali operational activities take place essentially to back up the regime or existing authorities and to avoid violent constitutional changes. Therefore, the operations guarantee those liberal principles.[109] They play an internal reformist role[110] and are (perceived as) a factor of international security in the relevant geo-political areas of operations. Of course, the foregoing does not rule out that in such contexts situations of confusion with those previously considered may arise.[111]

The contexts in question cannot be fall within the developments which focused on Libya on the basis of Res. 1973. By that Resolution, the SC, '[a]cting under Chapter VII of the Charter of the United Nations…4. Authorizes Member States that have notified that the Secretary-General, acting nationally or through regional Organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, …to protect civilians…'. Also (Section 5): '…bearing in mind Chapter VIII of the Charter of the United Nations, requests the Member States of the League of Arab States to cooperate with other Member States in the implementation of paragraph 4'; and '…8. Authorizes Member States that have notified the Secretary-General and the Secretary-General of the League of Arab States, acting nationally or

107 Res. 1674, par. 16; also S/PRST 2013/2, Section 16 *et seq.*

108 Picone, "Le autorizzazioni," 43 *et seq.*

109 See Picone, "Le autorizzazioni," 43, for the attitude taken by the Committee on Credentials of the GA at the time of the accreditation of representatives of Liberia and Sierra Leone; the Committee refused the credentials of the representatives of the Governments of Taylor and Koromo, which actually controlled most of the territory in both States. For the operation in Mali see footnote 83.

110 Cellamare, *Le operazioni*, 187 *et seq.*

111 See Resolutions 2071 and 2085 on Mali, as well as the report of the SG in UN Doc. S/2012/894.

through regional Organizations or arrangements, to take all necessary measures to enforce compliance with the ban on flights imposed…'.

First, it is a Resolution with no precise objectives, and thus of dubious interpretation. Also, we are dealing with a not fully documented situation that, in effect, '*may* amount to crimes against humanity' (recital 7; italics added).[112] Secondly, the operation in Libya was not aimed at the affirmation of democratic principles. Indeed, the operation in Libya was not inserted into a process of national reconciliation; it has fostered a real change of regime in favour of entities without 'democratic foundation'.[113] In fact, it was not an operation in support of the existing government intended to affect the results of the processes of pacification: although the mandate of the operation was not clearly the removal of President Gaddafi, the positions of the States that supported the operation in question shows that that removal was considered necessary for the future of Libya, thus causing a change of regime.[114]

In the cases previously considered, the dirigiste role of the Council with respect to the operations of (and/or of States within the framework of) regional organizations[115] is apparent, sometimes not previously authorized by the Council but registered and sustained by it after their creation.

Such a role is clear by general indications[116] as well as by the orientation followed by the Council.[117] For example, we can remember in this respect that, in

112 Picone, "Considerazioni," 217 s.

113 Ugo Villani, "L'intervento militare in Libia: responsibility to protect…o responsabilità per aggressione?" *I diritti dell'uomo, Cronache e battaglie* 22 (2011), No. 2: 57; and the articles published in *J. Conflict & Security L.* 17 (2012), No. 2.

114 On the Resolution in question see Picone, "Considerazioni," 213 *et seq.*; Villani, "L'intervento," 53 *et seq.*; Mehrdad Payandeh, "The United Nations, Military Intervention, and Regime Change in Libya," *VJIL* 52 (2012): 353. Most notable is the following position of the AU: 'l'Union africaine avait élaboré une feuille de route politique qui aurait aidé à résoudre le conflit politique dans ce pays. Le plan de l'Union africaine a été complètement ignoré en faveur d'un bombardement de la Libye par les forces de l'OTAN. Les conséquences des actions menées en Libye au nom du Conseil de sécurité ont été ressenties par d'autres pays de la région' (statement by President Zuma of 12 Jan. 2012, on the occasion of the 6702th meeting of the SC).

115 See Villani, "I rapporti," 82; Ugo Villani, "The Security Council's Authorization of Enforcement Action by Regional Organizations," *MPUNYB* 6 (2002): 535 *et seq.*; Chistine Gray, *International Law and the Use of Force* (3rd edn. Oxford: OUP, 2008): 417–418.

116 Resolutions 1631 and 1625; S/PV.5649, Section 3; recital 3 of Res. 1809 ('Recalling its primary responsibility for the maintenance of international security peace and, and Recognizing that cooperation with regional and sub-regional Organizations in matters relating to the maintenance of peace and security and consistent with Chapter VIII of the Charter of the United Nations, can improve collective security').

117 Resolutions 1049, 1556, 1575 and 1639.

the Congo, the Council authorized the EUFOR to carry out robust action under Ch. 7 and outlined the concept of the operation.[118] With Res. 1721, the SC endorsed the decisions of the Council of the AU referring to the situation in Côte d'Ivoire. In this way, it seems to us, the Council has extended to those decisions the most far-reaching normative role of its deliberations; the SC has affirmed, albeit implicitly, its primacy over the African Council as regards the maintenance of international peace and security (in Africa). Furthermore, in Res. 1744, on AMISOM, the Council did not strictly abide by the mandate of the African Council as to the use of force by the Mission.[119]

The dirigiste role of the SC is evident also when it approves or endorses, *ex* Ch. 7, agreements adopted by the warring parties: those agreements, then, are supported by a resolution whose legal basis is Ch. 7.[120] The role in question is illustrated by other indications: in Res. 2036, the Council agreed the concept of the operation adopted by the Council of the AU; and then, under Ch. 7, it authorized the expansion of the AMISOM mandate. By Res. 2072, the Council '[d]ecides on an exceptional basis and owing to the unique character of the mission to extend the United Nations logistical support package for AMISOM…3. Requests the Secretary-General to continue to provide technical, management and expert advice to the African Union in the planning and deployment of AMISOM' and 'Requests the Secretary-General to continue to provide for logistical support package for AMISOM' (Sections 2–4). In the same way, one can recall the reported content of Res. 2085.[121]

The manifestation of the will to control operational activities is also an expression of the primacy of the Council; this is quite evident in the transition to the Council's actions subsequent to those of regional organizations.[122] The determination of the Council to control operations may result from the directives on financial aspects,[123] from the request for regular reports to the competent

118 Res. 1671.

119 See the Declaration of the AU mentioned in the Preamble to Res. 1774 (the Council decided to establish for a period of six months a mission in Somalia, 'which shall be authorized to take all necessary measures as appropriate to carry out' the mandate indicated, in particular, 'To contribute, as may be requested and within capabilities, to the creation of the security necessary conditions for the provision of humanitarian assistance; (e) To protect its personnel, facilities, installations, equipment and mission, and to ensure the security and freedom of movement of its personnel').

120 Res. 1795, Section 1 *et seq.*; and the Preamble to Res. 2085 (and above, Section 4, text and footnotes recalled).

121 See *supra*, Section 1.

122 Res. 1609; for the 'bridging model' of EUFOR in Tchad/RCA, see *supra*, Section 1.

123 Res. 2010, Section 10, on the basis of Ch. 7.

organs[124] or, by implication, from the adoption of declarations and resolutions concerning the operations.[125]

On the other hand, in the presence of measures not involving the use of force already decided by the SC, only the SC can preclude the application of such a sanction in favour of the actions of regional organizations.[126]

Such orientation, even though manifested with respect to missions without prior authorization by the SC, shows that the Council considers the operations of regional organizations to be part of the overall competence of which, in fact, it is the holder under Art. 24 of the Charter; and all this with the assumption of duties provided for by acts (of regional organizations, or by the peace agreements) mentioned in the relevant resolutions and additional to the Charter.

On this basis the activities of regional organizations manifest themselves as a "segment" of a more complex task managed by the SC.[127]

c *Situations of Territorial Administration*

Furthermore, there are operational experiences in which regional organizations act together with States and the UN in general contexts of territorial administration;[128] therefore those contexts are to be kept separate from those considered above.

Briefly, it is worth remembering that Res. 1244 authorized, without any deadline (Section 9), the deployment of KFOR, which belongs essentially to NATO, i.e. a military operation for the management of the peace process in Kosovo, in co-deployment with UNMIK – the UN civil-political operation – to guarantee the latter. Res. 1244 demonstrates a unified vision by the Council of that process (Section 6); this is borne out in the request to the SG for periodic reports concerning the activities of both the operational components (Section 20). Such a unified vision and the guarantee function of KFOR do not exclude the structural role of UNMIK and its independent exercise of the powers of territorial administration on the basis of the relevant peace Agreement and the numerous resolutions of the SC.[129]

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124 Res. 1484, Section 9, with reference to the activity in Bunia; also above, Section 1, footnote 16 and the corresponding text.

125 See for example the Presidential Statement in S/PRST/2011/21.

126 See the request thereto by the Council of the AU (PS/PR/Comm (LXII)), with reference to the situation in Somalia.

127 See, even though with regard to other situations, Picone, "Le autorizzazioni," 33 *et seq.*

128 For this setting see Picone, "Le autorizzazioni," 45 *et seq.* For an overview of the experience in question see Ivan Ingravallo, "Amministrazione internazionale di territori," *Enciclopedia del diritto, Annali* IV (2011), 58 *et seq.*

129 In this regard, we can remember the activity of UNMIK; here it suffices to note that, by its own regulations (2000/47) UNMIK established the privileges and immunities of KFOR;

Operation KFOR is not like the operational presence of NATO in Afghanistan, following the well-known unilateral intervention of the US and British forces (Enduring Freedom, with support of various kinds of other States). Unlike KFOR, ISAF was not configured from the outset as a Force characterized by the predominant presence of the NATO contingents,[130] or as a force attached to that Organization. We can note that, in its developments (since 4 Feb. 2007), the ISAF leadership consisted of a 'composite' Command, consisting of personnel from NATO headquarters, as well as staff of the Member States of the Organization and other States contributing to the operation.

On the other hand, the powers of UNMIK are not reflected in UNAMA, the UN Mission created after ISAF with the task of coordinating certain civilian activities of the UN.[131] It is certainly a more modest mission than that carried out by the UN in Kosovo. Res. 1806 (and other resolutions referred to by the Res. 1806), for example, is indicative of the limited role of civil coordination given to UNAMA.

There is no doubt, therefore, that in the relations between the two operations in Afghanistan – which have been positively distinct from each other – the position of the military operation is overwhelmingly prevalent; this also in consideration of the continued presence in Afghanistan of Operation Enduring Freedom.

In conclusion, considering also the unclear relationship with the operation in Afghanistan,[132] ISAF – whose initial mandate was widened by Res. 1510 – cannot be compared to the Forces previously considered. As a whole, ISAF has come to take shape as a multinational force with the growing participation of contingents of NATO; i.e. a Force that, on behalf of the SC, has internationalized the foreign military presence in Afghanistan, with activities which connect to the so-called Bonn Agreement;[133] this in order to solve the financial

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and that the role in question has been exercised by the EU, in the context of UNMIK, by the representative of the United Kingdom (meeting of the SC, of 17 Oct. 2005 on "Cooperation between UN and Regional Organisations in Maintaining International Peace"). On the other hand, the unified operational view (which absorbs the activities of regional organization in the overall process outlined by the Council) can be considered confirmed in the wording of the Council Joint Action 2008/124/CFSP of 4 Feb. 2008 (on the EULEX Mission in Kosovo, the foundation of which was reached in Res. 1244 by the SG and by the Union: see Boisson de Chazournes, "Les relations," 283 *et seq.*).

130 Res. 1386.

131 Mission established by Res. 1401. See also recently Res. 2041, which recalls other Resolutions on the same Mission.

132 Picone, "Le autorizzazioni," 59 *et seq.*

133 See *supra*, Section 4.

problems which the occupation forces already in Afghanistan could not cope with, and lay the foundations for the future pursuit of the purposes set out by the SC in resolutions after the Enduring Freedom unilateral intervention.[134]

7 The Consent of the Security Council to Operations Already Started by Regional Organizations

Art. 53(1) submits to the authorization of the SC coercive actions planned by regional organizations: in other words, the Council shall examine whether the conditions for such authorization exist, so that it can control the activities authorized while exercising its primary responsibility for the maintenance of international peace and security. Several factors can affect the consent of the SC to the operations of the regional organization and the moment of the manifestation of the consent in question.

It may happen that the SC adopts a resolution in which it does not use the expressions of Art. 53, but asks for or urges the making of a decision by regional organizations favouring the activity indicated in the resolution itself.[135] At other times the Council has adopted a proper authorization.[136] There may also be an initiative of the regional organization that requires the permission of the Council for the deployment of a Force. And this can happen even after the adoption of the act whereby the same organization decides to operate: that is, in such a situation the authorization of the Council is subsequent to the deployment of forces.[137]

On the other hand, in a given situation the absence of political communication or of convergence of a policy analysis in the relationship with the regional organization can be a factor delaying the decision taken by the SC in favour of the regional organization's operation.[138]

Let us consider also the possibility that a traditional peacekeeping operation will undertake coercive powers after its deployment; in such hypothesis, it is easy to see how the Council's authorization could be given after the start of the operation.

134 Picone, "Le autorizzazioni," 61.

135 Res. 770, Section 2; Res. 1872, Section 8 (the EU responded to the solicitation of the SC with the creation of EUTM-Somalia, created by Council Decision 2010/96/CFSP), and Res. 1976, recital 10 and Section 8; Section 20 of Res. 2062.

136 Res. 816, Sections 4–5.

137 Res. 1464, Section 9; Res. 1744.

138 See the observations of the SG in UN Doc. S/2001/805, Section 34.

Now, the famous 'Report of the High-level Panel on Threats, Challenges and Change, 'A More Secure World': Our shared responsibility' states that in urgent situations authorization 'may be sought' after operations 'have commenced'.[139] That statement presupposes the eligibility of a 'subsequent authorization' to the deployment of the Forces of the regional organization. In fact, there have been cases in which the Council has not previously authorized the operation but has congratulated the regional organization or registered or welcomed the initiative of that organization.

Therefore, given the provisions of the second sentence of Art. 53(1), the issue arises about the admissibility of acts of the Council, under that rule, whereby the Council takes a clear position in favour of the operation already initiated by the regional organization. On this basis one may wonder what is the meaning of those acts. Now, first, it seems to us that the empirical character of the operations allows for flexibility in interpreting the concept of 'authorization': beyond its literal wording, the authorization can be taken as consent by the Council to the operation.

Of course, this is not to support the admissibility, *tout court*, of the so-called successive authorizations: given the rationale of Art. 53 reported earlier, the act by which the Council manifests its consent to an operation already started, without prior authorization, stands as an exception to the rule, so that that act is *strisctissimae interpretationis*.

In this regard, it should be noted that there are examples of cases in which the bodies of the UN have put in place activities from which it is possible to infer, it seems to us, the current availability on the part of the UN to support an operation of a regional organization, even in the absence of prior authorization of the Council. Let us think of the negotiations of the SG for the conclusion of agreements relating to the treatment of UN Forces that will replace or absorb existing forces of regional organizations; let us think also of manifestations of the consent to engage concretely in the operational context.[140] Such activities lend themselves to inclusion in the process of consensus-building (*rectius*: of a subsequent consensus) of the Council to those operations.

Based on the findings and on what has been observed with regard to the control of the SC over operations, it is possible to support the admissibility of the Council's consent to an operation already begun, provided that it is the unequivocal manifestation of willingness to do so, and provided that the Council's consent has as its object an operation currently in progress and with clear

139 UN Doc. A/59/565, Section 272.

140 As noted by Peyró Llopis, *Force*, 338 *et seq.*, with reference to the protection of the Mission in Sierra Leone.

objectives. In other words, the operation of the regional organization, however external to the Council but not to the system of the Charter, falls within the control of the Council, in the exercise of its powers as to the maintenance of international peace and security. Therefore, we cannot share the opinion, supported in the literature in several ways, which reconnects to certain resolutions adopted by the SC, at the end of the unilateral intervention of NATO in Kosovo, the effect of legitimizing/approval of that action which was not authorized and supervised by the Council.[141]

On the other hand, Art. 53 poses no specific formal requirements for the act by which the Council authorizes the regional organization; on this basis and within the limits indicated, it is legitimate to support the admissibility of acts with which the Council 'approves the operation' (rarely), (mostly) 'welcomes' or registers the activities of a regional organization. Indeed, in the acknowledged cases, the Council understands, approves (or tolerates) what has (already) happened and verifies the existence of the conditions present in the context of the operation in question; so that the operation comes within the overall system of the Charter.[142] In this situation, we can see unilateral behavior of the SC which is incompatible with its will to detect the illegitimacy of the operation in question; such behavior lends itself to being interpreted by the relevant regional organization and its Member States as the consent of the Council to the operation in question.[143]

In such situations we cannot speak of a literal application of Art. 53, but this does not rule out that, in the conditions indicated, the operation may be included in the overall system of the Charter.

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141 See the critical observations of Vincenzo Starace, "L'azione militare della Nato contro la Iugoslavia secondo il diritto internazionale," *Filosofia dei diritti umani* 1 (1999): 36; Picone, "La 'guerra del Kosovo'," 350 *et seq.*; Villani, "The Security," 545 *et seq.*

142 Although with reference to different situations, see Picone, "Considerazioni," 216 *et seq.*

143 Boisson de Chazournes, "Les relations," 288; Peyró Llopis, *Force*, 344 *et seq.*, with indications (in footnote 629) on the value to be recognized to a consensus after the time when it is supposed to be provided; Conforti and Focarelli, *Le Nazioni*, 347.

CHAPTER 6

Islam and International Organizations

The Organization of Islamic Cooperation

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1 The Islamic Nations and the International Organizations in Contemporary International Society

The vast world of Islam cover a little more than fifty heterogeneous States (city-states, traditional monarchies, republics, *etc.*) established after World War II and whose borders remains the subject of discussion. The evolution of the Muslim countries has been long and complex, albeit it is worth mentioning that they have been shaken by two great revolutionary processes since they became independent: a nationalistic one (in the 1950s) and a religious, Islamic one in the late 1970s. The main exponent of the former was Nasser, who conducted in Egypt a secular nationalistic revolution that later on spread to countries such as Syria and Iraq, where – much like in Egypt – heavily militarized republics, ruled by a single party and of a reformist nature from the social viewpoint, eventually unfolded. A decade later, the prestige of these nationalistic States would start to decline, for even if both the republics and the monarchies hailed modernization as one of their top ideals, all practical efforts to that end merely scratched the surface, giving rise instead to a process of growing without real development that only served the purposes of the oligarchies and small centers of power. Domestic corruption; the rise of customer-oriented structures; very few, if any, democratic reforms; and the failure of modernization from a political – survival of authoritarianism – and an economic – inability to overcome underdevelopment – standpoint led in the long run to an environment prone to change. It is in this context that Islam thrived as an alternative to political nationalism and the conservative structures of the existing monarchies. By that time, Islam had already taken root in many societies, and its invocation had played a political role all along. Nationalistic regimes long self-defined as secular ended up embracing Islam as their identifying brand, trying to find in its tenets the political legitimacy they had theretofore lacked. Furthermore, the conservative monarchies that came into being after decolonization had always claimed to be keepers of religious authenticity who pursued religion in an attempt to find social order and a rationale for their traditional structure.

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Under these circumstances took place the aforesaid second revolutionary process: the Iranian revolution. Spearheaded mostly by the masses – with the help of nationalists, communists, socialists and, of course, Islamism – this revolution enjoyed great popular support. The proposal to extend Islam to the social and political structure looked attractive to these masses, long pushed into the background. In general, Islam's broad social implications were unquestionable, as it presupposed a genuine alternative to what was known until then – to wit, socialist, nationalistic and other theses – and the recognition of social groups ranging from the religious moderates who favored reform to the most radical elements who advocated a swift transformation of society. The outcome of the Iranian revolution would be the advent of an *Islamist regime*, a system in which religion would be useful to design and legitimize power. On the other hand, the birth of the Islamic Republic of Iran would involve making Shiism, historically alienated in other States, 'official' and 'institutional'. Moreover, it would cause great upset in the international community: whereas Islam created an atmosphere of great expectation in Muslim countries, it was cause for concern in the West and the Sunni community.

In order to restrain fundamentalism and the likelihood of widespread revolution, many Islamic governments carried out political changes in their States. There was also no lack of repressive measures and forthright opposition, as in the case of Iraq, which counted on the express support of the West to engage in a drawn-out, bloody war with Iran that would eventually consolidated the Islamic revolution. Thus Islam became socially and politically stronger and, in some cases – e.g. Iran, Sudan and Afghanistan – even formed the backbone of the whole legal and political system. At the same time, the constant political disagreement among certain Western governments (particularly the United States) and the belligerence shown by some of their allies (namely Israel) led in time to the radicalization of religious groups whose ambition was to be in power.

At any rate, it should be made clear that throughout history the Islamist organizations have filled up the opposition's political space vis-à-vis the powers that be, mainly as a result of the authoritarian nature of most Islamist governments and, therefore, their exclusion from the institutions. In their capacity as adversaries, these Islamist movements ranged between a majority with a clear reformist slant – of an anti-establishment, protesting and antagonistic nature – and an anti-systemic minority – of a radical, extremist and violent kind – and thus conditioned the immediate future of their countries. Additionally, this state of affairs brought about a paradox: precisely as a result of the criticism leveled at them by the opposition and the community, the governments of Muslim-majority States gradually embraced Islam as a source of

legitimacy. The influence of religion on the domestic legal system has played out in different forms and to different degrees, but one of the most significant of the legal changes is represented by constitutional shifts from popular sovereignty to divine sovereignty as the foundation for the State's legitimacy and legislation.[1]

In the current setting of today's world, these States have sought for international forums in which they can defend and protect their interests, and in so doing they have paved the way for the emergence of international organizations (IOs) of a regional nature having quite different goals and whose geographic, political and economic diversity speaks for itself: the Arab League,[2] the African Union, the Arab Maghreb Union, *etc*. However, none has managed to bring together all the Islamic States of the world. The only one that has taken Islam as the agglutinating element of the organization, regardless of any geographic and cultural characteristics, is the Organization of Islamic Cooperation (hereinafter OIC).

2 The Organization of Islamic Cooperation

a *Evolution and Objectives*

Since 1924, the Muslim States have tried to bring the Islamic world into a single international organization. A number of landmark events laid the foundations of its final constitution, namely: (a) the Third Islamic Conference (Jerusalem, 1931) that mostly gathered Muslim intellectuals; (b) a first conference of political leaders in Aug. 1954, in which a bill was approved to that effect; and (c) the Islamic Summit Conference held in Rabat in 1969, aimed at discussing the Muslim world's problems and interests. Finally, in 1972, the Third Islamic Conference of Foreign Ministers approved and adopted the Charter of the Islamic Conference Organization, giving rise to a new organization that put special emphasis on the notion of Islamic solidarity. Indeed, in the wake of the criminal arson perpetrated against the Al-Aqsa Mosque in Jerusalem on 21 Aug.

1 An analysis of this development can be found in Aznin Tadjdini, "Constitutionalization of Islam in Afghanistan, Iran and Iraq. A Step Back for the Position of Human Rights?" *Nord. JHR* 4 (2011), 353–369.

2 Robert W. MacDonald, *The League of Arab States: A Study in the Dynamics of Regional Organization* (Princeton: Princeton University Press, 1965); Ahmed M. Gomaa, *The Foundation of the League of Arab States: War Time Diplomacy and Inter-Arab Politics, 1941–1945* (London: Longman, 1977).

1969, the Kings and Heads of State and Government of Islamic countries decided to organize the First Islamic Conference, held in Rabat, Morocco, from Sept. 22 to 25. The outcome of this Summit was the expression of their solidarity with the Palestinian people and their commitment to foster mutual economic, cultural and religious cooperation. On 23–25 Mar. 1970, King Faisal of Saudi Arabia convened in Jeddah the First Islamic Conference of Foreign Ministers, who decided to take steps for their own mutual international cooperation and create a forum for discussion about the main topics affecting the Muslim world. This forum would bring forth the Organization of the Islamic Conference, whose foundational platform – the Constitution of the Organization – was adopted in Jeddah in Mar. 1972 by the aforesaid Summit of Foreign Ministers and put into effect on 28 Feb. 1973.[3]

Years later, on 28 Jun. 2011, the Organization would change its name and emblem and thereafter became the Organization for Islamic Cooperation.[4] Currently consisting of 57 Member States, the OIC is open to all States that consider themselves Islamists regardless of their geographical location. Thirty of its present Members are founders, plus the Palestine Liberation Organization (currently Palestine). Likewise, the Organization grants 'observer' *status* to entities (such as the Moro Islamic Liberation Front of the Philippines or the Turkish Cypriot Muslim community), other international bodies (such as the African Union or the Arab League) and even States like Russia.

The main objectives and commitments laid down in the Constitutional Charter of the Islamic Conference are to improve and strengthen Islamic friendship and solidarity among Member States; protect and defend Islam's true image and prevent its defamation; promote dialogue among civilizations and religions; strive to achieve integrated and sustainable human development, and ensure the well-being of the Member States. Furthermore, the Charter safeguards the right to self-determination and non-interference in the internal affairs of Member States as well as their sovereignty, independence and territorial integrity. The extent of these goals led to the inclusion of certain priorities on its practical agenda, which has turned 'the question of Palestine' into the center of attention at every Islamic conference and a major topic of the Secretary-General's pronouncements. In fact, at the meeting held in Conakry in 2013, he called upon the Foreign Ministers to discuss the possibility of cutting

3 Ekmeleddin Ihsanoglu, *The Islamic World in the New Century: The Organization of the Islamic Conference, 1969–2009* (New York: Columbia University Press, 2010).

4 The Organization of Islamic Conference changed name into the Organization of Islamic Cooperation in Jun. 2011, at the 38th session of the Council of Foreign Ministers. 'OIC' as an acronym remains in use. Montreal International Forum, see: www.fimcivilsociety.org.

ties or breaking off diplomatic relations with any State that recognized Jerusalem as the capital of Israel. Other issues addressed by the Organization's agenda have been the countless conflicts suffered by or in its Member States, to wit, the Soviet intervention in Afghanistan (which led up to the Extraordinary Session of Foreign Ministers in Islamabad, Jan. 1980), the Iran-Iraq conflict, the war in Bosnia-Herzegovina, *etc*.

Nevertheless, beyond its interventions in conflicts, the OIC contributes in its capacity as subject of international law, to further institutionalize international society and develop its sources, but always from an Islamic perspective. Hence, for instance, the multiple international agreements that the OIC has championed in matters related to human rights, terrorism, education, and economy, *etc*. Still, these initiatives have caused controversy, as in the case of the texts about human rights (Islamic statements discussed herein) or the adoption of covenants such as the Convention on Combating International Terrorism approved in 1999.[5]

This last text is a good example of the assertions mentioned above: Art. 1(2) presents a much-criticized definition of terrorism, namely: 'Any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperilling their lives, honors, freedoms, security or rights or exposing the environment or any facility or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States'.

A description viewed as vague and labeled by doctrine as conducive to 'serious danger of the abusive use of terrorist prosecution against political opponents'. In Art. 2, the Convention exempts acts that are committed in 'people's struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination' from terrorism. The OIC has pushed for this exemption to be included in the international conventions against terrorism.[6] Along these lines, the Islamic Summit

5 In 1999, the OIC adopted 'the Convention of the Organisation of the Islamic Conference on Combating International Terrorism' (hereafter, 'the OIC Convention'). The Convention entered into force in 2002 after the deposit of the seventh instrument of ratification in accordance with its Art. 40. The Convention contains two particular points of friction with general international law on terrorism. One is the broad definition of terrorism and the second is the exemption of certain causes for terrorism which the OIC endorses.

6 During rounds of talks in the UN General Assembly on a convention on terrorism, proposed by India, the OIC pushed for an amendment in line with Art. 2 of the OIC Convention.

held in Mecca in Dec. 2005 approved the Ten-Year Action Plan (TYAP) to meet the challenges facing Member States in the present millennium, including the promotion of tolerance, modernization, trade, good governance and human rights in the Muslim world.

In light of the above, three very interesting features of the Organization can be outlined. First, OIC is the sole existing Organization based on an identifying religious conception as an element of unity among its Member States and in which Islam is the only common denominator and the only source of identity and integration. In fact, Art. II(A)(1) of the OIC Charter stipulates that its prime objective is to 'promote Islamic solidarity among Member States'. Secondly, OIC is neither a regional body – its Member States are from four different continents – nor a universal organization, since only the States that practice Muslim faith can be granted membership. Thirdly, OIC takes a basically political stance on the question of Palestine, consistent with the prevailing frame of mind that prevailed during the Cold War, when the organization was established. Art. VI(5) of the Charter indicates that OIC will have its headquarters in Jeddah (Saudi Arabia) until the liberation of Jerusalem. And, finally, OIC can be considered the world's second largest Organization after the United Nations, covering a geographical area of great strategic importance from an international standpoint. An interesting detail in this connection is that the Organization has no provisions regarding the 'expulsion' of a member, as it only envisages the possibility of 'suspension' or 'provisional loss'. Actually, several Member States have been suspended ever since the OIC was born, for instance, Sierra Leone in 1974, Burkina Faso in 1980 and, recently, Syria.

b *Structure and Specialized Organs*

Regarding its internal structure,[7] OIC consists of three bodies – two of them of a markedly interstate nature – namely the Conference of Kings and Heads of State and Government, known as Islamic Summit Conference (Art. IV of the Charter), the Islamic Conference of Foreign Ministers (Art. V of the Charter) and the Secretary-General of the Organization. The former can be considered the supreme authority of the Organization and its most important body, since it lays down the strategies to fulfill the OIC's objectives. The second could be

Through this exemption the OIC was pushing the Pakistan line on Kashmir, and the Pakistani president referred to the fighters in Kashmir as 'freedom fighters', while the same fighters were referred to by India as 'terrorists'.

7 See www.oic-oci.org. For a presentation of the structure and institutional functioning of the OIC see Saad S. Khan, *Reasserting International Islam: A Focus on the Organisation of Islamic Conference and Other Islamic Institutions* (Oxford: OUP, 2001).

described as an executive organ in charge of implementing OIC's policy and adopting all resolutions and recommendations. Finally, the General Secretariat, located in Jeddah, is elected by the Islamic Conference of Foreign Ministers and entrusted with the task of representing the Organization at international level. Throughout history, several Conferences have made significant contributions to OIC's development, among others those held in Lahore (1974), Mecca (1981), Casablanca (1984), Kuwait (1987) and Dakar (1991). This being said, it is worth pointing out that the OIC's Charter did not set up its own judicial organ from the very outset. It was not until the 5th Islamic Summit – held in Kuwait in Jan. 1987 – that the Draft Statute of the International Islamic Court of Justice (IICJ) was conclusively approved.[8]

Despite the fact that the Court is yet to become active for lack of ratifications,[9] its significance and originality cannot be denied. As to its composition and functions, Art. 3(a) of its Statutes establishes that it shall be composed of seven judges, each elected to a four-year term and renewable only once. According to Art. 4, these judges must be Muslim nationals of high moral standards, Shar'iah jurists of recognized competence, and experienced in international law. The jurisdiction of this organ, like other international courts, would be twofold: contentious and advisory, pursuant to Arts. 21 and 42 of the Statute, respectively. As to the sources of law, Art. 27 states that the Islamic Shar'iah[10] is the fundamental law of the Court and can only abide by general sources of international law (treaties, customs, general law principles, and international jurisprudence) as the second choice. This means that, for the first time in international law, a court would adopt the Shar'iah as applicable to solve international disputes.

Regarding the functioning of the Court, interesting scenarios began to take shape in practice. For instance, if two Members States decided to solve a

8 See Michele Lombardini, "The International Islamic Court of Justice: Towards and International Islamic Legal System?" *Leiden JIL* 14 (2001), 665–680.

9 Under Art. 11 of the OIC Charter, 2/3 of the Member States must ratify the Statute in order for the Court to become operative. So far, the Statute has been ratified by only a few Member States.

10 There are two primary sources of Shar'iah law: the precepts set forth in the Quranic verses (*ayahs*), and the example set by the Islamic prophet Muhammad in the Sunnah. Where it has official *status*, Shar'iah is interpreted by Islamic judges (*qadis*) with varying responsibilities for the religious leaders (*imams*). For questions not directly addressed in the primary sources, the application of Shar'iah is extended through consensus of the religious scholars (*ulama*) thought to embody the consensus of the Muslim Community (*ijma*). Islamic jurisprudence will also sometimes incorporate analogies from the Quran and Sunnah through qiyas, though Shia jurists also prefer reasoning (*'aql*) to analogy.

border-related problem in this Court, the judges would base their decisions on the sources of Islamic law: the Qur'an (the verbatim word of God) and the Sunnah (the revelation of God through the teachings and practices of the prophet Muhammad). Should they fail to find a principle they could apply to the dispute at issue, then they would have recourse to the secondary sources, that is, the classic codes of international law. Interestingly enough, however, the Statute makes no reference whatsoever to the school of religious law to be observed by the judges in Court (*maliki*,[11] *hanafi*,[12] *shâfi'I*,[13] *hanbali*),[14] which could forebode legal difficulties.

11 The Mālikī school is one of the schools of Fiqh or religious law within Sunni Islam. It was founded by Malik bin Anas and it considers the rulings from ulema from Medina to be sunnah. Its adherents reside mostly in North Africa, West Africa, the United Arab Emirates, Kuwait, in parts of Saudi Arabia, Oman and many middle eastern countries, and parts of India. The Murabitun World Movement also follows the Mālikī school.

12 The Hanafi school is one of the four *Madhhabs* (schools of law) in jurisprudence (*Fiqh*) within Sunni Islam. The Hanafi madhhab is named after the Persian scholar Abū Ḥanīfa an-Nu'man ibn Thābit (699-767CE/80-148 AH), a Tabi'i whose legal views were preserved primarily by his two most important disciples, Abu Yusuf and Muhammad al-Shaybani. As the predominant school in South Asia, Central Asia, the Caucasus, the Balkans and Turkey, the Hanafi school has the most adherents in the Muslim world. The Barelwi and Deobandi movements, the two largest Islamic movements in South Asia, are both Hanafi.

13 The Shafi'i school of thought is one of the schools of jurisprudence within the Sunni branch of Islam, adhering to the teachings of the Muslim Arab scholar of jurisprudence, Al-Shafi'i of the prestigious Quraysh tribe. Originally part of the early Ahl al-Hadith and Athari movement, the mainstream of school is now associated with the Ash'ari school of theology. The Shafi'i school is the dominant school of jurisprudence amongst Muslims in the Hejaz region of Saudi Arabia, Yemen, Syria, the Palestinian territories, Jordan, Egypt, Djibouti, Eritrea, Somalia, Ethiopia, Indonesia, Malaysia, Brunei, the North Caucasus, Kurdistan and Maldives. It is also practised by large communities in Saudi Arabia (in the Tihamah and Asir), Kuwait, Iraq, the Swahili Coast, South Africa, Thailand, Vietnam, Cambodia, the Philippines, Sri Lanka, Kazakhstan (by Chechens) and Indian States of Kerala (most of the Mappilas), Karnataka (Bhatkal, Mangalore and Coorg districts), Maharashtra (by Konkani Muslims) and Tamil Nadu.

14 The Hanbali school is one the schools of Fiqh or religious law within Sunni Islam. The jurisprudence school traces back to Ahmad ibn Hanbal (d. 855) but was institutionalized by his students. Hanbali jurisprudence is considered very strict and conservative, especially regarding questions of theology. The Hanbali school of jurisprudence is followed predominantly in Saudi Arabia and Qatar as well as minority communities in Syria and Iraq. The majority of the Salafist movement, though not all adherents, tend to follow the Hanbali school.

In addition to these domestic organs, OIC relies on several specialized bodies: IDB, ISESCO, ISBO and IINA. The Islamic Development Bank (IDB)[15] is the international finance guild for the entire OIC. Whist offering services such as equity participation, non-interest loans and lease facilities, which contribute to the promotion of social and economic development within individual Member States and other Muslim communities throughout the world, the Bank also supports technical cooperation between Islamic Countries. Moreover, like the Islamic Solidarity Fund (ISF), the Bank provides relief to Member States that suffer natural and man-made disasters. The Islamic Educational, Scientific and Cultural Organization (ISESCO)[16] was formally established by the Eleventh Conference when Res. 2/11-C approved the Statute of this newly created institution. Its headquarters are in Rabat, Morocco. ISESCO aims to promote cooperation among Member States in the fields of education, science, and culture. In the case of education, the Organization recommends that Islamic ethics and values should be integrated into the syllabus. In the area of science, the use of modern technology and the development of applied sciences are encouraged within the framework of Islamic ideals, whilst cultural and educational exchanges are organized with a view to promoting world peace and security.

By encouraging cooperation between Member States in the field of broadcasting vis-à-vis the exchange of radio and television programmes among the broadcasting organizations of these countries, ISBO (Islamic States Broadcasting Organization)[17] nurtures cooperation among OIC Member States and also encourages them to come to terms with each other's religious and cultural heritage and social and economic progress. It also encourages feelings of brotherhood among Muslim peoples with a view to uniting them in the development of Islamic causes. More importantly, ISBO proclaims the principles of the Islamic Da'wah (preaching of Islam) and promotes the teaching of Arabic and other languages spoken in Member States. The International Islamic News Agency (IINA)[18] was formally established by the Third Islamic Conference (Jeddah, Mar. 1972). Its main objective is to promote the exchange of information among news agencies in relation to cooperation programs designed to enhance mutual understanding of political, economic and social issues among Member States. It also aims to upgrade the professional standards of the media in all Member States on the basis of Islamic values.

15 See www.isdb.org/irj/portal/anonymous.

16 See www.isesco.org.ma.

17 See www.isboo.org.

18 See www.islamicnews.org.sa.

3 OIC and the International Protection of Human Rights

Human rights have become a topic of discussion that divides societies and affects the policies developed by the governments of Islamic States and the IOs in which they participate. This division manifests itself in the drafts, projects and final texts that private associations or public organizations have disseminated as proposals of human rights in Islam. Some of them clearly come close to the rights recognized in the classic universal texts of international law, whereas others maintain that all rights, be they individual or collective, must submit to Islam, breaking away from international declarations that they only deem fit for the Western world's secularized culture. Accordingly, rather than human rights accepted and adopted by Islam as a whole, there are only proposals made by ideologically committed sectors at variance with one another.[19] Be that as it may, and any difference notwithstanding, the fact that human rights are captured in Declarations of international Islamic organizations highlights their acceptance by Muslim countries and their adaptation to both a variety of cultures and, especially, to the need to bring *ad usum* institutions and rights into line with the idiosyncrasies of the Muslim world. Islam's most liberal wing concurs with the universal nature of human rights – which they consider compatible with the main tenets of Shar'iah – and therefore reject the need to draft lists of Islamic human rights that, in the final analysis, entail religion-based[20] limitations and restrictions on international human rights.

Our study is focused on three texts put forward by OIC. The first one is the Draft declaration of fundamental human rights and duties in Islam (First Declaration, 1979), followed by the Draft document of human rights in Islam (Second Declaration, 1981), and finally, the Cairo Declaration on Human Rights in Islam, adopted on 5 Aug. 1990 by the 19th Islamic Conference and held to be the ultimate proposal of Islamic Declaration (Third Declaration, 1990).

The ideology that promotes and makes these Islamic Declarations fruitful is the non-extreme traditionalistic line. In other words, one that accepts human rights formulated in the style of international texts provided they be subject to

19 Maurits S. Bergers, "Islamic Views on International Law," in *Culture and International Law*, ed. Paul Meerts (The Hague: Hague Academic Press, 2008), 105–117.

20 For a comprehensive discussion on the resurgence of religion in law, please see Ran Hirschl, *Constitutional Theocracy* (Cambridge: Harvard University Press, 2010); Gilles Kepel, *The Revenge of God: The Resurgence of Islam, Christianity and Judaism in the Modern World* (Cambridge: Polity, 1994). Also, José Casanova, *Public Religions in the Modern World* (Chicago: Chicago University Press, 1994).

the religious law or *Shar'iah*, whose rules and principles condition, qualify, regulate and limit the body of universal human rights. In fact, the true basis of these rights is said to be addressed in the *Shar'iah* in their most refined and flawless conception, which effectively reconciles faith and reason. The result of this approach to Islam, as Mayer underscored, is a set of Declarations built upon a mixture of international principles and standards and Islamic rules and concepts. This explains why one of the most outstanding features of these Declarations is the diversity of their formulation and the fact that their content is contingent on the individual's qualities, religion and sex. Consequently, we are faced with rights and duties that differ depending as much on the individual's gender as on whether or not he or she is a believer (Muslim, Jewish, Christian, *etc.*).

a *Islamic Declarations on Human Rights: The Shar'iah as Basis and Boundary*

As we have seen, the common denominator of the OIC Member States, beyond any ethnic, linguistic or cultural diversity, is their people's Muslim beliefs and Islam's *status* as an official State religion.[21] That is why, to some logical extent, Islam and the Shar'iah's principles, dictates and values are used as a point of reference to formulate means of human rights protection. What scholars of OIC-approved texts do find definitely surprising is how much they have made Islam dependent on the civil, political and social rights laid down in international declarations.

The three aforesaid Declarations open with a profession of faith in Islamic dogmas and the Shar'iah's moral tenets, and this makes them lean, surprisingly, towards the theological basis of the human rights doctrine and, at the same time, conceal their real origins in the schools of thought of the Enlightenment and ideological liberalism.[22] The preambles to the Second and Third Declarations suggest that people's rights and liberties were enunciated by Islam since its very inception and, therefore, their observance is a matter of necessity, both ethical and religious. In fact, human rights in Islam are held to be superior to those proclaimed by international law inasmuch as they fulfill the mandates revealed by God, and their commitment to spread Islamic concepts lies in the mission to help mankind attend a true balance between faith and reason and

21 For a comprehensive discussion about official State religion, please see Abdullahi A. An-Na'im, *Islam and the Secular State: Negotiating the Future of Sharia* (Cambridge: Harvard University Press, 2008).

22 Bassam Tibi, "Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations," *Hum. Rts. Q.* 16 (1994), 277–299.

overcome the materialistic nature of today's civilization. Underlying these Declarations, then, is the wish to constantly stress its unswerving loyalty and orthodoxy to Islamic religion beyond any other considerations of ethical or political convenience. Hence their leaning toward texts of a theological nature or containing religious morality, which distinguishes them from and even challenge other universal international declarations considered by some as *Western ideological products*. This is somewhat contradictory if we bear in mind that the OIC Member States played an active role in the drafting of the 1948 Universal Declaration of Human Rights and other international texts on this topic.[23]

The divine basis of the rights recognized in every OIC Declaration is expressly asserted therein.[24] In the preamble to the First Declaration we read the following: '…human rights and duties in Islam are guided by imperative texts provided by the Creator…in such a way that man shall not be able to infringe them…'. And the Third Declaration, closely following the text of the Second Declaration, emphasizes '…the universal rights and fundamental liberties [stem from] inalterable divine rules contained in the Book of God and transmitted to His Prophet to complete the preceding divine messages…'. This implies religious punishment in case of infringement. The above Declarations state that the protection of these rights is an act of worship, so that any attack against them is forbidden by religion (Art. 13 of the Second Declaration and Arts. 1 and 2 of the Third Declaration). From all this we can deduce that these rights are also subject to, and conditioned on, God's law.

Such a consequence – the subjugation of rights and liberties to the Islamic Shar'iah – is found throughout the process of recognition of the rights included in the OIC Declarations. From the standpoint of religious law, it represents the superiority of the divine law of the Qur'an and the Sunnah, which conditions and restrains the divine laws created by human legislators. This statement, shared by other religions in their approach to human rights, is the key to understand the structure at the root of the Islamic Declarations we have studied: they accept many international rights in their original terminology

23 For a comprehensive discussion on the relativism and Human Rights see Salem Azzam, "Universal Islamic Declaration of Human Rights," *IJHR* 2 (1998), 102–112, and Fred Halliday, "Relativism and Universalism in Human Rights: The Case of the Islamic Middle East," *Political Studies* 43 (2005), 152–167.

24 Augustín Motilla de la Calle, "Las declaraciones de derechos humanos de organismos internacionales islámicos," in *Islam y Derechos Humanos*, eds. María J. Ciáurriz, *et al.* (Madrid: Editorial Trotta, 2006), 27–52.

(the rights to life, marriage, freedom of opinion and expression, education, religious freedom, work, physical integrity, ownership, *etc.*), except that their content is limited and modified as a function of the content of the Shar'iah in its traditional conception. This is further noticeable in the fact that the said Declarations fail to mention rights that belie specific rules of the Shar'iah, thus limiting their exercise. This is the case, for instance, of the right to marriage, the granting of legal capacity, parental rights to choose their child's education, freedoms of opinion and expression, religious freedom, intellectual/scientific/artistic freedom, freedom of circulation, *etc.* In this way, Islamic law's role as limit and basis of the rights recognized in various Declarations is explicitly acknowledged by the assertion that 'all rights and freedoms stipulated in this document are subject to the provisions of Islamic law' (Art. 24 of the Third Declaration and Art. 27 of the Second Declaration) and the remark that Islam is the only possible point of reference to interpret or clarify any article (Art. 28 of the Second Declaration and Art. 25 of the Third Declaration). Taking the aforesaid into account, there is no doubt that by uplifting religion to a higher stage that restricts and regulates people's rights, Islam's Declarations make a clean break from their recognition at international level, where religious notions are never assumed as an element of human rights authentication. In conclusion, it is safe to say that by making human rights contingent on Islamic law rather than on people's intrinsic dignity, the OIC Declarations end up distorting their recognition and exercise. The 'cultural factor' that in this case distinguishes human rights in Islam from those proclaimed at universal level involves restrictions and limitations *religionis causae* bound to be rebuffed as contrary to international standards.

b *Rights Recognized in OIC Declarations: Disagreement and Concurrence with Universal Texts*

The basic principle of equality is covered by Islam's three Declarations, although a distinction is made between equality in dignity – based on the idea that man is God's creation – and equality before the law, which gives rise to different rights and obligations depending on the individual's religion and gender. This is particularly so in the case of the rights within the family, whose importance in Muslim society becomes apparent in the stress that the Declarations lay on this social group. For instance, man's and woman's roles in the family are clearly differentiated in the Declarations. According to Art. 6 of the Third Declaration, the male is responsible for the support and welfare of the family, and no mention whatsoever is made of the female. Another gender-related distinction, in this case with religious roots, is marriage. The obstacles to marriage recognized in the Declarations are different for men and women,

with religion at the core of the problem.[25] On the other hand, it is significant that all three Declarations regard as illicit to ban marriage on grounds of race, color or nationality, but nowhere do they say anything about possible limitations or prohibitions for religious reasons. Actually, the First Declaration explicitly states that faith in God is a necessary condition and religious unity a requirement in Muslim marriages (Art. 9), which leaves the door open to religion-based legal discrimination against marriage.

Additionally, the religious element is also present in the regulation of the right to life in its every form: dependent and independent. Its proclamation is linked to the ban on the permanent interruption of fertility, abortion and infanticide. Again, religious law is what essentially puts a limit on the right to life, as stipulated in Art. 2 of the Third Declaration: 'It is prohibited to take away life except for a Shar'iah-prescribed reason', In this connection, the right to safety from bodily harm is no less conditional, since it is the duty of the State to safeguard it and it cannot be breached 'without a Shar'iah-prescribed reason'. *Sensu contrario*, death penalty and bodily harm legalized by the Qur'an or the Sunnah are justified in the said Declarations. Other civil rights recognized by these Islamic Declarations are also conditioned by religious law. There are many examples: people will enjoy legal capacity in accordance with the Shar'iah, which stands out as a limitation to freedom of opinion and expression. Likewise, freedom of information may not be 'exploited or misused in such a way as may violate sanctities and the dignity of Prophets' (Art. 22.3 of the Third Declaration); the right to seek asylum is not guaranteed if the request is motivated by an act which Shar'iah regards as a crime; the right to free movement is respected within the context of Islamic law; the right to own property and to enjoy the fruits of scientific, literary, artistic or technical production are not protected if they go against Islamic law; and the right to resort to justice is equally subject to Islamic law, as per Art. 19(4) of the Third Declaration: 'There shall be no crime or punishment except as provided for in the Shar'iah'.

The right to religious freedom, subject as it is to the harsh and unequivocal limitations that protecting Islamic faith entails, deserves a separate analysis. What the Second Declaration calls 'right to freedom of worship' is followed by the prohibition of atheism, unlawful proselytism – ascertained through the use of coactive means – and the prohibition to take advantage of an individual's poverty or ignorance to convert him to another religion. Actually, religious

25 A comprehensive comparative analysis of the Cairo Declaration on Human Rights in Islam and universal rights is given by Anne E. Mayer, "Universal versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?" *Mich. J. Int'l L.* 15 (1993/1994), 308–402.

conversion is absolutely forbidden to Muslims, as laid down in Art. 10 of the Third Declaration: 'Islam is the religion of unspoiled nature'. As far as the civil rights recognized in the Declarations are concerned, it should be remembered that no mention is made of two rights essential to the development of an individual's social personality: the right of assembly and the freedom of association for private or public purposes. However, the texts include the political rights to participate in the administration of public affairs, assume public office, and exercise control over the government, albeit nothing is explicitly said about the democratic means and channels required by an election. As to social, economic or cultural rights, the Declarations prescribe the rights to medical care and social assistance, the right to work and the State's obligation to safeguard people's guarantees and provide for their self-development in fair conditions. Yet, nowhere do they say anything about the right to strike. Other rights based on and limited by the Shar'iah are also recognized, namely the individual's right to receive a decent burial and have his last will respected after his death '…in accordance with the rules set out in the Qur'an and the Sunnah' (Art. 26 of the Second Declaration and, in similar terms, Art. 30 of the First Declaration). The right to privacy in business and legitimate trade practices are also restricted by express order of the Shar'iah: usury is absolutely prohibited.

Religious inspiration is especially apparent with regard to the right to education, which is one of the fundamental rights granted to children and exercised mostly in the bosom of the family. The aforesaid Declarations point out that the father '…is the worthiest man capable of assuring the child's education…' (Art. 11 of the First Declaration), whereas the mother is assigned custody (*hadana*) or material sustenance of the minor. The father has the right and obligation to choose the type of education that he desires for the children in accordance with ethical values and the principles of the Shar'iah. This religious aim of education is laid down in Art. 9(1) of the Third Declaration: 'The State shall ensure the availability of ways and means to acquire education and shall guarantee educational diversity in the interest of society so as to enable man to be acquainted with the religion of Islam and the facts of the Universe for the benefit of mankind…'. Art. 9(2) states that '…every human being has the right to receive both religious and worldly education from the various institutions of education and guidance…and in such an integrated and balanced manner as to develop his personality, strengthen his faith in God and promote his respect for and defense of both his rights and obligations'.[26]

26 See Motilla de la Calle, "Las declaraciones," 27–52.

All of the above legalizes not only the teaching of Islamic religion at school but also the teaching of every other religious subject in keeping with the principles and values of Islam. Such is the task that Muslim States undertake to carry out in public education and the role of the public institutions in relation to social life, which is governed by religious morality. In this connection, Art. 17(1) of the Third Declaration states that 'everyone shall have the right to live in a clean environment, away from vice and moral corruption, that would foster his self-development; and it is incumbent upon the State and society in general to afford that right'. Imposing religious morality on society is also a right granted to individuals. Art. 22(2) of the Third Declaration quotes an expression from the Qur'an that says: 'Everyone shall have the right to advocate what is right, propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shar'iah.' Understood literally, this precept empowers any Muslim to demand observance of religious law in society if the relevant authority fails to do so.

Finally, these Declarations recognize people's right to freedom and self-determination and to exercise control over their wealth and resources and decry colonialism – an evil suffered by most Muslim States – in categorical terms in Art. 11(2) of the Third Declaration: '…Colonialism of all types, being one of the most evil forms of enslavement, is totally prohibited… It is the duty of all States and peoples to support the struggle for the liquidation of all forms of colonialism and occupation…'. Nor is there in the Declarations any definite prohibition on war, either defensive or offensive, for religious reasons (*jihad*), even if somewhere in a Declaration we either find a strong denunciation of any attack against other people to appropriate their wealth or natural resources or confirm the acceptance of certain humanitarian norms in case of armed conflict. The Declarations never mention any means to protect and safeguard the said recognized rights. Only in the First Declaration reference is made to people's right to '…employ any means necessary to guarantee and protect these rights' (Art. 5). Therefore, it is understood that the effective protection of these rights is made subordinate to whatever mechanism the OIC Member States envisages in their respective codes.

4 The Role of the OIC in the Conflicts Facing the Arab/Muslim World

The social movements and conflicts that Africa and the Middle East have suffered in the last few years have brought about political changes and clashes of undeniable international repercussion. Among others, the Iraqi War and the conflicts that took place in Somalia, Libya, Yemen, Mali, and Syria come to

mind. In these cases, the role of the IOs has been (and still is) critical, as evidenced by the Resolutions of the United Nations Security Council, which are not without controversy. Nonetheless, irrespective of the stance taken by the UN and other Western bodies like the North Atlantic Treaty Organization (NATO) or the European Union (EU), the role of regional organizations in Member States – and especially the part played by OIC – that have been affected to a greater or lesser extent by recent conflicts merits our full attention.[27] In this respect, we must bear in mind that OIC has tried to spearhead the efforts to manage regional conflicts, which explains why its attempts at mediating have been a regular feature of the disharmony we have witnessed in Africa and the Middle East. In fact, OIC's role has been recognized by the UN, with which it has intensely cooperated since 1975, the year when OIC was accepted as an 'observer member' pursuant to Res. 3369 of Oct. 10.[28] Both organizations have met at the highest level and extended these contacts to their specialized agencies ever since, as unquestionably proved by Resolutions 61/49 of 12 Feb. 2007; 63/114 of 26 Feb. 2009; and 65/140 of 5 Apr. 2011, all of which advocate mutual cooperation to uphold international peace and security, foster free self-determination, and promote fundamental human rights. There is also the report titled 'Follow-up to the cooperation between OIC and the United Nations' published by OIC itself.[29]

a *OIC and the Conflicts in Sub-Saharan Africa*

Sub-Saharan Africa has seen two recent conflicts in which the religious factor has played a key role, one in Somalia and another in Mali. State failure in Somalia in 1991 triggered a civil war that claimed over a million lives and, together with the country's political instability, had considerable fallout worldwide, including the appearance of pirates in the Gulf of Aden that seriously endangered international sea navigation.[30] This state of affairs led the UN to intervene in the conflict in 1993, albeit with little political success. OIC, in turn, tried to contribute to the peace process by establishing a 'Contact Group', but

27 For a comprehensive discussion on the OCI and regional challenges see Azin Tadjdini, "The Organisation of Islamic Cooperation and Regional Challenges to International Law and Security," *Amsterdam Law Forum* 4 (2012), No. 2, 36–48.

28 Follow up Report on Cooperation between the Organization of the Islamic Conference (OIC) and the United Nations (UN), Organization of the Islamic Conference, Jeddah, Sept. 2007, www.oic-oci.org.

29 For a interesting study about the role of the OCI in the conflicts see Ibrahim Sharqieh, "Can the Organization of Islamic Cooperation (OIC) Resolve Conflicts?" *Peace and Conflict Studies* 19 (2012), No. 2, 162–179.

30 Carlos Martín Martín-Peralta, *2013: Somalia y el Cuerno de África en la encrucijada*, Documento de Opinión IEEE (2013), No. 12, 9–11.

its efforts were no more successful. Following the failure of these initiatives, the regional scuffles escalated into a military intervention by Ethiopia in 2006. In this context, OIC took part in the talks that ended up in Aug. 2008 with the 'Djibouti Peace Agreement', signed by the countries involved and a number of IOs that attended the process as observers. Moreover, OIC played a very important role in coordinating relief efforts in the Horn of Africa, stricken by a drastic shortage of food in 2011. In fact, under OIC supervision, many Muslim NGOs provided assistance to the Somali people to round off the international effort. After two tours in the field, OIC alerted the world to the pressing need to fight famine and decided to open an Office for the Coordination of Humanitarian Affairs (OCHA) in Mogadishu in charge of delivering food supplies to affected areas. OIC's outstanding involvement in the conflict is beyond any doubt, to the extreme that since 2012 the Organization has served as Somalia's mouthpiece to report to the international community about the situation in that country, which is still closely monitoring.

In Mar. 2012, Malian president Amadou Toumani Touré, a retired general who had led national democracy in 1991, was overthrown by a military *coup d'état* that unleashed a bloody conflict in which rebel Tuareg groups opposed to Mali's Government since the 1950s were actively involved. After closing the borders and establishing a military junta, the pro-coup faction within the army justified their actions by saying that a firmer hand was needed to deal with the Tuareg separatists. Tension between the new government and the rebel ethnic group increased as a result, and grew even worse after the ousting of Libyan president Muammar al-Qaddafi, who had offered protection to the Tuaregs all through his mandate but whose fall forced their tribes to return to Mali, where they linked up with separatist movements in the northern part of the country. What followed was the emergence of a self-proclaimed State – Azawad – that nowadays spreads over two thirds of the national territory. In Sept. 2012, the Malian Government officially asked the UN to authorize a military intervention in the area, a request leading up to Security Council Res. 2085 of 20 Dec. 2012 approving the deployment of the International Support Mission to Mali to help the transitional government regain control over northern Mali. There had been no plans for an intervention before the end of 2013, but on Jan. 9 that year the Malian authorities requested military assistance from France, which set off operation SERVAL.[31]

31 Operation SERVAL is an ongoing French military operation in Mali. The aim of the operation is to oust Islamic militants in the north of Mali, who had begun a push into the center of Mali. Operation SERVAL follows the UN Security Council Res. 2085 of 20 Dec. 2012.

OIC's position on this conflict has also been particularly interesting. On 28 Dec. 2013 OIC Secretary-General Ekmeleddin Ihsanoglu condemned the Malian radical force's behavior, and has often urged action against the war and for dialogue to attain a political settlement in Mali. Besides, he tagged the UN Security Council's decision as *hasty* and made public the Final Communiqué of the Islamic Summit held in Cairo in Feb. 2013 that describes terrorism as contrary to 'the values of tolerance, peace and moderation advanced by noble Islam'.

b ***OIC and the Conflicts in the Middle East***

Countless conflicts have shaken the Middle East in the last few decades, so it would be impossible to review OIC's role in every one of them. Therefore, we will restrict our study to some of the most recent cases: Iraq, Syria, and the never-ending Palestinian conflict. OIC has been actively and permanently involved in the Iraqi situation. In the wake of the Gulf War – waged between Iraq and an international coalition headed by the UN following the invasion of Kuwait in Aug. 1990 – OIC adopted a Resolution in its 1997 Summit Conference in Tehran condemning the attack against Kuwait and appealing for respect of all UN Resolutions on the matter. In this context, the Organization considered that Iraq's aggression violated Art. II(A) of the OIC Charter that lays down the principle of solidarity among Member States. The whole situation recurred years later on the occasion of the attack launched by a second coalition under US command. This time, at the Islamic Summit Conference held in Putrajaya (Malaysia) on 16–18 Oct. 2003, OIC issued a Declaration reaffirming the value of the principles of self-determination, sovereignty, independence and national integrity of the States. Additionally, the document stressed the importance of the principle of non-intervention in Iraq's internal affairs, openly condemning any form of terrorism and calling upon all Member States to ratify the Convention on Combatting International Terrorism, put forward by OIC itself.

With regard to Syria, OIC has played a crucial role, both taking steps for cooperation and approving sanctions. In this connection, and in order to twist (Syrian president) Bashar al-Assad's arm, OIC seized upon the Islamic Summit held in Mecca, Saudi Arabia, in Aug. 2012, to suspend Syria's membership in the Organization.[32] The move had been previously approved at a preliminary meeting in the Saudi city of Jeddah and even recommended months before by the Arab League, and it was adopted despite Iran's opposition, voiced by that country all through a Summit billed as a showdown between Saudi Arabia – in

32 See Francisco J. Berenguer Hernández, *La organización de Cooperación Islámica suspende a Siria*, Documento informativo IEEE (2012), No. 52, 2.

favor of isolating Syria diplomatically – and the Iranians, who accused Qatar, Turkey and Saudi Arabia of arming the Syrian rebels. The Summit also rubberstamped the so-called *Mecca Letter to promote Islamic solidarity*, which at once censured human rights violations in Syria and underlined the need to 'preserve the unity, sovereignty and territorial integrity' of the Syrian nation, in light of rumors that the country might end up partitioned. At the present time, OIC is playing a key role in mediation and cooperation for development. To this end, the Organization reached an agreement with the Syrian authorities in Dec. 2013 to send humanitarian aid and a joint OIC-UN mission to Syria.

Finally, on the subject of OIC's stance on the Palestinian situation, we will restrict ourselves to offer a few short sentences, taking into account the complexity and duration of this case. Unlike other conflicts, the question of Palestine captured OIC's attention and became paramount to the organization since its very inception. We must not lose sight of the fact that it was in the aftermath of the arson perpetrated against the Al-Aqsa Mosque in Jerusalem on 21 Aug. 1969, and precisely because of it, that the OIC was established. Innumerable times throughout its history and that of the endless Arab-Israeli conflict, the Organization has made plain its rejection of the West Bank settlements, the boarding of the French ship *Dignité Al Karama*, and the policy of demographic change and land requisition, *etc*. Besides, OIC was instrumental in the efforts leading up to the UN General Assembly's approval of Palestine as observer member and has made pressing appeals to the international community to support the establishment of a an independent Palestinian State.

5 Conclusion

By way of conclusion, it is worth pointing out that the role of IOs of a regional nature is becoming ever significant in the peace and conflict management processes taking place in African and Middle Eastern countries. Even if there are many regional IOs operating in these badly affected continents, the OIC has set the pace of the race to cope with the conflicts facing the Arab/Muslim world. The reason for the creation of the OIC is often explained by pointing to the need for Muslim solidarity following two events in recent history: the Arab loss of the Six Day War in 1967, and the 1969 arson attack against the Al-Aqsa Mosque, a holy site in Sunni Islam. As a result of these two incidents the OIC, we learn, was created to safeguard the interests of the Muslim world. Its ability as mediator has been acknowledged as much by its Member States as by the international community. Suffice it to mention the free-flowing relations it has kept and still keeps with the United Nations, as is evident from their joint missions

in the Syrian conflict and the action OIC has undertaken together with regional organizations such as the Arab League and the European Union. OIC's leadership in the Muslim world has become all the more noticeable in the last decade on account of a number of circumstances, including: (a) its manifest independence from other regional organizations; (b) the criticism leveled at the UN Security Council for its discretionary attitude towards certain international conflicts; and (c) the decisions that it has adopted in spite of the rivalries existing among its Member States over religion – Shiites vs. Sunnis – politics – Qatar's pretensions to regional leadership – or economics. As a result of all these determining factors, OIC's voice has become pivotal around the world, which explains why various IOs and even non-Muslim States like Russia have shown great interest in the process to be granted OIC observer status or that China has signed framework cooperation agreements with this Organization.

CHAPTER 7

The International Financial Crisis and the Evolution of the Bretton Woods Institutions

Susanna Cafaro

1 The International Financial Crisis and the First Reforms

Since the global financial crisis started in 2008, a debate has gained momentum on rethinking global economic governance to increase legitimacy and efficiency, prevent further crises, restoring growth.

A number of institutional evolutions have been a direct outcome of the crisis. One of them, has been the G20 upgrading from financial ministers gathering to summit of heads of States and Governments. Not by chance, on the first meeting of the G20 leaders, which took place in Washington D.C. (15 Nov. 2008), an action plan was agreed to stabilize the global economy and prevent future crises. In the meeting's final declaration, the leaders committed to reforming the international economy governance by (among other things) overhauling the Bretton Woods institutions, i.e. the World Bank and the International Monetary Fund.[1]

The structure of the two institutions, created in 1944, had been discussed before. In fact, the earliest reforms date back to the Seventies; they were followed by regional financial crises that had global effects and sparked a debate among academics and politicians alike.[2] New impetus came from the anti-globalization movements – particularly active during the Nineties – that put the Bretton Woods institutions on trial. The claims for more 'voice and representation' by the emerging and developing countries were echoed by major international conferences[3] and institutions such as the G24. All this brought about a series of small actions through which the two organizations have

1 'Reforming International Financial Institutions: We are committed to advancing the reform of the Bretton Woods Institutions so that they can more adequately reflect changing economic weights in the world economy in order to increase their legitimacy and effectiveness. In this respect, emerging and developing economies, including the poorest countries, should have greater voice and representation', Section 9 of the Final Declaration.

2 Just consider the Mexican crisis in 1995, the South-East Asian one in 1997, the Russian and Brazilian crises in 1998–1999, and the Argentinian one in 2002.

3 See Susanna Cafaro, *Il governo delle organizzazioni di Bretton Woods* (Torino: Giappichelli, 2012), 202.

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begun to rethink their roles and structures. Nonetheless, the structure of the Bretton Woods institutions had never been discussed before by such a high-ranking forum.

As a consequence, each of the Bretton Woods institutions convened groups of wise men and committees of experts, and so did governments and other international institutions. The results of their work can be found in the *Manuel Report*, e.g. the Committee on IMF Governance Reform's *Final Report*, published on 24 Mar. 2009; the *Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System*, 21 Sept. 2009; the *Zedillo Report*, e.g. *Repowering the World Bank for the 21st Century*, Oct. 2009. Other contributions to the debate came by high level committees,[4] high profile technical bodies as the IMF Independent Evaluation Office,[5] by the civil society[6] and – of course – by academicians.[7]

4 Such as the one written by the Palais-Royal Initiative, a group of outstanding experts summoned by Michel Camdessus, Alexandre Lamfalussy and Tommaso Padoa-Schioppa. The committee produced a document (*Reform of the International Monetary System: A Cooperative Approach for the Twenty first Century*) to which we will refer, from now on, as the *Camdessus Report*.

5 IEO Report, *Governance of the IMF – An Evaluation*, 2008, Washington, DC (prepared by IMF Independent Evaluation Office, www.ieo-imf.org), to which we will refer, from now on, as the *IEO Report*.

6 See the *4th Pillar Report*, ensued from an IMF's consultation with the civil society, through a dedicated website, first, and in the occasion of the Annual Meeting in Istanbul in Sept. 2009. The think-tank New Rules for Global Finance Coalition was in charge of collecting the outputs, the final Report, addressed to the IMF Executive Board was written by Domenico Lombardi. Other think-tanks produced reports as well; see the Bank Information Center's, Bretton Woods Committee's, Brookings', Center of Concern's, G24's, Oxonia's and Group of Lecce's documents.

7 Ngaire Woods, *Accountability, Governance and Reform in International Financial Institutions*, G24 Research Paper, 2000, www.g24.org, 9; Dennis Leech and Robert Leech, *Voting Power in the Bretton Woods Institutions*, Warwick economic Research Papers, No. 718, Department of Economics, Warwick University, 2003; Michael Barnett and Martha Finnemore, *Rules for the World. International Organizations in Global Politics* (Ithaca: Cornell University Press, 2004); Ngaire Woods, *The Globalizers. The IMF, the World Bank and their Borrowers* (Ithaca: Cornell University Press, 2006); Daniel Bradlow, *The Governance of the IMF: The Need for Comprehensive Reform*, G24 Technical Paper, Washington, DC, Sept. 2006; *Reforming the IMF for the 21st Century*, ed. Edwin M. Truman, Institute for International Economics, Washington, DC, 19 Apr. 2006; Edwin M. Truman, *A Strategy for IMF Reform*, Institute for International Economy, Washington, DC, 2006; Ngaire Woods and Domenico Lombardi, "Uneven Patterns of Governance: How Developing Countries Are Represented in the IMF," *RIPE* 13 (2006), 480; Joseph E. Stiglitz, *Making Globalization Work* (New York: W.W. Norton & Company, 2006);

To understand the specific nature of the two Bretton Woods organizations, we have to consider that they have many traits in common with private companies,[8] precisely the connection between the subscribed capital by each Member State and their rights to vote and stand for election. Their decision-making bodies are similar, *mutatis mutandis*, to corporate ones: the Board of Governors is a shareholders' meeting; it elects the Board of Directors, that is the Executive Board which, in turn, elects a President (World Bank) or a Managing Director (IMF). Nonetheless, both the public nature of the goals and important elements of governance aiming to guarantee the sovereignty of each Member State lead us to classify, preferentially over any other choice, the two entities as international organizations. In fact, each State is given the same basic amount of votes no matter how large its subscription is and a direct or indirect representation in all the bodies is guaranteed to all and not just to a 'controlling majority'.

In the third millennium, a first set of reforms was adopted in both the organizations, as a direct consequence of the 'voice and representation' claim by the emerging countries. The significant shift in global income distribution intervened in the last decade could not, in fact, be ignored any longer.

Within the debate on 'voice and representation' we must distinguish between the need for adequate representation of the real economic weight of emerging countries (now partly satisfied) and the problem of the meagre influence exerted by many developing countries, whatever approach we use in order to

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Peter Chowla, Jeffrey Oatham and Claire Wren, *Bridging the Democratic Deficit: Double Majority Decision Making and the IMF*, 2007, www.brettonwoodsproject.org; Manuel López Escudero, "Crisis y reforma del Fondo monetario internacional," *Rev. es. der. int.* 59 (2007); Barry Eichengreen, *Global Imbalances and the Lessons of Bretton Woods* (Cambridge: The MIT Press, 2007); Martin Wolf, *Fixing Global Finance* (Baltimore: The Johns Hopkins University Press, 2008); Fabrizio Saccomanni, *Managing International Financial Instability, National Tamers versus Global Tigers* (Cheltenham: Edward Elgar, 2008); *What G20 Leaders Must Do to Stabilise our Economy and Fix the Financial System*, eds. Barry Eichengreen and Richard Baldwin, Centre for Economic Policy Research, London, 2008; Mark Engler, *How to Rule the World. The Coming Battle Over the Global Economy* (New York: Nation Books, 2008); Nancy Birdsall, *Double Majorities at the World Bank and IMF: For Legitimacy and Effectiveness*, Center for Global Development, Washington, DC, 2009; Carmen Reinhart and Ken Rogoff, *The Aftermath of Financial Crises*, NBER wp, No. 14656, Cambridge, Jan. 2009; Ettore Dorrucci, Julie McKay, *The International Monetary System After the Financial Crisis*, ECB Occasional Paper Series, No. 123, Feb. 2011, www.ecb.int; Dani Rodrik, *The Globalization Paradox. Democracy and the Future of the World Economy* (New York: W.W. Norton & Company, 2011); Ana Palacio, *Reinventing the World Bank*, 21 Feb. 2012, www.project-syndicate.org.

8 They are defined as 'corporate' international organizations by Evelyne Lagrange, *La représentation institutionnelle dans l'ordre international* (Den Haag: Brill, 2002), 89.

project their real economy data in the two organizations' decision-making process.

The first need – well represented by the G24 – calls for an economic and political solution, but allows technical answers. The second issue relates instead to the relationship between North and South and is mostly geopolitical: the developing countries' global weight scarcely expresses their interests as borrowers. The use of purely economic parameters through mathematical formulas is inadequate to solve issues that require a rethinking of the overall structure and of the variables used in the formulas themselves.

The first reforms were preceded by a profound reflection on the Fund's formula for the distribution of voting shares.[9] The reforms brought a selective increase: an increase in basic votes and at the same time a capital increase that also met the organization's need for refinancing.

Shares and voting right figures for each State or group of States are changing, since the amendments approved in 2008 are gradually coming into effect and each country affected by the reform is paying up for its larger quota, thus modifying the percentages of the other countries as well. The reforms adopted in 2010 will further change the figures but are not yet in force. However, we can confirm that the United states will continue to manage a 16% or higher package of votes in both the IMF and the Bank, thus retaining their unique right to veto the decisions for which the statutes require a super qualified majority of 85%.

However, commentators consider this small percentage shift a modest result[10] and, essentially, just a step in a long journey.

The changes approved (but not yet implemented) by the G20 in Korea in 2010 will modify this allocation only slightly. The foundation for the current distribution is based on the 2010 quota formula, with the understanding that serious flaws remained.

The EU countries are over-represented too: their voting power, even after the most recent reforms, remains stable at around 30% in the IMF and slightly less in the Bank. Those same countries elect one third of the executive directors in the two Boards, though the figure is expected to decrease by two units in the IMF.

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9 This has involved the Executive Committee first, then a group of independent experts, the Department of Finance and the Economic and International Financial Committee. See IMF, *Quotas – Updated Calculations*, *Prepared by the Finance Department in consultation with other departments*, 27 Aug. 2004, and the *Report of the Executive Board to the International Monetary and Financial Committee* (*IMFC*) *on Quotas, Voice, and Representation*, 24 Sept. 2004; both can be found on www.imf.org.

10 See Section 40 of the *Manuel Report* (Trevor Manuel *et al.*, *Report of the Committee of Eminent Persons on IMF Governance Reform*, 24 Mar. 2009, www.imf.org).

More generally, the most industrialized countries, amounting to only 15% of the Members (24 vs 159 developing countries), see their overall share of votes fall from 60% to 55% but firmly retain their majority; and, since changes mainly concern emerging countries, the G20's weight on the decision-making process will still be overwhelming. The Executive Board was instructed to report to the Governors (and the G20) by early 2013: the Board's report was that no consensus existed on how to reform the quota formula further. The G24, a caucus of developing countries in the IMF and World Bank, has argued for dropping elements of the formula that double count the same reality (Openness and Variability), which favour small open economies within the Euro-zone, whereby all cross-border trade is treated as international trade, even though within the same currency zone. This acrimonious debate within the Fund continues unresolved.

A comment frequently found in the analysis completes the picture of the critical issues relating to voting weights: the internal balance of the two organizations is now very different from the one created in Bretton Woods in 1944.[11] The tripling of basic votes decided in 2010, that will reach 6% or so when reforms are adopted, is still too far below the 1944 figure.

Another issue to address is the voting weight of the Bank's Member States. According to the IBRD's Articles of Agreement, the IMF's quota is also used to determine the number of shares allotted to each of the Bank's new Members, but unfortunately it doesn't foresee periodical updates. The specific aims and needs of the Bank may not been met by the IMF purely economic formula which doesn't reflect the different interests of countries in supporting development. This necessary link between membership and allotted shares in the two organizations is neither necessary nor helpful. Even inside the World Bank Group an increase in differentiation could be possible.

It would be expedient to schedule an automatic periodical revision of the IBRD's quotas too, which is not in the statutes.[12]

Other interesting reforms where related to the structure of the two Executive Boards:

In the IMF, the 2010 reform – unfortunately still far from being adopted and enforced – opted for a Board of elected members only, which is an undeniable

11 The enlargement of the membership base, from the 45 States of the inaugural conference to the current 185, has gradually eroded the total amount of basic quotas. In 1955 14% of the votes were divided equally among all Members, while today this figure stands at around 2–3%, and inequalities have proportionally increased. See Section 41 of the *Manuel Report*. On the same topic see in Section 81 of the *Zedillo Report*, and Woods, *Accountability*, 9.

12 Again see the *Zedillo Report*, Section 83.

progress. In the same occasion was decided to reduce the size of the IMF Board eliminating two European chairs. In the Bank, the decision to assign a 25th chair to Africa took immediate effect.[13]

2 The Proposed Revisions of the Bretton Woods Institutions

a *The Board of Governors*

The Board of Governors is the plenary of the Member countries and thus the maker of the most important decisions both in the IMF and in the IBRD. It is composed of a governor and a deputy appointed by each Member State usually among high profile international figures: most often – especially in the Fund – Ministers of Economy and Finance and Central Bank Governors.

The Board of Governors has all powers except those expressly delegated to the restricted body. The most important functions cannot be delegated: the admission and withdrawal of Members and the decisions pertaining the conditions of their participation; the increases and decreases in capital and the distribution of income, the general periodic revision of shares; the permanent suspension of operations; special allocations of SDRs, the amendment of the Articles of Agreement; the adoption and amendment of regulatory internal provisions, the so-called *By-Laws*; the agreements with other international organizations and the interpretation of the Articles of Agreement. The Board of Governors meets at least once a year, usually twice, at the beginning of Autumn (annual meeting) and in the Spring (Spring meeting). The Fund and the Bank's boards meet on the same dates.

The documents and papers issued on the topic of reforming the Bretton Woods organizations unanimously ask for a more equitable distribution of votes in the IMF and the World Bank, although they differ in identifying the most appropriate governance structures and their roles and responsibilities. That's because the issue of the organizations' form of government and powers is complex and of a political nature.

Among the structures, the Board of Governors is the one seemingly less interested in possible changes. It goes without saying that all Members of the organization should meet in a plenary assembly and that these meetings should be solemn and held at the highest political level, as it happens. Both the structure's size and political stature imply it can meet infrequently, hardly more than twice a year, as already required.

13 An 80% majority of the Council of Governors may, in fact, increase the size of the Board, according to Art. V(4), of IBRD Articles of Agreement.

Given the time constraints and the large number of Members, it is unlikely that governors, i.e. the financial ministers of the Member States can really debate during these meetings. Meetings with a more substantial content could be possible, perhaps, when preceded by the preparatory work of smaller structures, among these one could also monitor and report the collective performance of Executive Board Members.[14]

It appears that, in a still-to-be-imagined system of checks and balances, the power to elect the members of the Executive Board should go hand in hand with the power to impeach the whole body. For this purpose, it would be appropriate to set goals or requirements for its action in order to assess it according to shared guidelines.

The *Report* submitted by the committee of experts appointed by the President of the Assembly of the United Nations, interestingly remarks that the Boards of Governors are made up primarily of finance ministers and central bankers, whereas ministers responsible for development or economic planning could provide a broader vision,[15] this could be a reason to dismiss the practice of joint meetings for the Bank and the IMF.

Another issue concerning both the Governing Council and the Executive Board is the allocation of votes and consequently the quota formula. Among the proposals for rewriting the IMF's formula there is a greater use of purchasing power parity to calculate the GDP data,[16] but also the use of variables that are not purely economic, such as population size.[17]

Moreover, trade inside a single currency area should not be regarded as foreign trade; a sensible solution that easily reduces the over-representation of the euro area.[18] Although none of the commentators dare to imagine a clear

14 Civil society suggested the establishment of a permanent committee, to assist the Board of Governors with the sole responsibility of carrying out this periodical supervision (Section 34 of the *4th Pillar Report*).

15 Thus in Section 47 of the *Stiglitz Report* (Joseph E Stiglitz *et al.*, *Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System*, 21 Sept. 2009).

16 Nowadays, 60% of the GDP variable is calculated on change at market interest rates and 40% on value at purchasing power parity, obviously a compromise between two options whose results are not exactly the same.

17 Thus the *4th Pillar Report*, Section 11 *et seq*. For an alternative proposal, please refer to Arvind Virmani, *Global Economic Governance: IMF Quota Reform*, IMF Working Paper WP/11/208, Washington, DC, 2011.

18 See once again the *4th Pillar Report*, Section 13, but also the authors who have addressed the issue of the euro area's representation; please refer to Susanna Cafaro, "The Missing Voice of the Euro. Legal, Technical and Political Obstacles to the External Representation of the Euro Area," *DUE* 16 (2011), 895–913.

majority of votes given to developing countries, all agree on the need of reducing the gap between North and South.[19] Among the proposed solutions there is the challenging of the historic bond between Fund and Bank quotas,[20] since the variables used in calculating them are certainly more in accordance with the needs of the IMF.[21]

Like other organizations in the World Bank's group – IDA and MIGA –[22] the IBRD could maybe benefit of its Members' allocation into two categories (developed and developing countries) each with its own share of votes and a comparable ability to influence decisions, a concept that is based on the principle of shared interest in the result. Another very frequent proposal is institutionalizing – in both the Board of Governors and the Executive Board – double majorities of States and votes, i.e. of capital,[23] or, specifically for the Bank, of recipients and donors.[24]

At the moment, the statutes require a double majority (85% of votes and 60% of Members) only for their own revision procedure. Several proposals also affect the qualified majorities required to adopt decisions and there seems to be a broad consensus for the reduction of the 85% super-qualified majority: the *Zedillo Report* would like to lower it to 80%, the *Manuel Report*, more radically, to 70–75%. In other words, all these documents put forward the abolition of the US veto[25] and reduce the chance that groups of States could block decisions.

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19 As stated by Ariel Buira, "The Governance of IMF in a Global Economy," in *Challenges to the World Bank and IMF: Developing Country Perspectives*, ed. Ariel Buira, Group of Twenty-Four (London: Anthem Press, 2003), 4: 'Consequently, the total voting power of creditor and potential debtors should be in approximate balance. This would enhance the probability of each case being judged on its merits'.

20 Thus in Section 122 of the *Zedillo Report*.

21 See the considerations expressed in Section 82 of the *Zedillo Report*.

22 In the IDA the two blocks have 52% and 48% of the votes, in the MIGA both have 50% of the votes.

23 See Bradlow, *The Governance*; Chowla, Oatham and Wren, *Bridging*; and Birdsall, *Double Majorities*. Thus also David P. Rapkin and Jonathan R. Strand, "Developing Country Representation and Governance of the International Monetary Fund," *World Development* 33 (2005), 2009. See also Section 22 of the *4th Pillar Report*. The *Manuel Report* suggests this double majorities option specifically for the appointment of the general director, of the presidents of the ministerial committees and for the main political decisions and the access to loans.

24 As mentioned *en passant* in Section 44 of the *Manuel Report*: '…Consideration should be given to alternative forms of double majority (e.g., developed and developing countries)'.

25 Whose negative symbolic implications are specified in the *Zedillo Report*, Section 88.

b *The Executive Board*

The Board of Governors appoints the Executive Board, the restricted membership body to which it delegates some of its powers. Since their inaugural sessions, the Boards of Governors of both organizations have delegated all the delegable competences to the two Executive Boards, which have 24 members in the IMF and 25 in the Bank and meet frequently, i.e. with the frequency required by the day-to-day administration: on average, three times a week.

Therefore, all – and not only – the activities that can be referred to ordinary administration fall under the responsibility of those bodies, whose members are appointed by the countries underwriting the largest capital shares (5 members) or elected by the governors of the other Member States, through a procedure that leads them to represent, each, a group of Member States called 'constituency'. Among the latter, three are 'elected' by an individual State each: the representatives of Russia, China and Saudi Arabia.

The functions and responsibilities of the present Board's governance structure are hotly debated; several commentators rightly call into question the quantity of its functions and the lack of clarity of its responsibilities.

On closer inspection these are two facets of the same problem. Indeed there are, among the Board's functions, at one time the drafting of the two organizations' policies, the authority to take all operational decisions and the supervising of the staff enforcing such decisions; there is the monitoring of the Managing Director and of the President but also a subordination to those same figures who chair and lead its activities; there is a direct representation of the Member States, clashing – in different ways for the Fund and the Bank – with the task of reviewing and assessing national situations; finally there is – for members – a duty of loyalty towards the institution that can conflict with the loyalty toward the State or States they represent.

The tangle of so many potential conflicts of interests is difficult to unravel and while they might never occur, it would be only thanks to a cautious attitude and to a sort of understatement resulting from the current institutional structure: the Board can't break the delicate balance imposed on its work. It is only natural that such excessive powers are matched by equally hazy and confused accountability mechanisms.

The *4th Pillar Report* comments on the difficulties that arise from the dual role of the Board's members and points out that 'the board has never been evaluated'. To the issue of the Board's dual task – of decision-making and supervision – and of its members' double-hatting – as international officials and State representatives – some reform proposals respond by duplicating bodies and distributing their functions.

The governance structure can in fact be easily improved and clarified by enhancing the role of the Ministerial Committees, natural forums to which the most important decisions – e.g. those pertaining to strategy – could be conferred and in which the States could be represented and their interests balanced better and at a higher level.

The Board would be made up of international officials in charge of an independent and more impartial evaluation and this solution would also alleviate the Board's functions and allow for a greater efficiency in its operations. The greater independence of the body granting financial aids would be reflected in a reduced chance that donor countries influence its choices and, in more general terms, exercise an influence on the countries receiving the loans.[26]

The accountability of the Board would benefit from the establishment of a mechanism by which the Board of Governors could monitor its work[27] and – in case it is unable to pursue its goals – from a process by which it could be dismissed. Additional accountability might come from a periodic self-assessment procedure.[28] This would be an undeniable progress compared to the current situation, where we already have an assessment on what has been done,[29] but nobody is held accountable for verified mistakes.[30]

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26 This conditioning capacity is demonstrated in Axel Dreher and Jan-Egbert Sturm, *Do IMF and World Bank Influence Voting in the UN General Assembly?*, KOF Swiss Economic Institute, ETH Zurich, Working papers, No. 6–137, Apr. 2006. The authors empirically found that, inside the UN Assembly, the countries that have received funds from one institution or the other are more frequently aligned with the G7 countries' positions. See also Bradlow, *The Governance*, 11: 'Since the industrialized countries have no intention of using the IMF, it is reasonable to question why the G-7 have continued to support the IMF. The reason is that they find its influence over poor and middle income countries undergoing transformations or experiencing serious macro-economic and monetary problems useful'.

27 As in the *4th Pillar Report*, Sections 30–34.

28 As suggested by the *IEO Report*, Section 79.

29 The two organizations have, in fact, only recently been equipped with independent supervising bodies that, through their reports, monitor their activities and audit their results. The Bank has gradually created a complex network of monitoring bodies, which goes by the name of *safety net*. The Executive Board has its own Audit Committee which in turn monitors the internal auditors while the Independent Evaluation Group and the Inspection Panel report directly to the Board. Similarly, although lagging behind the Bank, the Fund's Executive Board created the Independent Evaluation Office in 2001. It's a permanent structure within the IMF, independent from the management and staff, with the task of objectively assessing the Fund's performance.

30 In the IMF Country Report No. 13/156 (Jun. 2013), *Greece: Ex Post Evaluation of Exceptional Access under the 2010 Stand-By Arrangement*, we read that, due to the process of fiscal

This solution is not the only one envisaged. The *Zedillo Report* suggests to raise the Executive Board's political stature by composing it at a ministerial level. This would result in a transition to a non-resident Board, which would be the organization's real governing body and which would transfer most of its current operational capabilities to the staff.[31] It goes without saying that with such proposal the authority of the IMFC and of the Development Committee would be swallowed up by the new Executive Boards and in particular those of the latter by a new World Bank Board.[32] Whether we accept to enhance the ministerial committees by giving them some decision-making powers or rather we transform the Board into something resembling a ministerial committee, the basic option remains the same: separate the political decision-making, conferred to the representatives of States, from the technocratic decision-making, conferred to the reformed Board or directly to the staff as in the second option. In all cases, some Board's current functions of a more operational nature could be curtailed and consigned to the staff.[33]

Once the relationship between the Board and the staff is defined in general terms, we'll have to clarify the Board's controversial relationship with the top of the administrative apparatus. In order to let this team exercise a supervisory role on the staff, more than one commentator advise against it being chaired

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consolidation required by the necessary intervention, the country paid too high a price in terms of social and economic losses. 'Market confidence was not restored, the banking system lost 30% of its deposits, and the economy encountered a much deeper-than-expected recession with exceptionally high unemployment. Public debt remained too high and eventually had to be restructured, with collateral damage for bank balance sheets that were also weakened by the recession. Competitiveness improved somewhat on the back of falling wages, but structural reforms stalled and productivity gains proved elusive'. '[N]otable failures' by the IMF are recognized.

31 Sections 123–127 of the *Zedillo Report*.

32 As stated in the Report, the powers of the new Board would be: 'i. Selecting, appointing, and (if required) dismissing the President; (ii) Approving the Group's overall strategy and direction; (iii) Making major policy decisions; (iv) Conducting general oversight of the institution, including periodically reviewing the President's performance; (v) Appointing members of the Inspection Panel and Administrative Tribunal; and (vi) Approving the budget and the Independent Evaluation Group's work plan'.

33 The *Manuel Report* is very precise on this point and outlines the functions of the new Board as a result of competences shifting upwards – to the Ministerial Council – and downwards to the staff. The four functions that would be left to the Board are the core of the outlined governance system and are (i) staff supervision and monitoring, (ii) preparatory work for the Council, to which recommendations and opinions would be addressed, (iii) adoption of decisions on the use of the Fund's resources and connected accountability and, finally (iv) adoption of all internal decisions with serious financial implications.

by the Bank's President or by the Fund's Managing Director. It is in fact unlikely that this body could effectually assess its chairperson's performance. Even more so when you consider that it is the Board that formally appoints its leaders and, if necessary, dismisses them.

If each Board elected a chairperson from among its members or was lead by one of them, as proposed in the *Zedillo Report*, the President/Managing Director could attend its sessions, with or without voting rights, informing the Board on a regular basis on the day-to-day administration.

Another discussed topic is the size of the Board. All agree in assuming that – in the Bank as well –[34] there should only be elected members, an option that would allow – as additional benefit – a reduction in the number of members. The two Boards of Directors are deemed too crowded with respect to their function and both the *Zedillo Report*[35] and the *IEO Report* (which refers to the experience of corporate governance) advocates a contraction in order to increase their efficiency.

A variation of the formula for the calculation of the shares in the two organizations would obviously result in a different quota of shares for the Member States in the two organizations. This opens the door to a different balance of shares, to different groupings of States in the constituencies and therefore to a different composition of the two Boards and of the two Ministerial Committees, whether by represented constituencies or by members' nationalities.

The transition to an elected-only Board is not enough in itself to ensure that the *de jure* privileges do not replace the *de facto* privileges, such as those that already concern China, Russia and Saudi Arabia. This transition should be accompanied by a significant reduction in the number of members and by all members necessarily representing more than one State. Each member should represent a constituency composed of roughly an equivalent number of States; this goal could be achieved by limiting the number of countries (and not only the number of votes, as it currently happens)[36] that can elect an Executive Director. In such Boards every term would have the same duration, hopefully longer than the current two years, to allow members to gain adequate knowledge

34 It is also the opinion of the committee chaired by Ernesto Zedillo, which goes on to affirm that each member should represent a constituency, composed – when possible – of roughly the same number of States.

35 The recommendation in Section 118 of the *Report* refers to a *Board consolidation*, which would decrease the number of directors from 25 to 20, halving the number of Europeans.

36 See the Annex E to the IMF Articles of Agreement which limits to 9% the capital quota which may be represented by an executive director. In the WB the Annex B foresees an higher ceiling for shares, of 15% of capital amount.

of the body and of how it operates.[37] The underlying purpose of all proposals and recommendations is the elimination of the current two categories of members, dividing countries into first and second class members. The election procedure is further diminished by the fact that appointments are made outside the organization and are merely validated by the Board of Governors. It would be very appropriate for executives' curricula to fulfil congruent requirements and that all appointments were informed by the criteria of professionalism and were the result of a transparent procedure inside the Board of Governors.[38]

A description of the specific skills required for each position also makes it less likely that the Executive Director serve for the Fund and the Bank at the same time or swap from the Fund to the Bank and vice versa, but would result in a greater specialization on the (different) topics and functions of the two organizations.[39] Once again distinguishing between the interests of the Bank and of the Fund and – within the World Bank Group – differently compose the Executive Committees of IBRD, IDA, IFC and MIGA may reward the States which support the most, with their capitals, the activities of each organization.

The Board's permanence is also discussed. The *Manuel Report* gives its preference to a resident Board, focused on the most important issues only, since this would increase its effectiveness and efficiency. The options for a non-resident Board or for its possible upgrade to the ministerial level are far from being discarded.[40]

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37 The *IEO Report*, Section 73, suggests that it be three years.

38 This requirement is illustrated in the *4th Pillar Report*, which is highly critical about the current practices (Sections 18 and 19) and points out that other models could allow for greater transparency (see the appointing mechanism for the members of the Board of the European Central Bank, who must be selected from among persons of recognized standing and professional experience in monetary or banking matters – Art. 283(2) TFEU. The appointment is made by the European Council, following the Council's recommendations and after consulting the European Parliament, where the candidates are interviewed by a special committee).

39 As remarked in the *Zedillo Report* (Section 111), the Bank could use an 'expertise in policy lending, development economics, and the environmental and social impact of certain kinds of projects', but also a 'background in finance, risk analysis, and some of the technical aspects of sectors in which IFC and MIGA operate', which would possibly pave the way to a differentiation between the Board of the organizations that make up the World Bank Group. Unable to find candidates with a broad spectrum of skills, the Report also imagines that 'the Board as a whole should have a well balanced mix of skills and capabilities'.

40 Thus in Sections 39–40 of the *Manuel Report*.

The *IEO Report* also favours the Board's permanence,[41] while the *Zedillo Report* disagrees.[42]

Finally, an amendment to the statutes allowing regional organizations[43] to join in would solve for the time being the issue of the over-representation of the European Union, thus making room for developing and emerging countries,[44] but it could also – in the long run – decrease the number of members and simplify the framework if the European example was followed by other areas of the world. Even if their consolidation was not feasible, the constituencies could benefit from a greater consistency and internal democracy, which would be obtained by enhancing existing ties within the regional areas: cooperation and/or integration organizations of various kinds in many parts of the world could work as transmission belts between the universal organization and the States, especially the smaller ones. It may be argued that not all regional organizations have comparable dimensions and levels of integration, but nothing prevents small groups from joining or large ones (such as the African Union) to appoint two or three executive directors. The advantage would be double: greater representation for all countries in the group through their director and an ongoing debate, even at regional level, among the States in each group.

In this case too, we must differentiate between the two Bretton Woods institutions because while the EU Treaty allows the EU to join the International Monetary Fund, the conditions are not ripe for its membership in the World Bank.[45]

Temporary intermediate solutions still need to be explored, because the formula for calculating the shares would not fit the economically integrated European area. All the proposed reforms try to find a more clearly defined role for the Board and its accountability paired to a different institutional balance that involves mechanisms of checks and balances for the Board of Governors, the ministerial committees, the President/Director and the staff. The solutions

41 Please refer to: *IEO Report*; Leonardo Martinez-Diaz *Executive Boards in International Organizations: Lessons for Strengthening IMF Governance*, IEO Background paper, 2008, www.ieo-imf.org; and Jeff Chelsky, *The Role and Evolution of Executive Board Standing Committees in IMF Corporate Governance*, IEO Background paper, 2008, www.ieo-imf.org.

42 In the logic of the report, the continuity of the functions of a non-resident Board could be ensured by the establishment of a 'Council of Representatives' with an advisory function: a team of senior executives, each representing one of the constituency and based in Washington for longer or shorter periods of time, which would give continuity to the Board's functions, but leaving the decision-making activity to the Board itself. Thus, in Sections 133–137 of the *Zedillo Report*.

43 See Cafaro, *Il governo*, 173, and Cafaro, "The missing voice."

44 See Cafaro, *Il governo*, 147–152.

45 See Cafaro, "The missing voice."

for the two Executive Committees clearly show that they are at the heart of every possible reform plan.

c *The Ministerial Committees*

In the institutional frame of the two Bretton Woods organizations, a special role belongs to the two ministerial advisory committees: the International Monetary and Financial Committee (IMFC) for the Fund, and the Joint Ministerial Committee for the Boards of Governors of the Bank and Fund on the Transfer of Real Resources to Developing Countries, better known as the Development Committee, common to the Fund and the Bank, but more focused on the issues dealt with by the latter.

Their members are the governors of the 24 countries that have an elected representative or appointed member in the Executive Board. The two bodies are comparable because of their similar composition and of their particularly important role, originating from their being restricted membership bodies gathering the ministers of the Member countries, and therefore particularly appropriate to discuss strategic directions and proposals for reform, regardless of their lack of decision-making powers. In fact, they are the hubs of political connections between the Board of Governors and the Executive Board, with important tasks of supervision on the two organizations and of discussion on possible evolutions of the international economic governance and of development policies. Their merely advisory role is apparently at the margins of the decision-making process, and their lack of decision-making authority conceals a relevant political stature but makes the two bodies somehow unaccountable for the choices they make, since they are formally adopted elsewhere.

The reforms concerning the two ministerial committees – the IMFC and the Development Committee – should be complementing the reforms proposed for the Board. Only by reducing the political role of the latter in favour of more technical functions we can imagine a role of strategic guideline definition benefiting the two political institutions *par excellence*, in which the best balancing of national interests is possible.

In this respect, it should be said that all authors would ascribe leadership roles to the ministerial committees, by giving decision-making powers to the current ones or altering the composition and increasing the political stature of the present Boards. It is therefore widely accepted that the two Bretton Woods institutions lack political management.[46]

46 This vacuum is well evidenced by Edwin M. Truman, *A Strategy for IMF Reform*, Institute for International Economy, Washington, DC, 2006, 77 *et seq*. The author points out the

After all, the IMF's Articles of Agreement[47] – unlike the Bank's – envisage the creation by the Board of Governors (with a majority of 85%) of a Board of ministers, governors and other members of 'comparable rank', with a broad and flexible mandate of supervision, 'management and adaptation of the international monetary system, including the continuing operation of the adjustment process and developments in global liquidity'. The implementation of such a committee was requested by several parties at various times in the history of the IMF.[48]

The most comprehensive proposal in this regard comes from the *Manuel Report*, which sees its prospects in terms of an increased importance and speed of the decisions adopted by the Fund.[49] The document presented by the IEO addresses this question too, highlighting the opportunities of improving the relationship between the ministerial level and the Executive Board. The first would be responsible for all major decisions and for a stronger supervisory role, while the latter would be more resolutely responsible for management.[50]

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absence of a forum dedicated to the political leadership in the IMF, a 'Steering Committee' as the reason for the role played by the groups of States, the various Gs.

47 In accordance with Art. XII(1), as amended by the Second Amendment (1976), the Council may be established by the Board of Governors with a 85% majority. This body is described by Annex D to the Articles of Agreement, which provides for its composition, powers and voting rules.

48 In particular, this need has surfaced in four specific moments: 'Discussions within the IMF surrounding the creation of a Council of Governors have occurred in four phases, corresponding roughly with: (1) responses to the international liquidity crisis of the 1960s and the need to reform the international monetary system (1969–74); (2) development of the Second Amendment to the IMF's Articles of Agreement and an increased focus on surveillance (1974–80); (3) the post-Asian financial crisis period and attempts to strengthen decision making regarding the international monetary and financial system (1998–99); and (4) efforts to reform the institution's governance system amid renewed concern regarding the Fund's legitimacy (2008)'. See Alisa Abrams, "The IMF Council of Governors," in *Studies of IMF Governance. A Compendium*, eds. Ruben Lamdany and Leonardo Martinez-Diaz, IEO, IMF, Washington, DC, 2009, 44.

49 To a series of detailed recommendations on role and responsibilities this *Report* (Sections 17–20) adds interesting organizational recommendations, such as the institutionalization of a troika as leader of the institution, appointed on a rotation system. This collective presidency would write the agenda as a result of the input of the Board and staff.

50 In Section 66 the *Report* says the Ministerial Council should be '…making decisions that require support at the highest political levels, such as the selection of the Managing Director; and it could legitimately exercise oversight over the institution, including the Board.… As a formal governing body, the IMFC/Council could legitimately exercise oversight responsibilities'.

While the IMFC is already well positioned to become the institution the world requires (we only need to tweak its competences and those of the bodies it interacts with), the Development Committee is another matter altogether. First of all this evolution is not expressly intended by the Bank's Statute. Secondly, in order to become the governing body of the World Bank, it should cease to be a Joint Committee of the Fund and the Bank and find its place exclusively in the latter's institutional framework. This would only acknowledge what is already happening: its agenda reflects the interests of the Bank much more than those of the Fund.[51]

Moreover, once this body was 'converted' into the Ministerial Council of the Bank, we may wonder whether its current functions need to be attributed to a new joint body or to a body coordinating the two Bretton Woods institutions. In my opinion this is not needed, because the same functions could be taken over by other connection mechanisms, such as regular joint meetings of the top leaders, the participation of observers from an institution in the decision-making bodies of the other institution and occasional joint initiatives.[52]

A direct involvement of national ministers would certainly reduce what is perceived as the democratic deficit of the two organizations, which see technocratic management as dominant over policy making. The establishment of the two ministerial councils would then fill the void of strategic direction recalled by all commentators.[53]

Obviously, these new councils would have the legislative initiative, namely for the adoption of regulations, policies and procedures and of the criteria and features of the various tools of intervention. The *IEO Report* sees its oversight functions as primary instead.

For them to be effective, the reform of the presidency selection process is also important, since the role of the top administrator is extremely relevant to the construction of a consensus and the preparation of statements. A transparent and inclusive selection process should be accompanied by a clear deadline, coinciding (as of today) with the duration of the national term.[54] Finally, the voting rules are still to be imagined and could mirror, if necessary, those of the Executive Board.

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51 However, the working group chaired by Ernesto Zedillo is very skeptical about this possibility, because of the Development Committee's current deficiencies (Sections 68–69).

52 See also Section 68 of the *IEO Report*.

53 Particularly from the *Zedillo Report*: see Section 66 *et seq*.

54 These are part of a larger package of proposals set out in Section 67 of the *IEO Report*.

In the document that expresses its point of view, civil society warns about the danger of such a strengthening of powers before a new balance of shares and votes is in place, and therefore sets the 'voice and representation' step (mentioned in every reform proposal) as logical antecedent in the reform agenda. Once legitimized by a more equitable representation, this new body could push the States to take charge of decisions and responsibilities.[55]

As for the optimal size of this organ, the reasoning is similar to the one applied to the Board, as the same groups of States (even if not necessarily the same States for each group) would have a representative in both bodies.

Concerning the composition of the ministerial committees, the most important change would automatically ensue from them being composed of ministers from the same groups represented in the Boards. A change in the balance of the latters would thus be naturally reflected in the composition of the IMFC and of the Development Committee.

d *The Management*

The top figures in the management of the IMF and the World Bank are respectively the Managing Director and the President. According to the statutes, the two figures are chosen by Executive Board members with a majority of votes from among the citizens of any Member State. A much discussed practice has so far brought only North Americans to the Bank's top and Western Europeans to the Fund's top. Strangely enough, they are not subject to specific requirements, such as those required for staff recruitment.

Besides all differences in terminology, the two figures essentially play the same role: the double role of chairmen of the respective Executive Boards – where they can only vote in case of a tie – and of leaders of their administrations. Their role is therefore both political and administrative.

While rethinking roles and functions, it is evident that changes in the features of the Executive Committee and Ministerial Committees would result in important consequences for their leaders and staffs. One might say that the Committee of Ministers, the Executive Committee and the staff in both organizations represent three parts of the four elements (encompassing the Boards of Governors) we need to change in order to create a system of checks and balances.

The role of the staff – which includes the Managing Director of the Fund and the President of the Bank – seems bound to evolve in two different ways.

First, there is a broad consensus on making management more autonomous. If the Executive Board, which now approves and revises almost all decisions,

55 See Sections 23 and 24 of the *4th Pillar Report*.

stepped back more freedom would be granted to the staff for ordinary business. This kind of reform could solve a number of ambiguities that arise from a hazy boundary between Board's and staff's functions. Today, operative decisions can be made by the Board, on inputs coming from the staff, and by the staff on advice and direction coming from the Board. A better definition of this boundary, enhancing the skills and autonomy of the staff, should go hand in hand with a clearer accountability procedure for the latter thanks to an efficient monitoring activity by the Board.[56] This increased monitoring capacity would come naturally from a more effective assessment procedure, supplemented by criteria for assessing performance and results, tools for guidance and call to order, and would go side-by-side with a diminished involvement of the Board in the day-to-day management.[57] To be monitored would mainly be the top figures, leading and controlling all the staff.

As for greater autonomy in management, with specific regard to the IMF, an effective description of the tasks that may be delegated can be found in the *Manuel Report*, particularly in the parts concerning the allocation of resources and the monitoring of Members (missions *ex* Art. IV).[58] In addition to increasing efficiency, this reform would decrease the political pressure on the evaluation of situations and countries.

As noted in the *4th Pillar Report*, however, it would be useful and appropriate, especially in the Fund, to broaden the staff's technical background. Making credible recommendations to Member States certainly requires sophisticated economic skills (already present in the structure), but also legal, political and cultural knowledge concerning the social situations in which the organization is going to intervene. Another point, even more strongly emphasized in the reform proposals, concerns the appointment process of the President and Managing Director, the figures presiding the IMF and the Bank. Presently, their appointment is sanctioned by the majority of the votes cast by the Executive Board, but it is widely acknowledged that it is decided through compromises and negotiations taking place outside the two institutions, in the major capital cities of the world and that the Board's election is little more than a *pro forma*. The need for a reform of this process had already been expressed by the *Draft Joint Report of the Bank and Fund Working Groups to Review the Process for Selection of the President and Managing Director* in 2001 and has been resumed

56 This assessment is also expressed in the *IEO Report*, Section 37 *et seq.* See also the External Review Committee, *Report of the External Review Committee on Bank Fund Collaboration* (*Malan Report*), 2007, 36.

57 For details refer to the *IEO Report*, Section 69 *et seq*.

58 See Sections 32 and 33 of the *Report*.

in all the mentioned documents.[59] According to many commentators, the power to appoint the Board conflicts with the responsibility of the President or the Director to chair this body; so, many reform proposals move the appointment process elsewhere or eliminate the role of chairperson of the Board. The *Manuel Report*, for example, would confer to the Ministerial Council the responsibility of selecting the Director, but believes that he/she should continue to chair the Executive Board. A trait that is common to all the proposals is the demand – possibly recorded in the statutes – for a job description, also – and even more so – for the director's role, as well as for the requirements of the ideal candidate on which to assess applications and interview candidates. In short, a standardized process that would reduce the (inevitable) heavy interferences of the Member States and all the processes taking place outside the institutional settings.

It is also known that, by a practice dating back to the origins of the two institutions and never questioned, the President of the Bank is American and the director of the IMF is European (the first of the three vice-Presidents is from the USA). This custom seems now in decline, although it was once again observed in the last two appointments despite the opposition of several emerging States. The highest administrative figures and the leader should not – according to all those who have spoken about – be selected on the basis of their geographical origin but of their skills, at the end of a transparent process.

The principle of alternation between nationalities – or, better yet, the principle of irrelevance of nationality – to be codified in the Articles of Agreement would be a clear cut from the past. Similar considerations obviously apply to the vice-Presidents as well.[60] Finally, a codification is also desirable for the professional qualifications of other important administrative figures such as the vice-Presidents,[61] the Secretary-General or the General Counsel assisting the Board. The top figures should also show greater openness to the requests and comments of the executive directors especially of those from lower income countries, who often seem to be uncomfortable and intimidated.[62]

As to the strengthening of accountability, both the *Zedillo* and the *IEO*[63] *Reports* highlight a number of critical issues. The management is not effectively monitored because of flaws inherent in the current governance structure

59 See Section 84 of the *IEO Report*, Section 140 of the *Zedillo Report* and Section 34 of the *Manuel Report*.

60 See Section 85 of the *IEO Report*.

61 See Sections 25 and 26 of the *4th Pillar Report*.

62 See Section 28 of the *IEO Report*.

63 In Section 62.

and of the lack of evaluation standards, as remarked by other documents.[64] Of course, this control would be exercised, in the first instance, mainly on the leaders of the organizations and would need a regular review of performances based on previously defined standards and a consistent process of appointment and dismissal.[65]

As far as the two Bretton Woods institutions are concerned, these points are also highlighted in the *Report* by the Stiglitz Committee at the United Nations.[66] As for the appointment, the evaluation of the chairperson and managing director by the Board seems to more than one author incompatible – as already pointed out – with their current roles of chairmen of the Board.[67]

3 The Disruptive Effect of European Union Membership

a *The EU's Accession to the IMF*

The European Union is now the IMF and World Bank's majority shareholder. Although, as we know, the largest block of shares belongs to the United States, the EU as a whole exerts twice their influence in the IMF, with 32.06% of votes, and slightly less in the IBRD, with 28.41% of votes. This easily explains the massive presence of Europeans in the Executive Boards of both organizations, where there are 8 or 9 members from the EU, three of which – from France, Germany and the United Kingdom – are directly appointed. Moreover, thanks to their leading role in constituencies that are only partially European, the Europeans often trail behind them a relevant number of votes from other countries and only occasionally, when EU countries are represented by other nations, the opposite holds true.[68]

64 Development Committee, *Review of Internal Governance: Conclusions and Proposals*, DC2009-0004, 17 Apr. 2009.

65 Thus in the *Zedillo Report*, Section 141 *et seq.* On the same point please refer to the *Manuel Report*, Section 36.

66 Please refer to Section 46 of the document.

67 This point is effectively highlighted both in the *4th Pillar Report*, from the introduction on, and in the *Manuel Report*, Section 35 *et seq*. The statement is followed by different practical suggestions such as, in the *Manuel Report*, the use of '*outside expert advisors*'.

68 See, for instance, the constituency grouping Spain and a number of South American countries (Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua and Venezuela) or the constituency represented by Switzerland which hosts Poland together with a number of central Asian republics.

It is easy to reply that this group is made up of different Members, each with its own ideas. The way they are represented, on the other hand, rewards fragmentation when accompanied by an average or significant stature of their economies.

It is also known that this role comes largely from the past. This balancing, or rather imbalancing, of the Bretton Woods organizations on the North of the planet and on Europe in particular has a historical basis: many European countries are among the founding Members of the two organizations, whose birth dates back to a time when only few nations, often colonial powers, ruled global economy.

It is legitimate to wonder whether and to what extent the European economic and monetary union should be reflected in the two organizations, giving way to a unified or coordinated representation of all the interests or to the succeeding of the regional institution to its Member countries.

The consolidated representation of the EU countries in the two Bretton Woods organizations requires, however, the solution of complex issues. Difficulties and obstacles both in EU laws and in the rules that govern the Bretton Woods institutions have prevented until now a full membership or other solutions that would lead to a unified EU representation. It is also difficult to challenge the current equilibrium, namely the relationships among European countries and among them and the other countries and to revise historical privileges.

And yet, this is an inescapable knot if we want to reshape the two organizations and 'update' them for the needs of the new millennium, an issue we must solve because the EU could break the ground for other regional groupings that are evolving on the same model in other relevant areas of the world. A model of States' integration that is so far unequalled.

It is true that inside an organization based on contributions, nobody is really over-represented since each Member pays his quota of capital. Nonetheless, it is impossible to deny that Europe is over-represented from a geopolitical point of view.[69] Surprisingly, Europeans do not seem to be over-represented with the recently revised quota formula.[70]

69 The perceived over-representation of this region is pointed out (*ex multis*) by the so-called *Manuel Report*, Sections 27, 41, and by Jacques De Larosière, *Report of the High-Level Group on Financial Supervisions in the EU*, Brussels, 25 Feb. 2009, ec.europa.eu, Section 256.

70 See the IMF communiqué: www.imf.org. A yet unpublished analysis by Bryant shows that under the new formula agreed on in Apr. 2009 the 27 countries of the European Union as a whole are collectively underrepresented by 0.22% points and that the figure for the sixteen EMU countries together is an under-representation of 0.06% points.

The unified representation of the euro area in IMF contexts tends to appear 'natural' from a legal point of view, as the States in the euro zone no longer have all the requirements needed to fulfil the obligations specified in the IMF's Articles of Agreement.[71] These States do not manage their own monetary policy and do not have their own currency, while their fiscal policies are clearly influenced by their membership in the monetary union. The import and export data of each State no longer influence its national currency since intra-area trades do not affect the balance of payments of the euro area, which is comparable to an internal market thanks to the free circulation of goods, services and capital.[72] One could even argue that the Union should naturally inherit the national position of the Member States which transferred their monetary sovereignty to the EU – as was the case with the General agreement on tariffs and trade in trade policy – and that the EU may be considered as a partial federation, playing a limited 'State role'.[73]

A legal obstacle to be tackled, nonetheless, lies in the fact that the European Union has a legal capacity to act as a member of the international community that the euro area has not. It's the EU who has inherited the monetary sovereignty lost by the seventeen countries of the euro area. This explains the preference given so far to informal coordination and representation formulas.

Since 2005, a coordination mechanism inside the IMF named EURIMF, has allowed for common positions to be attained through regular meetings among

71 See, for instance, the 'Obligations regarding exchange arrangements' foreseen by Art. IV, or the 'General Obligations of Members' in Art. VIII: Avoidance of restrictions on current payments; Avoidance of discriminatory currency practices; Convertibility of foreign-held balances; Furnishing of information; Consultation between members regarding existing international agreements; Obligation to collaborate regarding policies on reserve assets. The IMF enjoys the equivalent right to supervise the fulfillment of these obligations, and may, to this end, ask its Members to provide all the necessary information. On this topic see Frederick A. Mann, *The Legal Aspect of Money* (5th edn. Oxford: Clarendon, 1992), 364 *et seq*. On the same topic, see Rutsel S.J. Martha, "The Fund Agreement and the Surrender of Monetary Sovereignty to the European Community," *CMLR* 30 (1993), 749 *et seq*., and René Smits, *The European Central Bank* (London: Kluwer, 1997), 429 *et seq*.

72 See in this regard, Martha, "The Fund," 763 *et seq*.

73 This idea of *federation* or *partial federation* or *monetary federation* often appears in legal doctrine, see Mann, *The Legal*, commenting Sections 22 and 23 of the *Delors Report*, footnote 69, 16; Smits, *The European*, 442–444; Fabio Merusi, "Governo della moneta e indipendenza della banca centrale nella federazione monetaria dell'Europa," *DUE* 12 (1997), 89–99; Alberto Predieri, *Euro, poliarchie democratiche e mercati monetari* (Torino: Giappichelli, 1998), 341; Natalino Ronzitti, "Aspetti istituzionali del governo della moneta in Europa," in *Divenire sociale e adeguamento del diritto. Studi in onore di F. Capotorti* (Milano: Giuffré, 1999), II, 382.

euro area Members. When euro area States do not have their own Executive Directors, their positions are represented by alternate Executive Directors or by advisors in the constituency office. This group was originally chaired by the State holding the presidency, but since 2007 a president is elected for a two years term.[74] The EURIMF interacts with – and receives advice from – a subcommittee on the IMF (SCIMF) of the Economic and Financial Committee of the EU through a direct line of communication between Brussels and Washington DC.

Moreover, the Union's positions are presented to the IMF's Council of Governors by the EU Council's Presidency, which is in charge of *ad hoc* statements, while the EU Commissioner for economic and monetary matters holds an observer status in both the International Monetary and Financial Committee and the Development Committee.[75]

Different scenarios can be envisaged for the aggregation of euro area countries. These countries could be grouped into one constituency, but that would meet the limit of 9% of the quota established for each constituency – as made clear by Annex E to the Articles of Agreement – with the consequent reduction of EU voting rights to a level far too low compared with the US quota and the current European amount of votes. Or the EU members could be grouped into two constituencies, one for the euro area and the other for the other EU Member States. The two constituencies would enjoy a different degree of integration: the euro area constituency would later turn into a single chair while the other would remain a constituency to all intents and purposes. With regard to some points on the agenda, which are subject to coordinated policies at a regional level, the two seats and thus the EU as a whole could express common positions.

Finally, the main way forward seems to be the accession of the EU or of the euro area to the IMF,[76] with a Euro Area Governor and Executive Director

74 On EURIMF see Klaus Regling, *Strengthening the Economic Leg of EMU*, presentation given at the *Euro50 Group Roundtable, 50 Years after the Treaty of Rome: Strengthening the Economic Leg of EMU*, 2–3 Jul. 2007.

75 *The Relationship between Union and the IMF in Stage III: Issues and Options*, document by DGII of EC Commission, Brussels, 27 Jun. 1997, II/316/97-EN.

76 The option of having the European Union collapse in one or more seats is also presented in the *Manuel Report*, Section 22 and in the *De Laroisiere Report*, Section 256; *IEO Report*. A range of approaches to consolidation has been recently offered by several authors debating IMF reforms; among them by Charles Wyplosz, *Can the G-20 Reform the International Economic System*?, 2009, op-ed in VOX (www.voxeu.org); Dennis Leech and Robert Leech, *Power Versus Weight in Governance: The Possible Beneficial Implications of a United European Bloc Vote*, in *Reforming the Governance of the IMF and the World Bank*,

casting all the votes. This position is not new in scholarly debates,[77] but has recently been supported also by prominent EU institutional representatives[78] and relevant documents such as the communication from the Commission called *A Blueprint for a Deep and Genuine Economic and Monetary Union.*[79] Reflecting the improved governance of the euro area after the financial crisis, this document foresees a path for the accession: 'In due course, the Commission would make formal proposals under Art. 138(2) TFEU to establish a unified position in order to achieve the observer status, and subsequently the single seat, for the euro area in the IMF's Executive Board. In accordance with Art. 138 TFEU, the appropriate institution to represent the euro area in the IMF would be the Commission, with the ECB associated in the area of monetary policy'.[80]

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ed. Ariel Buira (New York: Anthem, 2005); Jean Pisani-Ferry and André Sapir, "IMF Reform: Only Basic Reform Can Deliver Legitimacy to the Fund," *The Financial Times*, 5 Jun. 2006 (www.pisani-ferry.net). See also The Group of Lecce, *Reforming Global Economic Governance. A proposal to the members of the G20*, Lecce, 2009.

77 See Jean-Victor Louis, *L'Union Européenne et sa monnaie* (3rd edn. Bruxelles: Editions de l'Université de Bruxelles, 2009), Section 424; and Susanna Cafaro, *Unione monetaria e coordinamento delle politiche economiche* (Milano: Giuffré, 2001), 301 *et seq*.

78 See the declaration of Eurogroup President, Mr. Junckers, in Apr. 2008, euobserver.com, and the speech by Commissioner Almunia, laying the foundations of a European foreign economic policy, DG ECFIN Seminar *Towards a European Foreign Economic Policy*, Brussels, 6 Apr. 2009, SPEECH/09/175, clearly stating that '[t]he Commission has long called for a consolidation of European representation on the boards of the IFIs. In the case of the IMF, the argument for a single consolidated Euro-area chair is quite obvious'.

79 The Communication says that '[w]e can only achieve these objectives through the agreement on a roadmap aimed at streamlining and, whenever possible, unifying the external representation of the euro area in international economic and financial organizations and forums. The focus should be on the IMF, which is a key institutional pillar in global economic governance thanks to its lending and surveillance instruments. As the crisis has shown, it is of the utmost importance for the euro area to speak with a single voice in particular on programs, financing arrangements and the crisis solution policy of the IMF. This will require a strengthening of coordination arrangements of the euro area in Brussels and Washington on EMU-related matters, to mirror changes in the EMU's internal governance and to ensure consistency and effectiveness of the messages provided', communication from the Commission, *A Blueprint for a Deep and Genuine Economic and Monetary Union. Launching a European Debate*, Brussels, 28 Nov. 2012, COM(2012) 777 final.

80 According to Art. 138 TFEU: '1. In order to secure the euro's place in the international monetary system, the Council, on a proposal from the Commission, shall adopt a decision establishing common positions on matters of particular interest for economic and monetary union within the competent international financial institutions and conferences.

Such a choice would assign euro area States the responsibility of starting the procedure to revise the Articles of Agreement under Art. XXVIII[81] or to push for an extensive and evolutionary interpretation of the existing Articles. This step would have important consequences on the IMF institutional balance, on the quota and voting rights of all its Member States and on the composition and functioning of the Executive Board. An indirect consequence, which is mentioned here from a purely theoretical perspective, would be to transfer the IMF's headquarters to Europe, as Art. XXIII states that '(t)he principal office of the Fund shall be located in the territory of the member having the largest quota'.

The result would be a reduced amount of votes for Europe,[82] more votes for emerging and developing countries, a smaller Board and an overall better reflection of the geopolitical diversity inside the organization.

Even though the single chair would significantly reduce European votes – as each Member State would lose its individual amount of basic votes and the intra-European trade would be considered in the quota formula as national trade – we could agree[83] that reduced voting rights and representation would not jeopardize the role and influence of Europe on a global scale – but possibly increase it – if Europeans could express a strong and coherent voice.

b *The EU's Participation in the World Bank*

The current management of the relationships between the Union and the World Bank is different and seems to reflect the will to find more pragmatic solutions, case by case.

The Council shall act after consulting the European Central Bank. 2. The Council, on a proposal from the Commission, may adopt appropriate measures to ensure unified representation within the international financial institutions and conferences. The Council shall act after consulting the European Central Bank…'.

81 Art. XXVIII: 'a) Any proposal to introduce modifications in this Agreement, whether emanating from a member, a Governor, or the Executive Board, shall be communicated to the chairman of the Board of Governors who shall bring the proposal before the Board of Governors. If the proposed amendment is approved by the Board of Governors, the Fund shall, by circular letter or telegram, ask all members whether they accept the proposed amendment. When three-fifths of the members, having eighty-five percent of the total voting power, have accepted the proposed amendment, the Fund shall certify the fact by a formal communication addressed to all members'.

82 Of course single euro area States would no longer have their amounts of basic votes.

83 On this point see Lorenzo Bini Smaghi, "A Single EU Seat in the IMF," *JCMS* 42 (2004), 229–248, and Lorenzo Bini Smaghi, "IMF Governance and the Political Economy of a Consolidated European Seat," in *Reforming the IMF for the 21st Century*, Edwin M. Truman, Special Report 19, Peterson Institute for International Economics, Washington, DC, Apr. 2006, 233–255.

The representatives of the European countries inside the Executive Board meet and coordinate, but without pre-set rules and without establishing a regular dialogue with EU institutions. Informality has its advantages, proof is the fact that this coordination delivers joint statements much more frequently than the coordination within the Fund.

Moreover, between the Bank and the Union there is a significant cooperation on specific initiatives, such as the HIPC initiative for debt relief or other projects related to particular areas of the world, such as Sub-Saharan Africa, the Mediterranean region and the Balkans. The Union is also an important contributor to the World Bank Trust Fund. In 2008, the Commission signed an agreement with the Bank and the United Nations for the management of the post-conflict situations.[84]

The existence of a competence within the Union to carry out development cooperation policy certainly would allow – in principle – its participation in the IBRD and other organizations of the World Bank Group. Anyway, this competence is not exclusive and – as expressly stated by the TFEU – the competence of the latter to conclude with competent international organizations any agreement helping to achieve the objectives is 'without prejudice to Member States' competence to negotiate in international bodies and to conclude agreements'.[85] This makes the withdrawal of individual EU Member States from the organization extremely unlikely, if not impossible.

The Bank too has a problem of European over-representation, as pointed out by all the most influential commentators.[86] Thus the repeated suggestion to reduce the number of seats allocated to European members in the Board could find a compensation for the excluded in the grouping of European seats in few constituencies to represent the whole Union.[87]

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84 See the *Joint Declaration on Post-Crisis Assessments and Recovery Planning*, adopted in Sept. 2008.

85 See Art. 209(2) TFEU.

86 See Section 98 of the *Zedillo Report*: 'European countries (European Union Members plus Norway and Switzerland) appear to be considerably overrepresented in terms of the number of chairs they occupy in the Group's Executive Boards. Depending on rotation schemes, European countries occupy eight or nine chairs at any given time – 32 or 36% of the chairs in the 25-chair Board. The large number of chairs from a single region is a historical legacy that no longer seems appropriate for a global institution and a transformed global economy. This number of European chairs is not in line, for example, with economic weight or population While some European countries are generous donors to IDA (EU countries provided about 60% of the donor contributions to IDA15), it is not clear why this should translate into chairs in the IBRD, IFC, and MIGA boards'.

87 Recommendation sub '1', *voice and participation*, in the *Zedillo Report*: 'The Commission recommends adopting a Board of Directors that is relatively compact and therefore more

As for the Fund, in the Bank one constituency would not be enough to accommodate current European votes, although this requirement is more relaxed in the Bank than it is in the Fund. In fact, Annex B to the Articles of Agreement states that, through successive elections, no elected Executive Director may represent more than 15% of the share capital and therefore two groups would provide adequate representation for all European votes, while letting the States maintain their individual memberships (and their own packages of basic votes).

In order to let the Union replace its Member States or consider their parallel and simultaneous presence as members of the States and the Union, under the current rules, an amendment to the Statute of the IMF would suffice – as Bank membership is allowed in general to 'members of the Fund' –[88] but we hope in a more substantial revision that would make the accession to the IBRD and other organizations of the World Bank Group independent from participation in the IMF and open to international organizations. In this latter case, however, it would be necessary to develop a joint participation formula like the one used in other international organizations such as the FAO and the WTO since Europeans are already perceived as over-represented and the option of a cumulative participation of the Union and its States would be politically unsustainable. The visible presence of the European Union as a subject of international law that replaces its Member States – speaking with a stronger voice – in all global economic governance organizations is actually wished for by several think tanks and NGOs.[89]

4 Conclusion

As far as the Bretton Woods organizations' specific regulatory field is concerned, the conditionality on which loans are granted clearly shows that the two organizations don't simply suggest State interventions but condition the States

efficient and effective. The World Bank Group's Board should be reduced in size to 20 chairs from the current 25. Board consolidation should be achieved in part by reducing the number of European chairs by no less than four'.

88 See Art. II(b) of the IBRD's Articles of Agreement. It is not even pointed out, here, that the rule refers to 'countries', as in the IMF's Articles.

89 See *The Contribution of 14 European Think Tanks to the Spanish, Belgian and Hungarian Trio Presidency of the European Union*, eds. Elvire Fabry and Gaëtane Ricard-Nihoul, Think Global – Act European II (TGAE II), Notre Europe, 2010. In the conclusions is stated that: '[a] unique European representation (or at least for eurozone countries) within the G20, IMF and World Bank is also put forward as a means of increasing European influence'. Not differently in the following report of the same series, *The contribution of 16 European think tanks to the Polish, Danish and Cypriot EU Trio Presidency*, ed. Elvire Fabry, Think Global – Act European III (TGAE III), Notre Europe, 2012.

themselves in their economic policies, investments and welfare programs thus significantly compressing their sovereignty and affecting their citizens' life. This growing intrusion is today's most controversial side of their activity.[90] Hence the increasing focus on ensuring that their interventions originate from democratic processes and provide for an equitable balance of all needs and requests. The two institutes must therefore be re-balanced to reflect the new economic situation and reformed to confront the challenges of the new millennium. A third good reason for reforms is the evolving role of the IFM and World Bank.

After the World War II, it was utterly impossible to imagine the growing complexity and fragmentation of the context in which the two organizations would have to operate, that is an international community made up of a larger number of subjects, defined by a then inconceivable degree of interconnection and by highly contagious economic phenomena (and everything that goes under the name 'globalization').[91]

The possible solutions may appear – unfortunately – theoretical and even utopistic as there is a number of real difficulties, still to be overcame. These are: the absence of a legal status for individuals in the international organizations' laws (with the only exception of the EU law), the distance from them, the dimension and diversities inside a global demos – however we decide to conceptualize it – and the difficulty to imagine the application to IOs of paradigms for democracy which have been conceived for the State, which is a completely different entity.

An international organization is first and foremost a decision-maker, whose natural limit is its poor capacity to enforce decisions, which have to be shared by a large majority of States in order to be adopted and executed. This requires that all members feel represented and are not overwhelmed by the strongest ones. This is the more evident risk, since the international community is an association of equals only in purely formal terms.

An evolutionary trend points towards an appropriate level of representativeness and legitimacy albeit at a slow and uncertain pace. In terms of representativeness, a little shift in voting rights has already happened and more could be done to reflect new and different patterns that are suitable for each organization, designed to reflect the growing role of emerging economies and –

90 As effectively highlighted also by Barnett and Finnemore, *Rules*, 57.

91 As stated in Section 8 of the *Stiglitz Report*: 'Global economic integration…has outpaced the development of the appropriate political institutions and arrangements for governance of the global economic system. Economic globalization means that actions that occur in one country have effects on others'.

especially in the IMF – the monetary integration that took place in Europe. The two Executive Boards' appointment rules should reject all old privileges – some of which have already lost relevance since the end of the Cold War – and avoid the introduction of new ones. This calls for the creation of two executive Committees of elected members only, as already decided for the IMF. A reform largely supported by scholars and experts should be able to lower the required qualified majorities that – once the veto powers of individual members are removed – will only allow for blocking minorities. The best viable solution, however, is the double majority – majority of the States and of the votes cast – that will recognize equal dignity to all States and at the same time acknowledge their differences in economic status and size.

The lack in multilateralism and political vision can be remedied by rethinking the organizations' internal structures. The enhanced governance systems of both institutions should stand on the pillars of two small political bodies – the ministerial committees – holding significant strategic and political powers. The limited number of their members would be compensated by the well-known constituency system by which a minister would speak for the whole group or – hopefully – for the entire geopolitical area he or she represents, better if it is integrated at regional level.[92]

The Ministerial Committees would be given the task of balancing national interests in a shared strategic planning, while the Executive Board could be left with the more technical and less political task of making all decisions concerning the loan granting activity. The new Board, modelled on the European Commission, would be composed of independent officials who owe their allegiance only to the organization and do not accept or solicit dictates from the States. Of course, effective independence guarantees can only be guaranteed by the statutes.

The second standard to be applied, accountability, should be increased by enforcing a system of checks and balances.

Having lost their double affiliation, the new Executive Directors would enjoy greater credibility and authority and report to the Board of Governors, who elected them and who should be able to dismiss them in the event of serious misconduct. Some of the major gaps to be filled concern in fact the Directors' accountability. Likewise, the Managing Director and the President should report to the two Executive Boards, who must have the power to dismiss them if they fail to work as expected. For this control to be effective, the Managing Director and the President should be members of the executive

92 Please refer to the considerations above as to whether the constituencies reflect, when possible, the composition of regional integration organizations.

body, but not chairpersons, a role that would be assigned to another member chosen by an internal election. At the top of the system, the two Boards of Governors should reassert their grip on the essential decision-making functions the statutes grant them, and acquire new supervisory powers, availing themselves of the support of special committees.

For the purposes of accountability, the aim of reforms concerning transparency, openness and inclusion is to enable States and citizens – these latter in association – to monitor the institutions from the outside, request and obtain information and be heard when they are recipient of the organizations' daily decisions. Unfortunately, when States fail as cogs in the transmission of democracy, an important link in the accountability chain breaks. The problem posed by non-democratic States cannot – by definition – be eliminated. As a partial correction, a growing number of intermediate bodies – representing civil society – could be heard before a decision is taken – as it happens in the EU for the Commission's documents[93] – and allowed to voice their disapproval and file complaints about the implementation of interventions within the recipient countries. The event of maladministration, which may occur, would affect the relationship between organization and Member State in ways we still have to imagine.

Among the suggested reforms, just a few actually require a review of the Articles of Agreement of the two organisations: changing the voting majorities, splitting the Bank's membership from the Fund's one and letting the international organizations in, but also ensuring independence to the two Boards, set up new accountability processes and create a Ministerial Council for the Bank (the IMF already has one in its statute). Other proposals are already works in progress like the transition to an all-elected Board for the Fund. Much more can be accomplished by modifying internal rules – eliminate (or change into a Bank inner body) the Joint Development Committee and create other frameworks to provide a link between the two organizations, modify the structure of the constituencies, provide different share distributions for the two organizations – or even by simple practices. Some cases, though, just demand for a return to the statutes, turning away from deviant practices that are no longer acceptable, such as the Director's and President's appointment procedures.

93 See the practice of publishing *Green Papers* by the European Commission to stimulate discussion on given topics at European level. The Commission invites the relevant parties (bodies or individuals) to participate in a consultation process and debate on the basis of the proposals they put forward. *Green Papers* may give rise to legislative developments that are then outlined in *White Papers*.

As the global financial crisis has demonstrated, there is a request for political leadership and the need to institutionalize the forums facing the global economic emergencies whose solutions are beyond the reach of national States. We are thus presented with two gaps to fill which cannot be prioritized: a deficit in democracy – requiring a return to multilateralism together with a comprehensive set of reforms – and a deficit in politics. Creating effective Ministerial Councils in the two Bretton Woods institutions would in itself be the answer. As a consequence, the G20 would lose most of its purpose, since most of their Member States would be represented in the two new ministerial bodies, with the honour and burden of speaking also for those who are not there, i.e. the other 170 countries.

CHAPTER 8

The Evolution of the Banking Supervision Architecture in Europe

*Concetta Brescia Morra**

1 Introduction

In recent years rules on banking supervision have been hotly debated in Europe. The reform proposed by the European Commission in 2012 gave rise to a radical change in the institutional framework of supervision of the European financial sector. The Commission's Road Map[1] is an important step on the road towards an integrated banking system in Europe.

In trying to understand to what extent recent reforms will change the legal framework, we cannot limit our analysis to the rules recently approved without looking at the past. In this paper I first describe the progress made so far towards the single market for banking services in Europe; Sections 2.a and 2.b deal with the changes in the legislation process from 'minimum harmonisation' to 'maximum harmonisation'. In Section 2.c I analyse the new system of European authorities for banking supervision in the aftermath of the financial crisis. Section 3 examines in more depth the change of approach adopted in the light of projected banking union. Sections 3.a and 3.b contain a brief overview of the institutional framework of the Single Supervisory Mechanism (SSM) as well of the Single Resolution Mechanism. Section 4 concludes.

2 The First Step: The Creation of the Single Market for Banking Services

a *The Common Definition of Credit Institutions and 'Minimum Harmonisation'*

The single market for banking services in Europe is part of the European integration process that began in Rome in 1957. The European Economic Community

* The opinions expressed in this article are solely those of the author and do not necessarily represent the official policy or position of the Administrative Board of Review of Single Supervisory Mechanism of participating EU countries.

1 European Commission, *Proposal for a Council Regulation Conferring Specific Tasks on the European Central Bank Concerning Policies Relating to the Prudential Supervision of Credit Institutions*, Brussels, 12 Sept. 2012, COM(2012) 511 final.

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had as its purpose 'to promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it', by establishing a common market and progressively bringing into closer proximity the economic policies of Member States (Art. 2 EEC Treaty) The common market was founded on the abolition of restrictions on the free movement of persons, services, goods and capital (the 'four freedoms').

A prerequisite for a single market is uniformity of rules in the Member States. To this purpose, the harmonisation of the rules in all the relevant economic sectors has been undertaken. The beginning of this process for the banking industry was the First Directive on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (77/780/EEC). This Directive established a common definition of 'credit institution', i.e. 'bank' in the language of European legislation, and harmonised the requirements for obtaining authorisation for the establishment of a new bank in order to reduce the restrictions on access to the market. Authorisation to carry out banking activities could no longer be denied on the basis of an assessment of the 'economic needs of the market'; the Directive established uniform conditions for obtaining such authorisation: initial adequate minimum capital, and the presence of at least two persons who effectively direct the business of the credit institution (the 'Vier-Augen Prinzip'). The new rules were aimed at promoting more competitive markets by reducing barriers to entry represented by the discretionary powers of national authorities.

The First Banking Directive was not enough to achieve a single market for banking services. The difficulties were due not only to the efforts of Member States to protect their national interests, but also to the complex and cumbersome legislative process of the European Community. At that time, to approve EU directives it was necessary to have the unanimous consent of all the Member States on all issues of regulation. Under this system the achievement of the single market would have taken a very long time.

The turning point in this process was the Single European Act which entered into force on 1 Jul. 1987; it established a new strategy for harmonising regulatory systems in Europe, based on the principles of 'minimum harmonisation', 'mutual recognition of authorisations' and the 'single passport'. This system allows a 'credit institution' legally set up in one Member State to establish a branch or provide its services in the other Member States without any further authorisation requirements. The 'home country authorities' are responsible for the prudential supervision of foreign established branches. Subsidiaries, on the other hand, fall under the jurisdiction of their State of incorporation.

The Single European Act stated that the European provisions in force in a Member State would be regarded as equivalent to those applied by another Member State. The mutual recognition of laws is conditional upon the implementation in all Member States of a set of common rules necessary to ensure minimum standards of prudential regulation ('minimum harmonisation'). The achievement of an agreement on some common provisions was considered necessary to avoid competition among Regulators 'in laxity' (i.e. imposing less stringent requirements) between Member States. A mechanism of competition between jurisdictions would have allowed the initial target of a system of uniform rules in European countries to create a single market to be achieved sooner.

The Second Banking Coordination Directive (646/89/CE) was enacted based on the Single European Act. This Directive established minimum harmonisation in the banking sector in order to allow for the mutual recognition of banking regulations. Since the transposition in all Member States of this Directive, which should have been achieved by 31 Dec. 1992, banks have been able to operate throughout the EU on the basis of regulation by their home country, remaining subject to the control of the authorities of their home country ('home country control'). The only exception to the principle of home country control is the supervision of the liquidity of branches, which has been entrusted to the competent authorities of the host country, in collaboration with the authorities of the home country. To this purpose, the host authorities have retained certain powers in respect of branches of EU banks, such as those relating to the transfer of information necessary for the performance of such tasks. In a case where a bank operates in another country with a subsidiary, namely through the acquisition of control over a bank established in another European country, the latter is supervised primarily by the authorities of the country in which it is established. Consolidated supervision, i.e. the supervision of the corporate group as a whole, remains entrusted to the authorities of the country where the parent company is established (the principle of consolidated supervisor).

The mutual recognition of European standards is limited by the need to safeguard the 'general interests' protected by the legislation of the host country.

The single European market in the banking sector started on 1 Jan. 1993, but it did not give rise to an extraordinary increase in cross-border activity in the European banking market. This was due mainly to the intrinsic characteristics of banking products. The relationship between banks and clients is strongly dependent on trust. The person who entrusts his savings to a bank, especially in the form of a deposit or bank account, tends to look for an intermediary that has been present in his own country for long enough to have built up a reputation. Lending to firms, especially in the case of small and medium-sized enterprises, requires the bank to have knowledge of balance sheets and other

financial data and the organisational structure of the borrowers; this is easier in a limited geographical area. Of course, technological and financial innovation has led to changes in these markets (the most obvious example is the possibility of 'online banking'), but the structural characteristics of these markets have not changed very much. In 1992 we were very far from imagining that it could become commonplace for small investors in Italy to deposit money in a foreign bank, where the economic conditions offered by the latter were much more convenient than those offered by Italian banks.

Furthermore, there were still many obstacles to the free movement of banking services. The most important was the lack of harmonisation of many important rules for the exercise of banking activities in other countries, such as those relating to commercial law, bankruptcy law and contract law.

The creation of the single market was delayed by two weaknesses in the mutual recognition mechanism. First, the fear of foreign competition, in practice very limited for the reasons mentioned above, did not provide a strong incentive to Member States to harmonise their rules with those of other Member States, with the exception of the minimum requirements necessary to implement the Second Banking Coordination Directive. Second, the principle of home country control requires a strong system of cooperation between the supervisory authorities of the Member States; the Directive required the subscribing to memoranda of understanding on a bilateral basis by the home country authority and the host country authority in the case of the establishing of a branch in another Member State, but these agreements did not work properly. In the case of consolidated supervision over cross-border groups, the coordination among competent authorities was even less effective.

b *'Maximum Harmonisation'*

In the last few years of the twentieth century, there were still substantial divergences in national implementation and supervisory practices among EU countries in the banking sector. Hence the European institutions set up a commission to study the best solutions for increasing the level of harmonisation.

The resulting Lamfalussy Report of 2001[2] proposed, in order to reduce market fragmentation in Europe, the adoption of a four-level regulatory approach. Level 1 consists of 'framework directives'; level 2 is the 'implementing measures' of framework directives, which could be either directives or regulations; level 3 is guidelines for 'convergence in supervisory practices'; level 4 is measures

2 The report was endorsed by the Stockholm Council of Economics and Finance on Mar. 2001 and then agreed upon by the European Parliament on Feb. 2002.

adopted by the European Commission for enforcing directives. Based on the report, three committees of supervisors were created; the Committee of European Securities Regulators (CESR), the Committee of European Banking Supervisors (CEBS) and the Committee of European Insurance and Occupational Pension Supervisors (CEIOPS) to assist the Commission in proposing 'level 2' regulations and trying to coordinate the supervisory behaviour of national competent authorities. In the banking sector, the CESB, composed of high level representatives of the supervisory authorities and central banks of the European Union, had as its main functions to prepare technical advice for the European Commission about the proposed regulations on banking; to promote the uniform application of European directives on the convergence of supervisory practices on the part of the Member States; and to strengthen cooperation in this field. The presence of national authorities in the legislative bodies of the Community would also facilitate the application of the rules by a network of people with a common knowledge and similar approaches on technical issues such as those under discussion.

The Lamfalussy Report supported the idea of 'maximum harmonisation' to reach a more intensive level of harmonisation in the securities regulation field. The maximum harmonisation approach means that the directive leaves no room for flexibility among national legislators to adopt divergent approaches; States cannot adopt different rules from those of the directives, not even stricter ones. The report did not change the 'minimum harmonisation' approach adopted in the banking prudential field, but fostered the convergence of regulations.

The purpose of this reform was to reduce the discretion of national legislators and authorities implementing European legislation to speed up the process of standardising rules.

The reform did not change the allocation of responsibilities of supervision: the 'home country control'. It merely reinforced the principle of cooperation between national authorities. A step forward in the coordination of the national authorities took place with the reform of Directive 2006/48/EC, which transposed into European law, with adaptations, the principles outlined by the Basel II Accord.[3] This still maintained the principles of home country control

3 Since the 1980s, the Basel Committee, established by the governors of the central-banks of the G-10 countries in 1974, formulates supervisory standards and guidelines and recommends statements of best practice. The Committee does not possess any formal supranational supervisory authority, and its conclusions do not have legal force. The standards have been implemented in the legal systems of many countries because of the reputation of the Committee. In 1988, the Committee decided to introduce a capital measurement system, commonly

and consolidated supervisor for the exercise of consolidated supervision. Therefore, for each large group with subsidiaries in more than one European country there was set up a 'college of supervisors' composed of representatives of national authorities for the exchange of information.

c *A New System of European Authorities for Banking Supervision in the Aftermath of the Financial Crisis*

The financial crisis of 2007–2009 revealed that the regime of financial supervision had failed to prevent the accumulation of excessive risk in the financial sector. Lack of coordination in supervising cross-border groups and the 'light touch approach' adopted by some important national authorities, such as the UK, led to the spread of the crisis.[4]

The financial crisis that started in the summer of 2007 gave rise to a new reform on the basis of a study conducted by another group of European experts, the 'Committee of Wise Men' chaired by Jacques de Larosière set up by the European Commission in Nov. 2008[5] to make recommendations on how to strengthen the European supervisory system and to restore confidence in the financial system.[6]

In Sept. 2009 the Commission proposed to create four new bodies. One, the European Systemic Risk Board (ESRB), was established to deal with macro-stability issues. The other three bodies, the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA), and the European Insurance and Occupational Pensions Authority (EIOPA), replaced the EU's existing supervisory architecture based on the 'level 3' committees. They have micro-prudential tasks.

The reform was approved by the Parliament and the EU Council in 2010. The European Commissioner Michel Barnier called this political agreement a 'milestone' in the creation of an integrated system of supervision of finance in Europe. Despite the emphasis of the political debate, however, it was a compromise that did not radically change the previous architecture of financial supervision.

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referred to as the 'Basel Capital Accord'. In 2004, the Committee issued a revised Capital Adequacy Framework: 'Basel II Accord'.

4 Financial Services Authority (FSA), *The Turner Review: A Regulatory Response to the Global Banking Crisis* (18.3.2009), available at www.fsa.gov.uk.

5 De Larosière Report, by the High-level group on financial supervision, chaired by Jacques de Larosière, Brussels, 25.2.2009, available at ec.europa.eu.

6 Rainer Masera, "Reforming Financial Systems after the Crisis: A Comparison of EU and USA," *PSL Quarterly Review* 63 (2010), 297–360.

The powers entrusted to the new authorities are limited.[7] They develop rules defining common technical standards; settle disagreements between national supervisors when the current legislation requires their coordination; help to ensure uniform application of the Community rules; and play a coordinating role in emergency situations. Only ESMA has received powers of direct control over credit rating agencies.

These conclusions are confirmed by the analysis of the powers attributed to the two authorities relevant to the banking sector, the ESRB and the EBA.

The ESRB (EU Regulations 1092/2010 and 1096/2010) is mandated to monitor and assess systemic risk in normal times for the purpose of mitigating the exposure of the financial system to the risk of failure of systemic components and strengthening the system's resilience to shocks. The ESRB should contribute to ensuring financial stability and mitigating the negative impacts of financial crisis on the internal market and the real economy.

To pursue these objectives the ESRB has few powers. It is to collect information; identify and prioritise systemic risks; and issue warnings and recommendations. If the ESRB detects a risk which could seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the Union's financial system, it must promptly inform the European Council, which then activates a process to establish the existence of an emergency situation. The only sanctioning power is based on a mechanism to 'comply or explain'.

Regulatory functions are the main task of the EBA (Reg. 1093/2010). It plays an important role in advising the European Commission on drafting 'level 2' rules, promoting convergence by national competent authorities in implementing measures through non-binding guidelines and recommendations. The EBA may issue harmonised regulatory technical standards in order to ensure a level playing field and adequate protection of investors and consumers across the EU ('single rulebook').[8]

The EBA does not have authority to control individual institutions, but it could play an important role in coordinating banking supervision in Europe due to the important tasks set out in its remit. First, the EBA has the power to take decisions that may impact on financial markets in certain situations: in case of a breach of EU law by a national competent authority which does not comply with the formal opinion of the EBA; in emergency situations when a

7 Raffaele Lener and Edoardo Rulli, "The Reforms of the European Financial Markets Supervision: The Difficult Coordination between EU and Member States," *LEYR* 2 (2013), No. 1, 99–162.

8 Vincenzo Troiano, "The New Institutional Structure of EBA," *LEYR* 2 (2013), No. 1, 163–183.

national competent authority does not comply with a decision of the EBA; to settle disagreements between competent authorities in the supervision of cross-border groups. The last is the most important power. If the competent authority does not comply with the decision of the EBA, the Authority may adopt an individual decision addressed to a financial market participant requiring the necessary action to comply with its obligations under EU law. Moreover, the EBA has important tasks having regard to colleges of supervisors. The EBA must contribute to promoting and monitoring their efficient, effective and consistent functioning; and must ensure the consistent and coherent functioning of colleges of supervisors for cross-border institutions across the Union, taking account of the systemic risk posed by financial market participants. The EBA may also prohibit certain activities, especially the most innovative, in order to protect consumers and safeguard the integrity and orderly functioning of markets.

The EBA has powers to initiate and coordinate EU-wide stress tests, in close cooperation with the ESRB. The aim of such tests is to assess the resilience of financial institutions to adverse market developments, as well as to contribute to the overall assessment of systemic risk in the EU financial system; stress tests are based on harmonised methodologies and testing between groups belonging to similar categories ('peer reviews'). On 15 Jul. 2011 the EBA, after having carried out the stress tests for the first time on the European banking system, published a formal Recommendation relating to banks' recapitalisation needs. This Recommendation was strongly criticised. The main objection was that requiring banks to raise capital during a period of depression in the financial markets, such as the aftermath of the crisis, was too costly for the banking system. The fact that the EBA recommendations on strengthening the banks' capital were part of a package of measures that received political legitimation, having been approved by the European Council and ECOFIN,[9] showed the ambiguity of the system. A political agreement on technical standards was needed because of the lack of a centralised supervisory system in Europe, but the literature in the field of banking supervision has shown that it is effective only if the decisions are made by an independent authority without any considerations of a political nature.

The purpose of the 2010 reform was primarily to strengthen the cooperation between national authorities and to improve the level of harmonisation of rules.

9 The Recommendation by EBA was part of a broader European package, agreed by European Council on 26 Oct. and confirmed during the ECOFIN Council on 30 Nov. 2010, to address the situation in the EU by restoring stability and confidence in the market.

Although these objectives are important, they represented too small a step to address the dramatic consequences of the financial crisis. Despite the crisis, European countries did not want to renounce their sovereign powers over banks. This was mainly due to the fact that, in the case of the insolvency of a bank, the burden of the bail-out remains on the public finances of the country where the bank is established. The European Commission in May 2010 published a paper on how to implement a European bank resolution fund to avoid the costs of bank failures in the future continuing to fall on the taxpayers of a particular Member State. The document was very cautious and proposed, as a first step, the creation of a harmonised network of national funds that would have to operate within a system of rules on crisis management coordinated between Member States. Therefore in 2012 the Commission, abandoning the idea of a single deposit insurance system, decided to push for the approval of a Regulation on the SRM and for the harmonisation and strengthening of national systems of deposit guarantee schemes.

3 The Change of Approach: Banking Union

At the beginning of 2012, although the peak of the financial crisis had passed, the European authorities realised that problems had not been solved and that the reforms approved in 2010[10] were not sufficient to deal with a new phase of financial instability.

The nature of the crisis has changed. The main problems originated in tensions in the market for sovereign debt of the countries adhering to the Euro Area. In some States, the public debt increased significantly, with consequent difficulties in the financial markets for sovereign bonds. In the case of Ireland, the public finance problems were exacerbated by the intervention of the government to rescue the most important banking intermediaries that had suffered heavy losses during the financial crisis. Therefore a vicious circle was created between tensions in the sovereign debt market and the difficulties faced by intermediaries.[11] The fragility of the banking system, already affected by the crisis in 2007–2009, worsened in countries with high public debt. The trust of markets in the solvency of banks established in countries with exces-

10 Guido Ferrarini and Filippo Chiodini, "National Fragmented Supervision over Multinational Banks as a Source of Global Systemic Risk: A Critical Analysis of Recent EU Reforms," in *Financial Regulation: A Post Crisis Analysis*, eds. Eddy Wymeersch, Klaus J. Hopt and Guido Ferrarini (Oxford: OUP, 2012).

11 Ignazio Visco, *The Aftermath of the Crisis: Regulation, Supervision and the Role of Central Banks*, Lecture delivered at Harvard Kennedy School, Cambridge (Mass.), 16 Oct. 2013.

sive public debt decreased. This was the result of two issues: on the one hand, governments had difficulty intervening in favour of intermediaries due to the constraints of public deficit budgets; on the other hand, banks generally held in their portfolios a relevant amount of the national debt; when the value of these securities decreased, due to the increased risk of default by the State, there were problems in the banks' balance sheets. In this setting, fragility in the national banking system can be quickly transmitted to the national fiscal side and vice versa, triggering an adverse feedback loop between fiscal and banking problems. This is what happened in Spain. Many savings banks (*Cajas de Ahorros*) suffered heavy losses because of their great involvement in the housing bubble that burst soon after the start of the global financial crisis. The Spanish government's intervention to bail out the banking system was hampered by tensions in the market for public debt; in recent years the spread between the ten-year Spanish government bond and the benchmark, the ten-year German bond (*bund*), had dramatically increased. For this reason it was necessary for other European countries to support Spanish banks. The Euro Area countries on 25 Mar. 2011 signed a Treaty that established the European Stability Mechanism (ESM); the new structure would grant financial assistance to Euro Area countries, thus safeguarding the stability of the Euro Area as a whole. This Treaty permits financial assistance also to be provided to the banking system of the adhering countries, but it could not consist of the direct recapitalisation of distressed banks. Based on these provisions, in Jun. 2012 the ESM provided a loan to the *Fondo de Reestructuración Ordenada Bank* (*FROB*) set up by the Spanish government for the recapitalisation of saving banks.

It was in this context that the radical change of perspective and the Road Map drawn up by the European Commission for the Banking Union in Sept. 2012[12] originated. The Commission programme implies a strong discontinuity in the history of banking regulation in Europe. The document recognises that taking further steps in the creation of a system of common rules for banks is important, but it is no longer sufficient, where the monetary policy powers have been transferred at European level.[13] If countries have a single currency it is also very important to centralise the powers of supervision over banks. Moreover, recognising the failure in achieving the common market, the Commission acceded to the position of the European Central Bank (ECB),[14] according to which the persistence of the fragmentation of the European

12 See footnote 1.

13 Paul De Grauwe, *Design Failures in the Eurozone: Can They Be Fixed?* LSE "Europe in Question" Discussion Paper Series, Feb. 2013.

banking system makes less effective the transmission of monetary policy impulses to the real economy in the Euro Area system. The ECB stated that there is a fundamental inconsistency in banking supervision being carried out at national level in a currency area with a single monetary policy; fragmentation and tension in bank funding conditions at the national level have impaired the transmission mechanism of monetary policy. The fragmentation could contribute to negative loops between banking problems and tensions in sovereign funding.

In order to reduce fragmentation and foster the creation of a unified banking system in Europe, the European Commission approved a reform based on three pillars: a single mechanism of supervision over banks, referred to as the Single Supervisory Mechanism (SSM); a single mechanism for the 'resolution' of troubled banks, the Single Resolution Mechanism (SRM), and the harmonisation and strengthening of systems of deposit guarantee schemes.

The rationale behind this project cannot be explained just on the basis of safeguarding the soundness of the banking system and financial stability. It is part of a broader reform aimed at restoring confidence in the euro and creating economic and fiscal integration in Europe in the long term.[15]

After a broad discussion, in the space of a few months a Regulation on the mechanism of centralised supervision was agreed. Reg. 1024/2013 of the Council of 15 Oct. 2013 confers specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions. Negotiations to establish a single mechanism for crisis resolution were more complex and proceeded more slowly than those for the SSM, but eventually a political compromise has been reached. On 7 Jul. 2014 the EU Parliament and the Council adopted the Reg. 806/2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions. The Reg. 806/2014 establishes also a Single Resolution Fund (SRF), constituted by compulsory contributions of European banks. The Fund will not be entirely regulated by the SRM Regulation. Some aspects necessary to set up the Fund, such as the transfer of contributions raised nationally towards the Single Fund and the mutualisation of the national compartments are contained in an inter-governmental agreement established among the participating Member States that was signed on 21 May 2014. Moreover, on 16 Apr. 2014 the European Parliament approved the recast of the Directive on Deposit Guarantee schemes that

14 European Central Bank, ECB, *Financial Stability Review*, Dec. 2012, 119–127.

15 Francesco Capriglione, "European Banking Union: A Challenge for a More United Europe," *LEYR* 2 (2013), No. 1, 5–80.

contains a deeper harmonisation of national deposit guarantee schemes that are set up in each Member State (Directive 2014/49/EU).

a *The Compromise on the SSM: The Challenge to Achieve a Substantial Centralisation of Powers*

The supervisory model outlined in Reg. 1024/2013 provides for the establishment of a single supervisory mechanism for Euro Area banks that is open to other Member States wishing to join, with arrangements for enhanced cooperation. For its implementation, the acceding countries have chosen to confer upon the ECB prudential supervision tasks as laid down in Art. 127(6) TFEU: 'The Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings'.[16]

This solution was due to the need to accelerate progress towards Banking Union. The creation of an ad hoc authority with discretionary powers would require a change to the Treaty that would be difficult to achieve in a short time. The governments of many European countries are reluctant to allow the transfer of sovereign powers to European institutions. The most important example is the United Kingdom, which has on several occasions expressed opposition to strengthening European integration. Consistent with this position, the United Kingdom which, as it does not adhere to the Euro Area, is not automatically part of the SSM, has already stated that it does not want to 'opt in' to the SSM, as provided by Reg. 1024/2013 (Art. 7).

The tasks conferred on the ECB for prudential supervisory purposes comprise all the relevant tools needed to carry out prudential supervision. First, the EBC can authorise credit institutions and assess applications for the acquisition and disposal of qualifying holdings in credit institutions. The ECB ensures compliance with rules that impose prudential requirements on credit institutions in the areas of own funds requirements, securitisation, large exposure limits, liquidity, leverage, reporting and public disclosure on those matters. Moreover, it ensures compliance with rules that impose requirements on credit institutions to have in place robust governance arrangements, including fit and proper requirements for the persons responsible for the management,

16 On the legal basis of the SSM see Francesco Guarracino, "Role and Powers of the ECB and the EBA in the Perspective of the Forthcoming Single Supervisory Mechanism," *LEYR* 2 (2013), No. 1, 184–210.

internal control mechanism, remuneration policies and internal capital adequacy assessment processes, including Internal Rating Based models. The ECB shall carry out supervisory reviews, including stress tests, and supervision on a consolidated basis. Where a credit institution does not meet or is likely to breach the applicable prudential requirements the ECB may exercise 'early intervention' powers to prevent financial stress or failure, excluding any resolution powers.

To avoid problems of conflict of interest between monetary policy decisions and financial stability decisions, the Regulation provides special rules on 'supervisory governance'. The Regulation establishes a new internal body of the ECB: the 'Supervisory Board', entrusted with the prudential supervision of banks. Because the Governing Council of the ECB, which is responsible for monetary policy, is the only decision-making body of the ECB under the Treaty, the Supervisory Board shall carry out preparatory supervisory tasks and shall propose draft decisions. The Governing Council shall adopt these decisions. Therefore, the Governing Council will remain 'formally' responsible for taking decisions prepared by the Supervisory Board (Art. 26, Reg. 1024/2013).

An important aspect of the new supervisory architecture is represented by the split between the regulatory function and operational control functions (authorisation, supervision and audit information).[17] The regulation of banks remains essentially a national competence, implementing European standards. According to Art. 4(3) of Reg. 1024/2013, the ECB 'shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives. Where the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options'. The ECB has very limited regulatory powers (Art. 4.3). It may adopt 'guidelines and recommendations' within the framework of technical standards developed by the EBA and by the European Commission. The ECB may 'adopt regulations only to the extent necessary to organise or specify the arrangements for the carrying out of the tasks conferred on it by this Regulation'. This division of competence among European authorities is a natural consequence of the limitation of the scope of the SSM to the Euro Area countries. Hence the European legal sources remain those established by the Treaty. This solution could create problems for the ECB in carrying out its tasks. It is possible that the ECB will apply different rules to banks established in different countries with a 'non-equal

17 Eddy Wymeersch, *The European Banking Union, a First Analysis*, University of Gent, Financial Law Institute, working paper series, wp 2012-07, Oct. 2012.

treatment' outcome. This problem will be overcome only when the process of achieving the 'single rule book' is completed.

The new supervisory architecture provides a complex system of cooperation between the ECB and national competent authorities. The ECB must carry out its task within a single supervisory mechanism composed of the ECB and national authorities. The ECB shall be responsible for the effective and consistent functioning of the single supervisory mechanism. Both the ECB and national competent authorities shall be subject to a duty of cooperation in good faith and an obligation to exchange information.

The regulation distinguishes banks 'of significant relevance' and banks that are 'less significant'. The ECB will directly supervise banks that 'shall not be considered less significant' because of their size; importance for the economy of the EU or any participating Member State; or the significance of their cross-border activities.[18] With respect to 'less significant banks' supervisory decisions are adopted by national competent authorities. The ECB shall issue regulations, guidelines or general instructions to national competent authorities. With respect to 'banks of significant relevance', national competent authorities shall be responsible for assisting the ECB with the preparation and implementation of any acts relating to the ECB tasks, including assistance in verification activities. Reg. 1024/2013 confers broad investigatory and supervisory powers on the ECB, but the challenge of effective implementation must not be underestimated. To coordinate the activities of the ECB and the national competent authority, the former shall adopt a detailed framework for practical modalities of supervisory cooperation within the SSM. There are some risks associated with the SSM's operational structure. In the event that the ECB has

18 According to Art. 6(4) '…a credit institution or financial holding company or mixed financial holding company shall not be considered less significant, unless justified by particular circumstances to be specified in the methodology, if any of the following conditions is met: (i) the total value of its assets exceeds EUR 30 billion; (ii) the ratio of its total assets over the GDP of the participating Member State of establishment exceeds 20%, unless the total value of its assets is below EUR 5 billion; (iii) following a notification by its national competent authority that it considers such an institution of significant relevance with regard to the domestic economy, the ECB takes a decision confirming such significance following a comprehensive assessment by the ECB, including a balance-sheet assessment, of that credit institution. Upon initiative of the ECB where the bank has established banking subsidiaries in more than one participating Member State and its cross-border assets or liabilities represent a significant part of its total assets or liabilities subject to the conditions laid down in the methodology. Notwithstanding the previous rules, the ECB shall carry out the tasks confers upon the regulation in respect of the three largest banks in each Member State, unless justified by particular circumstances'.

insufficient resources to perform its tasks, the SSM could be excessively dependent on national authorities. In a transitional period, the national authorities, which have more experience in the exercise of supervision and a better understanding of the situation of the domestic banks, could retain a strong power in making decisions regarding supervision, promoting national interests.

This complex system of relationships between the ECB and national authorities has been compared to the one in force in the competition field between the European Commission and national authorities.[19] We believe that there are some important differences. Under the rules of the TFEU, the Commission shall ensure the application of the principles laid down in Arts. 101 and 102 ('agreements impeding competition' and alleged 'abuses of dominant position'). In the European regulation system the distribution of powers is quite clear between the European Commission and the national authorities applying antitrust rules. Despite this division of responsibilities we must note that there is a principle of primacy of European law in the antitrust field. On the other hand, in more than one Member State, such as Italy, antitrust rules were enacted many years after those of the European Treaty. The European Commission and the national authorities carry out their respective tasks on the basis of the same discipline: the rules of the Treaty. As stated in Art. 1(4), of the Italian law 287/90, the interpretation of its provisions 'shall be conducted in accordance with the principles of European Union competition law'. In contrast, as we mentioned above, in the field of banking supervision the European rules will certainly apply in the first place, except where these do not leave scope for interpretation in their implementation at national level.

b *The New System of Management of Banking Crises: A Complex Decision-Making Mechanism*

The compromise reached in the Reg. 806/2014 on the single mechanism for the resolution of banks is based on Art. 114 TFEU, according to which 'The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'.

Implementing this provision, the Reg. 806/2014 establishes a new European agency, the Resolution Board. This Board shall comprise an Executive Director, four further full-time members and a member appointed by each participating

19 Jacopo Carmassi, Carmine Di Noia and Stefano Micossi, *Banking Union: A Federal Model for the European Union with Prompt Corrective Action*, CEPS Policy Brief, No. 282, 17 Sept. 2012.

Member State, representing the national resolution authorities. The Reg. 806/2014 also establishes a Single Bank Resolution Fund, composed of compulsory contributions of European banks: in a period of no more than ten years after the entry into force of the Regulation, the available capital in the Fund shall reach at least 0.8% of the amount of deposits of all credit institutions authorised in the participating Member States.

The authorities involved in the phase of 'resolution' are four: the ECB (and the national authorities responsible for the supervision of 'less significant' banks), the Resolution Board, the European Council and the European Commission. If the ECB, or the national supervisory authority after consultation with the ECB, concludes that a bank is 'failing or likely to fail' it shall immediately notify the Commission and the Resolution Board. The latter agency shall conduct an assessment of the economic and financial situation of the troubled bank and adopt a 'resolution scheme'. The resolution scheme enters into force only if, within 24 hours after its adoption by the Board, there are no objections from the Council or the Commission or the resolution scheme is approved by the Commission.

A very complex mechanism has been created, with multiple authorities where the boundaries between their tasks are not very clear. The involvement of the Council and the Commission is justified, considering the relevant impact of the resolution decisions on the financial stability of Member States and on the Union, as well as on the fiscal sovereignty of Member States. The allocation of decision-making powers to the Council, with an important role for the Commission, is a consequence of the impossibility of conferring discretionary powers on authorities not provided for by the Treaty, such as the new Resolution Board, according to the 'Meroni doctrine'.[20] On this point, however, we must take into account the innovative decision of the European Court of Justice of 22 Jan. 2014[21] on the powers conferred on the ESMA under Art. 28 of Reg. 236/2012, finding that these powers 'are precisely delineated and amenable to judicial review in the light of the objectives established by

20 European Court of Justice, Case 9/56, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*, 13 Jun. 1958. In this case the Court stated that the delegation of powers by the Commission to an authority of 'discretionary power implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy' is incompatible with the Treaty.

21 European Court of Justice (Grand Chamber), Case C-270/12, *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union*, 22 Jan. 2014.

the delegating authority', thus they 'comply with the requirements laid down in *Meroni* v *High Authority*'.[22]

It is a bureaucratic procedure characterized by the involvement of several 'protagonists'. Taking a final decision requires a very long time, which is not compatible with the need for speed in the management of banking crises. Moreover, the boundaries between the interventions of the ECB and those of the new agency for resolutions are not well defined. The most delicate point concerns the measures of early intervention in the phase just before insolvency. In the architecture of the supervisory system outlined in the regulation on the SSM, the ECB has the exclusive power to 'carry out the tasks related to supervisory action plans and early intervention by a credit institution or group' (Art. 4.1.k). If we consider that the Reg. 806/2014 on the single resolution mechanism confers on the ECB the power to assess the 'non-viability' of the troubled bank, we can conclude that it is a matter of a discretionary decision of the ECB to identify the boundary between the powers of the two authorities. When the ECB states that the bank is 'failing or likely to fail' the decision on the measures to be taken is the responsibility of the Board Resolution.[23]

4 Conclusion

The compromises achieved on the SSM and on the single resolution mechanism to implement the Road Map of the Commission drawn up in 2012 highlight some weaknesses.[24]

The first problem is the United Kingdom's choice to stay out of these agreements. The British position is consistent with its decision not to participate in the Euro Area, but it will make it difficult to create a single financial system in Europe and reduce the current fragmentation. Even if most of the European Member States would adhere to the SSM, apart from the nineteen euro

22 The Court stated, therefore, that when delegated powers are 'precisely delineated' and are 'executive decisions in a specific factual context' they do not imply the transfer to the Authority of a wide degree of discretion.

23 European Central Bank, *Opinion on a Proposal for a Regulation of the European Parliament and of the Council Establishing Uniform Rules and a Uniform Procedure for the Resolution of Credit Institutions and Certain Investment Firms in the Framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and Amending Regulation (EU) No. 1093/2010 of the European Parliament and of the Council*, CON/2013/76, 6 Nov. 2013.

24 Guido Ferrarini and Luigi Chiarella, *Common Banking Supervision in the Eurozone: Strengths and Weaknesses*, ECGI, Working Paper Series in Law, No. 223, Aug. 2013.

countries, the decision of the UK to 'opt out' could not be considered irrelevant. As it is the location for an important part of the EU financial services business, the UK's national strategies in the banking supervision field are closely tied up with those adopted by the ECB as the prudential supervisory authority of the Euro Area countries.[25]

Another weak point is the lack of a political agreement on sharing the burden of banking crises involving systemically important intermediaries in Europe.[26] The Single Resolution Mechanism and the Single Resolution Fund created by the intermediaries' contributions may allow crises of one or more intermediaries to be dealt with. In the event of a crisis of systemic importance, public intervention would be necessary, but there is no formal commitment by European countries on this point, except as provided in the latest revision of the agreement on the European Stability Mechanism that will operate within very tight limits. The agreement of 20 Jun. 2013 to preserve the financial stability of the Euro Area as a whole and to help remove the risk of contagion from the financial sector to the sovereign allows for the direct recapitalisation of banks: The agreement sets out stringent eligibility criteria. There is an *ex ante* limit for the amount of financial assistance available for a direct recapitalisation instrument of EUR 60 billion; this amount may not be sufficient if a systemic crisis occurs. Moreover, a significant part of the cost of the recapitalisation mechanism falls on the country of the troubled bank, reducing the possibility of breaking the vicious circle between banks' fragility and tension in the sovereign debt market.

The weaknesses of the agreements reached up to now, however, do not necessarily imply a sceptical judgment about the chances of success of the initial project. As has often happened in the history of Europe, the first step towards closer integration is represented by a compromise limited to only a few areas: a Europe of different speeds is now also recognised by the Treaty itself.[27]

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25 Eilis Ferran and Valia Babis, *The European Single Supervisory Mechanism*, University of Cambridge, Faculty of Law, Legal Studies Research Paper Series, paper No. 10/2013, Mar. 2013; Zsolt Darvas and Guntram B. Wolff, *Should Noneuro Area Countries Join the Single Supervisory Mechanism?*, Bruegel Policy Contribution, Mar. 2013.

26 Stefano Micossi, "Banking Union in the Making," *LEYR* 2 (2013), No. 1, 80–98; Zsolt Darvas and Silvia Merler, *The European Central Bank in the Age of Banking Union*, Bruegel Policy Contribution, Oct. 2013; Maria Nieto and Gillian Garcia, *The Insufficiency of Traditional Safety Nets: What Bank Resolution Fund for Europe?*, 'Paolo Baffi' Centre Research Paper Series, No. 2012-117, 2012.

27 See Jean-Claude Piris, *The Future of Europe: Towards a Two-Speeds EU* (Cambridge: CUP, 2012); Paolo Fois, "Applicazione differenziata e integrazione nel diritto dell'Unione europea," *SIE* 6 (2011), 25 *et seq.*

In the genesis of the European Union proposals were made in 1950 by the French Foreign Minister Robert Schuman to prevent the risk of a conflict between France and Germany over the coal and steel resources of the Ruhr and Saar. With the proposal to place Franco-German coal and steel production under a common High Authority 'whose decisions will bind France, Germany and the acceding countries, …' the foundations of economic unification were laid. The agreement was the first concrete tool of a European federation indispensable for the preservation of peace. The Treaty establishing the European Coal and Steel Community (ECSC) was signed two years later. The large investment pools made necessary by the commitment of Member countries in the field of nuclear energy were the rationale for the start of the European Atomic Energy Community (EURATOM) in 1957. That same year the European Economic Community was born.

The project on banking union is based on strong political grounds. It is not a 'technical report', produced by a study commission of experts. I do not believe that this phase can be seen in the light of 'functionalist' theory. 'Functionalism' holds that European integration is driven by 'elites' and interest groups without the political consensus of national governments on the progress of European integration. According to this view, transferring some policy functions to the supranational level creates pressure for more integration. European integration is boosted by elites of 'technocrats', who support proposals that provide for the transfer of certain functions into the hands of European authorities to create pre-conditions, at a later time, for further transfers of sovereignty from Member States to the European institutions ('Jean Monnet's Chain Reaction').[28]

The project defined by the European Commission in the Road Map in Sept. 2012 stands as an important convergence of the governments of the Euro Area countries, which are aware that it is the only possible solution to the problems arising from the global financial crisis. The political agreement preceded the technical solution in the preparation of the SSM regulation as well as in the draft regulation on the single mechanism for resolution of banking crises. The signing of the Treaty setting up the European Stability Mechanism shows the strong political interest of governments in supporting European integration, even if there remain disagreements on technical solutions and on the distribution of the burdens of banking failures. The progress made among the Euro Area countries will also strengthen the negotiating capacity of the latter with

28 Enrico Spolaore, *What Is European Integration Really About? A Political Guide for Economists*, NBER wp No. 19122, Jun. 2013.

countries outside the euro zone, primarily the UK, thus favouring the conclusion of cooperation agreements with them within the EBA.[29]

We can conclude that the financial crisis has led to a new phase of European integration. As Padoa-Schioppa pointed out, limiting the sovereign powers of the States and developing supranational institutions is the only way to preserve peace and stability in a globalised world.[30]

29 International Monetary Fund, European Department, in collaboration with the Legal, Monetary and Capital Markets, and Research Departments, *A Banking Union for the Euro Area*, Prepared by Rishi Goyal, Petya Koeva Brooks, Mahmood Pradhan, Thierry Tressel, Giovanni Dell'Ariccia, Ross Leckow, Ceyla Pazarbasioglu, and an IMF Staff Team, 13 Feb. 2013.

30 Tommaso Padoa Schioppa, *Europa Forza Gentile* (Bologna: Il Mulino, 2001).

CHAPTER 9

The Protection of Non-economic Values and the Evolution of International Economic Organizations

The Case of the World Bank

Maria Rosaria Mauro

1 Economic Globalization, Global Economic Governance and the Protection of Non-Economic Values

The relationship between market needs and values of other nature, generally defined as non-trade/economic values/concerns, has become a central theme in the debate on economic globalization from the moment the need for 'sustainable' globalization became ever more evident, turning not only to economic growth but also to the protection of interests not strictly economic,[1] such as, for example, human rights, the environment, the preservation of cultural identities.

This theme is connected, of course, to a different notion of development, stemming in particular from the gradual integration of this concept with the protection of human rights,[2] which resulted precisely in the emergence of a 'rights-based approach to development' and the related right to develop. This broad concept of development, which is particularly obvious in the *Declaration on the Right to Development* adopted by the General Assembly (GA) of the United Nations (UN) in 1986,[3] is by now generally accepted.

The reconciliation between apparently conflicting needs and interests, even though all deserving of equal protection, is one of the most delicate aspects of global economic governance. In such a scenario it is necessary, therefore, to

1 The International Labour Organization (ILO) and the World Trade Organization (WTO) have recently published a joint study dedicated to finding a socially sustainable globalization: cf. *Making Globalization Socially Sustainable*, eds. Marc Bacchetta and Marion Jansen (Geneva: WTO Secretariat, 2011): www.wto.org.

2 See in this respect Ibrahim F.I. Shihata, "Human Rights, Development, and International Financial Institutions," *Am. U.J. Int'l L. & Pol'y* 8 (1992): 27–37; Dominic McGoldrick, "Sustainable Development and Human Rights: An Integrated Conception," *ICLQ* 45 (1996): 796–818.

3 See GA Res. 41/128, *Declaration on the Right to Development*, UN Doc. A/Res/41/128, 4 Dec. 1986 (www.un.org).

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reflect on the present and future role of international economic organizations in the promotion and protection of non-economic values and, consequently, on the possible evolution of their mandates.

Indeed, the new concept of development, established at the international level, has led several international organizations working in this field to assess the operational implications of the relationship between economic growth and the values of other nature, often entailing an expansion of their functions and responsibilities.[4] In this context, international economic organizations, of both a regional nature and a universal vocation, have gradually, in the implementation of their statutory objectives, devoted greater attention to the individual and space for the protection of non-economic values.

With regard to the World Bank (WB), in particular, such a phenomenon, quite in contrast to its original statutory mandate, is manifested not so much in terms of regulation as in the practice of the Organization, wherein a solution has been found for the apparent conflict.

Moreover, as we shall see, this new approach has resulted, within the WB, in a major institutional change: in fact, in 1993, the Inspection Panel was established, the first example of the constitution by an international economic organization of an organ in order to allow non-State actors to appeal against the international organization, permitting oversight of its conduct.

2 The Promotion and Protection of Human Rights by International Economic Organizations

The safeguard of human rights, on the one hand, and the promotion and protection of interests of a strictly economic nature, on the other, have long been considered incompatible.

In a strictly legal sense, the issue considered is at the heart of the potentially conflicting relationship or, at least, of mutual 'indifference', between two branches of international law: international economic law, aimed primarily at

4 See Report of the Intergovernmental Group of Experts on the Right to Development on its second session (Geneva, 29 Oct. 1997), UN Doc. E/CN.4/1998/29, Sections 40–41 (daccess-dds-ny.un.org). See on this topic Shihata, "Human Rights," 28, stating that, '[t]he pressing issue should be further distinguished from the policy question of whether the charters of international financial institutions should be amended to enable them to serve all the purposes of development. In other words, the question which must be asked is whether these institutions should be required to move beyond addressing freedom from poverty, into the realm of addressing all types of freedoms'.

promoting financial stability and a stable exchange rate, trade liberalization, economic development and the promotion and protection of international investment, and the international system of human rights, the rules of which are intended to safeguard the human being, the individual as such, from abuses and violations, above all, by the State.

In the abstract, therefore, there could be a conflict between these regulatory subsystems of international law, which in general respond to different needs. In reality, however, despite being born as independent and separate branches of international law, the gradual evolution of the international context, of the international society and of the rule of law that regulates it, that is international law, has given rise to the need for interaction between these two regulatory systems, in some ways a 'constructive' interaction.

As noted in general in terms of the evolution of international law, the need for interaction is manifested in a specific way in relation to international economic organizations and their role in the international context. Indeed, the main international economic organizations have been set up not only with a vocation and mandate 'limited to the economy', but also, some of them at a time in history when we did not yet understand the importance of certain problems and the need to respect specific international values. The international context has, however, gradually changed, and increasingly some international economic organizations have appeared inadequate in their original form; for this reason, because of the many criticisms of them, on a legal, political and economic level, at least for some of these organizations there has been a rethinking of their methods and policies of intervention.

It should be noted, too, that, apart from the regional systems of human rights protection and, more recently, international criminal law in matters of gross violations, it is precisely in the context of international economic organizations, and in particular within the World Bank Group (WBG), that a system of protection of the rights of the individual has gradually been established. Moreover, in international economic law, contrary to what happened originally in public international law, the individual has always had a special role, both as an actor and as the beneficiary of a number of rights. In fact, international economic relations are characterized, in reality, by the fact of involving private actors and, therefore, often there are discrepancies between the traditional subjects of international law, which remain essentially States and international organizations, and material subjects of the rules of international economic law.[5]

5 See Elena Sciso, *Appunti di diritto internazionale dell'economia* (2nd edn. Torino: Giappichelli, 2012), 7.

Now, the relationship between international economic organizations and the protection of human rights is based on rules and practices that, on the one hand, may appear contradictory, since they apparently respond to different needs; on the other hand, however, they are complementary, as economic development is now considered a prerequisite for the protection of human rights, or at least some of those rights. Indeed, international organizations for the protection of human rights have often affirmed the primary role of economic organizations in the promotion and safeguard of those rights. Thus, according to the UN Committee on Economic, Social and Cultural Rights (CESCR), '[i]t is particularly important to emphasize that the realms of trade, finance and investment are in no way exempt from these general principles and that the international organizations with specific responsibilities in those areas should play a positive and constructive role in relation to human rights'.[6]

In fact, the international standards of human rights originated as a function of the relationship between individuals and the State and, in particular, to protect individuals against abuses by the latter; therefore, it can be complicated to identify which of these rules apply to international economic organizations.

Moreover, as subjects of international law[7] organizations are bound by international obligations in the field of human rights as provided by customary law[8] and, therefore, also by the norms of *jus cogens*, although then it is difficult to imagine concretely that the activities of international economic organizations can, in some ways, give rise to acts of torture, genocide or gross violations of human rights, which establish their international responsibility.

6 See *Globalization and Economic, Social and Cultural Rights*, Statement by the CESCR, May 1998, Section 5.

7 See the Advisory Opinion of the International Court of Justice of 11 Apr. 1949 on the *Reparation for Injuries Suffered in the Service of the United Nations*, *ICJ Reports* 1949, 185.

8 See on this topic Adam McBeth, "A Right by Any Other Name: The Evasive Engagement of International Financial Institutions with Human Rights," *Geo Wash. Int'l L. Rev*. 40 (2009): 1105, footnote 6. See also International Law Commission, Draft Articles on the Responsibility of International Organizations with commentaries, in the report of the ILC's sixty-third session, UNGAOR 66th session, UN Doc. A/66/10, 2011, commentary to Art. 4(b), Sections 2 and 14. Finally, see International Law Association, "Final Report of the International Law Association Committee on Accountability of International Organizations," 2004, 26, which states: '[h]uman rights obligations, which are increasingly becoming an expression of the common constitutional traditions of States, can become binding upon IO-s in different ways: through the terms of their constituent instruments; as customary international law; or as general principles of law or if an IO is authorized to become a party to a human rights treaty. The consistent practice of IO-s points to a recognition of this. Moreover, certain human rights obligations may have attained the status of peremptory norms'.

As far as treaty law is concerned, however, one notes in particular, in the context considered, the two UN Covenants of 1966.[9] Indeed, both the Bank and the International Monetary Fund (IMF) were invited by the Commission on Human Rights to take part in the drafting of the International Covenant on Economic, Social and Cultural Rights, but they refused to participate to the extent that human rights did not fall within their mandates.[10] Moreover, the CESCR has clearly stated on numerous occasions that the activities of international financial institutions (IFIs) should be consistent with the obligation to respect, protect and fulfill the rights enshrined in the Covenant and that the measures adopted by them should take these rights into account, having to be compatible with international obligations in the field of human rights to which its members are bound.[11]

It should be added that, as UN specialized agencies, the WB and IMF would seem to be required to respect and promote human rights and fundamental freedoms for all without distinction as to race, sex, language or religion on the basis of the same Charter.[12] In this sense, the same idea is expressed in the so-called '*Tilburg Guiding Principles on World Bank, IMF and Human Rights*',[13] which urged the IFIs to recognize their responsibilities in the implementation

9 See International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, both adopted by the GA on 16 Dec. 1966.

10 See on this topic the paper of the General Counsel of the International Monetary Fund, François Gianviti, *Economic, Social and Cultural Rights and the International Monetary Fund*, 4 (www.imf.org).

11 See for example the CESCR General Comment No. 15 (2002), *The Right to Water* (*Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights*), UN Doc. E/C.12/2002/11, Section 36 (www.unhchr.ch): 'States parties should ensure that their actions as members of international organizations take due account of the right to water. Accordingly, States parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should take steps to ensure that the right to water is taken into account in their lending policies, credit agreements and other international measures'. See also the CESCR General Comment No. 14 (2000), *The Right to the Highest Attainable Standard of Health* (*Article 12 of the International Covenant on Economic, Social and Cultural Rights*), UN Doc. E/C.12/2000/4 (www.unhchr.ch), in which the Committee made the same observation regarding the right to health. On this topic see M. Magdalena Sepúlveda, *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights* (Antwerpen: Intersentia, 2003), 237.

12 See Arts. 55(c) and 59 of the UN Charter.

13 The *Tilburg Guiding Principles on World Bank, IMF and Human Rights* were developed by a group of scholars of international law at two meetings held at the University of Tilburg (The Netherlands) in Oct. 2001 and Apr. 2002. The text is available at www1.umn.edu.

of human rights, by virtue of their international legal personality and of their status as specialized agencies of the UN.[14]

The impact of the work of international economic organizations on human rights can be seen first in the perspective of *protecting* human rights, a view that connects to the intervention of these organizations to prevent any violations of human rights by Member States. In fact, unlike other international economic organizations, the IFIs in general and the WB in particular can by their own conduct cause human rights violations both indirectly, as a result of their activities in support of financial development, granting loans or financing projects that can affect the condition of the individual, and directly, by influencing the behaviour of States through the instrument of conditionality.[15]

The impact of the international economic organizations on human rights can also be examined, moreover, anticipatorily, concerning the *promotion* of human rights by these organizations and, therefore, the existence of tools, mechanisms and practices which enable these institutions, directly or indirectly, to ensure greater respect for human rights within the Member States.

Therefore, when we examine the role of the WB in the protection and promotion of human rights, both the effects, concretely or potentially, negative for the enjoyment of certain human rights, linked to the reforms associated with economic and financial assistance required by the conditions imposed by the Bank, and positive actions decided by the Organization to promote the enjoyment of human rights in the beneficiary countries of its economic and financial assistance must be considered.

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14 See Section 6, which states: '[t]he two IFIs are also Specialised Agencies, having entered into Relationship Agreements with the United Nations in accordance with UN Charter Art. 63. This is another indication of their international legal personality separate from their members, which carries with it rights and obligations according to international law. According to the Relationship Agreements the organizations are, and are required to function as, independent international organisations. It provides an organisational independence from the UN, not from international law'. See also Sections 5 and 26.

15 'Conditionality' means the set of conditions to which the granting of loans or financing of projects by the IFIs are subjected. These conditions have traditionally been economic in nature, in view of the principle of political neutrality expressed in the statutes of these organizations. Moreover, since the '90s, the IMF and the WB have started to offer political conditionality, aiming not so much and not only at the protection of human rights as at the adoption of public policies of good governance. See on this topic Ibrahim F.I. Shihata, *The World Bank Legal Papers* (The Hague: Martinus Nijhoff, 2000), 248 *et seq*.; Claudio Dordi, "Profili giuridici dell'attività di sostegno finanziario del Fondo Monetario Internazionale: le nuove linee-guida sulla condizionalità," *DCI* 16 (2002): 863–899.

3 The Bank's Political Neutrality and the Interpretation of the Articles of Agreement

The International Bank for Reconstruction and Development (IBRD) was the first Organization of the group of financial institutions generally known as the WB, established in 1944 at the Bretton Woods Conference.

According to the Articles of Agreement of the Organization its goals are essentially: to contribute to the reconstruction of war-affected economies and the development of territories of member countries by encouraging the investment of capital for productive purposes; to promote private foreign investment by providing guarantees or participation in loans and other investments made by private investors; to promote a balanced and long-term growth of international trade and the maintenance of an equilibrium in balances of payments by encouraging international investment for the development of productive resources in Member countries; to arrange the loans made or guarantees granted in relation to international loans through other channels so that the projects most useful and urgent, large or small, would be treated first; to conduct its operations with due regard to the effects of international investment on business conditions in the territories of the Member States and, immediately after the War, to promote a smooth transition from a war economy to a peace economy.[16] This Article, therefore, calls on the Organization to implement objectives that are clearly economic and financial.[17]

Originally, indeed, the IBRD was established in order to facilitate reconstruction in the countries involved in World War II and development in the Member States. For that purpose, it was assigned the task of granting long-term loans. Over the years, however, with the changing international political, economic and social landscape, the purposes of the Bank have gradually transformed and it has become the leading international organization for the support of development and poverty reduction. To this end, since 1960, the IBRD has been supported by the International Development Association (IDA), established to promote economic development, increase productivity and raise the standard of living in less developed areas of the world.[18]

16 See Art. 1 of the Articles of Agreement of the Organization, adopted at the United Nations Monetary and Financial Conference at Bretton Woods (1–22 Jul. 1944) and entered into force on 27 Dec. 1945.

17 In addition, in the conclusion of the Article containing the objectives of the Organization, it is specified that it should be guided by the purposes set out in all its decisions.

18 See Art. 1 of the IDA Articles of Agreement. In addition to the IBRD and IDA, the International Finance Corporation (IFC), the International Center for Settlement of Investment

Both the Statute of the IBRD and that of the IDA provide the so-called 'political neutrality', aimed at ensuring a mandate of the Organization focused mainly on economic development. This means, first, that these institutions and their management will not intervene in the political affairs of the Member States, nor allow themselves to be influenced in their decisions by the political character of those States. Moreover, their decisions will be based solely on economic considerations, which will be evaluated impartially in order to achieve the objectives of the Bank. Finally, the IBRD and the IDA shall ensure that the results of the loans are linked only to the objectives for which they are granted, taking due account of economic and performance considerations, without permitting political or extra-economic influences or evaluations.[19]

From a reading of the Articles, therefore, it is clear that the original intention was to preserve the financial and technical character of the WB; as a result, this Organization has long considered human rights to be outside its mandate to promote development, both because there is no reference in the Articles to such rights, and because this matter was traditionally considered to involve considerations of a political nature. Moreover, the dividing line between economic and political assessments in the Bank's practice has proved somewhat uncertain. In fact, the principle of political neutrality in the Bank's activities

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Disputes (ICSID) and the Multilateral Investment Guarantee Agency (MIGA), associated organizations, which are however legally and financially separate, are also a part of the WBG. The IFC, founded in 1956, has the task of financing investments for the development of the private sector in developing countries; the ICSID, established in 1965, is responsible for the settlement of disputes between States and foreign private investors through the establishment of arbitral tribunals or conciliation commissions; the MIGA, finally, established in 1985, aims to promote foreign investment in developing countries, providing them with insurance against non-commercial risks.

19 See Art. IV(10) of the IBRD Articles of Agreement, according to which '[t]he Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Art. I'. See also Art. III(5)(b), according to which the Bank shall ensure that loaned funds will be used only for the purposes for which they were loaned, 'with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations'. See, finally, Art. V(5)(c), which states that '[t]he President, officers and staff of the Bank, in the discharge of their offices, owe their duty entirely to the Bank and to no other authority. Each member of the Bank shall respect the international character of this duty and shall refrain from all attempts to influence any of them in the discharge of their duties'. With an analogous meaning see Art. V(1)(g) and Art. V(6) of the IDA Articles of Agreement.

has proved difficult to interpret and implement, causing widespread criticism of its work.

In any case, as a result of the changes in the international context, the Bank has seen its role evolve gradually from a mere economic development agency to an international organization with a broader mandate. This was done essentially through practice and without specific statutory changes,[20] even though the provisions of the Articles of Agreement have been the subject of different interpretations over time, formal and informal, explicit and implicit, which allowed an extension of the activities of the Bank.[21]

In the context of the WB, the Board of Executive Directors is solely responsible for the interpretation of the Articles, subject only to possible review by the Board of Governors upon the request of a Bank member.[22] The procedure provided for in the Articles was frequently used in the early years of the Bank's activity; later, however, the practice of the Organization leaned toward an *informal interpretation*. On numerous occasions, in fact, the General Counsel of the Bank, who is the head of the legal department, gave his opinion on specific issues by providing advice to the Executive Board, which then acted on the basis of those opinions without adopting a true interpretative decision.[23] Moreover, the legal opinion of the General Counsel is not equivalent to an authoritative interpretation of the Articles, since only the Board of Executive Directors may provide such an interpretation. However, the Board's endorsement of, or concurrence with, the General Counsel's opinions allows one to incorporate these opinions into the subsequent practice of the Organization. This informal approach provides a certain flexibility to the Board and, at the same time, reinforces the value of the General Counsel's legal opinions as a *source* of the Bank's law.[24]

Moreover, the Executive Directors expect a legal analysis and advice from the General Counsel that allows the development of solutions congruent with

20 The Articles of the Organization have been amended three times: 17 Dec. 1965, 16. Feb. 1989 and 27 Jun. 2012.

21 See Stefanie Killinger, *The World Bank's Not Political Mandate* (Berlin: Heymann, 2003), 97.

22 See Art. IX of the Articles of Agreement. The power of interpretation also includes the settlement of disputes between the Bank and a Member State in relation to the meaning or to the implications of the Articles of Agreement.

23 See Andres Rigo Sureda, "The World Bank and Institutional Innovation," in *The World Bank, International Financial Institutions, and the Development of International Law: A Symposium Held in Honor of Dr Ibrahim F.I. Shihata*, eds. Edith Brown Weiss *et al.* (Washington, DC: The American Society of International Law, 1999), 12 *et seq*.

24 See Ibrahim F.I. Shihata, "The Dynamic Evolution of International Organizations: The Case of the World Bank," *J. Hist. Int'l L.* 2 (2000): 225.

the goals and interests of the Bank. It is not enough, therefore, for the General Counsel to provide an opinion correct on a legal level, as this opinion must also permit the Executive Directors to fulfill their responsibilities in a way that best suits the needs of the Bank.

The interpretations of the General Counsel, indeed, have always preserved the Bank's role as an international institution aimed at the reconstruction and development of its members. They have, however, at the same time allowed the Organization to deal with non-economic issues related to the economic development of its borrowing countries that were not considered as such at the time the Articles of Agreement were drafted.

4 The New Concept of Development and Evolution of the World Bank's Original Mandate

Due to the explicit prohibition in the Articles of any political consideration, the Bank has, traditionally, based its action on feedback of an exclusively economic nature, without therefore giving any attention to issues relating to human rights. In fact, the WBG's legal department originally interpreted the activities relating to the protection of human rights as matters of a political nature and therefore outside the mandate of the Organization.[25]

However, over time it has established a need to integrate the protection of human rights, including civil and political rights, in the concept of economic development and, therefore, in the work of the Bank, based essentially on three arguments. First, human rights are indivisible and interdependent. In addition, the statutes of the organizations should be interpreted by taking into account the evolution in time of the values and fundamental principles that inspire them. Finally, the international standards of human rights should take precedence over the statutes of these organizations, which should, therefore, be construed accordingly.[26]

Specifically, the Bank's activities began to relate to human rights beginning in the '60s, when the GA adopted a series of resolutions which then 'invited',

25 See on this theme Robert T. Coulter, Leonard A. Crippa and Emily Wann, *Principles of International Law for Multilateral Development Banks. The Obligation to Respect Human Rights*, Indian Law Resource Center, Jan. 2009, 2 (www.indianlaw.org); Siobhán McInerney-Lankford, "Human Rights and Development: A Comment on Challenges and Opportunities from a Legal Perspective," *J. HR Pract* 1 (2009): 55.

26 See on this theme Ibrahim F.I. Shihata, "La Banque Mondiale et les droits de l'homme," *RBDI* 32 (1999): 91–92.

'urged' and 'requested' the Bank to suspend credit to South Africa and Portugal, respectively, because of their apartheid and colonial policies.[27] Moreover, this Organization, proclaiming its very non-political nature, continued to approve loans in defiance of UN resolutions.[28] In fact, the Bank continued to follow the traditional view of development as a purely economic phenomenon, as reflected in the Articles. Moreover, at that time, there was a widespread view that the problems of development of a country resulted primarily from its lack of capital.

However, since the '70s, the Bank's approach has radically changed. In fact, one had to take note of the failure of the financing policies implemented in previous years and, gradually, partly because of strong pressures external to the Organization, it began to assert a more modern approach to development, which also included non-economic factors, such as environmental protection, safeguarding of indigenous groups and women, and other social and cultural issues. In this way, the Bank, without amending the Articles, began to expand its mandate through a reinterpretation of its Statute.

Indeed, this new position of the Bank was linked to the gradual recognition, on the international level, of the close connection between human rights and development, seeing the latter as subordinate to the actual implementation of those rights, mainly economic, social and cultural rights. The *liaison*, in fact, allowed the Bank to connect its original purpose and mandate – focused on economic development – to the wider issue of human rights, initially and formally completely outside the mandate of the Organization.

As already noted, this new concept of development has emerged, mainly thanks to the Declaration adopted by the GA on the subject in 1986, with Res. 41/128, which contains two important principles. First, there is the subordination of development processes to the effective enjoyment of human rights and fundamental freedoms,[29] from which development cannot be separated. In

27 See GA Res. 2054 A (XX), *The Policies of the Apartheid of the Government of the Republic of South Africa*, UN Doc. A/6014, 15 Dec. 1965, 20 UN GAOR, Supp. (No. 14) 16; and GA Res. 2105 (XX), *Implementation of the Declaration on the Granting of Independence to Colonial Countries Peoples*, UN Doc. A/6014, 20 Dec. 1965, 20 UN GAOR, Supp. (No. 14) 16. Note that Art. V(8)(b) requires the Bank to give consideration to the views and recommendations of international organizations; while Art. VI(1) of the Agreement between the UN and the IBRD of 15 Nov. 1947 requires the Bank to give 'due regard' to decisions of the Security Council. Therefore, the Bank in theory could not be obligated to interrupt a loan to a country through either a GA or a Security Council resolution.

28 See Samuel A. Bleicher, "UN v. IBRD: a Dilemma of Functionalism," *IO* 24 (1970): 31–47.

29 According to Art. 1 of the Declaration: '1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in,

addition, the importance of international cooperation for the promotion of development on a global scale is emphasized.[30] This second aspect highlights the possible role of international organizations, just as an instrument of intergovernmental cooperation, in the promotion of development and of human rights in general.

As for the WB, it was Bank President McNamara in particular, in office from 1968 to 1981, who extended the objectives of the Organization to focus on human as well as economic capital and to promote a new concept of development, broader and more respectful of the different structural factors specific to a given context.[31] The so-called 'human development approach' was thus affirmed and considered necessary for sustained economic growth.

This new approach led to a substantial increase in the proportion of loans approved by the Organization for social, legislative and institutional reform and a parallel decrease in loans aimed at building infrastructure, which initially had been the focus of the Bank's activities.

Starting in the '80s, furthermore, the failure of financial aid that had been granted in the past began to be explained as having depended on the structural dysfunctions of the recipient States.[32] So, with the changing economic circumstances and financial problems of the Member States, the WB began to subordinate its own projects and programmes to specific conditionalities, introducing a new type of loan: the so-called 'Structural Adjustment Lendings'. These loans provide for macroeconomic measures, such as demands for privatization, devaluation of the over-valued national currency, abolition of subsidies, price

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contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized. 2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources'.

30 According to Art. 4 of the Declaration: '1. States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development. 2. Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development'.

31 See in this regard Barend A. De Vries, *Remaking the World Bank* (Washington, DC: Seven Locks, 1987).

32 See in this regard Sigrun I. Skogli, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (London: Cavendish, 2001).

deregulation and liberalization of the investment markets. However, the measures adopted by the Bank were hotly contested, both for their rigidity and because, in general, they did not produce the expected results.

Thus, beginning with the '90s, there was a further extension of the Bank's activity, which began imposing on Member beneficiaries its intervention measures of a political nature, aimed at promoting good governance, which became increasingly identified by the Bank as a condition for development,[33] despite the debtor States challenging this interference in their political autonomy. Moreover, the difficulty of developing countries in obtaining private financing, due to the international debt crisis, meant that the Bank became at that time the only institution willing to grant their financial requests: therefore; this Organization acquired a central role in the financing of development loans. At the same time, the need to manage the social cost of adjustment was affirmed and the WB radically changed its operating strategy, combining the aim of reducing poverty with the traditional objective of supporting the economic growth of the Member countries.

The expansion of the Bank's mandate came about mainly through legal memoranda from the General Counsel to the Executive Directors. Thus, in 1991, General Counsel Ibrahim Shihata adopted a Memorandum on issues tied to governance,[34] which were for the first time applied in the actions of the Organization through 'liberal readings' of its Statute, which, while preserving as unaltered the general aims provided therein, allowed variations in the functions, methods of intervention and investment instruments of the Bank.

In the '90s, the Bank then identified its priority in poverty reduction, indicated as a criterion for the granting of loans and a parameter for the evaluation of its activities. Therefore, to obtain a loan from the Bank the requesting State would have had to submit a document, which set out its policies to reduce poverty and to promote socio-economic development, the so-called 'Poverty Reduction Strategy Paper'.

These changes increasingly blurred the boundary between economic issues and political aspects. However, despite its openness to non-economic objectives, the protection of civil and political rights and good governance, the Bank still did not openly acknowledge an evolution of its mandate to be in conflict with the provisions of the Articles of Agreement. In fact, General Counsel Shihata had proposed a restrictive interpretation of the mandate of the

33 See in this regard World Bank, *Sub-Saharan Africa – From Crisis to Growth: A Long-Term Perspective Study* (Washington, DC: World Bank, 1989).

34 See Legal Memorandum of the Vice President and General Counsel of IBRD, *Issues of 'Governance' in Borrowing Members – The Extent of Their Relevance Under the Bank's Articles of Agreement*, 5 Feb. 1991, reproduced in Shihata, *The World*, 248 *et seq*.

Organization, recognizing the possibility for it to deal with the aspects related to the protection of human rights only in certain circumstances.[35] In particular, according to the General Counsel, although major human rights violations would be of concern to the Bank, this, nonetheless, was not to be understood as contravening the provision of the Statute, which prohibits the Bank from considering political factors in the approval of loans. To this end, in fact, a specific amendment to the Articles of Agreement would have been necessary; however, according to Shihata, such an amendment would have affected the 'value of specialization' of international organizations, since there are other bodies and *fora*, of a non-economic/non-financial nature, which would have the specific mandate to protect human rights.[36]

In a study published in 1998, however, on the occasion of the fiftieth anniversary of the Universal Declaration of Human Rights, the WB confirmed its contribution to the protection of economic, social and cultural rights, recognizing that 'creating the conditions for the attainment of human rights is a central and irreducible goal of development'[37] and placing the protection of the individual at the focus of its development policies.[38]

35 See Ibrahim F.I. Shihata, *Prohibition of Political Activities in the Bank's Work: Legal Opinion by the Senior Vice President & General Counsel*, 12 Jul. 1995. This Memorandum, which takes up and develops the thesis expressed in the 1991 Memorandum on questions of governance, expresses the most significant and complete expression of the Bank's policy in relation to issues of human rights.

36 In particular, according to Shihata '[i]f it is true, as I believe it is, that the World Bank's Articles of Agreement cannot be appropriately interpreted to allow the World Bank to use its lending power as an instrument for ensuring respect for political human rights, except in circumstances where pervasive violations have obvious economics effects, or where compliance with UN Security Council decisions requires that a specific course of action be taken, amendment of the Articles of Agreement remains to be tackled. Clearly, opinions widely differ on this matter of policy. I personally believe in the value of specialization of international organizations' (see Shihata, "Human Rights," 35–36).

37 See IBRD, *Development and Human Rights: The Role of World Bank* (Washington, 1998), 2 (siteresources.worldbank.org).

38 See IBRD *Development and Human Rights*, 3, in which is stated: 'The Bank contributes directly to the fulfillment of many rights articulated in the Universal Declaration. Through its support of primary education, health care and nutrition, sanitation, housing, and the environment, the Bank has helped hundreds of millions of people attain crucial economic and social rights. In other areas, the Bank's contributions are necessarily less direct, but perhaps equally significant. By helping to fight corruption, improve transparency and accountability in governance, strengthen judicial systems, and modernize financial sectors, the Bank contributes to building environments in which people are better able to pursue a broader range of human rights'.

Following these views, in 1999 the Bank defined the 'Comprehensive Development Framework' (CDF), which offers a holistic approach to development, highlighting the interdependence of all elements of development, social, structural, human, governance, environmental, economic and financial.[39] In this way, an integrated development strategy was initiated, in the sense that it began to be considered necessary for the purpose of sustainable economic growth, adequate institutional reforms, the protection of human rights, good governance, the fight against corruption, greater literacy, improved health care and increased attention to the environment.[40] This operational strategy has clearly distinguished the work of the WB from that of the IMF, whose policy of conditionality tends, however, only to improve macroeconomic parameters, without considering the social impact of the measures decided.[41]

Then, in 2000, the Bank confirmed its commitment to promoting human rights by adopting, as targets for its operations, the UN Millennium Development Goals, which are centred on individual and human rights,[42] and confirming its strategy for poverty reduction.[43]

A few years later, in 2003, Roberto Dañino became General Counsel of the Bank. It is to him that is owed a much more flexible approach in the field of

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39 See James D. Wolfensohn, *A Proposal for a Comprehensive Development Framework* to the Board, Management, and Staff of the World Bank Group, 21 Jan. 1999, 10, Section 2 (web.worldbank.org), in which it is recognized that '[w]ithout the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible'.

40 See in this regard David Gillies, "Human Rights, Democracy and Good Governance: Stretching the World Bank's Policy Frontiers," in *The World Bank: Lending on a Global Scale*, eds. Jo Marie Griesgraber and Bernhard G. Gunter (London: Pluto, 1996), 101–141; Laurence Boisson De Chazournes, "Issues of Social Development: Integrating Human Rights in the Activities of the World Bank," in *Commerce mondial et protection des droits de l'homme: les droits de l'homme à l'épreuve de la globalisation des échanges économiques* (Bruxelles: Bruylant, 2001), 47–70.

41 See Annamaria Viterbo, "Fondo monetario internazionale e Banca mondiale," in *Neoliberismo internazionale e* Global Economic Governance. *Sviluppi istituzionali e nuovi strumenti*, ed. Andrea Comba (2nd edn. Torino: Giappichelli, 2013), 115.

42 On the human-centred perspective on development of the Bank see *Voices of the Poor*, the WB's three-book series: Deepa Narayan with Raj Patel, Kai Schafft, Anne Rademacher and Sarah Koch-Schulte, *Voices of the Poor: Can Anyone Hear Us?* (New York: World Bank and OUP, 2000); Deepa Narayan, Robert Chambers, Meera Kaul Shah and Patti Petesch, *Voices of the Poor: Crying Out for Change* (New York: World Bank and OUP, 2000); Deepa Narayan and Patti Petesch, *Voices of the Poor: From Many Lands* (New York: World Bank and OUP, 2002).

43 See on this argument Skogli, *The Human.*

human rights. In particular, in 2006, Dañino issued the important 'Legal Opinion on Human Rights and the Work of the World Bank',[44] which can be considered the most evolutionary interpretation of the liability of the Bank in the field of human rights. In fact, Dañino, going well beyond what had until then been argued, stated that 'the articles of agreement permit, and in some cases require, the Bank to recognize the human rights dimensions of its development policies and activities since it is now evident that human rights are an intrinsic part of the Bank's mission'. Therefore, according to the General Counsel, although within certain limits, the Articles of the Organization should be interpreted in a dynamic way so that the Bank can achieve its overall aim – that is, the fight against poverty – through economic growth and social justice, aspects closely associated with the protection of human rights. In addition, according to Dañino, 'human rights may constitute legitimate considerations for the Bank where they have economic ramifications or impacts, and it confirms the facilitative role the Bank may play in supporting its members to fulfil their human rights obligations'. Thus, according to the General Counsel, not only the political and social aspects of a State are relevant for the Bank, being able to influence economic decisions, but also human rights are to be considered in the decision-making process of the WB. However, even in the opinion in question, the Bank's obligation to consider the violations of these rights is recognized *exclusively* where they involve 'an economic impact', and it is affirmed that the Bank's intervention must always be within these limits, even if the Organization is explicitly requested to support the fulfillment of obligations by the State receiving its assistance.[45]

It must be said also that no debate originated in the Bank from these conclusions. In fact, the succeeding General Counsel, Ana Palacio, merely stated that '[Dañino's legal opinion] marks a clear evolution from the pre-existing restrictive legal interpretation of the Bank's explicit consideration of human rights. It is "permissive": allowing, but not mandating, action on the part of the Bank in relation to human rights. It…gives the Bank the necessary leeway to explore its proper role in relation to human rights… It…enables the Bank to take these issues into account where they are relevant'.[46]

44 See *Legal Opinion on Human Rights and the Work of the World Bank. Senior Vice-President and General Counsel*, 27 Jan. 2006.

45 See Sections 20 and 19, respectively, of the *Legal Opinion on Human Rights and the Work of the World Bank*.

46 See Ana Palacio, *The Way Forward: Human Rights and the World Bank*, Oct. 2006 (web.worldbank.org).

Thus, while adopting the Bank's measures aimed at ensuring respect of human rights in the implementation of projects financed by it, nonetheless, that Organization has not yet clearly defined its role in the promotion of human rights in the countries in which it operates.[47] In particular, although human rights have gradually entered into the assessments of the Bank, the Organization has not formally acknowledged itself to be constrained in its actions by international standards in this area, nor to have the power formally to extend its mandate beyond what is provided for in the Articles,[48] continuing to emphasize the need to preserve its economic and financial character.

In any case, the Bank has progressively *de facto* developed its mandate and its scope to include new areas such as the environment,[49] sustainable development,[50] governance,[51] democracy,[52] cultural development, post-conflict reconstruction, programmes to combat corruption and, of course, human rights, issues that have become an integral part of the Bank's strategy against poverty and underdevelopment. Therefore, the protection of human rights and, in general, the non-economic values now inspire the practice of the WB.[53]

5 The Bank's 'Operational Policies' as a Means of Implementing the Protection of Non-Economic Values

Important tools available to the Bank for the protection of non-economic values are its Operational Policies (OPs).

47 See in this regard Kunibert Raffer, *Good Governance, Accountability and Official Development Cooperation: Analyzing OECD-Demands at the Example of the IBRD*, in *Sustainable Development and Good Governance*, eds. Konrad Ginther, Erik Denters and Paul J.I.M. de Waart (Dordrecht: Martinus Nijhoff, 1995), 343–359; Mark E. Wadrzyk, "Is It Appropriate for the World Bank to Promote Democratic Standards in a Borrower Country?," *Wis. Int'l L.J.* 17 (1999): 553–577.

48 According to Palacio, *The Way*: 'it is now clear that the Bank can and sometimes should take human rights into consideration as part of its decision-making process'. Although, all the while 'the Bank must also respect the legal limits imposed by its Articles of Agreement'.

49 See in this regard Mohammed Abdelwahab Bekhechi, "Some Observations Regarding Environmental Covenants and Conditionalities in World Bank Lending Activities," *MPYUNL* 3 (1999): 287–314.

50 See Celia R. Taylor, "The Right of Participation in Development Projects," in *Sustainable Development*, 205–229.

51 See Nicholas H. Moller, "The World Bank: Human Rights, Democracy and Governance," *Netherlands Quarterly of Human Rights* 15 (1997): 21–45.

52 See Ibrahim F.I. Shihata, "Democracy and Development," *ICLQ* 46 (1997): 635–643.

53 See on this theme Shihata, "The Dynamic," 217–249.

The initial operational proposals and application notes were adopted by the Bank in the '70s in order to identify, prevent and mitigate any environmental or social damage by its projects.

However, it was in the '80s that the WB decided to change its Operational Manual to respond to criticism of absence of transparency of the criteria for the selection of projects to be funded and, above all, lack of attention to the consequences resulting to the local population and environment from the implementation of some funded projects.

Therefore, the Bank decided to adopt self-regulatory rules that would have permitted its organs internal oversight in the exercise of their functions.

Initially, these rules were contained mainly in the Operational Manual Statements (OMSs)[54] and Operational Policy Notes (OPNs), both issued by the Office of the Senior Vice President, Operations, under the authority of the President. In 1987, it tried to organize the Operational Manual of the Bank in a systematic way and the so-called Operational Directives (ODs) were established, which contained aspects of policies, procedures and operational techniques all at the same time and replaced the OMSs, frequently incorporating policy previously set out in the OMSs, and in other circumstances establishing new policy.

In 1992, in order better to clarify the practices and responsibilities of the Bank, the ODs were divided into OPs, which determine the parameters of the Bank's operations, and Bank Procedures (BPs), which explain how to implement the OPs, both binding for the staff of the Bank. Also, Good Practices (GPs), non-binding in nature,[55] were provided for. These instruments were designed to ensure the economic, financial, social and environmental sustainability of the work of the Bank.

In 1997, the World Bank regrouped ten OPs as specific Safeguard Policies (SPs) – six environmental, two social, and two legal policies[56] – and put in place

54 In 1984, for example, the Bank published an OMS on Environmental Aspects, in which the Bank's policies and procedures relating to projects, technical assistance and other aspects of its work that could have environmental implications were delineated. The term 'environmental' was interpreted in this context in a broad sense to include both natural and social conditions and welfare of present and future generations.

55 See on this argument Laurence Boisson de Chazournes, "Policy Guidance and Compliance: The World Bank Operational Standards," in *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, ed. Dinah Shelton (Oxford: OUP, 2000), 281–303; Daniel D. Bradlow, "Operational Policies and Procedures and an Ombudsman," in *Accountability of the IMF*, eds. Barry Carin and Angela Wood (Aldershot: Ashgate, 2005), 88–107.

56 It involves, in particular: OP 4.01 Environmental Assessment; OP 4.04 Natural Habitats; OP 4.09 Pest Management; OP 4.10 Indigenous Peoples; OP 4.11 Physical Cultural Resources;

administrative procedures to support compliance with the SPs during project preparation and implementation. The SPs are guidelines designed to ensure that the Bank's operations do not harm the people and the environment affected by its actions.[57] These policies are the object of an internal evaluation due to the WB's Independent Evaluation Group (IEG),[58] operational since 1973.

It should be stressed that there is not currently an OP specifically dedicated to human rights, nor, in general, are there explicit references in the current OPs,[59] although these policies *de facto* facilitate the protection of these rights in the operations of the Bank.

6 The Mechanisms of Control: The Inspection Panel and the CAO

In the early '90s a number of factors, both internal and external, led the WB to seriously reflect on its lending activities. Thus, in order to assess compliance with the OPs, the Bank also decided to establish a special monitoring body.

The first step in this direction came with the appointment of the so-called Morse Commission, in 1991, a commission of inquiry responsible for investigating one of the most criticized projects: the *Sardar Sarovar Dam and Canal Projects on the River Narmanda* in India, which foresaw the uprooting of 200,000 people. The Commission published its report in Jun. 1992, stating that the project in question did not comply with the policies of the Bank and recommending its termination.

OP 4.12 Involuntary Resettlement; OP 4.36 Forests; OP 4.37 Safety of Dams; OP 7.50 Projects on International Waterways; OP 7.60 Projects in Disputed Territories.

57 There are also the Fiduciary Policies that govern the use of the funds of the Bank and the Disclosure of Information Policies, originally developed in 1993 in order to ensure the transparency of the activities of the Bank.

58 In 2010 the IEG undertook the first comprehensive evaluation of all the SPs and Performance Standards of the WBG. This evaluation proves that the SPs have avoided or mitigated adverse impacts, especially in high-risk projects. However, the IEG also affirmed the need to modify the SPs in order to reflect the changing context in which the WB operates. In particular, it recommended that greater attention be paid to using the SPs to support environmentally and socially sustainable development and to assess a wider range of potential social risks and impacts. See IEG World Bank, IFC and MIGA, *Safeguards and Sustainability Policies in a Changing World: An Independent Evaluation of World Bank Group Experience* (Washington, DC : World Bank, 2010): siteresources.worldbank.org.

59 The OP 4:10 on indigenous peoples is an exception, where Section 1 specifies that Bank's objective must be to ensure that the development process fully respects the dignity, human rights, the economy and culture of these peoples.

Then, in 1993, the institution of the Inspection Panel[60] came about, an independent body composed of three members, which has the task of verifying whether the activities of the Bank, during the preparation, evaluation and implementation of a project, were consistent with its policies and procedures[61] which, as has been said, represent binding internal directives imposed by the Bank's management on its staff. It has also been noted that these directives can relate to many aspects of the implementation of a project, such as environmental protection and the safeguarding of local populations representing the social groups that may be affected by the implementation of a Bank project.

The most striking aspect of this mechanism relates to the eligibility criteria of requests for inspection, which confirm the originality of the Inspection Panel. There are four conditions to which the jurisdiction of the Panel is subjected, concerning the legal status of the requester, the object of the inspection request, the stage of the project cycle in relation to which the request is made, the admissibility of the request for inspection in the absence of other impediments in accordance with the provisions of the Resolution establishing the Panel.[62]

In this context, the requirement for the *ratione personae* competence of the Panel is, in particular, noted, as individuals (at least two) are entitled to file an application before the Panel. In this way, at least in part, the gap between the Bank's decision-making bodies and individuals, who bear the practical impact of the decisions of the Organization, is filled. The Inspection Panel can receive

60 See on this argument Lori Udall, *The World Bank Inspection Panel: A Three Year Review* (Washington, DC: Bank Information Center, 1997); *The World Bank Inspection Panel: The First Four Years* (*1994–1998*), ed. Alvaro Umaña (Washington, DC: World Bank, 1998); Ibrahim F.I. Shihata, *The World Bank Inspection Panel: In Practice* (2nd edn. Oxford: OUP, 2000); Angela Del Vecchio, *International Courts and Tribunals between Globalisation and Localism* (The Hague: Eleven, 2013), 53–54. Even the regional development banks – the International American Development Bank (IADB), the Asian Development Bank (ADB), the European Bank for Reconstruction and Development (EBRD) and the African Development Bank (AfDB) – have established mechanisms similar to the Inspection Panel.

61 According to Section 12 of the Resolutions 93–10 of the IBRD and 93–6 of the IDA of 22 Sept. 1993 which established the Panel: '[f]or purposes of this Resolution, the operational policies and procedures consist of the Bank's Operational Policies, Bank Procedures and Operational Directives, and similar documents issued before these series were started, and does not include Guidelines and Best Practices and similar documents or statements'. See on this argument Ibrahim F.I. Shihata, "Historical, Legal and Operational Aspects," in *The Inspection Panel of the World Bank: A Different Compliants Procedure*, eds. Gudmundur Alfredsson and Rolf Ring (The Hague: Martinus Nijhoff, 2001), 40 *et seq*.

62 See Section 12 of Resolutions 93–10 of the IBRD and 93–6 of the IDA.

requests for inspection if there is an adverse effect, actual or potential, which affects the rights or interests of a group of individuals, that is attributable to acts or omissions of the WB, not complying with the OPs and the procedures of the Organization on the development, evaluation and implementation of a project financed by it.[63]

So far, almost half of the requests received have led to the opening of an investigation.[64] Actually, the Panel is rarely asked to consider matters directly related to the protection of human rights, nevertheless, it is an important step in this direction: in fact, in the oversight activities of the Inspection Panel the aim to deal with any negative social aspects resulting from the projects reviewed is of constant import, preventing setbacks in the protection of certain rights.

Indeed, on several occasions, the Panel has received requests for inspection of projects that put at risk the enjoyment of human rights of people living in areas affected by financial activities. For example, the 2002 case concerning the *Chad-Cameroon Petroleum and Pipeline Project* is known as the case in which the Panel assessed 'whether human rights issues as violations of proper governance would impede the implementation of the project in a manner that was incompatible with Bank policies',[65] concluding with an especially critical report of the management of the Bank, accused of having a narrow view on the protection of human rights. In addition, in the 2007 case of *Honduras Land Administration*, the Panel interpreted a Bank policy in the sense that the Bank should have considered first of all the international obligations of a State in respect of the human rights of the indigenous peoples concerned.[66]

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63 See Section 12 of Resolutions 93–10 of the IBRD and 93–6 of the IDA.

64 Most of these relate to the Bank's policies on the environmental impact on the supervision of the project, the forcible transfer of population and indigenous peoples.

65 In particular, the Panel verified whether the human rights situation in Chad could spoil compliance with the WB's policies on informed and open consultation. See WB Inspection Panel, Investigation Report, *Chad: Petroleum Development and Pipeline Project, Management of the Petroleum Economy Project, and Petroleum Sector Management Capacity Building Project*, 17 Jul. 2002 (siteresources.worldbank.org). See on this topic Steven Herz and Anne Perrault, *Bringing Human Rights Claims to the World Bank Inspection Panel*, Oct. 2009 (www.bicusa.org); WB Inspection Panel, *Accountability at the World Bank. The Inspection Panel at 15 Years*, 2009 (siteresources.worldbank.org).

66 In particular, in the *Honduras Land Administration Project* case, the Inspection Panel interpreted the Bank's policy OMS 2.20 (Project Appraisal) to require consideration of relevant human rights treaties. The Inspection Panel held that the Bank would have to assess whether the project violated Honduras's commitments under ILO Convention No. 169 on the rights of indigenous peoples. The WB's legal department, however, disagreed

In general, this body has identified four circumstances in which issues related to human rights must necessarily be taken into account, the Bank having to adapt its policies to the legal context in which a project is implemented.

First, the Bank must ensure that its projects do not contravene the borrower's international human rights commitments.[67] In addition, as part of its due-diligence for a project the Bank must determine whether human rights issues are likely to prevent compliance with Bank Policies.[68] The Bank must also interpret the provisions of the Indigenous Peoples Policy in accordance with the Policy's human rights objectives.[69] Finally, the Bank is required to consider

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with this interpretation, making evident the internal confusion about the role of human rights in the policies and operations of the Bank (see WB Inspection Panel, Investigation Report, *Honduras: Land Administration Project*, 12 Jun. 2007: siteresources.worldbank.org).

67 See in this regard WB Inspection Panel, *Honduras*. This is the first case in which the Panel explicitly took into account a claim based on the international standards of human rights advanced by the indigenous Garifuna community. The community argued that the project financed by the Bank violated not only the Indigenous Peoples Policy of the Bank and other OPs, but also other obligations to which it was subject as the recipient Government of Honduras under Convention No. 169 of the ILO. The Panel, even though considering that it could not rule on the possible violation of the Convention of the ILO, being its mandate limited to verify compliance with the OPs of the Bank, concluded, however, that the provisions of the ILO Convention were applicable to the Bank through the Bank's OMS 2.20, by virtue of which the Bank must ensure that its funded activities are compatible with the borrower's international agreements regarding its environment and the health and well-being of its citizens (Sections 243–258).

68 See WB Inspection Panel, *Chad*. The Requesters believed that the project was funded in violation of the ODs on governance and human rights. According to Bank management the opportunity to consider issues related to human rights was limited by the Articles of Agreement, under which the Bank shall be guided only by economic considerations and, therefore, issues related to human rights might be relevant to the Bank's activities only if they had a 'significant direct economic effect on the project'. According to management the project could achieve its development goals in spite of political repression in Chad. Therefore, the question of respect for human rights should not be taken into account. Instead, the Panel, rejecting such a position, argued that considerations relating to human rights are important not only if they have a direct economic effect on the project, but also when they 'impede the implementation of the Project in a manner compatible with the Bank's policies'. Hence, the Panel concluded that the human rights situation in Chad posed serious problems regarding compliance by the Bank with its policies on informed and open consultation (Sections 210–217).

69 See WB Inspection Panel, Investigation Report, *China: Western Poverty Reduction Project*, 28 Apr. 2000 (siteresources.worldbank.org). The Requesters claimed that ethnic Tibetan and Mongolian peoples living in the 'move-in' areas would be harmed by the project, the harm being attributable to the Bank's failure to comply with its policies and OPs. In

the protection of human rights in light of the provisions of national law, and in particular, of State constitutions.[70] In fact, several policies of the Bank require the management to consider the conditions laid down by national law in the evaluation and implementation of projects.[71]

Indeed, the same Articles of Agreement of the Bank provide for an obligation of cooperation between the Bank itself and other international organizations, applicable also in the field of human rights.[72]

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particular, it was disputed whether the Bank had prepared an Indigenous Peoples Development Plan (IPDP) as required by the Indigenous Peoples Policy (OD 4.20). According to the management an IPDP was required for the Qinghai Project, but it contended that the Project as a whole constituted the IPDP because a majority of the Project's beneficiaries were indigenous minorities. The Panel did not accept this interpretation, noting that it would allow the project to subvert the development aspirations of indigenous peoples in the 'move-in' area in favour of providing benefits to the far greater population of indigenous peoples from the 'move-out' area. The Panel considered this to be inconsistent with the objectives of the policy '…to ensure that the development process fosters full respect for [indigenous peoples'] dignity, human rights, and cultural uniqueness…' and to 'ensure that indigenous peoples do not suffer adverse effects during the development process…and that they receive culturally compatible social and economic benefits' (Sections 271–280).

70 In the *Honduras Land Administration* case, for example, the Panel considered that the management had an obligation to assess the impact of the internal legal framework on indigenous peoples under the Indigenous Peoples Policy of the Bank (OD 4.20) (WB Inspection Panel, *Honduras*, Section 242).

71 For example, OP 4.01 (Environmental Assessment) requires that the environmental evaluation of a project take into account '…the country's overall policy framework, [and] national legislation…related to the environment and social aspects…' (Section 3). Then, BP 4.01 (Environmental Assessment) specifies that the Bank must 'identify any matters pertaining to the project's consistency with national legislation or international environmental treaties and agreements' (Section 10). Analogously, OP 4.10 (Indigenous Peoples) requires the borrower to conduct 'a review…of the legal and institutional framework applicable to Indigenous Peoples' (Annex A – Social Assessment, Section 2.a) as part of the evaluation of the social impact of a project on the indigenous peoples (Section 9). Finally, OP 7.00 (Lending Operations: Choice of Borrower and Contractual Agreements) clarifies that the Bank 'tries to work within existing law to the extent possible' (Section 14).

72 According to Art. V(8): '(a) The Bank, within the terms of this Agreement, shall cooperate with any general international organization and with public international organizations having specialized responsibilities in related fields. Any arrangements for such cooperation which would involve a modification of any provision of this Agreement may be effected only after amendment to this Agreement under Art. VIII. (b) In making decisions on applications for loans or guarantees relating to matters directly within the competence of any international organization of the types specified in the preceding paragraph

Regarding the function of the Panel, according to one opinion it would have a preventive role, pushing the Bank to guarantee *a priori* compliance of its operations and its projects with the policies and procedures, so as to avoid unnecessary costs associated with a potential initiation of the investigation procedure.[73] While, according to one school of thought, allowing a procedure to monitor Bank mechanisms compliance, the Panel would fit into the wider system of protection of human rights.[74]

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and participated in primarily by members of the Bank, the Bank shall give consideration to the views and recommendations of such organization'. Since the 'general international organization and…public international organizations' would also include specialized bodies in the field of human rights, such as the CESCR, the Bank would be required to comply with their 'views and recommendations' in every phase of its activity, because they could only be disregarded for a specific reason. See also CESCR, General Comment No. 2, *International Technical Assistance Measures* (*Art. 22*), 2 Feb. 1990, Sections 2 and 6 (www.unhchr.ch), in which it is affirmed that, 'all United Nations organs and agencies involved in any aspect of international development cooperation', including the WB, 'should do their utmost to ensure that their activities are fully consistent with the enjoyment of civil and political rights. In negative terms this means that the international agencies should scrupulously avoid involvement in projects which, for example, involve the use of forced labour in contravention of international standards, or promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation. In positive terms, it means that, wherever possible, the agencies should act as advocates of projects and approaches which contribute not only to economic growth or other broadly defined objectives, but also to enhanced enjoyment of the full range of human rights'. Moreover, according to the Committee '[e]very effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenants are duly taken into account. This would apply, for example, in the initial assessment of the priority needs of a particular country, in the identification of particular projects, in project design, in the implementation of the project, and in its final evaluation' (Section 8.d). Also the Committee on the Rights of the Child encouraged this in a 2003 report: 'States parties, UN specialized agencies, funds and programmes, the World Bank and regional development banks, and civil society…adopt a broader rights-based approach to indigenous children based on the Convention and other relevant international standards such as ILO Convention 169' (Committee on the Rights of the Child, 34th Session, 15 Sept.–3 Oct. 2003, *Day of General Discussion on the Rights of Indigenous Children*, Recommendations, Section 3: www2.ohchr.org).

73 See on this argument Laurence Boisson de Chazournes, "Public Participation in Decision–Making: The World Bank Inspection Panel," in *The World Bank, International Financial Institutions*, 91 *et seq.*

74 See Sabine Schlemmer-Schulte, "The World Bank Inspection Panel: A Record of the First International Accountability Mechanism and Its Role for Human Rights," *Human Rights Brief* 6 (1999): 1, 6–7, 20.

Indeed, the work of the Panel has undoubtedly contributed and contributes to greater protection of human rights within the WB, due to both the investigation reports of this body and the recommendations by which the Board of Executive Directors responded to the Action Plan imposed on it by the Bank's management, which had developed the Action Plan based on the investigation reports.[75]

However, we must also remember the limits of the Inspection Panel. First, this mechanism does not propose remedies or corrective actions, which instead must be approved by the management of the Bank.[76] It thus examines only projects financed by the IBRD and the IDA, and cannot conduct formal investigations into the activities of the IFC and MIGA[77]; in addition, its mandate is limited to the OPs, BPs and ODs, not relating instead to other documents of the Bank such as guidelines and best practices.

The Panel, moreover, has always been concerned with respecting the jurisdictional limits of its mandate, considering only whether the actions of the Bank were in compliance with its policies, avoiding instead considerations regarding compliance by the State that had requested the loan with its international obligations, even in matters where the protection of human rights is concerned.[78]

It should be added, also, that this body is not judicial in nature, for a number of elements that characterize and distinguish this procedure: it does not have decision-making powers, which belong instead to the Executive Directors, who must authorize the investigative procedure and decide then whether or not to follow the recommendations of the Panel; the request cannot

75 See in this regard Pasquale De Sena, "Fondo monetario internazionale, Banca mondiale e diritti dell'uomo," in *Problemi e tendenze del diritto internazionale dell'economia.* Liber amicorum *in onore di Paolo Picone*, eds. Aldo Ligustro and Giorgio Sacerdoti (Napoli: Editoriale Scientifica, 2011), 852.

76 Moreover, the Action Plans developed in response to the weaknesses of the Bank often do not fully or adequately meet the needs identified by the Inspection Panel.

77 See on this argument Sciso, *Appunti*, 112.

78 For example, in the *Chad: Petroleum Development and Pipeline Project* claim, the Panel limited its discussion of a human rights claim specifying that '[i]t is not within the Panel's mandate to assess the status of governance and human rights in Chad in general or in isolation…' (see WB Inspection Panel, *Chad*, Section 215). Analogously, when the Requesters in the *Honduras: Land Administration Project* claim argued that the Bank's support of the project would have facilitated a violation by the government of treaty-based obligations, the Panel observed that 'it is a matter for Honduras to implement the obligations of an international agreement to which it is party and [the Panel] does not comment on this matter' (see WB Inspection Panel, *Honduras*, Section 258).

be made by one person, because only the groups are empowered to take action; the initiation of the investigation is not automatic, but subject to the authorization of the Board of Executive Directors; the report of the Panel is not binding on the Bank, but has the value of a mere recommendation; the purpose of the report is only to highlight the Bank's failures or adverse effects of its policies and procedures, while there are no monetary damages provided for requesters; the only possible form of reparation is for the Bank's Board of Executive Directors to modify the project; for the requesters, once the application has been presented, *jus standi* is not granted in the procedure; and finally, requesters do not have an appeal in the event that the Panel is not given authorization to investigate or where they cannot agree on the results.

In any case, the Inspection Panel is certainly a very innovative mechanism in the law of international organizations and its institution has contributed significantly to the evolution of this area of the law, in particular with regard to the issue of accountability of international organizations, considering that for the first time the right to react against an entity has been recognized to individuals, with no legal relationship with the international body, to seek justification for its actions.[79]

In the present context, then, an important fact is that, through its action, the Inspection Panel has marked a clear evolution of the mandate of the WB in the direction of increasing the protection of non-economic values. The Inspection Panel, ultimately, is the result of an internal functional need of the Bank: to broaden its mandate as a consequence of an evolution of its objectives.

After the creation of the Inspection Panel, other institutions of the Group were also equipped with internal mechanisms for compliance and adopted parameters for assessment of their work to enable local people to submit claims for social and/or environmental damage. In fact, both the IFC in 2006[80] and the MIGA in 2007 have adopted their own performance standards on social and environmental sustainability, which constitute a non-binding code of conduct in which are set out the procedures to be followed when implementing a project that may have a social or environmental impact or consequences on the health of the population or the interests of indigenous peoples.

79 See in this regard Laurence Boisson de Chazournes, "The World Bank Inspection Panel," in *International Human Rights Monitoring Mechanisms. Essays in Honour of Jakob Th. Möller*, eds. Gudmundur Alfredsson *et al.* (2nd edn. Leiden: Martinus Nijhoff, 2009), 311–312.

80 The IFC performance standards on social and environmental sustainability inspired the Equator Principles, a set of voluntary guidelines which must be applied to project finance activities of the banks. Major international private banks have adhered to those Principles.

In addition, in 1999, the Compliance Advisor Ombudsman (CAO) was established. This is an independent body which deals with complaints relating to the activities of the IFC and MIGA and promotes dialogue, in a fair, objective and constructive way, between individuals, groups of individuals or organizations affected by a project and the two agencies. However, the CAO cannot be assimilated to the Inspection Panel, since it is only an informal advisory and conciliatory mechanism for the solution of conflicts between stakeholders. Complaints may be submitted by any individual, group, community or organization that claims to have been, or be in danger of being damaged by environmental or social effects of a project supported by the two institutions. The claim can also be brought by a third party, if it proves to be acting as a representative of the injured party. The complaint may be made at any stage of the project financed or guaranteed by the institution. Moreover, the Ombudsman may not assign compensation, nor block the project pending its assessment, or cancel it. Once the Ombudsman has confirmed that the complaint falls within its mandate and it has decided on the admissibility, it notifies the staff of the financial institution concerned of the complaint, which must provide the necessary information on the project. The Ombudsman, therefore, after hearing all the parties involved, decides how to resolve the issue according to a very flexible and concrete approach. This body also carries out a compliance audit, verifying the compliance of the activity performed by the technical staff of the two institutions with the relevant policies, procedures and guidelines. Finally, it expresses an opinion on the adequacy of internal policies and their application.

7 Strengths and Weaknesses in the Work of the World Bank on the Protection of Non-Economic Values and Future Prospects

As noted, economic organizations generally do not have a formal mandate to deal with human rights, but were expressly given the purpose of ensuring economic development. The issue of human rights, however, has been linked increasingly to economic development and international solidarity, a phenomenon that has led to a new role of economic international organizations in the promotion and protection of values that are not strictly economic.

The WB, in particular, has tried to overcome the limits imposed by its Statute, integrating the protection of non-economic values in its mandate, mainly through its practice. Therefore, while not formally amending its Articles

of Agreement, which define its objectives and set explicit limits to its mandate, the Bank has evolved over the years, gradually expanding its scope of action. This is due, in particular, to a new interpretation of the concept of development, which has not affected the purpose but rather the functions of the Bank. Therefore, the gradual emergence of a 'right-based approach to development' and the general awareness of the necessary interdependence between economic welfare and the effective recognition of human rights now prevent a restrictive interpretation of the Bank's mandate.

Indeed, apparent in the practice of the WB is its tendency not only to avoid its activities resulting in an adverse effect on the respect of human rights and, in particular, given its field of activity, on the rights protected by the UN Covenant on Economic, Social and Cultural Rights, but also actively to contribute to the promotion of those rights.

The dynamic evolution of the Bank's mandate was triggered by protests from civil society on the initial lack of responsibility of the Organization for the damage caused by its activities, which led to the development of OPs and BPs and the establishment of the Inspection Panel.

The application of OPs and Evaluation Standards, however, is not always satisfactory, for three different reasons. In the first place, there is still no objective and comprehensive control mechanism that can properly assess the results of the operations carried out by agencies of the group. In addition, a significant portion of the Bank's funding is beyond the control of compliance with the Standards, as it is granted through financial intermediaries. Finally, even if it is possible to find breaches of OPs and Standards, the effectiveness of the control system is weakened by the failure to provide for the responsible bodies to take adequate decisions.

In addition, the Bank's SPs are not currently in a position to ensure that human rights are respected in all its projects,[81] since these rights were not included in a systematic way in the operations of the WBG. This Organization, indeed, does not yet have specific policies regarding the protection of human rights,[82] nor is there an agenda in this respect for the institutions that make up the WBG. In fact, the official position of the WBG continues to be that the role of the Bank is not as an *enforcer* of human rights, but to cooperate with the

81 See in this regard Human Rights Watch, *Abuse-free Development. How the World Bank Should Safeguard Against Human Rights Violations*, 22 Jul. 2013, 4 (www.refworld.org).

82 See in this regard the document *The World Bank's Safeguard Policies Proposed Review and Update. Approach Paper*, 10 Oct. 2012, 9 (siteresources.worldbank.org).

Member States to ensure that they meet their commitments in this regard.[83] Thus, while the WB will not fund activities that may be incompatible with the international environmental obligations of the State borrower, a similar attitude does not exist in relation to the international standards of human rights. Therefore, the WB should develop a set of policies and operational guidelines in order to both promote human rights – civil, political, economic and social – through its work and ensure that its actions are not in conflict with, or even violate international norms on human rights.

The WB, however, was the first international organization to establish a permanent independent oversight body – the Inspection Panel in fact – in order to increase the transparency and accountability of its actions with regard to the beneficiaries of its financial activity. The establishment of such a body confirms that, at the international level, the increasing need to provide a better link between economic activities and the pursuit of the protection of non-economic values is ever clearer.[84] However, for this purpose it would be necessary for the Panel to become a true organ of control, able to take binding decisions in cases of violation of the procedures established and provide an effective remedy to those harmed. This would require a strengthening of the Inspection Panel structure and an extension of its powers to the Bank's agencies that operate in the private sector.

Now a new stage is opening for this important Organization, which is characterized by the necessary policy and governance reforms. In Oct. 2012, moreover, the WB started reviewing and updating its social and environmental SPs, which should have a duration of two years. The review covers 8 environmental and social policies – OP 4:01 Environmental Assessment, OP 4:04

83 See Kirk Herbertson, Kim Thompson and Robert Goodland, *A Roadmap for Integrating Human Rights into the World Bank Group*, World Resources Institute, 2010 (www.wri.org).

84 For example, recently, the UN Human Rights Council on basis of Section 12 of its Res. 17/4, *Human Rights and Transnational Corporations and Other Business Enterprises*, 16 Jun. 2011 (daccess-dds-ny.un.org), instituted the Forum on Business and Human Rights under the guidance of the Working Group on the issue of human rights and transnational corporations and other business enterprises, aimed at 'discuss[ing] trends and challenges in the implementation of the Guiding Principles [on Business and Human Rights] and promot[ing] dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices'. The Forum is open to all relevant stakeholder groups, in particular States, the United Nations system, intergovernmental and regional organizations, businesses, labour unions, national human rights institutions, non-governmental organizations, and affected stakeholders.

Natural Habitats, OP 4:09 Pest Management, OP 4:10 Indigenous Peoples, OP 4:11 Physical Cultural Resources, OP 4:12 Involuntary Resettlement, OP 4:36 Forests, OP 4:37 Safety of Dams – as well as the Policy on Piloting the Use of Borrower Systems for Environmental and Social Safeguards ('Use of Country Systems'), OP 4.00.

Other areas not currently covered by the SPs have also been identified by the Bank, in particular: human rights; gender; free, prior, and informed consent of indigenous peoples; labour and occupational health and safety; disability; land tenure and natural resources; and climate change.[85]

The Safeguard Policy Review in progress may cause the Bank to recognize explicitly its international obligations in the field of human rights in as much as it is an international organization and to promote specific policies that prevent it from violating those rights and also allow it to promote them. The initiated review, therefore, represents an opportunity for the Bank to establish a due diligence framework that allows it to assess the impact of its activities on human rights,[86] as is already done for climate change, energy and the environment.

Ultimately, the WB has been able to adapt to new international economic and political contexts and to the needs that have gradually emerged, through the development of appropriate policies and the establishment of control mechanisms. However, in order to consolidate a global economic governance the role of this Organization needs to become more and more central, giving in its actions an increasing importance in the protection of human rights, the rule of law, democracy, good governance and transparency, and promoting sustainable economic development on a social and environmental level.

The liberalization of trade, investment protection, economic globalization and legal and social progress must be developed at the same time, with paths that are not parallel but which meet and intersect one with another, because low standards for the protection of human rights and, in general, critical social and environmental conditions represent an element that is destabilizing to the international situation and also distorting of international trade and investment. In this context, the integration between economic and non-economic values and the development of coordination between international organizations that have expertise in these areas must always be more and more

85 See World Bank, *Review and Update of the World Bank Safeguard Policies: Objectives and Scope* (web.worldbank.org).

86 See Human Rights Watch, *Abuse-free*, 3.

nurtured. Therefore, we need to develop a constructive interaction between the different areas of international law, so that globalization can act as a positive force.[87]

87 See in the regard the Res. 2005/17 of the UN Commission on Human Rights, *Globalization and Its Impact on the Full Enjoyment of All Human Rights*, E/CN.4/RES/2005/17, 14 Apr. 2005 (www.refworld.org), in which it is affirmed that 'globalisation should be guided by the fundamental principles that underpin the corpus of human rights, such as equality, participation, accountability, non-discrimination, at both the national and international levels, respect for diversity, tolerance and international cooperation and solidarity'. The Resolution also reiterates that 'multilateral institutions have a unique role to play in meeting the challenges and opportunities presented by globalization' and restates 'the need for these institutions to recognize, respect and protect all human rights'. It affirms, finally, 'the commitment to create an enabling environment, at both the national and international levels, that is conducive to development and to the elimination of poverty through, inter alia, good governance within each country and at the international level, transparency and accountability in the financial, monetary and trading systems, including in the private sector and transnational corporations, and the commitment to an open, equitable, rule-based, predictable and non-discriminatory multilateral trading and financial system to ensure that there is greater complementarity between the basic tenets of international trade law and international human rights law' (Section 3).

CHAPTER 10

The Changing Form of the International Law Commission's Work

Jacob Katz Cogan

1 Introduction

Two elements of the International Law Commission's (ILC) procedure receive relatively little attention: its decision on the final form of its work and its recommendation to the UN General Assembly (GA) on what action the Assembly should take on its completed text.[1] Though infrequently considered (at least in comparison to the substantive drafts it produces), this packaging is significant, as it frames how the Commission's work will be conceptualized and evaluated upon completion.[2] While the ILC Statute provides the Commission with flexibility in choosing the form and the action that it recommends to the GA, the Commission does not work in a vacuum.[3] Because the impact of the Commission's work depends on how that work is received (and because the ILC wants its work to be well-received), its decision to produce a certain type of text reflects its assessment of who its clients are and what legal products they desire. In other words, the Commission's supply is a function of what it perceives as the demand. As this chapter will explain, the form of the ILC's work is changing, reflecting larger trends in international lawmaking.

1 For recent studies, see, for example, Michael Wood, "The General Assembly and the International Law Commission: What Happens to the Commission's Work and Why?", in *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner*, eds. Isabelle Buffard *et al* (Leiden: Martinus Nijhoff, 2008), 373, and Sean D. Murphy, "Codification, Progressive Development, or Scholarly Analysis? The Art of Packaging the ILC's Work Product," in *The Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie*, ed. Maurizio Ragazzi (Leiden: Martinus Nijhoff, 2013), 29.

2 On the term 'packaging', see Murphy, "Codification," 29.

3 On the Commission's flexibility, see Herbert W. Briggs, *The International Law Commission* (Ithaca: Cornell University Press, 1965): 276–277; Ramaa Prased Dhokalia, *The Codification of Public International Law* (Manchester: Manchester University Press, 1970), 231–233.

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2 The Traditional Form of the Commission's Work

One of the first things the ILC considers once it begins its work on a new topic is the shape that its eventual product will take – its 'final form'.[4] For most of its history, that product was typically (though not exclusively)[5] packaged as 'draft articles' – that phrase being taken from the language of Art. 20 of the ILC Statute.[6] For example, the Commission's work on treaties (twice),[7] diplomatic relations,[8]

4 See Report of the International Law Commission on the work of its sixty-third session, Section 383, UN Doc. A/66/10 (2011) [hereinafter 2011 ILC Report] ('A preliminary indication as to the final form of the work undertaken on a specific topic…should, as far as possible, be made at an early stage by Special Rapporteurs or Study Groups, subject to review and later adjustment as the work develops'); see also Wood, "The General," 375. It is certainly possible for the ILC to change the form of its work during its consideration of a topic, and it has done so – for example, with the topic 'unilateral acts of States'. See *infra*, footnote 32. At times, as well, the Commission, having made a preliminary decision on form, will reserve the right to reconsider that decision at a later date – as it did with the topic 'allocation of loss in the case of transboundary harm arising out of hazardous activities'. See UN Doc. A/59/10, Report of the International Law Commission on the work of its fifty-sixth session, in *YbILC* 2004, II(2), 68, Section 176, General Commentary, Section 14; see also *infra*, footnote 23.

5 Thus, for example, during its first fifty years, the Commission adopted two 'draft conventions', two 'draft codes', a 'draft declaration', a 'draft statute', a set of 'model rules' and a set of 'principles'. See, e.g., UN Doc. A/2693, Report of the International Law Commission on the work of its sixth session, in *YbILC* 1954, II, 143, 151; UN Doc. A/49/10, Report of the International Law Commission on the work of its forty-sixth session, in *YbILC* 1994, II(2), 26. The ILC has also submitted 'reports' to the GA. See, e.g., UN Doc. A/1858, Report of the International Law Commission covering the work of its third session, in *YbILC* 1951, II, 125–144, Sections 12–34 (Report on Reservations to Multilateral Conventions).

6 Art. 20 provides: 'The Commission shall prepare its drafts in the form of articles and shall submit them to the General Assembly together with a commentary'. This Article appears in the part of the Commission's Statute that pertains to the codification of international law. The term 'draft' is also used in the Articles that pertain to 'progressive development of international law'. The distinction made in the Statute between those functions (codification and progressive development) is not maintained in the contemporary practice of the ILC. See Francis Vallat, "The Work of the International Law Commission: The Law of Treaties," *NILR* 22 (1975): 327, 335; Murphy, "Codification," 30–31.

7 UN Docs. A/6309/Rev.1, Report of the International Law Commission on the work of its eighteenth session, in *YbILC* 1966, II, 177, Section 38 [hereinafter 1966 ILC Report]; UN Doc. A/37/10, Report of the International Law Commission on the work of its thirty-fourth session, in *YbILC* 1982, II(2), 17, Section 63.

8 UN Doc. A/3859, Report of the International Law Commission on the work of its tenth session, in *YbILC* 1958, II, 89, Section 53.

consular relations,[9] special missions,[10] the diplomatic courier and the diplomatic bag,[11] the immunities of States,[12] the non-navigational uses of international watercourses,[13] the succession of States (thrice),[14] and State responsibility[15] (about which more below) all took the form of 'draft articles'. The term '*draft* articles' suggested that further work needed to be taken outside the Commission to turn the drafts into law, and what's more, that that work would be done collectively by States through the process of negotiating a treaty. Draft articles were draft treaties.

One of the last decisions the Commission must take as it concludes its work on a topic is the recommendation that it will make to the GA on what (if any) future action should be taken on the text adopted by the ILC. Though Art. 23 of the ILC Statute provides the Commission with four options, again, for the greater part of its history, the ILC has typically recommended the elaboration of a convention (either by the GA or a diplomatic conference convened by the Assembly) on the basis of the completed draft articles.[16] Thus, in 1966, the Commission concluded its work on the law of treaties between States by 'recommend[ing] that the General Assembly should convene an international conference of plenipotentiaries to study the Commission's draft articles on the law of treaties and to conclude a convention on the subject'.[17] And in 1991, to

9 UN Doc. A/4843, Report of the International Law Commission on the work of its thirteenth session, in *YbILC* 1961, II, 92, Section 37.

10 UN Doc. A/6709/Rev.1, Report of the International Law Commission on the work of its nineteenth session, in *YbILC* 1967, II, 347, Section 35.

11 UN Doc. A/44/10, Report of the International Law Commission on the work of its forty-first session, in *YbILC* 1989, II(2), 14, Section 72.

12 UN Doc. A/46/10, Report of the International Law Commission on the work of its forty-third Session, in *YbILC* 1991, II(2), 13, Section 28 [hereinafter 1991 ILC Report].

13 UN Doc. A/49/10, Report of the International Law Commission on the work of its forty-sixth session, in *YbILC* 1994, II(2), 89, Section 222.

14 UN Docs. A/9610/Rev.1, Report of the International Law Commission on the work of its twenty-sixth session, in *YbILC* 1974, II(1), 174, Section 85; A/36/10, Report of the International Law Commission on its thirty-third session, in *YbILC* 1981, II(2), 20, Section 87; A/54/10, Report of the International Law Commission on the work of its fifty-first session, in *YbILC* 1999, II(2), 20, Section 47.

15 UN Doc. A/56/10, Report of the International Law Commission on the work of its fifty-third session, in *YbILC* 2001, II(2), 26, Section 76 [hereinafter 2001 ILC Report].

16 See Ian M. Sinclair, *The International Law Commission* (Cambridge: Grotius Publications, 1987), 36. Art. 23(1) provides: 'The Commission may recommend to the General Assembly: (a) To take no action, the report having already been published; (b) To take note of or adopt the report by resolution; (c) To recommend the draft to Members with a view to the conclusion of a convention; (d) To convoke a conference to conclude a convention'.

17 1966 ILC Report, II, 177, Section 36.

take just one more example (from among many), the ILC used nearly identical language when it reported its work on the 'jurisdictional immunities of States and their property'.[18] The recommendation made at the end of the Commission's work (to negotiate a convention) was implicit in the form typically chosen by the ILC at the beginning – draft articles.[19]

Thus, over the course of its first five decades, the Commission primarily worked in the form of draft articles – and this work was undertaken on the presumption that the ILC's final text would serve as the basis for the negotiation of a treaty in the near term.[20] This practice was not predetermined by the Commission's Statute; its evolution was functional, and its eventual dominance in the Commission's practice reflected its successes.[21] For many years, the ILC's work did in fact lead to many important and well-subscribed to treaties. But the practice also reflected certain assumptions (shared by the GA) about the proper way in which international law should be (and would be) made and the Commission's role in that process. In particular, it took for granted that States were international law's lawmakers (because of their status as the prime subjects of international law) and that States would prefer to make international law through treaties (due to their authority, specificity, durability, and stability).[22] The ILC's role, therefore, was to

18 1991 ILC Report, 25. For a full list, see *The Work of the International Law Commission* (8th ed. New York: United Nations, 2012), 50–51.

19 There was an early exception to this practice. In 1953, the Commission 'recommend[ed] to the General Assembly the adoption by resolution' of the Draft Articles on the Continental Shelf. UN Doc. A/2456, Report of the International Law Commission covering the work of its fifth session, in *YbILC* 1953, II, 217. The GA did not follow the Commission's recommendation.

20 As noted previously, there were some exceptions to this trend, particularly during the ILC's first decade. Yet, by the early 1960s, the dominant form became 'draft articles'. See 1966 ILC Report, 176, Section 23 (describing why the Commission 'changed the scheme of its work from a mere explanatory statement of the law to the preparation of draft articles capable of serving as a basis for an instrument intended to become legally binding'). In 1996, when the Commission comprehensively reviewed its program, procedures, and working methods, it still assumed, without discussion, that its work product would take that form. See UN Doc. A/51/10, Report of the International Law Commission on the work of its forty-eighth session, in *YbILC* 1996, II(2), ch. VII.A.

21 A path dependency ensued. See Franklin Berman, "The ILC Within the UN's Legal Framework: Its Relationship with the Sixth Committee," *GYIL* 49 (2006), 107, 123–124.

22 Thus, the British Institute of International and Comparative Law Study Group noted that 'it does appear that there has been reliance upon the treaty as an outcome even where it is largely superfluous'. Report of the Study Group on the Future Work of the International Law Commission, *The International Law Commission and the Future of International Law*, eds. Michael R. Anderson *et al.* (London: British Institute of International and Comparative Law, 1998).

assist States in their lawmaking function by thoroughly researching and debating topics in need of codification and drafting texts that could then be used as starting points by States in their treaty negotiations.[23]

3 The Commission's New Approach

During the past fifteen years, the Commission's practice has shifted. Now, the outcome of the ILC's work is more likely than not to be described as something other than 'draft articles', and the Commission's recommendation to the GA is unlikely to be for the *immediate* drafting of a treaty (or even for the drafting of a treaty at all).

The latter trend might be dated to 1999. That year, when the Commission submitted its newly completed Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, it simply requested that the Assembly adopt them as a declaration.[24] But the most well-known manifestation of this development occurred two years later, in 2001, when the ILC recommended that the GA 'take note of the draft articles' on State responsibility and 'consider, *at a later stage*,…the possibility of convening an international conference… with a view to concluding a convention on the topic'.[25] The Commission subsequently used the same formula when it completed the topics 'responsibility

23 Of course, this is a general conclusion. There were always members of the Commission and commentators who took a different view, and the ILC itself occasionally reassessed the appropriate form its work should take in light of its consideration of the topic. See, e.g., UN Doc. A/9610/Rev.1, Report of the International Law Commission on the work of its twenty-sixth session, in *YbILC* 1974, II(1), 169–170, Sections 61–64 (reporting on the ILC's 're-examin[ation] [during that session] of the question whether or not the final form of the codification of the law relating to succession of States in respect of treaties should be effected in the form of a convention').

24 UN Doc. A/54/10, Report of the International Law Commission on the work of its fifty-first session, in *YbILC* 1999, II(2), 20, Section 44. It is unclear why the Commission decided to recommend the adoption of a declaration. To some members, the form of a declaration was appropriate because 'the draft articles…resembled an instrument of internal law rather than one of international law'. *YbILC* 1999, I, 87, Section 33. Others noted that 'most States had favoured a declaration by the General Assembly, which they viewed as sufficient for achieving the purpose of providing States…with a set of legal principles and recommendations to be followed by their legislators when drafting nationality laws'. *YbILC* 1999, I, 86, Section 28.

25 2001 ILC Report, Sections 72–73 (emphasis added); see also David D. Caron, "The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority," *AJIL* 96 (2002): 857.

of international organizations',[26] 'effects of armed conflicts on treaties',[27] and 'law of transboundary aquifers', adding a request in the latter instance that the Assembly 'recommend to States concerned to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers on the basis of the principles enunciated in these articles'.[28] For other topics (as described below), the ILC made no mention of treaty drafting at all. This has been the Commission's post-1999 practice, with but one exception: when it completed its work on diplomatic protection in 2006, the ILC, reverting to its customary practice, 'recommend[ed] to the General Assembly the elaboration of a convention on the basis of the draft articles'.[29]

The move away from the 'draft articles' form, though, has been even more recent. Many of the projects that the ILC has concluded or initiated in the past fifteen years have taken that traditional form. In addition to the draft articles on State responsibility and diplomatic protection, the Commission has also produced draft articles and commentaries on the 'responsibility of international organizations', the 'law of transboundary aquifers', the 'prevention of transboundary harm from hazardous activities', the 'effects of armed conflicts on treaties', and the 'expulsion of aliens' (the last adopted to date only on first reading).[30] Even so, a countertrend has become evident. In 2006, the Commission completed three projects that were not titled 'draft articles': the 'Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities',[31] the 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations',[32] and the

26 2011 ILC Report, Section 85.

27 2011 ILC Report, Section 97.

28 UN Doc. A/63/10, Report of the International Law Commission on the work of its sixtieth session (2008), Section 49 [hereinafter 2008 ILC Report].

29 UN Doc. A/61/10, Report of the International Law Commission on the work of its fifty-eighth session (2006), Section 46 [hereinafter 2006 ILC Report].

30 2011 ILC Report, Sections 87, 100; 2008 ILC Report, Section 53; 2001 ILC Report, Section 97; UN Doc. A/67/10, Report of the International Law Commission on the work of its sixty-fourth session (2012), Section 45.

31 The Commission explained in its 'General Commentary' to the Draft Principles that it chose that form because it 'would have the advantage of not requiring harmonization of national laws and legal systems, which is fraught with difficulties'. 2006 ILC Report, Section 67, General Commentary, Section 12. Additionally, the ILC 'felt that the goal of widespread acceptance of the substantive provisions is more likely to be met if the outcome is cast as principles'.

32 The Commission's project on 'unilateral acts of States' began in the form of draft articles – that approach being recommended by a working group in 1998. See UN Doc. A/53/10,

'Conclusions of the Work of the Study Group on the Fragmentation of International Law'. Five years later, in 2011, the ILC completed its 'Guide to Practice on Reservations to Treaties' (a project begun in 1994). As these texts were not 'draft articles', when the Commission reported them to the GA, it did not recommend the elaboration of a convention. Instead, it either 'commended [the Commission's work] to the attention of the General Assembly' (as it did with the Conclusions on Fragmentation and the Guiding Principles on Unilateral Acts of States),[33] asked the GA to 'take note of [the Commission's work] and ensure its widest possible dissemination' (as it did with the Guide to Practice on Reservations),[34] or asked the Assembly to 'endorse the [Commission's work] by a resolution and urge States to take national and international action to implement' it (as it did with the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities).[35]

This trend is especially evident in the Commission's current program of work. Though the ILC is now crafting 'draft articles' on the topics 'expulsion of aliens', 'immunity of State officials from foreign criminal jurisdiction', and 'protection of persons in the event of disasters', that form is now distinctly in the minority. Thus, during its sixty-fifth session in 2013, the Commission provisionally adopted five 'draft conclusions' on 'subsequent agreements and subsequent practice in relation to the interpretation of treaties'.[36] It also decided, in the context of its project now-titled 'identification of customary international law', to develop 'a set of conclusions with commentaries'.[37] On the topic of

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Report of the International Law Commission on the work of its fiftieth session, in *YbILC* 1998, II(2), 59, Section 200. As the ILC considered the topic, though, its complexity became evident, consensus on the topic's scope was difficult to achieve, and resistance to codification in the form of draft articles grew. By 2005, many in the Commission and the Sixth Committee were inclined to complete consideration of the topic in the form of 'conclusions', 'principles', or 'guidelines'. See Victor Rodríguez Cedeño, Ninth Report on Unilateral Acts of States, UN Doc. A/CN.4/569/Add.1 (2006), Sections 3–8; UN Doc. A/60/10, Report of the International Law Commission on the work of its fifty-seventh session, in *YbILC* 2005, II(2), Sections 301–332.

33 2006 ILC Report, Section 170.

34 2011 ILC Report, Section 72.

35 2006 ILC Report, Section 63.

36 UN Doc. A/68/10, Report of the International Law Commission on the work of its sixty-fifth session, Section 36 [hereinafter 2013 ILC Report].

37 Report of the International Law Commission on the work of its sixty-fifth session, Section 73; see also Section 101. In 2014, Michael Wood, the topic's Special Rapporteur, proposed eleven draft conclusions. See Michael Wood, Second Report on Identification of Customary International Law, UN Doc. A/CN.4/672 (2014).

'provisional application of treaties', the Special Rapporteur 'indicated that he considered the development of guidelines with commentaries to be an appropriate outcome of the consideration of the topic'.[38] On the topic 'obligation to extradite or prosecute (*aut dedere aut judicare*)', the ILC seemed to be moving away from the draft articles that had been proposed by a Special Rapporteur several years earlier.[39] And on the topic 'most-favoured-nation clause', the ILC's Study Group 'noted the possibility of developing for [its] final report guidelines and model clauses'.[40] On 'protection of the environment in relation to armed conflicts', a topic added during the sixty-fifth session, the Special Rapporteur 'indicated that [she believed that it] was more suited to the development of non-binding draft guidelines than to a draft convention'.[41] At the same session, the Commission also decided to include the topic 'protection of the atmosphere' in its program of work 'with the understanding that', *inter alia*, '[t]he outcome of the work on the topic will be draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein'.[42] Among its new projects, only the one most recently added, 'crimes against humanity', is likely to take the form of draft articles for the purpose of an eventual treaty.[43] Of the topics on the ILC's long-term program of work, a few may also take the form of legal instruments, but

38 2013 ILC Report, Section 129.

39 Indeed, in 2014, the Final Report of the Working Group on the Obligation to Extradite or Prosecute (*aut dedere aut judicare*), recommended that the Commission conclude its work on the topic by adopting the Working Group's 2013 and 2014 reports, which contained no draft articles, conclusions, or similar texts. See UN Doc. A/CN.4/L.844 (2014).

40 2013 ILC Report, Section 164. This is the Commission's second go-round with the topic. When it first considered MFN clauses in the 1960s and 70s, the project's outcome took the form of draft articles.

41 2013 ILC Report, Section 143; see also Marie G. Jacobsson, Preliminary Report on the Protection of the Environment in Relation to Armed Conflicts, Section 167, UN Doc. A/CN.4/674 (2014) (anticipating making proposals for guidelines, conclusions, or recommendations).

42 2013 ILC Report, Section 168. In 2014, Shinya Murase, the topic's Special Rapporteur, proposed three draft guidelines. See Shinya Murase, First Report on the Protection of the Atmosphere, UN Doc. A/CN.4/667 (2014).

43 The topic was added to the Commission's long-term program in 2013 and moved to its current program in 2014. Recently appointed Special Rapporteur on the topic Sean Murphy described the likely outcome of the Commission's work thusly: 'The objective of the International Law Commission…would be to draft articles for what would become a Convention on the Prevention and Punishment of Crimes against Humanity'. 2013 ILC Report, Annex B, 141.

an equal number will likely take the form of guidelines or principles should they eventually be added to the Commission's current program of work.[44]

4 The Commission's New Role

The trends are clear: the Commission is utilizing new forms for its work, and even when it employs the traditional form of 'draft articles' it is generally not recommending that its drafts be turned into treaties in the near term, as it had customarily done in the past. Certainly the ILC has previously worked outside the form of draft articles, and it is also true that the Commission has not always recommended that its work be converted into treaties, but what before was the exception is now, seemingly, the rule, and vice versa. And what before was considered a failure (the refusal of the GA to pursue a convention),[45] is now envisioned as a goal.[46]

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44 The topics on the long-term program of work include: the fair and equitable treatment standard in international investment law; jurisdictional immunity of international organizations; protection of personal data in trans-border flow of information; extraterritorial jurisdiction; and ownership and protection of wrecks beyond the limits of national maritime jurisdiction. See 2011 ILC Report, Section 369. When 'fair and equitable treatment standard' was added in 2011, the drafter of the syllabus suggested that '[o]ne possib[le] [outcome would] be to put forward a statement concerning the meaning of the standard', and '[i]t may be possible that a set of guidelines for States could emerge from this study'. 2011 ILC Report, Annex D, 335. On the other hand, the syllabus for 'jurisdictional immunity of international organizations' presupposed that the topic 'would lend itself to the preparation of a draft convention'. 2006 ILC Report, Annex B, 458.

45 Thus, the refusal of the GA to convene diplomatic conferences to turn into treaties the 1978 Draft Articles on Most-Favoured Nation Clauses and the 1989 Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag Not Accompanied by Diplomatic Courier was in both cases considered evidence of the failure of those projects. See GA Dec. 46/416 (Dec. 9, 1991), UN Doc. A/46/49, I, 319 ('decid[ing] to bring the draft articles on most-favoured-nation clauses…to the attention of Member States and interested intergovernmental organizations for their consideration in such cases and to the extent as they deem appropriate'); GA Dec. 50/416 (11 Dec. 1995), UN Doc. A/50/49, I, 351 ('decid[ing] to bring the draft articles prepared by the Commission to the attention of Member States…and to remind Member States of the possibility that this field of international law and any further developments within it may be subject to codification at an appropriate time in the future'). As noted by Christian Tomuschat, '[i]n the past, Special Rapporteurs mostly insisted on their draft being recommended to the [General Assembly] for the conclusion of an international convention. To see a draft transformed into a convention was considered to be the most felicitous and prestigious outcome of a drafting exercise'. Christian Tomuschat, "The International Law Commission – An Outdated Institution?" *GYIL* 49 (2006): 77, 84.

46 In 2011, when it reviewed its methods of work, the ILC recognized a wide variety of forms its work could take: 'draft articles which might be embodied in a convention, declaration

Traditionally, the ILC conceived of its role as the originator – but not the finalizer – of important codification projects. The Commission would pass on its work to the GA, which would either take up the treaty-drafting exercise itself, convene a diplomatic conference for that purpose, or decline to pursue further work on the subject. As a result, States collectively controlled the ILC's work product, serving as a gatekeeper, deciding whether to codify an area of law and, if so, what the final formulation of that law would be. By not recommending the convening of treaty-drafting conferences for its 'draft articles' (at least not in the first instance) and by framing much of its work product not as 'draft articles' but as 'guidelines', 'conclusions', and 'principles' the Commission is reconceiving its completed texts as the culmination of the law-drafting process and not its commencement.[47]

Though by no means giving up its traditional role entirely, by making this shift, the ILC is envisioning for itself a wider audience, one made up not just of States, but also of attorneys, judges, policymakers, and academics. It is also envisioning and embracing a softer lawmaking process – one that depends not solely on the approval of States but also on the endorsement of a wide range of international actors, including international tribunals and domestic courts. To be clear, the new forms chosen by the Commission are not exclusively meant for an audience beyond States. In 1995, when it chose the form of guidelines for its project on reservations to treaties, the audience the ILC had in mind was lawyers advising States and international organizations, not those working elsewhere.[48] But its recent work reveals its intention to produce texts for a broader constituency. Indeed, the Commission explained its decision to develop 'conclusions with commentaries' on the topic 'identification of customary international law' by noting that such 'a practical outcome… would serve as a guide to lawyers and judges who are not experts in public

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of principles, guidelines, expository study with conclusions and recommendations, etc.', 2011 ILC Report, Section 383. Just fifteen years earlier, it had envisioned only 'draft articles' as comprising the outcome of its efforts. See *supra*, footnote 20.

47 The ILC continues to use the term 'draft' when it reports 'draft articles' to the GA, but (with one exception) the Commission has not used that word when referring to its work that takes the form of guidelines, principles, or conclusions. On the significance of not using the term 'draft', see *infra*, footnotes 58–63 and accompanying text.

48 UN Doc. A/50/10, Report of the International Law Commission on the work of its forty-seventh session, in *YbILC* 1995, II(2), 108, Section 487. In 1995, the Special Rapporteur described the project's outcome as 'a guide to practice…[which] would take the form of draft articles whose provisions…would be guidelines'. See also First Report on the Law and Practice Relating to Reservations to Treaties, UN Doc. A/CN.4/470 (1995), in *YbILC* 2005, II(1), 155, Section 178.

international law'.[49] The Commission's work was for them, and not for States (or not only for States).

5 The General Assembly's Position

The ILC's move away from treaties has not been made unilaterally. Rather, it has been acquiesced in, and encouraged by, the GA. In addition to providing positive feedback to the Commission during the Sixth Committee's yearly debate on the Commission's annual report, the Assembly has supported the ILC's novel practice in two ways.[50] First, it has generally followed the Commission's recommendations that propound its new practices. Thus, the Assembly, as suggested by the ILC, '[*took*] *note* of the Guide to Practice [on Reservations to Treaties], presented by the Commission, including the guidelines,…and encourage[d] its widest possible dissemination'.[51] It also 'commend[ed]…to the attention of Governments' the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities[52] and 'commend[ed] the…dissemination' of the Guiding Principles applicable to unilateral declarations of States.[53] And it '[took] note of the [draft articles on State responsibility and other sets of draft articles]…and commend[ed] them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action'.[54] Since establishing in 2000 an *ad hoc* committee to negotiate what would become the UN Convention on the Jurisdictional Immunities of States and Their Property,[55] the Assembly has not authorized treaty-drafting exercises on any completed ILC project (such as those on State

49 2013 ILC Report, Section 73.

50 See Berman, "The ILC," 124 ('more voices began to be heard within the Sixth Committee to the effect that the codification convention was far from being the only concrete contribution which the ILC could make to the progress of international law'). The endorsement of new forms continues to the present day.

51 GA Res. 68/111 (16 Dec. 2013).

52 GA Res. 61/36 (4 Dec. 2006).

53 GA Res. 61/34 (4 Dec. 2006).

54 GA Resolutions 56/83 (12 Dec. 2001) (State responsibility); 62/68 (6 Dec. 2007), Section 3 (prevention of transboundary harm from hazardous activities); 63/124 (11 Dec. 2008), Section 4 (law of transboundary aquifers); 66/99 (9 Dec. 2011), Section 3 (effects of armed conflicts on treaties); 66/100 (9 Dec. 2011), Section 3 (responsibility of international organizations).

55 GA Res. 55/150 (12 Dec. 2000), Sections 2–4.

responsibility and diplomatic protection), albeit keeping open the possibility that it will endorse such work in the future.[56]

Second, in recent years the GA has subtly lent greater authority to the Commission's work by not using the word 'draft' in its resolutions when acting on the ILC's completed texts.[57] Previously, when it identified those texts it had always included that term.[58] Thus, the Assembly's resolutions invariably referred to 'draft articles' (or 'draft codes') and not 'articles' (or 'codes'). That made sense when the GA planned to convene a committee or conference to transform those texts into a treaty. After all, as already noted, the Commission's work was understood to be only the precursor to a final product (a treaty).[59] Referring to the Commission's texts as 'drafts' described (and ensured there was no doubt about) their provisional and preliminary status. In 2000, though, when it considered the Commission's Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, the Assembly dropped the word 'draft' from its resolution, and simply '[took] note of the articles…the text of which [was] annexed to the…resolution', 'invit[ed] Governments to take [them] into account', and 'recommend[ed] that all efforts be made for [their] wide dissemination'.[60] It took the same action – dropping the word 'draft' – the

56 See, e.g., GA Res. 68/104 (16 Dec. 2013), deciding 'to include in the provisional agenda of its seventy-first session the item entitled "Responsibility of States for internationally wrongful acts" and to further examine, within the framework of a working group of the Sixth Committee and with a view to taking a decision, the question of a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles'.

57 This fact has been noted, but not elaborated upon, by the UN Secretariat in its *Materials on the Responsibility of States for Internationally Wrongful Acts*, at ix, UN Doc. ST/LEG/SER.B/25 (2012), pointing out that '[i]n the recent practice of the General Assembly, when draft articles, as presented by the Commission, are taken note of by the Assembly and annexed to one of its resolutions, the reference to "draft" is excluded'.

58 In 1956, when the ILC completed its work on the law of the sea, its report titled its product, simply, as 'Articles Concerning the Law of the Sea', though elsewhere it referred to them as 'draft articles'. See UN Doc. A/3159, Report of the International Law Commission covering the work of its eighth session, in *YbILC* 1956, II, 256, Section 33. But the GA subsequently referred to the text as 'draft articles'. See GA Res. 1105 (XI) (21 Feb. 1957).

59 See, e.g., GA Resolutions 49/52 (9 Dec. 1994), Section 3, deciding to convene a working group 'to elaborate a framework convention on the law of the non-navigational uses of international watercourses on the basis of the *draft* articles adopted by the International Law Commission' (emphasis added); 55/150 (12 Dec. 2000), Section 3, deciding 'to establish an Ad Hoc Committee on Jurisdictional Immunities of States and Their Property… with a view to elaborating a generally acceptable instrument based on the *draft* articles on jurisdictional immunities of States and their property' (emphasis added).

60 GA Res. 55/153 (12 Dec. 2000). This was the Assembly's second consideration of the draft articles, which were adopted by the Commission during its fifty-first session in 1999.

following year when it considered the Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts.[61] Since then, with only a single exception, the GA has omitted the word 'draft' each time it has reviewed one of the ILC's new texts.[62] The deletion of that term suggests that the Assembly no longer considers the Commission's work provisional in nature; rather, the GA believes that the ILC's completed 'articles' can be evaluated by governments, tribunals, and others on their own merits, without the need for further revisions by States acting collectively.[63] With the rare exception, 'draft articles' are no longer thought to be draft treaties. Rather, they are now preliminary versions of GA-blessed soft law instruments called 'Articles', which are part of a spectrum of such texts generated by the Commission, including guidelines, principles, and conclusions.

6 Why Has the Commission Changed the Form of its Work?

There are and have always been many good reasons why the ILC might choose to work in a form other than that of 'draft articles', and there are and have always been many good reasons why the Commission might suggest to the Assembly that its work not be transformed into a treaty and instead be considered on its own terms. A treaty-drafting process might be eschewed because it 'can be extremely time-consuming'.[64] It also 'might result in the repetition or renewal of

When the GA reviewed them initially in the fall of 1999, it referred to them as 'draft articles' and deferred a decision on the ILC's request to issue them as a declaration until its next session. See GA Res. 54/112 (9 Dec. 1999), Section 2.

61 See GA Res. 56/83 (12 Dec. 2001), Section 3.

62 See GA Resolutions 61/36 (4 Dec. 2006), Section 2 (allocation of loss in the case of transboundary harm arising out of hazardous activities); 62/67 (6 Dec. 2007), Section 3 (diplomatic protection); 62/68 (6 Dec. 2007), Section 3 (prevention of transboundary harm from hazardous activities); 66/99 (9 Dec. 2011), Section 3 (effects of armed conflicts on treaties); 66/100 (9 Dec. 2011), Section 3 (responsibility of international organizations). The lone exception is the Draft Articles on the Law of Transboundary Aquifers. See GA Resolutions 63/124 (11 Dec. 2008), Section 4 (referring to the 'draft articles'); 63/124 (11 Dec. 2011), Section 4 (same); 68/118 (16 Dec. 2013), Section 1 (same).

63 The GA's new practice of omitting the word 'draft' has been noted by some, as if that action had some significance. See *Wintershall Aktiengesellschaft* v. *Argentine Republic*, Award, Section 112, ICSID Case No. ARB/04/14 (8 Dec. 2008); James Crawford, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect," *AJIL* 96 (2002): 874, 875.

64 James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: CUP, 2002), 59.

the discussion of complex issues and could endanger the balance of the text found by the I.L.C.', which in turn might lead to the failure of negotiators to agree on a text and the resultant undercutting of the Commission's work.[65] And even if a treaty were adopted, it might only garner a small number of ratifications.[66] Soft law instruments, such as guidelines or principles or conclusions, might be attractive (and more widely accepted) because those texts provide greater flexibility to States in their implementation. They also 'allow for a continued process of legal development' through 'international courts and tribunals', and might allow 'State practice…to adopt and apply the rules'.[67] Soft law instruments might also be of use for some topics because of the difficultly of harmonizing national laws and legal systems or because of the insufficient development of State practice.[68] Further, nonbinding texts allow drafters to be more progressive in the development of the rules. For these reasons, Christian Tomuschat has argued that '[s]ometimes codification in the form of a soft-law instrument may prove as effective or even more effective than a treaty which after its launching receives only a hesitant response from the international community'.[69] Yet, though always available, these rationales for working outside of the form of draft articles were not accepted by the ILC or the GA until recently.

There have also been not infrequent calls over the years to vary the form of the Commission's work.[70] Thus, for example, B.G. Ramcharan concluded in 1977 that the 'present practice [of preparing draft treaties] is unduly rigid and deprives the Commission of avenues for influencing the development of the law in subjects which have not yet reached the stage for the conclusion of a convention'.[71] Four years later, Mohamed El Baradei, Thomas M. Franck, and Robert Trachtenberg likewise wrote that the 'Commission should explore the possibility of the production of restatements and reports as alternatives to draft articles…[because not] every area of international law is susceptible to or requires treaty treatment'.[72] To them, a 'restatement of customary doctrines

65 Berman, "The ILC," 124.

66 See Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford: OUP, 2007): 182.

67 Crawford, *The International*, 58–59.

68 Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities: General Commentary, Section 12, in 2006 ILC Report.

69 Tomuschat, "The International," 104.

70 See, e.g., Sinclair, *The International*, 38–39.

71 Bertrand G. Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law* (The Hague: Martinus Nijhoff, 1977), 76.

72 Mohamed El Baradei, Thomas M. Franck and Robert Trachtenberg, *The International Law Commission: The Need for a New Direction* (New York: UNITAR, 1981): 27.

and practice could make the law more accessible and comprehensive and could serve under certain conditions as a substitute for the conclusion of a treaty'.[73] Yet, these calls for reform were not heeded until the turn of the century.

If the logic of using a variety of forms was always available, and if the use of such forms had been recommended by prominent international lawyers for many years, why did the ILC (with the GA's evident approval) not take changes its practices until the past fifteen years? The Commission's motivation for changing the form of its work product is founded on its recognition that States are now much less interested in working through the treaty form on subjects within the Commission's purview. Once, treaties were considered the most appropriate technique to codify international law. Thus, in 1973, the Commission predicted that 'it is to be expected that in the years ahead the codification convention will continue to be considered as the most effective means of carrying on the work of codification. Its preciseness, its binding character, the fact that it has gone through the negotiating stage of collective diplomacy at an international conference, the publication and wide dissemination of the conventions, all these are assets that will not lightly be abandoned'.[74] Yet the ILC's prediction proved incorrect. Leaving aside the Rome Statute of the International Criminal Court, which was not directly the product of the Commission's work,[75] the most recent ILC texts that have entered into force are the 1978 Vienna Convention on Succession of States in Respect of Treaties and the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses.[76] And even these two treaties have only acquired minimal ratifications. Over the past decades, many of the Commission's efforts have not succeeded (such as the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, the 1978 Draft Articles on Most-Favoured Nation Clauses, the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, the 1989 Draft Articles on the Status of the Diplomatic

73 El Baradei *et al., The International*, 27.

74 UN Doc. A/9010/Rev.1, Report of the International Law Commission on the work of its twenty-fifth session, in *YbILC* 1973, II, 230, Section 169.

75 The Commission's Draft Statute for an International Criminal Court and Draft Code of Crimes Against the Peace and Security of Mankind were helpful in the elaboration of the Rome Statute.

76 Vienna Convention on Succession of States in Respect of Treaties, 23 Aug. 1978 (entered into force 6 Nov. 1996); Convention on the Law of the Non-Navigational Uses of International Watercourses, 21 May 1997 (entered into force 17 Aug. 2014).

Courier and the Diplomatic Bag Not Accompanied by Diplomatic Courier),[77] and the fate of other projects (such as the 2004 UN Convention on Jurisdictional Immunities of States and Their Property) remains uncertain. As is well-documented, by the late 1990s States began to recognize and accept, more than they did in the past, that their relations in some substantive areas could effectively be governed through informal texts and agreements, and indeed that the codification and development of some areas of the law might only be possible through mechanisms. The multilateral treaty-based conceptualization of international lawmaking that had operated for so long (and which had been the foundation for the ILC's work) no longer applied, and so the demand for the Commission's traditional output dried up.

The disinterest of States in the ILC's usual products led to introspection and the eventual alteration of the Commission's long-held practices. In 2002, Martti Koskenniemi remarked that 'the codification of international law by such bodies as the Commission was beginning to look like an archaic relic'.[78] In 2009, Christian Tomuschat asked whether the Commission was 'An Outdated Institution?'.[79] And two years later, Georg Nolte observed that some have wondered 'whether [there] is a sufficient basis for being confident that the ILC can make a difference in the future'.[80] The changing form of the Commission's work was (and is) a response to that challenge.[81]

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77 See *supra*, footnote 45.

78 Summary Records of the meetings of the fifty-fourth session, in *YbILC* 2002, I, 88, Section 38.

79 Tomuschat, "The International."

80 Georg Nolte, "The International Law Commission Facing the Second Decade of the Twenty-First Century," in *From Bilateralism to Community Interest: Essays in Honor of Judge Bruno Simma*, eds. Ulrich Fastenrath *et al.* (Oxford: OUP, 2011), 781, 785. Nolte believes the ILC 'is as important as it was in the 1960s…[and that it is crucial] that a body exists which can credibly represent all when it comes to the articulation and the development of the common rules [of international law] and their sources' (792).

81 Sean D. Murphy, "Deconstructing Fragmentation: Koskenniemi's 2006 ILC Project," *Temple Int'l & Comp. L.J.* 27 (2013): 293, 306 (commenting that 'other forms for 'packaging' the ILC's work may be necessary for the ILC to remain relevant').

PART 2

Evolution in the Institutional Law of International Organizations: Selected Issues

CHAPTER 11

The Proliferation of Institutional Acts of International Organizations

A Proposal for Their Classification

Roberto Virzo

1 Introductory Considerations

One of the effects of the increase in number and types of international organizations (IOs) – an increase due, as is known, to the need felt by States and, more recently, other subjects of international law to cooperate within an institutional framework in pursuing specific objectives – is the multiplication in the number and type of institutional unilateral acts formulated by said organizations. After all, it is in order to try to fulfil the purposes for which they are created that IOs primarily[1] need to adopt unilateral acts.

Given the subject of this volume, it has seemed appropriate to propose a classification of different categories of unilateral acts. While this survey cannot possibly claim to be exhaustive (especially in the limited space of this chapter), the proposed classification aims to highlight some key features of the law of IOs, as well as a number of trends in its development.

Before proceeding any further, I must clarify that I am here concerned only with the 'institutional' unilateral acts of IOs,[2] that is, acts whose source is to

1 It is hardly necessary to recall that – where necessary and always with the aim of aiding the performance of the functions for which they have been created – IOs can conclude bilateral treaties or be contracting parties to multilateral international agreements.

2 For a general discussion of such acts see, among others, Michel Virally, "La valeur juridique des raccomandations des organisations internationals," *AFDI* 2 (1956): 66 *et seq*.; Riccardo Monaco, "L'autonomia normativa degli enti internazionali," in *Studi in onore di Tomaso Perassi* (Milano: Giuffré, 1957), 135 *et seq*.; Antonio Malintoppi, *Le raccomandazioni internazionali* (Milano: Giuffré, 1958); Marcel Merle, "Le pouvoir réglementaire des institutions internationals," *AFDI* 4 (1958): 341 *et seq*.; Clarence Wilfred Jenks, *The Proper Law of International Organizations* (London: Stevens, 1962); Arnold J.P. Tammes, "Decisions of International Organs as Source of International Law," *RdC* 94 (1958): 265 *et seq*.; Ingrid Detter, *Law-making by International Organizations* (Stockholm: Norstedt, 1965); Charles H. Alexandrowicz, *The Law-Making Functions of the Specialised Agencies of the United Nations* (Sidney: Angus & Robertson, 1973); Rosalyn Higgins, "The Role of Resolutions of International Organizations in

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be found (albeit sometimes implicitly)[3] in the constituent instruments of the organizations themselves. Indeed, despite the fact that, like other subjects of international law, IOs can formulate unilateral acts governed by general international law (e.g., the recognition of a new State) or treaty law (e.g., the denunciation of a treaty), such unilateral declarations still produce 'effects that, in international law, are proper to and typical of these acts'.[4]

More specifically, I will focus on the institutional acts of IOs that are capable of expressing an autonomous will, independent of that of their Members. As noted by authoritative commentators,[5] if the organs of an institutionalized

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the Process of Creating Norms in the International System," in *International Law and the International System*, ed. William E. Buttler (Dordrecht: Martinus Nijhoff, 1987), 21 *et seq.*; Christian Dominicé, "Valeur et autorité des actes des organisations internationales," in *Manuel sur les organisation internationales. A Handbook on International Organizations*, ed. René-Jean Dupuy (Dordrecht: Martinus Nijhoff, 1988) 441 *et seq.*; Constantin P. Economidès, "Les actes institutionnells et les sources du droit international," *AFDI* 34 (1988): 131; Chittharanjan F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn. Cambridge: CUP, 2005), 160–216; José E. Alvarez, *International Organizations as Law-Makers* (Oxford: OUP, 2005), 109–268; Jacques Dehaussy and Hervé Ascensio, "Actes unilatéraux et action normative des organisations internationales," *JurisClasseur Droit International* 14 (2005); Geneviève Bastid-Burdeau, "Quelques remarques sur la notion de droit dérivé en droit international," in *Droit du pouvoir, pouvoir du droit. Mélanges offerts à Jean Salmon* (Bruxelles: Bruylant, 2007), 161 *et seq.*; Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (5th edn. Leiden: Martinus Nijhoff, 2011), 755–792; Markus Benzing, "International Organizations or Institutions, Secondary Law," *MPEPIL* (2007); Geir Ulfstein, "Les activités normatives de l'Organisation Internationale," in *Droit des organisations internationales*, eds. Evelyne Lagrange and Jean-Marc Sorel (Paris: LGDJ, 2013), 737 *et seq.*; Jan Wouters and Philip De Man, "International Organizations as Law-makers," in *Research Handbook on the Law of International Organizations*, eds. Jan Klabbers and Åsa Wallendahl (Cheltenham: Edward Elgar, 2013), 190 *et seq.*; Claudio Zanghì, *Diritto delle organizzazioni internazionali* (3rd edn. Torino: Giappicchelli, 2013), 256–275.

3 The reference here is to the well-known doctrine of implied powers of IOs. See ICJ, Advisory Opinion of 8 Jul. 1996, *Legality of the Use by a State of Nuclear Weapons in armed Conflicts*, *ICJ Reports 1996*, 79, Section 25: 'The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as "implied powers"'.

4 Giuseppe Biscottini, *Il diritto delle organizzazioni internazionali. Parte prima. La teoria dell'Organizzazione* (2nd edn. Padova: CEDAM, 1981), 157.

5 Francesco Capotorti, *Corso di diritto internazionale* (Milano: Giuffré, 1995), 33–34.

association of States can make decisions only by unanimity or *consensus*, that association does not possess international legal personality and the acts adopted by its organs must be attributed to the 'pooled wills of the Member States'.[6] However, I will of course take into account institutional acts that require unanimity or *consensus* but are formulated by an IO which can adopt other types of acts by majority vote. In such cases, it is undeniable that the organization is capable of expressing its own will and, therefore, that acts requiring unanimity are also imputable to it.

2 Irrelevance of the Acts' Denominations with Respect to their Exact Legal Classification

Institutional acts by IOs can be fully or partially binding or not binding at all. When they are binding, they constitute sources of law – or, more specifically, sources provided for in international agreements. Indeed, the founding treaty of an IO, or the protocols or subsidiary agreements to it, directly or indirectly[7] contain a rule on normative capacity whereby one or more bodies of the organization are vested with the competence to adopt binding acts. This rule may be general or specific, depending on whether it describes the characteristics, scope and effects of the binding act(s) in question, as well as the procedure to be followed in order to issue such acts.

The institutional acts of each IO, whether binding or non-binding, must all necessarily conform to the constitutive treaties of the organization, to general international law,[8] and, of course, to *jus cogens* norms. In addition, with some

6 Of course, one cannot deny the relevance in international law of acts adopted in the framework of institutionalized associations of States or of summits, including the so-called 'actes concertés non conventionnels'. See Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public* (8th edn. Paris: LGDJ, 2009), 422–431; Jean Combacau and Serge Sur, *Droit international public* (9th edn. Paris: Montchrestien, 2010) 86–92; Roberto Virzo, "Vertici internazionali," *Enciclopedia del diritto*, *Annali* V (2012), 1436–1438 and, in this volume, Angela Di Stasi, "About Soft International Organizations: An Open Question."

7 In some instances, an act of an organ of an IO is adopted on the basis of another institutional act of the organization. For example, Art. 290(1) TFEU provides that an act adopted by the European Parliament and the Council or by either of them through the ordinary or special legislative procedure set out in the TFEU itself, 'may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act'.

8 But the constitutive treaty may derogate to general international law. For instance, Art. 20(2) TFEU, as well as the other provisions on the free movement of persons contained in that

differences among the various organizations, institutional acts may be subordinate to other sources of law, such as, in particular, any general principles of the internal law of the IO to which such acts are imputable,[9] or any international agreements concluded by the organization itself.[10]

In practice, there are many types of acts that an IO may adopt by virtue of its internal system of rules.

Sometimes they are expressly foreseen in the constitutive act of the IO, which also specifies their characteristics and legal scope: in this case they can be defined as 'typical acts'. Other times, a constitutional provision confines itself to conferring on the organs of an IO the competence to adopt acts without providing any denomination or, most importantly, the exact legal categorization of such acts. Still other times, the competence of the organs of an IO to issue certain non-binding acts can be only implicitly derived from its charter. In the last two cases, they can be defined as 'atypical acts'.

When classifying acts by IOs, however, it is impossible to regard their denomination as a reliable criterion. The first reason for this is that an act cannot be categorized solely on the basis of its *nomen iuris*. Indeed, the ECJ has

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Treaty, constitutes an exception to the discretion enjoyed by States under general international law, that is, the discretion not to admit a foreigner into their territories.

9 One may refer here to the general principles of regional integration law, which have been asserted by various courts created within regional economic integration organizations. In addition to the better-known general principles of EU law, one may think, with regard to the Central American Integration System (SICA), of the principle of the supremacy of Central American community law (see, for example, Central American Court of Justice, Judgment of 5 Mar. 1998, *Dr. Coto Ugarte*). Another relevant example is the East African Community's principle of variable geometry (see the Advisory Opinion of the EAC Court of Justice in Case No. 1/2008, 24 Apr. 2009, Section 34).

10 Since an act may happen to be wholly or partly contrary to the founding treaty of the IO adopting it or to other hierarchically superior sources, specific mechanisms or procedures – internal or external to the organization, but in either case enforceable by virtue of one of its constituent instruments – are often foreseen which make it possible to assess the entire or partial invalidity of the act and determine the most appropriate remedial measures. In this regard, see Hélène Raspail, "Contrôle de validité des actes juridiques des organisations internationales," in *Droit des organisations*, 937 *et seq*. For a recent example of an international organization's decision challenged before an external body, see: Findings and Recommendations of 5 Jul. 2013 of the Review Panel established under Art. 17 and Annex II of the Convention on the Conservation and Management of High Seas Fisheries Resources in the South Pacific Ocean with Regard to the *Objection by the Russian Federation to a Decision of the Commission of the South Pacific Regional Fisheries Management Organisation* (available online at www.pca-cpa.org).

explained that, for the purposes of such classification, it 'cannot restrict itself to considering the official title of the measure, but must first take into account its object and content'.[11]

Another reason is that the constitutive treaty of an IO may sometimes use the same word to designate both a specific category of acts and, in a more general sense, the resolutions of one of the organs of the organization. It is in this second, broader sense that the term 'decisions' contained in Art. 18(2) of the UN Charter, for example, must be interpreted: as specified in the Article itself and emphasized by the ICJ, the 'decisions' of the UN General Assembly (GA) on important questions include certain categories of 'recommendations'.[12]

Finally, it is hardly necessary to point out that the term used by an IO to designate certain acts may not have the same meaning when it is used by another organization. Thus, for instance, while recommendations are non-binding acts in most IOs, in others they impose procedural obligations on the Members to which they are addressed.[13] To give an example, one may cite the recommendations referred to in Art. 19(6)(b) of the ILO Constitution and those mentioned in Art. IV(4) of the UNESCO Constitution, which must be submitted by States to the competent bodies of the organization of which they are Members, so that said bodies may decide whether to transform them into laws or other sources of internal law. A different case is that of CARICOM recommendations: Member States failing to implement a recommendation must, within six months of its adoption by the regional organization, provide at least a written explanation of such failure.[14]

In light of the above, it seems appropriate to classify the various types of institutional acts of IOs under consideration based on other criteria rather than the titles used to designate them. More specifically, I will proceed by identifying general categories according to the persons or entities to which an act is addressed; for each general category of acts, I will examine the effects they produce.

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11 ECJ, Judgment of 14 Dec. 1962, joined cases 19–22/62, *Fédération nationale de la boucherie en gros and others v. Council*, *ECJ Reports*, 498.

12 ICJ, Advisory Opinion of 20 Jul. 1962, *Certain Expenses of the United Nations*, *ICJ Reports* 1962, 163.

13 In addition, one should recall that the founding Treaty of the now dissolved ECSC, in its Art. 14, provided that recommendations be binding with regard to their intended outcomes, even though Member States were free to determine the most appropriate steps to be taken to achieve those outcomes.

14 Cf. Art. 27(6) of the CARICOM Treaty.

3 Internal Acts of International Organizations

The first category comprises acts which concern the functioning of an IO and its organs.[15] A good example are acts aimed at regulating the internal procedures of individual organs or procedures relating to interorganic relationships, as well as acts establishing new subsidiary organs.

Acts falling within this category address and pertain to an IO in its entirety or to its organs, producing specific effects within the organization's internal system of rules. This does not necessarily mean that such acts have no relevance for subjects to whom they are not directly addressed. Consider, for instance, the rules of procedure of individual bodies of an IO, which have a certain impact on all the Members of the organization, since they are bound to comply with the adopted rules even when they have voted against them or did not take part in the vote.

The impact on the Members of an organization is even clearer in the case of acts whereby an organ allocates seats in other organs with restricted membership, or appoints Members of bodies consisting of individuals. Indeed the impact is particularly strong when the allocation or appointment is based on non-objective criteria[16] – such as elections[17] – in which factors of a mainly political nature often come into play.

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15 On the internal acts of international organizations, see, among others, Matteo Decleva, *Il diritto interno delle unioni internazionali* (Padova: CEDAM, 1962); Giorgio Balladore Pallieri, "Le droit interne des organisation internationals," *RdC* 127 (1969): 145 *et seq.*; Dehaussy and Ascensio, "Actes unilatéraux," Sections 9–33; Schermers and Blokker, *International*, 755–766; Zanghì, *Diritto*, 250–263.

16 Of course, if the charter or other binding act of an IO set out objective criteria to determine the composition or partial composition of a specific organ, any other organ that did not comply with said criteria would incur in a violation of the charter or binding act. In this regard, the ICJ Advisory Opinion of 8 Jun. 1960 on the *Constitution of the Maritime Safety Comity of the Inter-Governmental Maritime Consultative Organization* [IMCO], *ICJ Reports* 1960, 150 *et seq*, is especially relevant. Art. 28(a) of the Convention of the IMCO (a UN specialized agency, later renamed IMO) provided that the fourteen Members of the Maritime Safety Committee be elected by the IMCO Assembly from the Members of the Organization. More precisely, the Assembly had to allocate eight seats to the 'eight largest ship-owning nations'. In its Advisory Opinion, the Court found that the Committe elected on 15 Jan. 1959 was not constituted in accordance with Art. 28(a) of the Convention, since the Assembly's subjective interpretation of the expression 'largest ship-owning nations' had led to the arbitrary exclusion of Liberia and Panama.

17 By way of example, one may cite the limited-membership organs elected by the UN GA (Art. 18.2 of the UN Charter) and the Executive Council of the OPCW, which is elected by the Conference of the States Parties (Arts. VIII.B.12 and VIII.C.23 of the Chemical Weapons Convention).

Overall, the range of IO acts falling within this category is very wide. Among the legally binding ones, consider first of all, the rules of procedure of individual organs, which have been briefly mentioned above. These are acts that set out organizational and procedural rules governing the exercise of the specific functions vested in each organ.

The founding treaties of many IOs provide for a 'reservation of competence' to certain organs with regard to the adoption of their own internal rules. Relevant examples are: Arts. 21, 30, 72 and 90 of the UN Charter (which confer such a competence, respectively, on the General Assembly, Security Council, Economic and Social Council, and Trusteeship Council); Art. 30 of the ICJ Statute; Art. 13 of the Treaty Establishing the Central American Parliament; and Arts. V(3) and XIV(3) of the NAFO Convention (which confer the aforesaid competence on the General Council and the Commission, respectively).

The purpose of constitutional provisions that reserve to individual organs the competence to adopt their own rules is to guarantee the functional and organizational autonomy of said organs. Of course, the power of an organ to establish its own rules of procedure – a power that may be exercised whenever necessary to adapt internal regulations to actual practice or fill any gaps in said regulations – is subject to compliance with both constitutional provisions and the principles underlying the legal system of an IO, including the principle of equal sovereignty of its Members. For example, any *ad hoc* amendments to the rules of procedure of an organ that 'suppress or seriously limit the right of the Member of the organ to express its opinion or present its proposals' would be unlawful.[18] Precisely to avoid arbitrary derogations from their application, some regulations establish strict procedural conditions for their suspension. As examples, one may cite Art. 45 of the Rules of Procedure of the Governing Council of IFAD and Art. 29 of the Rules of Procedure of the Executive Board of the same organization.

Regulatory autonomy is more limited, however, in the case of organs that draw up their own regulations but are required to submit them to the approval of another organ. Examples include: the CJEU and European Court of Auditors, which establish their respective rules of procedure but must submit them to the approval of the Council[19]; the EU General Court, whose rules of procedure are established in agreement with the CJEU and also require the approval of the Council[20]; and the FAO Council, which draws up its own rules of procedure but must submit them to the approval of the FAO Conference.[21]

18 See Benedetto Conforti and Carlo Focarelli, *The Law and Practice of the United Nations* (4th edn. Leiden: Martinus Nijhoff, 2010), 421.

19 See, respectively, Arts. 253(6) and 287(4) TFEU.

20 See Art. 254(5) TFEU.

21 See Art. V(4) of the FAO Constitution.

Finally, no independent regulatory power is conferred on those organs, which are usually subsidiary,[22] whose internal regulations are prepared and adopted by another organ. Art. 25 of the Treaty establishing the UEMOA for instance, contains a provision establishing that the rules of procedure of a subsidiary organ (i.e., the rules of procedure of the Committee of Experts) must be issued by the Council of Ministers. At the same time, the rules of procedure of the Committee of Experts of UEMOA must be considered as an 'interorganic' binding act – that is, an act directed by one organ to another organ.

Many interorganic acts are binding on those to whom they are addressed. The approvals and authorizations mentioned above in connection with the adoption of internal regulations are a case in point.[23]

With regard to approvals, it may be inferred from the examples so far discussed that the act of an organ becomes effective only after it has been approved by another organ. It also follows from the same examples that an act subject to external approval, such as the aforesaid rules of procedure of the FAO Council, is a 'composite act', in that two or more organs are involved in the approval process (in this case, the FAO Council and Conference). Another example is the approval of the European Parliament, which is required with regard to certain acts by the Council, such as decisions concluding international agreements that fall within one of the categories listed in Art. 218(6)(a) TFEU.

On the other hand, prior authorization by an organ may determine the legitimacy of another organ in adopting a certain act. An extremely well known example is that of Art. 96(2) of the UN Charter, under which UN specialized agencies and UN organs other than the Security Council (SC) and GA may request advisory opinions of the ICJ subject to authorization by the UN GA.

Other interorganic acts – even when non-binding – are a necessary condition for the adoption of the act of another organ. This is the case with certain

22 A notable exception is the Executive Council of the WMO, which is one of the constitutional organs of the Organization: Art. 8(1)(d) of the Convention confers on the World Meteorological Congress the power to determine and issue the rules of procedure of the Executive Council.

23 As another example of binding interorganic acts, one may cite the recommendations, decisions and guidelines which may be addressed by the OPCW Conference of the States Parties to the Executive Council of the Organization. Indeed, Art. VIII(B)(30) of the Chemical Weapons Convention provides that, in carrying out its functions, the Executive Council must act in conformity with the recommendations, decisions and guidelines of the Conference. Delegations (such as those mentioned in footnote 7) are also a relevant example, since the functions delegated to an organ must be exercised in accordance with the act that delegates them.

types of recommendations and proposals. Within the UN, for instance, decisions on the admission of a new Member,[24] or on the suspension or expulsion of a Member State, may be adopted by the GA only on the basis of a recommendation from the SC.[25] In other words, the GA may make decisions on those matters only upon the recommendation of the SC. However, despite the recommendation of the SC, the GA may still decide against the admission, suspension, or expulsion of a State.[26] As a further example, one may recall that within the EU the adoption of most acts is conditional on a proposal being made by the Commission.[27]

Many interorganic acts have no binding force. Especially common among the many types of acts that fall into this sub-category are, on the one hand, advisory opinions issued by the organ of an IO to provide guidance or warnings to another organ with regard to specific matters or procedures[28] and, on the other hand, recommendations made by the organ of an IO to urge another organ to take a certain course of action.[29]

Finally, it seems appropriate to touch upon the acts defined by some commentators[30] as 'organizational resolutions'. This category includes the aforementioned resolutions on the appointment or election of the Members of an organ, as well as many of the acts that provide for the creation of various types

24 See Art. 4(2) of the UN Charter.

25 See, respectively, Arts. 5 and 6 of the UN Charter.

26 On this subject, see Pietro Pustorino "Lo *status* di membro delle organizzazioni internazionali," in *Diritto delle organizzazioni internazionali*, ed. Angela Del Vecchio (Napoli: ESI, 2012), 141 *et seq*.

27 See Art. 17(2) TEU. Cf. also Art. 293 TFEU.

28 With regard to interorganic advisory opinions issued by bodies which have no judicial function, one example are those addressed by the Secretary-General of the OAS to the organs of the Organization under Art. 112(b) of the OAS Charter.

Within the EU, the Council is bound to consult the European Parliament before adopting certain acts (see for instance Arts. 21.3 and 22.2 TFEU). Accordingly, any act issued by the Council without consulting the European Parliament is illegitimate on the grounds of an 'infringement of an essential procedural requirement' within the meaning of Art. 263(2) TFEU. However, the Council is free to disregard the opinion rendered by the European Parliament within the context of this obligatory consultation procedure.

29 Interorganic recommendations include those that the Consultative Assembly of the CoE may present to the Committee of Ministers of the Organization (see Art. 22 of the Statute of the CoE), as well as the recommendations submitted to the Council of the ISA by its Legal and Technical Commission (Art. 165 of the United Nations Convention on the Law of the Sea-UNCLOS).

30 See Conforti and Focarelli, *The Law*, 410 *et seq*.

of organs and, at the same time, do not contain any recommendations or decisions addressed to the Members of the organization.[31]

With regard to the latter, in many cases the constituent instrument of an IO provides that, to aid the organization in performing certain of its functions, specific subsidiary organs may be created through acts of institutional organs.[32]

However, the exercise of this power may be subject to some limitations, such as, in particular, compliance with the principle of conferred powers, which, in the case under consideration, means that a subsidiary organ may not be vested with functions falling outside the competence of the organization to which it belongs. In addition, as noted in the literature, the principal organ of an IO cannot, through the creation of a subsidiary organ, extend its competence at the expense of another principal organ.[33]

In some instances it is expressly provided that the functions conferred on a subsidiary organ must be proper to the organ that establishes it.[34] Under such a provision, any resolution whereby the main organ of an IO confers powers it does not possess on one of its subsidiary organs is unlawful. On the other hand, if the main organ has very wide powers, the provision ought to be interpreted in the sense of preventing only the creation of subsidiary organs whereby the principal organ would acquire – albeit indirectly – powers that it is expressly prohibited from having under the founding treaty of the organization.[35]

Moreover, the ICJ has pointed out that if the subsidiary organ is an administrative tribunal, the organ that has created it cannot refuse to give effect to a decision

31 It should be noted, however, that recommendations or decisions addressed to the Members of an IO are sometimes contained in the resolutions whereby the IO establishes organs tasked with providing assistance in solving situations that, even though involving one or more specific Members, are of relevance for the organization as a whole. In this case, one cannot merely speak of 'organizational resolutions'. One may consider resolutions of the UN SC establishing peace-keeping operations involving the deployment of military and/or civilian personnel within a given State.

32 Art. XII(2)(j) of the Articles of Agreement of the IMF provides that the Board of Governors and the Executive Board 'may appoint such committees as they deem *advisable*' (emphasis added).

33 As noted by Dehaussy and Ascensio, "Actes unilatéraux," Section 27, the logic behind this limitation is that 'l'équilibre organique voulu par les rédacteurs de l'acte constitutif doit être respecté, ainsi que la hiérarchie normative entre l'acte costitutif et les actes des organes institués'.

34 See, for example, Arts. 22 and 29 of the UN Charter.

35 Consider, for instance, the powers of the UN GA with respect to actions for the maintenance of international peace under Art. 11(2) of the UN Charter.

rendered by that tribunal.[36] As a consequence, the resolution establishing such a tribunal has an especially binding force on the organ to which it is attributable.

4 Acts Addressed to Members of the Organization

a *Non-binding Acts*

Generally speaking, the most important acts of an IO are those addressed to its Members, since it is mainly through them that an organization pursues the purposes for which it was created.

This category includes many types of acts, each having different effects. It seems appropriate to examine non-binding acts first.

There is a general tendency to prevent an IO, where possible and in a manner compatible with the objectives to be achieved by the organization, from having a 'penetrating influence'[37] on the conduct of its Members and, rather, to ensure that it acts in accordance with a principle of proportionality. The need to adopt binding acts only where necessary may even be expressly stated in the constituent instruments of the organization. A typical example is Art. 5(4) TEU (it should be noted, moreover, that the EU usually adopts many obligatory acts): 'Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. This means that, within the EU, 'regulatory measures must be proportional to their aims and have as little binding force as possible'. Accordingly, 'a directive must be issued rather than a regulation if the latter is not indispensable'; and 'a recommendation must be preferred to a binding act if the latter is not necessary'.[38]

Therefore, non-binding acts may be more appropriate to achieve certain purposes and objectives of an IO. In any case, acts of this kind are very common, whatever the reasons for their adoption (which frequently depends also on specific political or diplomatic interests of the organization's Members).

Given the large number of existing IOs, it is impossible to examine all the types of non-binding acts foreseen in their constituent instruments or established in practice. Nevertheless, many of these acts can be classified into one of two categories: (a) exhortatory acts; and (b) non-binding opinions and interpretative acts.

36 ICJ, Advisory Opinion of 13 Jul. 1954, *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, *ICJ Reports* 1954, 47 *et seq*.

37 Biscottini, *Il diritto*, 124.

38 Ugo Villani, *Istituzioni di Diritto dell'Unione europea* (3th edn. Bari: Cacucci, 2013), 82.

As briefly noted above,[39] recommendations are a typical example of exhortatory act. More specifically, the type of recommendations I am here concerned with, that is those addressed by an organization to its Members, urge said Members to take a particular course of action or conduct, which, if appropriate, may also consist in abstention.[40] A recommendation can have an individual scope, if it expressly covers one or more specific Members of the organization,[41] or if its text implies that it is actually addressed to a limited number of Members. On the other hand, a recommendation has a general scope if it covers all the Members of the organization, or if its text clarifies that it is not addressed to one or more specific Members only.

Sometimes an exhortatory act of general scope 'is suitable for a comprehensive treatment of a subject or for expressing principles the purpose of which is to influence the progressive development of international law', as noted by the Institut de droit international in Conclusion 12 of its Res. of 17 Sept. 1987,[42] which specifically referred to the declarations of the GA of the United Nations (also denominated as 'declarations of principles' when the Assembly intends to solemnly emphasize their importance). Such declarations, now numerous and covering many areas of international law, are not binding *per se* and, with the exception of sections reproducing rules and principles of general international law, they contain mere recommendations addressed to the Members of the UN.[43]

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39 See *supra*, Section 3, with regard to interorganic recommendations.

40 As examples one may cite two UN GA Resolutions: 63/301 of 30 Jun. 2009, *Situation in Honduras: democracy breakdown*, Section 3, in which the GA called upon States not to recognize any government other than the democratically elected government led by Zelaya Rosales; and 68/262 of 27 Mar. 2014, *Territorial Integrity of Ukraine*, in which it urged States and IOs 'not to recognize any alteration of the status of the Autonomous Republic of Crimea and the City of Sevastopol'.

41 Under Art. IV(d) of its Constitution, for instance, the International Rice Commission of FAO may recommend to its Members such measures as it deems necessary for the solution of problems relating to rice production, conservation, and marketing.

42 Resolution on the *Elaboration of General Multilateral Conventions and Non-contractual Instruments Having a Normative Function or Objective* (Cairo session).

43 As examples, consider the following UN GA Resolutions: 217 A (III), Universal Declaration of Human Rights; 1962 (XVIII) Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space; 2749 (XXV) Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction; 3314 (XXIX) Definition of Aggression; 55/2, United Nations Millenium Declaration; 61/295, United Nations Declaration on the Rights of Indigenous Peoples; 66/137, Declaration on Human Rights Education and Training.

Similar characteristics are found in many other acts by principal or subsidiary organs of the UN or other IOs, acts that are not in themselves obligatory or exhortatory (since they may actually reproduce norms of general international law, as is the case with certain declarations of principles), and which are variously called codes,[44] codes of conduct[45] or guidelines,[46] to name only a few. These, too, are acts whose purpose is to address – in a comprehensive manner – matters which fall within the competence of the organ that adopts the acts and, where necessary, to promote the progressive development of international law on those same matters.

Some of these acts, as well as important declarations of principles – though they belong to what is termed *soft law* – may indeed contribute in a significant way to the consolidation and 'crystallization' of rules of customary law or to the progressive development of international law.

In this regard, it must be noted, first of all, that the content of certain declarations of principles, such as the Universal Declaration of Human Rights, is now considered as largely corresponding to general international law. In addition, as stated by the ICJ, GA resolutions, 'even if they are not binding', can, in certain circumstances, 'provide evidence important for establishing the existence of a rule or the emergence of *opinio juris*',[47] which, according to a widely accepted view in the literature, is a necessary element for the formation of international custom.

Secondly, certain international treaties contain or refer to rules corresponding to those found in previous codes or other non-binding acts. For example, the Code of Conduct for Responsible Fisheries[48] is expressly referred to in international agreements such as, for instance, the Convention on the Conservation and Management of Fisheries Resources in the South East Atlantic,[49] which established the South East Atlantic Fisheries Organisation.

With regard to the second category of non-binding acts, the most common type of instrument is the opinion. This is an act whereby an organ expresses a

44 See, for instance, the Global Code of Ethics for Tourism, adopted by the General Assembly of the UNWTO on 1 Oct. 1999 (Res. 416/XII).

45 See, for instance, the Code of Conduct for Responsible Fisheries, adopted by the FAO Conference on 31 Oct. 1995 (Res. 4/95).

46 See, for instance, the World Bank Guidelines on the Treatment of Foreign Investments of 21 Sept. 1992 and the OECD Guidelines for Multinational Enterprises of 21 May 2011.

47 ICJ, Advisory Opinion of 8 Jul. 1996, *Legality of the Threat or Use of Nuclear Weapons*, *ICJ Reports* 2006, 254–255, Section 70.

48 See *supra*, footnote 45.

49 The Convention, signed in Windhoek on 20 Apr. 2001, entered into force on 13 Apr. 2003.

position on or approach to a certain matter, for example by proposing a certain interpretation of a question of law or suggesting solutions to problems of a technical character.[50]

Acts falling within the same category as opinions include the interpretative communications of the European Commission, which are intended to provide guidance on the application of sector-specific EU legislation, as well as the explanatory reports on the conventions of the CoE prepared by the Committee of Ministers.

A further confirmation that the denomination of an act is in itself irrelevant, and that a particular act cannot always be easily included in a single category, may be found in the fact that the 'recommendations' issued by the Ministerial Conference of the WTO pursuant to Art. XIII(4) of the WTO Charter should perhaps also be considered as interpretative instruments. Indeed, that provision states that the Ministerial Conference 'may review the operation of this Article in particular cases at the request of any Member and make appropriate recommendations': it seems, therefore, that the Ministerial Conference should first and foremost propose an interpretation of Art. XIII and the procedure it governs.[51]

As repeatedly noted above, the acts briefly discussed in this paragraph are all non-binding. As a consequence, if the Member of an IO decides not to give effect to an exhortatory act, or to disregard an opinion, it commits no internationally wrongful act. This is expressly stated in the constituent instruments of a number of IOs (e.g., with regard to the recommendations addressed by ICAO Council to a specific Member, the last sentence of Art. 69 of the Convention establishing the ICAO, which provides that 'No Contracting State shall be guilty of an infraction if it fails to carry out these recommendations').

However, some commentators[52] contend that, even though the Members of an IO have no obligation to give effect to a non-binding act, they must at least take it into account and examine it in good faith – not least in light of the principle of sincere cooperation existing between an IO and its Members. In this regard, one may cite the ICJ's Judgment of 31 Mar. 2014 in *Whaling in the Antarctic*, where, with regard to the recommendations of the International Whaling Commission

50 Cf., for example, the advice provided by the Scientific Council of NAFO at the request of coastal States, in accordance with the combined provisions of Arts. VI(1)(c) and VII of the NAFO Convention.

51 I am referring to the procedure relating to the 'non-application of multilateral trade agreements between Particular Members' (the so-called 'opt-out' clause).

52 Notably Hersch Lauterpacht, *Separate Opinion*, *Admissibility of Hearings of Petitioners by the Committee of South West Africa*, in *ICJ Reports* 1955, 45.

(IWC), the Court ruled that States parties to the International Convention for the Regulation of Whaling 'have a duty to co-operate with the IWC and thus should give due regard to [its] recommendations'.[53]

Moreover, a non-binding act – provided that it is lawful – i.e. it is not contrary to hierarchically superior sources of law and has been adopted by a competent body – has a permissive effect.[54] In other words, a Member that gives effect to such an act, despite being under no obligation to do so, must be regarded as complying with the treaty establishing the organization to which the act is attributable. But such a Member will find itself in breach of obligations deriving from general international law or assumed under other international treaties (including agreements concluded with other Members that decide not to comply with the non-binding act) if the content of the relevant norms or principles of international law is contrary to that of the act in question. To put the issue differently, I do not share the view of those[55] who argue that, in this case, a lawful recommendation operates as a circumstance excluding the wrongfulness of an act of an IO (the so-called 'effect of legality').

Finally, an international treaty that does not establish an IO may contain a provision whereby the contracting parties agree to be bound by a non-obligatory act of an existing IO. In the Treaty of Peace with Italy of 10 Feb. 1947, for instance, the Contracting States undertook to accept the recommendation of the GA of the UN concerning the fate of the former Italian colonies, as well as to take appropriate measures to implement it.[56]

b *Authorizations*

A particular category of acts directed by IOs to their Members is that of authorizations. These are acts whereby the organ of an IO permits one or more Members to take: (a) measures otherwise prohibited under the founding treaties of the organization or under general international law, but whose adoption, in derogation from said prohibition, may be deemed necessary to achieve the

53 ICJ, Judgment of 31 Mar. 2014, *Whaling in the Antarctic* (*Australia v. Japan: New Zealand Intervening*), Section 31. For a commentary, see Chiara Ragni, "Interpretazione dei trattati e *standard of review* nella giurisprudenza della Corte internazionale di giustizia: riflessioni sull'affare della *Caccia alla balena nell'Artico*," *RDI* 97 (2014): 725 *et seq*.

54 See Dailler, Forteau and Pellet, *Droit International*, 418, and Dehaussy and Ascensio, "Actes Unilatéraux," Section 44.

55 See, among others, Benedetto Conforti up to the 10th edition of his Manual of International Law. See for example, *Diritto internazionale* (6th edn. Napoli: Editoriale Scientifica, 2002), 180–183.

56 Cf. Section 3 of Annex XI to the Treaty of Peace with Italy.

objectives pursued by the organization[57]; (b) measures that serve the constitutive purposes of the organization and are reserved to it under its constituent instruments but which the organization itself is prevented from directly adopting; (c) measures that are not contrary to, but only potentially compatible with, the rules of the organization, and which thus require, under those rules, prior evaluation and approval by one of its organs.

In practice, the authorization to adopt a certain measure is often contained in an act addressed to two different kinds of Members: the recipient(s) of the authorization and the others Members of the organization in question. Members of the first category are given the power to put the authorized measure in place; if they decide to exercise this power, they must implement the measure in accordance with the conditions laid down in the act that authorizes it. With regard to the other Members, the act may make recommendations or impose obligations.

As an example of act that authorizes a specific Member but at the same time make recommendations to other States one may cite the resolutions whereby the Marine Environment Protection Committee of the IMO authorizes one or more coastal States to establish a Particularly Sensitive Sea Area (PSSA).[58] A resolution designating a sea area as a PSSA confers on the coastal State(s) concerned the power to take measures aimed at protecting ecosystems or improving the safety of navigation, even when such measures limit freedom of navigation in sea areas – which the PSSA may reach – where that freedom is guaranteed by general international law.[59] At the same time, the resolution invites all IMO Members to recognize the ecological vulnerability of the PSSA and its natural resources, as well as to comply with the measures requested by the coastal State(s) concerned.[60]

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57 However, these should not be measures that the IO is itself prohibited to take. Under Art. 17(2) of the Draft Articles on the Responsibility of International Organizations of 5 Aug. 2011, 'An international organization incurs international responsibility if it circumvents one of its international obligations by authorizing Member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization'.

58 See, for instance, Res. MEPC. 204(62) of 15 Jul. 2011, which designates the Strait of Bonifacio as a particularly sensitive sea area.

59 It is thus an authorization of the category described at the beginning of this Section, (a).

60 On authorizations of this kind, see Markus J. Kachel, *Particularly Sensitive Sea Areas: The IMO's Role in Protecting Vulnerable Marine Areas* (Berlin: Springer, 2008) and Roberto Virzo, "Coastal State Competences Regarding Safety of Maritime Navigation," in *International Law of the Sea. Current Trends and Controversial Issues*, ed. Angela Del Vecchio (The Hague: Eleven, 2014), 226–230.

The second sub-category, that is authorizing acts which also contain decisions addressed to all the Members of an organization, includes the different types of resolutions whereby the UN SC authorizes the use of armed force.[61] For example, the SC has authorized the use of force by one[62] or more UN Members, thus making such use legitimate, both as a coercive measure aimed at restoring international peace and security[63] and as a measure to be employed in order to implement an embargo[64] or other sanctions,[65] or even to fight piracy in the

61 On this subject, see, among others, Dan Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of Its Chapter VII Powers* (Oxford: Clarendon, 1999); Niels M. Blokker, "Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of the Force by Coalitions of the Able and Willing," *EJIL* 11 (2000): 541 *et seq*.; Ugo Villani, "The Security Coucil's Authorization of Enforcement Action by Regional Organizations," *MPYUNL* 6 (2002): 535 *et seq*.; Robert Kolb, "Does Article 103 of the Charter of the United Nations Apply only to Decisions or also to Authorizations Adopted by the Security Council," *ZaöRV* 64 (2004): 21 *et seq*.; Nils Kriepe, *Les authorisations données par le Conseil de sécurité des Nations Unies à des mesures militaires* (Paris: LGDJ, 2005); Paolo Picone, "Le autorizzazioni all'uso della forza tra sistema delle Nazioni Unite e diritto internazionale generale," *RDI* 88 (2005): 5–75; Linos Alexander Sicilianos, "Entre multilateralism et unilatéralisme: l'autorisation par le Conseil de sécurité de recourir à la force," *RdC* 339 (2008): 154 *et seq*; Antonello Tancredi, "Di pirati e Stati 'falliti'. Il Consiglio di sicurezza autorizza il ricorso alla forza nelle acque territoriali della Somalia," *RDI* 91 (2008): 937 *et seq*.; Conforti and Focarelli, *The Law*, 271–287; Anne Lagerwall, "La résolution de l'Institut de droit international sur l'autorisation du recours à la force par les Nations Unies," *RBDI* 45 (2012): 263 *et seq*.; Massimo Starita, "L'intevento francese in Mali si basa su un'autorizzazione del Consiglio di sicurezza?" *RDI* 96 (2013): 561 *et seq*.

62 See, for instance, Section 18 of Res. 2100 of 25 Apr. 2013, on the situation in Mali, which 'authorizes French troops, within the limits of their capacities and areas of deployment, to use all necessary means…to intervene in support' of the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), established by the SC under Section 7 of the Resolution. A similar authorization, also addressed to the French troops, is contained in Section 50 of Res. 2127 of 5 Dec. 2013 on the Central African Republic. Both authorizations are of the category described at the beginning of this Section, (b).

63 See for instance Res. 678 of 29 Nov. 1990 on the invasion of Kuwait by Iraq. Here, however, the provision on the use of military force is actually implied by Section 2, which contains an express authorization to use all necessary means. Also in this case, the authorization falls within the category described at the beginning of this Section, (b).

64 With regard to the 1990/1991 Gulf crisis, see also Res. 665 of 25 Aug. 1990, in which the SC authorized measures to ensure compliance with the maritime embargo against Iraq. In this case, the authorization is of the category described at the beginning of this Section, (b).

65 See for instance Res. 2146 of 19 Mar. 2014 concerning Libya, whose Section 5 'Authorizes Member States to inspect on the High Seas Vessels designated by the Committee pursuant to paragraph 11, and authorizes Member States to use all measures commensurate to the

territorial waters of a State that is temporarily unable to prevent and suppress acts of private violence at sea.[66] In addition to containing the aforesaid authorizations, the resolutions of the SC are binding on all UN Members, including those that decide, legitimately, not to use armed force. Indeed, UN Member States are all bound to implement the sanctions imposed by the SC[67] or, as the case may be, to refrain from obstructing the use of armed force – as defined in the resolutions – by other Member States.[68]

The above categories must be distinguished from the case of authorizations contained in acts of individual scope, that is, acts expressly addressed to specific Members of an IO. As a first example of this type of acts, one may cite the decisions adopted by the Dispute Settlement Body (DSB) of the WTO pursuant to Art. 22(2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.[69] Under that article, the DSB, following the conclusion of dispute settlement procedures, may authorize any Party having invoked the dispute settlement procedures to suspend the application to the other Party of concessions or other obligations under the WTO Multilateral Trade Agreements, if the other Party is in breach of the obligations set out in said agreements.[70]

Other examples of authorizations expressly addressed to specific Members of an IO can be found within the EU.[71] This is the case, for instance, of the Commission's decisions concerning the compatibility with EU law of a Member State's notified plan to grant new State aid or alter existing State aid.[72] These decisions may even be implicit: the applicable regulation provides that '[w]here the

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specific circumstances, in full compliance with international humanitarian law and international human rights law, as may be applicable to carry out such inspections and directs the vessels to take appropriate actions to return the crude oil, with the consent of and in coordination with the Government of Libya, to Libya'. Such an authorization falls within the category described at the beginning of this Section, (b).

66 See for instance Res. 1816 of 2 Jun. 2008 on the situation in Somalia, which falls within the category described at the beginning of this Section, (a).

67 See for example Section 10 of Res. 2146.

68 See for example Section 3 of Res. 678.

69 On authorizations of this kind see Beatrice I. Bonafé, "L'autorizzazione ad adottare contromisure nel quadro dell'Organizzazione Mondiale del Commercio: il requisito delle 'circostanze sufficientemente gravi'," in *Problemi e tendenze del diritto internazionale dell'economia:* liber amicorum *in onore di Paolo Picone*, eds. Aldo Ligustro and Giorgio Sacerdoti (Napoli: Editoriale Scientifica, 2011), 497 *et seq*.

70 Such an authorization falls within the category described at the beginning of this Section, (c).

71 On authorizations of this kind see, among others, Paul Craig, *EU Administrative Law* (2nd edn. Oxford: OUP, 2012), 349 *et seq*.

72 Cf. Art. 108 TFEU and Council Regulation 659/1999 of 22 Mar. 1999.

Commission has not taken a decision… within the period laid down in paragraph 5 [of Art. 4 of Regulation 655/99], the aid shall be deemed to have been authorised by the Commission'. Therefore, notification of State aid measures, which is required in order to obtain approval of said measures, entails a standstill obligation: notified aid 'shall not be put into effect before the Commission has taken, or is deemed to have taken, a decision authorising such aid'.

c *Acts Binding on Members That Accept Them*

Another category of acts that are *sui generis* – and difficult to classify on the basis of their effects – is that of acts which are binding on the Members that accept them.[73]

Acceptance may be express or tacit. It is tacit if the constitution of an IO provides that a certain act will take effect for the Members that, within a stated time period, do not expressly reject it (the so-called 'opt-out' procedure).

This second sub-category includes, among other acts,[74] the International Health Regulations of the WHO,[75] which are adopted by a majority vote of the World Health Assembly. Art. 22 of the WHO Constitution provides that, after due notice of their adoption has been given to all WHO Members, the regulations will automatically come into force for the Members that have not rejected them within a period specified in the notice.[76]

The International Health Regulations cannot be classified as acts devoid of binding force. Indeed, they create obligations for the Members that accept them, whereas other acts such as recommendations are merely exhortatory even for the subjects of international law that implement them and which thus remain at any time free to disregard them.[77]

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73 This is the case, for instance, with the decisions of the League of Arab States (Art. 7 of the 1945 Pact).

74 By way of example, see the 'proposals' of the NAFO Commission (Art. XII of the NAFO Convention) and the 'binding' recommendations of the General Fisheries Commission for the Mediterranean (Art. V of the Agreement for the Establishment of the General Fisheries Commission for the Mediterranean).

75 The importance of the International Health Regulations lies in the fact that through them the World Health Assembly establishes the necessary measures to prevent and combat diseases, as well as to avert their spread and contagion. See Pia Acconci, *Tutela della salute e diritto internazionale* (Padova: CEDAM, 2011), 151–170.

76 See for instance Art. 59(1) of the International Health Regulations of 2005.

77 In this regard, it is significant that, in Res. 2177 of 18 Sept. 2014 on the outbreak of the Ebola virus in West Africa, the UN SC referred to the 2005 International Health Regulations as follows: 'the International Health Regulations (2005) . . . are contributing to global public

Some authors[78] have maintained that the International Health Regulations are to be considered nothing but international treaties or, more specifically,[79] agreements in simplified form. This view seems to be favoured by a number of factors, namely: the opt-out procedure, whereby – as noted above – the regulations cannot take effect for the Members that have expressly refused to be bound by them; the possibility for Members to express reservations[80]; the practice of registering the regulations with the UN Secretariat, in accordance with Art. 102 of the UN Charter; and the fact that any subject of international law that is not a Member of WHO may become a party to the regulations.

Quite clearly, however, the International Health Regulations are acts attributable to the World Health Assembly, which, as mentioned above, adopts them by a simple majority vote. Moreover, once they have entered into force, the Assembly may decide – by simple majority vote and regardless of the individual wills of the Members that have accepted them – to replace them with new regulations.[81] From this point of view, the International Health Regulations seem to have something in common with acts such as the resolutions of the UN SC, which the ICJ distinguished from international treaties because, among other things, they 'are issued by a single, collective body and are drafted through a very different process than the one used for the conclusion of a treaty', so that 'the final text of such resolutions represents the view of the Security Council as a body'.[82]

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health security by providing a framework for the coordination of the management of events that may constitute a public health emergency of international concern, and aim to improve the capacity of all countries to detect, assess, notify and respond to public health threats and underscoring the importance of WHO Member States abiding by these commitments'. See also Section 2 of the decision of the Executive Council of the African Union of 8 Sept. 2014 on the Ebola Virus Disease (EVD) Outbreak: Ext/EX.CL/Dec. 1 (XVI).

78 Schermers and Blokker, *International*, 795.

79 Roberto Ago, "Die internationalen Organisationen und ihre Funktionen in Inneren Tätigkeitsgebiet der Staaten," in *Rechtsfragen der Internationalem Organisation. Festschrift für Hans Wehberg zu seinem 70. Geburtstag* (Frankfurt am Mein: Klosterman, 1958), 28.

80 On these reservations see Michèle Poulain, "Le règlement sanitaire international de l'OMS," in *Droit des organisations*, 762–763.

81 Of course, WHO Members are free to reject the new regulations.

82 ICJ, Advisory Opinion of 22 Jul. 2010, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *ICJ Reports* 2010, 442, Section 94. See Pietro Franzina, "L'interpretazione delle risoluzioni del Consiglio di sicurezza alla luce del Parere sul Kosovo," in *Il parere della Corte internazionale di giustizia sulla Dichiarazione di indipendenza del Kosovo*, eds. Lorenzo Gradoni and Enrico Milano (Padova: CEDAM, 2011), 59 *et seq*.; Paolo Pachetti, "L'interprétation des résolutions du Conseil de Sécurité à

In addition, it should be noted that, in practice, the opt-out procedure has only rarely been used by WHO Member States. The 2005 Regulations, for example, are legally binding on all Members of the organization.

In light of the above, one must agree with the view[83] that, given the *sui generis* nature of these regulations, it is difficult to decide with certainty whether they can be classified as unilateral acts of an IO or, on the other hand, as international treaties.

Of particular interest are also the 'recommendations' issued by the Commission on the Limits of the Continental Shelf pursuant to Art. 76(8) UNCLOS. Any coastal State wishing to extend the limits of its continental shelf beyond 200 nautical miles from its baselines must submit a proposal to the Commission. After examining the proposal, the Commission 'shall make recommendations' to the coastal State, which is free to decide whether to accept or reject them. In the latter case the State will not be allowed to delineate the outer limits of its continental shelf, whereas in the first case the limits of the shelf it has established on the basis of the Commission's recommendations 'shall be final and binding'. Therefore, these recommendations produce two different types of binding effects, depending on whether they are accepted or not by a coastal State. If not accepted, they prevent the State in question from extending its continental shelf up to an additional 150 nautical miles in the international seabed area beyond the 200-mile limit[84] (negative obligation). On the other hand, as provided for by Art. 76(8) UNCLOS, if, even though under no obligation to do so, a costal State decides to comply with the recommendations, that State will be bound by the unilateral act it itself adopts on the basis of said recommendations. At the same time, that act will produce legal effects both on the other States Parties to the Convention and the competent international organization (i.e., the International Seabed Authority), which will have to recognize the established outer limits as 'final and binding'.

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la lumière de l'Avis de la Cour internationale de justice sur le Kosovo," in *Questions de droit international autour de l'Avis Consultatif de la Cour international de justice sur le Kosovo*, eds. Maurizio Arcari and Louis Balmond (Milano: Giuffré, 2011), 155 *et seq*.

83 See Laurence Boisson de Chazournes, *Le pouvoir réglementaire de l'Organisation Mondiale de la Santé à l'aune de la santé mondiale: réflexions sur la portée et la nature du règlement sanitaire international de 2005*, in *Droit du pouvoir*, 1178.

84 As is well known, the continental shelf of a coastal State extends up to a distance of 200 nautical miles from its baselines (UNCLOS, Art. 76.1), while 'International Seabed Area' (or 'Area') means 'the seabed and ocean floor and subsoil thereof, beyond the limit of national jurisdiction' (UNCLOS, Art. 1.1.1). The Convention provides that the outer limits of the continental shelf of a coastal State 'shall not exceed 350 nautical miles' from its baselines (UNCLOS, Art. 76.5).

d *Binding Acts*

Many types of institutional acts of IOs are binding on the Members of the organizations. These include, for example, the following sub-categories: acts of individual or general scope, acts establishing mere procedural obligations; acts imposing obligations to achieve a particular result, and acts that are binding in their entirety. Due to this great variety, in this case too I will be able to discuss only a few examples.

Starting with the acts whereby IOs impose fewer restrictions on the international legal rights of their Members one may cite again the recommendations of ILO and those of UNESCO.[85] In both cases these acts – in spite of their name – create an obligation for Member States to obtain the approval of competent national authorities. The latter, however, are free to decide whether to approve them and, therefore, whether to adopt national laws or other regulatory measures to implement them.

Another example is that of the decisions of the WMO. Art. 9 of the WMO Convention provides that all Members 'shall do their utmost to implement the decisions of Congress'. However, if 'any Member finds it impracticable to give effect' to a decision, 'such Member shall inform the Secretary-General of the Organization whether its inability to give effect to it is provisional or final' and, in either case, 'state its reasons therefor'. In other words, the decisions of the WMO create at least one procedural obligation, namely the obligation for States that choose not to be bound by them to notify the Organization. A similar provision is foreseen with regard to the international standards and procedures of the ICAO.[86]

The most important sub-category of acts that are partially binding includes the directives referred to in Art. 288(3) TFEU, as well as those of regional integration organizations inspired by the EU model.[87] These may have general scope, if addressed to all Member States of an organization, or individual scope, if directed to one or more specified Member States.

The directives in question impose, first and foremost, an obligation to achieve a particular result, which usually consists in the approximation

85 See *supra*, Section 2.

86 See Art. 38 of the Convention on International Civil Aviation. For a discussion of such acts see Thomas Buergenthal, *Law Making in the International Civil Aviation Organization* (Syracuse: Syracuse University Press, 1969), 98–101, and Alvarez, *International*, 223–224.

87 See, for example, the directives that may be adopted within the CAEMC (Art. 40 of the founding Treaty) and the UEMOA (Art. 8 of the Additional Protocol No. 1 relating to the Organs of Control of UEMOA).

and harmonization of national regulations in a given field, and the Member States concerned are required to fulfil this obligation by the end of a certain time period. The directives themselves establish the period within which the result prescribed must be achieved, whereas competence as to form and methods is left to national authorities. This is because, once it has entered into force, a directive is not directly applicable, but, rather, requires national acts to be adopted by Member States to transpose it into their respective national legal systems.[88] Therefore, the aforesaid competence as to form and methods[89] is exercised by national authorities especially with regard to the necessary transposition measures implementing the content of a directive. This content, especially where the purpose of the directive is the approximation of laws, should not be exhaustive or too detailed.[90]

In addition, the directives in question create a secondary, negative obligation, namely the so-called 'standstill obligation'. According to the ECJ, 'it is during the transposition period that the Member States must take the measures necessary to ensure that the result prescribed by the directive is achieved at the end of that period', and that 'they must refrain from taking any measures liable seriously to compromise the result prescribed'.[91]

Moreover, EU Member States covered by a directive have the additional obligation to notify the Commission of all their transposition measures.[92]

88 It must be noted that, according to the CJEU's jurisprudence, a non-transposed or poorly transposed directive may produce vertical direct effects in favour of private individuals after the lapse of the implementation deadline, if the directive or any of its provisions appear to be unconditional and sufficiently precise.

89 See Art. 288(3) TFEU.

90 Within the European Union, however, it is not uncommon to find directives that are actually so detailed as to infringe the competence of Member States as to the form and means to be adopted to attain the required result.

91 ECJ Judgment of 18 Dec. 1997, case C-129/96, *Inter-Environnement Wallonie ASBL*, *ECJ Reports*, I-7411, Sections 44 and 45.

92 In the event of a breach of this obligation, the Commission may, during an infringement procedure, apply Art. 260(3) TFEU, which provides that 'when the Commission brings a case before the Court pursuant to Art. 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances'.

On the other hand, the regulations of the EU[93] and of other regional integration organizations[94] are binding in their entirety. Moreover, they are of general scope and directly applicable in the Member States' legal systems.

A number of conclusions can be drawn from the three aspects mentioned above. In the first place, regulations, unlike directives, do not merely impose an obligation to achieve a certain result, but, rather, are fully binding. In the second place, they have direct effect in the domestic legal systems of the Member States, which are thus left – in principle[95] – with no discretion as to methods of implementation. Indeed, the Members of regional integration organizations are not allowed to adopt any domestic implementation measures, since these would, on the one hand, jeopardize the simultaneous and uniform application of the regulations in question in all the Member States[96] and, on the other, conceal their special nature as acts of regional integration organizations. In the third place, a regulation is applicable 'not to a limited number of persons, defined or identifiable, but to categories of persons viewed abstractly and in their entirety',[97] be they organs or institutions of the relevant regional integration organization, Member States, public sector bodies, other legal entities, or natural persons.

Because of these general characteristics, the regulations in question are fundamental acts of regional integration organizations that have, or wish to achieve, supranational *status*. Indeed, as noted in the literature, regulations are the result of the European Union's capacity to produce legislation that, by overriding State sovereignty (which usually comes between international law and national legal systems), has direct effect on EU Members – thus creating legal rights and duties for them – and binds the administrative or judicial authorities called upon to apply such legislation.[98]

Other acts of IOs tend to lay down uniform rules on certain matters, which all the Member States of the relevant organization are required to apply. The Uniform Acts on commercial law adopted by the Council of Ministers of the OHADA

93 See Art. 288(2) TFEU.

94 See, for instance, the regulations that may be adopted within the CAEMC (Art. 40 of the founding Treaty) and UEMOA (Art. 8 of the Additional Protocol no. 1 relating to the Organs of Control of UEMOA).

95 Indeed, the regulations themselves may not be fully *self-executing*, in which case the Member States have an obligation to adopt the necessary internal implementation measures.

96 ECJ Judgment of 7 Feb. 1973, case 39/72, *Commission* v. *Italy*, *ECJ Reports*, 101.

97 ECJ Judgment of 14 Dec. 1962, joined cases 16–17/62, *Confédération nationale des fruits et des légumes* v. *Council*, *ECJ Reports*, 472.

98 Villani, *Istituzioni*, 275 *et seq*.

are a case in point. Even though decisions related to their adoption are taken by unanimous vote of the Members present and voting, these acts are binding on all OHADA Member States, including those that have not participated in the vote. A Uniform Act confers rights and obligations also on individuals and legal entities operating in a Member State, regardless of whether or not they are nationals of that State. Also, under Art. 10 of the OHADA Treaty, 'uniform acts are directly applicable and overriding in the Contracting States notwithstanding any conflict they may give rise to in respect of previous or subsequent enactment of municipal laws'.

As another example of acts that are binding not only on the Members of an IO, but also on natural and legal persons, consider the regulations adopted by the Assembly of the ISA pursuant to Art. 160(2)(f) UNCLOS.[99] These acts lay down very detailed rules and procedures, which, moreover, are the only applicable ones in the fields of activity of the ISA.

Again with regard to obligatory acts aimed at regulating certain areas of international law in general and abstract terms, it should be noted that many legal writers have raised doubts on the legitimacy of the so-called 'legislative' resolutions of the UN SC. In this regard, three resolutions have attracted particular attention, namely Res. 1373 of 28 Sept. 2001 – through which the SC imposed on all UN Members[100] certain obligations enshrined in the International Convention for the Suppression of the Financing of Terrorism of 9 Dec. 1999, which was not yet in force at the time[101]; Res. 1540 of 18 Apr. 2004 on the measures to be taken by UN Member States to prevent the acquisition of weapons of mass destruction by non-state actors; and Res. 2178 of 24 Sept. 2014 on threats to international peace and security caused by terroristic acts. Authors who have been critical of these resolutions have maintained, in particular, that the SC cannot adopt general resolutions for the maintenance or restoration of international peace and security, but only decisions concerning specific situations constituting threats to peace, breaches of peace, or acts of aggression.

Fewer doubts of legitimacy are raised by the binding resolutions that, although greatly limiting the sovereignty of certain Member States, have been adopted by the UN SC with regard to specific and localized situations.

99 On the binding character of some of these regulations, see Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS), Advisory Opinion of 1 Feb. 2011, Responsibilities and Obligation of States Sponsoring Persons and Entities with Respect to Activities in the Area, *ITLOS Reports* 2011, 20, Sections 59–60.

100 As of 15 Oct. 2014, the Convention has been ratified by 186 States.

101 It entered into force on 10 Apr. 2002. See *UNTS*, 2178, 197.

The reference here is not only to decisions taken under Art. 41 of the UN Charter, which, for instance, may require UN Members to apply economic sanctions (e.g., an embargo against a particular State,[102] or the freezing of financial assets and resources owned or controlled by individuals or entities[103]) and the related resolutions establishing subsidiaries committees tasked with monitoring the implementation of said sanctions.[104] As a matter of fact, other acts based on the UN Charter are even more intrusive, namely the resolutions adopted by the SC under Art. 42 or Ch. 7 as a whole. Among other things, these resolutions have established: (a) peace-keeping operations involving the deployment of military and/or civilian personnel within a given State[105]; (b) international criminal tribunals[106] that, by virtue of decisions adopted by the SC itself, have replaced national courts in the prosecution of international crimes[107]; or even (c) operations involving the administration of territories and the creation of international authorities[108] that have assumed full governing powers over said territories, replacing national governments and directly regulating relationships between individuals.[109]

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102 One may think here of Res. 661 of 6 Aug. 1990 on Iraq/Kuwait, which, among other things, established an embargo against Iraq, Sections 3–4.

103 See, for instance, Res. 1970 of 26 Feb. 2011 on Peace and Security in Africa and Res. 1973 on Libya, which, among other things, decided that all Member States should freeze all funds owned or controlled by Members of the Gaddafi family within their territories (Sections 17–21 and 19–21, respectively).

104 See, for instance, the Sanctions Committee established under Section 19 of Res. 2140 of 26 Feb. 2014 on the situation in the Middle East, and Yemen in particular.

105 See also Section 7 of Res. 2100 on Mali (cited above, footnote 62), which established the MINUSMA.

106 See for instance Resolutions 827 (25 May 1993) and 955 (8 Nov. 1994), which established, respectively, the International Criminal Tribunal for the former Yugoslavia and that for Rwanda.

107 At the same time, these Resolutions significantly contribute to the progressive development of international law. It has been noted, for instance, that including violations of the Common Art. 3 of the four Geneva Conventions in a single, independent category of international crimes was a great innovation. See Karl Zemanek, "The Legal Foundation of the International System. General Course on Public International Law," *RdC* 266 (1997): 233. Of course, in general, the establishment of the two tribunals represented a fundamental stage in the development of international criminal law.

108 See for instance Res. 1244 of 10 Jun. 1999, which established the UNMIK (United Nations Interim Administration Mission in Kosovo).

109 In this regard, see Conforti and Focarelli, *The Law*, 287–302, and Pierre François Laval, "Les activités opérationnelles du Conseil à l'Administration international du territoire," in *Droit*

As a final, less common example, one must mention the decisions by which other IOs[110] impose sanctions on their Members,[111] or require them to apply sanctions to third States[112] or natural or legal persons.[113]

5 Binding Acts Addressed to Non-members

As noted in Section 4.d, it is not uncommon for binding acts of IOs to confer rights and obligations not only on Member States, but also on natural and legal persons. In addition, at times, specific binding acts are addressed solely to the latter.

Within this category, a relatively frequent type is the one referred to Art. 288(4) TFEU, namely that of a 'decision which specifies those to whom it is addressed'. Such a decision has an individual scope, is binding in its entirety[114] and, especially if aimed at regulating specific matters of significant importance, is often directed by the EU to natural or legal persons.

Inspired by the EU model, other regional integration organizations may adopt decisions of this type.[115]

As an additional example of decisions addressed to individuals, one may cite the instructions issued by the Agency of the European Organisation for the Safety of Air Navigation (also known as EUROCONTROL) for the guidance of aircraft commanders, who are bound to comply with those instructions.[116]

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des organisations, 765 *et seq*. On the nature of the acts adopted by UNMIK, see also Section 5.

110 For an overview of relevant theory and practice, and for further bibliography, see Guillaume Le Floch, "L'adoption de sanctions," in *Droit des organisations*, 833–858.

111 As an example, one may cite the sanctions imposed on Myanmar for non-compliance with the 1930 ILO Forced Labour Convention (No. 29) by the 87th (1999), 88th (2000) and 102nd (2013) sessions of the ILO International Labour Conference. See www.ilo.org.

112 For an example within the EU, see Council Regulation 401/2013 of 2 May 2013 concerning restrictive measures in respect of Myanmar/Burma.

113 For an example within the EU, see Council Decision 2014/119/CFSP of 5 Mar. 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine.

114 Indeed, Art. 288(4) TFEU distinguishes such an act from other types of decisions, providing that 'a decision which specifies those to whom it is addressed shall be binding only on them'.

115 See, for example, the decisons that may be adopted within the CAEMC (Art. 40 of the founding Treaty) and UEMOA (Art. 8 of the Additional Protocol no. 1 relating to the Organs of Control of UEMOA).

116 See Art. 18 of the EUROCONTROL Convention. In this regard, see also Schermers and Blokker, *International*, 831.

The competence of some IOs to adopt acts that are binding on specific individuals or legal entities should not be regarded as a further manifestation of the legal personality of IOs, and least of all is it to be viewed as the result of a supposed international legal personality of individuals, which has been asserted by some authors. In fact, that competence derives solely from the constitution of an IO and, therefore, is wholly dependent on the wills of its Members, which may or may not have agreed to such a significant transfer of sovereignty to the organization in order to achieve the cooperation or integration goals they pursue.

Said transfer of sovereignty is especially apparent in the case of certain acts adopted by UN territorial administrations, which are authorized by the UN SC to exercise a 'legislative function'.[117] As noted in the literature, unlike most UN peace-keeping operations, territorial administrations do not merely provide legislative advice or assistance to the national authorities of the State in which they are established; rather, they are entrusted with the direct administration of a territorial community.[118] Despite being attributable to subsidiary organs of an IO, some acts of UN territorial administrations, such as certain regulations enacted by the United Nations Transitional Administration in East Timor (UNTAET) or the United Nations Interim Administration Mission in Kosovo (UNMIK),[119] are adopted primarily to fulfil legislative[120] and, in some cases, administrative functions,[121] neither of which may be exercised by State authorities during the period of transitional administration. Therefore, acts of this type, which regulate certain 'aspects of the life of the territorial community'

117 For a discussion of such acts see Ian Johnstone, "Law-Making through the Operational Activities of International Organizations," *Geo Wash. Int'l L. Rev.* 40 (2009): 87 *et seq*.

118 Ivan Ingravallo, *Il Consiglio di sicurezza e l'amministrazione diretta di territori* (Napoli: Edtoriale Scientifica, 2008), 128.

119 For a discussion of the direct administration of territories, and for further bibliography, see Ingravallo, *Il Consiglio*, *passim*. See also footnote 109.

120 One may think, for example, of UNTAET/REG/1991/1 of 27 Nov. 1999, whose Section 1(1) provides that 'All legislative and executive authority with respect to East Timor, including the administration of the judiciary, is vested in UNTAET and exercised by the Transnational Administrator'. In addition, Section 4 establishes that 'In the performance of the duties entrusted to the transnational administration under United Nations Security Council resolution 1272 (1999), the Transnational Administration will, as necessary, issue legislative acts in the form of regulations'. Cf. www.journal.gov.tl.

121 Again with regard to UNTAET, Section 6(1) of the aforementioned UNTAET/REG/1991/1 provides that 'The Transitional Administrator shall have the power to issue administrative directives in relation to the implementation of regulations promulgated'. Cf. www.journal.gov.tl.

placed under UN administration,[122] are addressed first and foremost to the population which inhabits the territory administered by the United Nations, including the citizens of the State which previously exercised sovereignty over such territory.[123]

The obligation for subjects of international law that are not Members of an IO to implement the acts adopted by the latter must be based on international treaties. Art. 3 of the Statute of the Organization of Arab Petroleum Exporting Countries (OAPEC), for instance, stipulates that decisions of the Organization of Petroleum Exporting Countries (OPEC) are binding on all Member States even if they are not Members of OPEC.

Similarly, the obligation of a UN specialized agency to give effect to SC resolutions for the maintenance of international peace and security[124] follows from an obligation to cooperate under a relationship agreement between the specialized agency and the UN.

6 Conclusion

The analysis, undertaken above, of the scope and legal effects of the various types of institutional acts adopted by IOs, together with the resulting classification of such acts into different categories, provides the opportunity to reflect on the capacity of the law of IOs to 'adjust' to the unceasing 'development'[125] of the international community (a development which, in some fields, does not always imply progress).

After all, exercise of the so-called 'law-making power' on the part of IOs is connected with the degree of institutional cooperation established by their Members in order to pursue specific objectives,[126] and such degree varies not

122 See Ingravallo, *Il Consiglio*, 128.

123 See for instance UNTAET/REG/2000/27 "On the temporary prohibition of transactions in land in East Timor by Indonesian citizens not habitually resident in East Timor and by Indonesian Corporations." Cf. www.journal.gov.tl.

124 Consider, for example, Res. 662 of 18 Aug. 1990, in which the SC, among other things, called upon specialized agencies not to recognize the annexation of Kuwait by Iraq.

125 The reference is here to the suggestive title of a collection of essays in Italian, *Studi in onore di Francesco Capotorti: Divenire sociale e adeguamento del diritto* (Milan: Giuffré, 1999).

126 The role of IO Members in the formation of international law has been widely debated in the literature. For an overview of the different positions in the debate, see, among others, Alvarez, *International*, 585 *et seq*.; Andrew Guzman, "International Organizations and the Frankstein Problem," *EJIL* 24 (2013): 999 *et seq*.; Paolo Fois, "Le organizzazioni

only over time, but also according to the purpose for which international cooperation has been put in place. All this must necessarily be taken into account when one tries to explain the multiplication in the number and type of institutional acts formulated by IOs.[127]

Consider, for instance, the different types of resolutions adopted by the UN SC: on the one hand, they are the result of alternating stages of progress and regression in the diplomatic relations among the five permanent Members of the Council,[128] but on the other, they demonstrate the constant efforts made by the Council to refashion the instruments available to it in order to face (at least some of) the many and diverse challenges to international peace and security.[129]

Moreover, the UN SC often authorizes or encourages the participation of other IOs, which may contribute – as they have indeed done in many cases – to closer cooperation in the restoration or maintenance of peace and security. As a consequence, other types of institutional acts of IOs must be taken into account alongside the resolutions of the SC. In addition to the acts of certain regional organizations,[130] one may think, for example, of the distinctive decisions of the Executive Council of the Organization for the Prohibition of Chemical Weapons (OPCW). Decision EC-M-33/DEC. 1 of 27 Sept. 2013 is especially relevant to the topic under discussion. The decision, which concerns the destruction of Syrian chemical weapons, is divided into two parts: the first sets out the sanctions imposed on Syria, and thus may be regarded as typical of a decision of individual scope; whereas the second provides for investigation activities to be conducted by the Executive Council in the sanctioned State, and thus may be said to correspond to the operational decisions of other IOs.

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internazionali e la formazione del diritto internazionale contemporaneo. Il ruolo degli Stati membri," *RDI* 97 (2014): 641 *et seq*.

127 Concerning EU, see also Jürgen Bast "New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law," *CMLR* 29 (2012): 885 *et seq*.

128 As is well known, the state of relations among the five permanent Members has an impact on the decision-making capacity of the UN SC with regard to non-procedural matters, due to the unusual voting procedure provided for in Art. 27(3) of the UN Charter; a procedure which has been partially derogated by a new UN internal rule of customary law, concerning voluntary abstention.

129 See, among others, Ian Johnstone, "Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit," *AJIL* 102 (2008): 275 *et seq*.

130 See, in this volume, Giovanni Cellamare "The Activities for the Maintenance of International Peace in the Relationships between the United Nations and Regional Organizations."

Quite clearly, decision EC-M-33/DEC1 is a significant example of how IOs strive to fulfil the functions conferred upon them by their Members.

Of course, an IO can more easily adopt binding acts if its Members regard institutional cooperation as inevitable (either due to the firm belief that cooperation facilitates the achievement of the objectives pursued,[131] or, by contrast, due to the limitations of unilateralism).[132]

However, even where the Members of an IO have decided that certain functions of the organization are not to be fulfilled through the adoption of binding acts, it often happens that individual organs of the organization promote or aim to enhance international cooperation through soft-law instruments. In other words, when the organ of an IO – in response to calls from groups of Members and/or, in some cases, civil society – adopts soft-law acts (of which there are many types), it does so in order to recommend that the international community achieve a certain purpose and, where necessary, to provide guidance to one or more subjects[133] of the international community on the methods and means to achieve that purpose.

131 This belief is probably more widespread among the Members of technical international organizations and regional integration organizations.

132 In this case, cooperation is 'accepted' almost passively and the 'inconvenience' of having to be bound by majority decisions is considered hard to bear, to the point that there is a risk that the *raison d'être* of institutional cooperation will not be perceived by Members as much as the fact that they may not exercise their sovereignty due to such cooperation.

133 Including the IO of which the organ in question is a part. Cf. *supra*, Section 3.

CHAPTER 12

The League of Nations and the Emergence of Privileges and Immunities of International Organizations

Vittorio Mainetti

1 Introduction

The inter-war period was a key moment for the emergence and evolution of the concept of immunity applied to international organizations (IOs). This chapter focuses on the case of the League of Nations (LoN), a pioneer organization with regard to the issue at hand as well as in many other areas of the law of IOs. The necessary starting point of this analysis is Art. 7 of the Covenant of the LoN, which contains one of the first provisions ever adopted referring to the immunity and inviolability of an international organization.

The first authors who commented on Art. 7 did not fully comprehend its novelty. They regarded its provisions on immunity as if they were fairly obvious, by virtue of assimilation between IOs and international conferences.[1] As a result, they treated them as rather dull provisions relying on the international customary law applicable to international persons, which, it seemed, should also naturally apply to persons acting on behalf of IOs. This simplistic vision was disavowed in practice for two main reasons. On the one hand, what may be taken for granted in theory often raises in practice a number of concrete problems. On the other hand, the vague and extremely general provisions contained in Art. 7 of the Covenant raised a series of difficulties of interpretation.

One aspect of fundamental importance for its influence on the subsequent practice was the actual interpretation and implementation of such provisions given in Switzerland (the main country called to host the activities of League) by means of two exchanges of notes between the Secretary-General (SG) of the

1 See in particular Olof Hoijer, *Le Pacte de la Société des Nations. Commentaire théorique et pratique* (Paris: Éditions Spes, 1926), 121–128; Jean Ray, *Commentaire du Pacte de la Société des Nations, selon la politique et la jurisprudence des organes de la Société* (Paris: Sirey, 1930), 291 *et seq.*; Walther Schücking and Hans Wehberg, *Die Satzung des Völkerbundes* (3rd edn. Berlin: Velag Franz Vahlen, 1931), 383 *et seq.*; Jesús M. Yepes and Fernando P. da Silva, *Commentaire théorique et pratique du Pacte de la Société des Nations et des Statuts de l'Union panaméricaine* (Paris: Pedone, 1934), I: 195–202.

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LoN and the Federal Council. The exchanges became the *modus vivendi* of the organization with regard to the matter under discussion, and could be considered the main source of inspiration for the solutions adopted by other States.

2 Art. 7 of the Covenant

Art. 7 of the Covenant of the LoN deals with various issues: the seat of the Organization, equal opportunities between men and women, diplomatic privileges and immunities conferred on League officials and representatives of Member States, as well as the inviolability of the buildings and other property occupied by the League. The different provisions it contains cover a great variety of subjects. While it is true that Art. 7 was drawn up very quickly by the Commission of the LoN at the time of the Paris Peace Conference, and its different paragraphs were brought together only at a later stage,[2] its purpose was to address fundamental technical aspects of the functioning of an international organization. As a consequence, its structure was perfectly coherent. The first thing to be established was the seat of the organization, together with any procedures for its possible transfer. Secondly, it was essential to determine the *status* of the organization and provide for the protection of those who would ensure its operations, and to do so in such a way as to guarantee career advancement opportunities for women. Finally, it was necessary to protect the organization itself by providing for the inviolability of its premises.

Of particular interest to our discussion are Sections 4–5 of Art. 7: '4. Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities; 5. The buildings and other property occupied by the League or its officials or by Representatives attending its meetings shall be inviolable'.[3]

With these two provisions, the drafters of the Covenant intended to grant special protection to the League and provide the necessary guarantees to the persons entrusted with the operations of the Organization and its decision-making bodies. Despite being formulated in very general terms, such provisions were among the firsts of their kind in the statutes of IOs. They were

2 David H. Miller, *The Drafting of the Covenant* (New York: Putnam's Sons, 1928), I: 316, 348 and 441; II: 108–109, 233, 260 and 506.

3 The French version reads as follows: '4. Les Représentants des Membres de la Société et ses agents jouissent dans l'exercice de leurs fonctions des privilèges et immunités diplomatiques; 5. Les bâtiments et terrains occupés par la Société, par ses services ou ses réunions, sont inviolables'.

adopted with no particular controversy.[4] Their rationale seems quite obvious: in order to play a major role in international relations, the League needed to be able to exercise its functions independently and without any interference from national governments.

3 Privileges and Immunities of League Officials and Representatives of Member States

It is now widely accepted that the real basis for granting privileges and immunities lies in the interest of the function of their beneficiaries. This principle is clearly reaffirmed in Art. 105 of the UN Charter, which provides that representatives of Member States and officials of the Organization 'shall…enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization'. The privileges and immunities set out in the Covenant served the purpose of enabling the League to exercise the function of establishing peace and cooperation among Nations

4 The two provisions originate from two draft articles submitted by the British delegation to the Peace Conference on 20 Jan. 1919. See Miller, *The Drafting*, II, 108–109. Draft Art. 12, on which Art. 7(4) is based, reads as follows: 'Representatives of the States Members of the League attending meetings of the League, the representatives of the High Contracting Parties at the capital of the League, the Chancellor and the members of the permanent secretariat of the League, and the members of any judicial or administrative organ or of any commission of enquiry working under the sanction of the League shall enjoy diplomatic privileges and immunities while they are engaged in the business of the League'. The final wording corresponds to a slightly amended version submitted on 3 Feb. 1919, during the first meeting of the Committee entrusted with drawing up the Covenant. See Miller, *The Drafting*, II, 233. The Committee adopted it two days later, without any amendments. Miller, *The Drafting*, II, 260. Even though the original text listed in greater detail the beneficiaries of privileges and immunities, the change does not seem due to any disagreement on the scope *ratione personae* of the Article. Martin Hill, *Immunities and Privileges of International Officials. The Experience of the League of Nations* (Washington: Carnegie Endowment, 1947), 4. On the other hand, the draft article on which Art. 7(5) is based provided as follows: 'All buildings occupied by the League, or by an organisation placed under the control of the League or by any of its officials, or by representatives of the High Contracting Parties at the capital of the League shall enjoy the benefits of extraterritoriality'. During the negotiations held on 22 Mar. 1919, the French delegation requested that the term 'extraterritoriality' be deleted, maintaining that it might give rise to difficulties in interpretation, since it was used at a time when a right to asylum in embassies existed. This delegation suggested using the term 'inviolability'. The Drafting Committee was entrusted with choosing the most appropriate expression and the current wording of Art. 7(5) was then adopted without further negotiations. See Miller, *The Drafting*, II, 506.

provided for by the Covenant itself, enjoying full and effective independence from national governments. As emphasized by the Institut de Droit International (IDI) in a report adopted during its 1924 session in Vienna, the prerogatives granted to representatives of Member States and League officials have the same purpose, namely the need to enable the beneficiaries of said prerogatives to carry out their missions in the best possible conditions, and to do so in the general interest.[5]

By using the terms 'privileges and immunities', Art. 7(4) of the Covenant took up an expression that had been previously used only for diplomatic agents, also called 'public ministers', appointed to represent their government in foreign countries. To a certain extent, it is possible to assimilate the *status* of representatives of Member States to that of public ministers. At the time, there were only a few IOs that expressly recognized this kind of protection also to their staff.[6]

Since the second half of the XIX century, public ministers were no longer the only persons entitled to diplomatic privileges and immunities. These prerogatives had been extended to the members of what went under the name of 'organes d'intérêt international' (bodies of international interest),[7] but they were granted diplomatic prerogatives only insofar as their *status* was assimilated to that of diplomatic agents. These officials were considered as agents of the States that had appointed them, rather than as representatives of a community of States.[8] As a consequence, the practice that preceded the adoption

5 "Rapport sur l'art. 7, al. 4: Privilèges et immunités diplomatiques des agents de la S.D.N. de MM. Adatchi et Ch. de Visscher," *AIDI* 31 (1924): 1–19, at 3. See also Joseph Blociszewski, "L'Institut de droit international, session de Vienne," *RGDIP* 32 (1925): 261–267.

6 For an historical survey, see: Josef L. Kunz, "Privileges and Immunities of International Organizations," *AJIL* 41 (1947): 828–862. See also Jacques Secrétan, *Les immunités diplomatiques des représentants des États membres et des agents de la Société des Nations League of Nations* (Lausanne: Payot, 1928), 9–10; Francis Rey, *Les immunités des fonctionnaires internationaux* (Paris: Sirey, 1928); Francis Rey, "Les immunités des fonctionnaires internationaux," *Rev. d. int. pr. et d. pen int*. 13 (1928): 432 *et seq*.; Roger Secrétan, "Les privilèges et immunités diplomatiques des agents de la Société des Nations," *Rev. d. int. pr. et d. pen int*. 13 (1928): 1; Paul-Henri Frei, *De la situation juridique des représentants des membres de la Société des Nations League of Nations et de ses agents* (*Commentaire de l'Art. 7, alinéa 4 du Pacte Covenant de la Société des Nations League of Nations*) (Paris: Sirey, 1929), 10; Jean Secrétan, "The Independence Granted to Agents of the International Community in Their Relations with Public Authorities," *BYIL* 16 (1935): 56–78.

7 See, for instance, Art. 240 of the Treaty of Versailles, on the members of the Reparation Commission, or Art. 3 of the Agreement of 28 Jun. 1919, on the members of the Inter-Allied Rhineland High Commission. See also Secrétan, *Les immunités*, 10.

8 Frei, *De la situation*, 19.

of the Covenant provides little help in defining the expression 'officials of the League'.

The very general designation of the beneficiaries of privileges and immunities gave rise to some difficulties in the implementation of Art. 7. Moreover, the Covenant did not specify the prerogatives to which League officials and representatives of Member States were entitled. The scope of privileges and immunities had thus to be established by analogy with the practice concerning diplomatic agents and public ministers.[9] Given the general terms used in Art. 7(4), as regards both the scope and the beneficiaries of such privileges and immunities, specific agreements with the States concerned were required in order to clarify the applicable legal regime. For this reason, an agreement with the Swiss authorities became necessary.

The Swiss Federal Council had drawn the attention of the Federal Assembly to this question in Aug. 1919, in the process of ratifying the Covenant.[10] Negotiations with the SG of the LoN, Sir Eric Drummond, led to an agreement on several important issues, which were brought together in the exchange of letters of 19 Jul. 1921 between the Swiss Government and the SG of the LoN on the provisional regime applicable to the LoN and its staff in Geneva.[11] This first *Modus Vivendi* was supplemented by a further arrangement on 20 Sept. 1926.[12] Rather than an official interpretation of Art. 7, these agreements were considered as a solution to the practical problems posed by the general terms used in the Covenant.[13] In many respects, they restricted the scope of Art. 7 and the privileges and immunities it conferred.

a *Beneficiaries of Privileges and Immunities*

Art. 7(4) provides for two different categories of beneficiaries of privileges and immunities: on the one hand, the 'representatives of the Members of the League' and, on the other hand, the 'officials of the League'.

9 Yepes and da Silva, *Commentaire*, 196; Hill, *Immunities*, 12, Ray, *Commentaire*, 291.

10 Message du Conseil Fédéral à l'Assemblée Fédérale concernant la question de l'accession de la Suisse à la Société des Nations, 4 août 1919. For the text, see Hill, *Immunities*, 14.

11 Échange de lettres entre le Conseil fédéral et le Secrétaire Général de la Société des Nations: Aperçu du régime provisoire applicable à la Société des Nations et à son personnel résidant à Genève du 19 Juillet 1921 (hereinafter: 1921 *Modus Vivendi*).

12 Communication du Conseil fédéral suisse concernant le régime des immunités diplomatiques du personnel de la Société des Nations League of Nations et du Bureau international du Travail du 20 Septembre 1926 (hereinafter: 1926 *Modus Vivendi*), *LNOJ* (1926): 1407.

13 Hill, *Immunities*, 19.

a.1. The privileges and immunities referred to in Art. 7(4) applied, first of all, to 'representatives of the Members of the League'. This expression gave rise to a number of problems from the very beginning, since it does not provide specific details or criteria (such as the rank or role of the person concerned), which may qualify a person as a representative of a Member State.[14]

Early on, the literature agreed that this general expression referred only to persons appointed by Member States to the LoN, rather than to all representatives of Member States.[15] Once this limited scope was accepted, however, it was deemed useful to specify who could be qualified as a 'representative' within the League. Therefore, the question was raised whether the provision contained in the Covenant applied only to the representatives of Member States or also to delegates to international conferences held under the auspices of the League, as well as to representatives of the members of the International Labour Office (ILO) and other technical bodies.

That delegates to the Assembly or the Council and accredited representatives to the Secretariat should be considered as 'representatives of the Members of the League' was never disputed. Since these were the main bodies of the organization, their members were defined as 'representatives' by the Covenant itself. Indeed, Art. 3(1) provides that '[t]he Assembly shall consist of Representatives of the Members of the League'. Likewise, Art. 4(1) specifies that '[t]he Council shall consist of Representatives of the Principal Allied and Associated Powers, together with Representatives of four other Members of the League'. The *status* of persons accredited to the Secretariat as representatives of Member States was therefore immediately recognized both in the literature and in State practice.[16] Taking into account the terms used in the Covenant and the nature of their mission, it seemed unquestionable that these persons were entitled to the privileges and immunities set out in Art. 7.[17]

To a large extent, the representatives of Member States to the bodies in question were indeed similar to 'public ministers', to whom international custom granted diplomatic prerogatives. Public ministers are appointed by a State

14 As already noted above, the draft article submitted by the British delegation did include a list of persons concerned, but that list was not retained in the final text, a fact that did not lead to any controversy.

15 Frei, *De la situation*, 23–24.

16 See, for instance, the letter of the Chairman of the Cuban delegation to the Secretary-General, *LNOJ* (1922): 1114–1115; see also the letter of the Persian Government, *LNOJ* (1925): 1276; Ray, *Commentaire*, 289; Frei, *De la situation*, 27.

17 See Secrétan, *Les immunités*, 11–12.

and are responsible for representing it, as well as for taking resolutions and voting on its behalf within the context of international negotiations. As a consequence, much of the literature has observed that, in granting them privileges and immunities, the Covenant introduced no particular innovations.[18] Therefore, whenever representatives of non-Member States were to appear before the Council or Assembly, their privileges and immunities were not challenged, even though these representatives could not rely on Art. 7 of the Covenant.[19]

Many resolutions of the Assembly and the Council concerning technical and advisory bodies of the League use the expression 'representative of Member States' to refer to their members.[20] The League itself was the model for the creation of such bodies, like the Organization for Communications and Transit or the Economic and Financial Organization. As a consequence, the representatives of the States participating in the meetings convened by those organizations were considered as representatives of the Members of the League under Art. 7 of the Covenant. The fact that delegates regularly representing their government at international conferences convened by the LoN were entitled to the prerogatives provided for in the Covenant was furthermore recognized relatively early in the literature, for two reasons: on the one hand, it was noted that, given the delegates' role in negotiating and concluding international agreements, custom recognized privileges and immunities for the delegates to such conferences, despite the fact that they could not formally invoke Art. 7.[21] Moreover, since the Covenant provided that the Council could, by decision of the Assembly, convene such conferences with a view to implementing the purposes of the League, it was observed that those conferences had a legal connection with the League, which effectively turned them into advisory bodies.[22]

The question of the status of delegates to the International Labour Conference was also raised. According to Art. 389 of the Treaty of Versailles, the Conference 'shall be composed of four Representatives of each of the Members', of whom two were Government Delegates and the other two represented respectively the employers and the workers of each of the Members. Taking into account the close connection between the ILO and the LoN, scholars wondered

18 Secrétan, *Les immunités*, 13–14; Ray, *Commentaire*, 289–290; Frei, *De la situation*, 48–49.

19 See, for example, the discussions that took place during the Extraordinary Assembly of 8 Mar. 1926 on the admission of Germany to the LoN; *LNOJ* (1926), special supplement, n. 42.

20 Secrétan, *Les immunités*, 12; see for instance the Res. of the Council of 19 May 1920, *LNOJ* (1920): 151.

21 Secrétan, *Les immunités*, 21–22; Schücking and Wehberg, *Die Satzung*, 383 *et seq*.

22 Frei, *De la situation*, 24 and 27.

whether those representatives could be granted the privileges and immunities provided for in Art. 7 of the Covenant. The question was decided relatively early on, and with no great difficulties. ILO members could be admitted as 'representatives of the Members of the League', within the meaning of Art. 7(4), for three main reasons. First of all, it was observed that the ILO was one of the League's technical bodies.[23] Although the ILO enjoyed a vast autonomy, the Treaty of Versailles established a close connection between the two organizations. Indeed, while Art. 23(a) of the Covenant provided that the League must endeavour to maintain fair and human conditions of labour, according to Art. 427 of the Treaty of Versailles, the ILO was a body 'associated' with the LoN. In addition, Art. 387(2) of the Treaty of Versailles provided that the membership to the LoN involved necessarily the membership to the ILO. Finally, Art. 399 of the Treaty of Versailles provided that the expenses of the ILO and of its principal organs had to be paid out of the general funds of the League. For these reasons, and despite rare opinions to the contrary,[24] the connection between the League and ILO was deemed close enough to consider the delegates to the ILO as 'representatives of the Members of the League'.

According to some scholars, it was even not necessary to refer to the strong ties between the ILO and the League or to rely on an extensive interpretation of the Covenant in order to recognize the privileges and immunities of representatives of ILO Members.[25] Indeed, the mission of the International Labour Conference was to develop draft conventions and recommendations. Since these instruments were subject to a vote, the persons negotiating them had to be considered as representatives of the sending States. Given the nature of their mission, they were thus granted diplomatic prerogatives under international customary law.[26] The fact that identical privileges and immunities had been conferred on representatives of ILO Members that were not Members of the League (i.e. Germany) is a case in point.

The issue proved more complex in the case of the Governing Body of the ILO, which was composed of 24 members, and, among other things, was responsible for examining budget estimates, appointing the Director-General (DG),

23 Ray, *Commentaire*, 290; Schücking and Wehberg, *Die Satzung*, 274.

24 For instance, the Salvadorean delegate at the 1921 and 1922 sessions of the Assembly of the LoN maintained that the ILO was a completely separate organization and that, despite Art. 387(2) of the Treaty of Versailles, membership of the LoN did not necessarily entail membership of the ILO. See LoN, *Records of the Third Assembly*, 1922, II: 194.

25 Secrétan, *Les immunités*, 23–25.

26 It should be noted that the same privileges and immunities were recognized also to delegates representing employers and workers.

and setting the agenda of the International Labour Conference. By virtue of Art. 393 of the Treaty of Versailles, 12 members were appointed as representatives by their respective Governments, six as representatives of the employers, and the remaining six as representatives of the workers. The diplomatic character of the mission of the 12 governmental representatives was unanimously recognized. On the other hand, more problematic was the recognition of the representatives of employers and workers as 'representatives of the Members of the League' within the meaning of Art. 7.[27] Therefore, it was preferred to consider them as 'officials of the League', since they did not directly represent the interests of their Governments.

In accordance with customary law, the privileges and immunities of representatives of Member States were extended by analogy to their official and non-official '*suite*' (i.e. *entourage*).[28] Indeed, the delegations of Member States (especially permanent delegations) were most often composed of several persons. The accompanying people were then divided into different categories. On the one hand, there were deputy delegates and technical consultants or experts; on the other, secretaries, clerks and attendants. Subject to certain conditions that will be described below, these categories of persons were granted the privileges set out in the Covenant. The same holds true for non-official entourage, which includes the representative's close relatives, like spouses and children.

Therefore, governmental delegates to international conferences held under the auspices of the League, to the Assembly, to the Council, or to other LoN bodies did not all have the exact same *status*. Some were diplomats or 'public ministers', while others were experts or persons who did not regularly exercise diplomatic functions. The existence of a customary norm guaranteeing the diplomatic prerogatives of delegates appointed by their Governments to negotiate on their behalf made it considerably easier to define the scope of application of Art. 7(4) with regard to the notion of 'representatives of Members of the League'.

a.2. The second category covered by the Covenant, namely the 'officials of the League', was to a great extent a novelty. The meaning of this expression raised several difficulties. While there were persons working in IOs before the creation of the League, no clear and definitive answers had yet been

27 Secrétan, *Les immunités*, 26; Frei, *De la situation*, 29–30.

28 Arts. 1, 2, 11 and 12 of the Regulations on diplomatic immunities adopted by the IDI on 13 Aug. 1895, *AIDI* 14 (1895–1896): 240 (hereinafter: Regulations on diplomatic immunities, IDI 1895). See also Ray, *Commentaire*, 290; Secrétan, *Les immunités*, 30, Frei, *De la situation*, 9.

found to the question of their *status*.[29] As a matter of fact, unlike that of representatives of Member States, the *status* of League officials could not be determined according to a customary practice based on their functions and the acts they performed. In this respect, contrasting opinions were expressed on the scope of application of Art. 7. Eventually, the uncertainty due to the lack of precision of the terms used in the Covenant could only be overcome through specific agreements with the host States.

First of all, a precise definition of the terms used in the Covenant conflicted with certain political issues. While the interests and the freedom of action of persons working in the organs of the League had to be protected, it was necessary to prevent the extension of privileges and immunities to a too great number of people, in order to avoid imposing an excessive burden on the host States.[30] States like Switzerland, where the League had its seat, were concerned about the possibility of granting such prerogatives to a great number of people; but other States were equally concerned. With the establishment of the Permanent Court of International Justice (PCIJ) in The Hague, the International Institute of Intellectual Cooperation (IIIC) in Paris, and the International Institute for the Unification of Private Law (UNIDROIT) in Rome, the problems raised by the *status* of League officials became even more serious and complex.

Scholars did not immediately agree on which persons had to be considered as officials of the League within the meaning of Art. 7(4). Part of the literature maintained that, in the absence of express restrictions, the right to enjoy privileges and immunities had to be recognized to all League staff, regardless of their functions. Therefore, the prerogatives in question had to be granted across the board.[31] Some League bodies agreed with this extensive interpretation. For example, in his 1926 annual report, the DG of the ILO made no distinction among staff members with regard to their right to enjoy the prerogatives provided for in the Covenant.[32]

29 See, in this regard, Suzanne Basdevant (Bastid), *Les fonctionnaires internationaux* (Paris: Sirey, 1931); José Gascón y Marin, "Les fonctionnaires internationaux," *RdC* 41 (1932): 721–797.

30 Frei, *De la situation*, 30.

31 Lassa F.L. Oppenheim, *International Law: A Treatise* (ed. Ronald F. Roxburgh, London: Longmans and Green & Co., 1920), 271; Paul Grunebaum-Ballin, "De l'utilité d'une juridiction spéciale pour le règlement des litiges intéressant les services de la Société des Nations," *RDILC* 48 (1921): 67–82.

32 International Labour Conference, 8th session, Geneva, 1926, Section 44.

On the other hand, other authors preferred to adopt a restrictive interpretation of the Covenant and stressed the difficulty of finding a general solution to this issue.[33] Thus, some suggested that the *status* of League officials should be reserved to the SG and Under Secretaries-General, the only persons whose responsibilities could justify the recognition of a diplomatic *status*.[34] If prerogatives were to be conferred on officials in the interest of their being able to carry out their duties, an extensive interpretation of the Covenant indeed appeared to be illegitimate.[35] According to some scholars, the League staff, with few exceptions, did not have international functions; therefore, they were simply individuals bound by a service contract with the head of the Secretariat or the LoN itself.[36] A good example against this strict interpretation of the Covenant is the case of M.F.M., former department head at the General Secretariat. After being placed on leave without pay, M.F.M., claimed compensation for 'unilateral breach of an employment contract'. The Council of the League, which was seized of the case, referred the matter to a committee of jurists, which met in Geneva on 24 Aug. 1925. The committee considered that 'by hiring officials, especially high-ranking ones, whose work is not only technical, the public administration exercises its authority for a public purpose; and in this way, it confers public functions on private persons, thus conferring on them the *status* of officials'.[37]

Since the session held in Vienna in Aug. 1924, the IDI had adopted the concept of 'interest of the function performed' for defining the notion of 'officials'. In its report, the IDI identified two different categories of persons entitled to privileges and immunities.[38] On the one hand, the staff of the head office at Geneva (the Secretariat), such as the SG, the Deputy SG, the Under Secretaries-General, and the directors of the different divisions of the Secretariat. On the other hand, the personnel sent on mission abroad, and the members of their official entourage, were also to be considered as League officials. The report specified that the functions of these persons, who were required to live and work in politically unstable countries, especially justified the enjoyment of privileges and immunities.[39] The same report, however, did not recognize the members of the committees established by the League as officials, maintaining

33 Schücking and Wehberg, *Die Satzung*, 383 *et seq*.

34 Antoine Rougier, *La première Assemblée de la Société des Nations* (Paris: Pedone, 1921), 82.

35 Frei, *De la situation*, 54.

36 Rougier, *La première*, 81; Hoijer, *Le Pacte*, 123.

37 For the text, see Secrétan, *Les immunités*, 41.

38 *AIDI* 31 (1924): 107–108.

39 See for instance the High Commissioner of Danzig, the High Commissioner for Refugees, as well as the members of the Saar Governing Commission. Frei, *De la situation*, 34.

that, in their public capacity, they did not perform acts on behalf and under the control of the LoN. According to this interpretation, these persons had a very general mission and performed it independently.

After discussion, the IDI adopted a resolution concerning the interpretation of Art. 7(4) of the Covenant which, in its Art. 1, recognized as 'officials of the League': 'those who are appointed by the Assembly, the Council, the Secretary-General of the League of Nations or his qualified delegates to perform acts of a political or administrative nature in their public capacity, on behalf or under the control of the above organs', as well as the DG of the ILO and his immediate staff.[40] Nonetheless, the interpretation proposed by the IDI was the subject of much criticism. Some authors criticized this interpretation on the grounds that an official was thereby defined only on the basis of his 'political or administrative' functions. This excluded the judges and the members of the PCIJ, whose function was judicial.[41] Moreover, the interpretation had the disadvantage of not defining what was meant by the expression 'specifically qualified delegates' ('délégués spécialement qualifiés').[42] Hence, if the IDI had the merit of establishing the criterion of the 'interest of the function performed', its interpretation was not considered entirely satisfactory. Partially different solutions were thus subsequently adopted in practice.

In Switzerland, where the League had established its headquarters and where the largest number of officers performed their duties, the question was of particular importance. The arrangements concluded between Switzerland and the League were not intended to settle questions of principle or to constitute an official interpretation of the expression 'official of the League'. Rather, they sought to provide answers to practical problems. It should be noted, however, that the solutions adopted in Switzerland served as a model for addressing similar situations elsewhere.[43]

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40 According to Art. 1 of the Resolution concerning the interpretation of Art. 7(4), of the Covenant of the LoN adopted by the IDI at its 31st session in Vienna (Aug. 1924) (hereinafter: Resolution concerning interpretation Art. 7(4), IDI 1924): 'Sous le nom d'agents de la Société des Nations au sens de l'art. 7, al. 4, du Pacte, il faut entendre : 1° Les personnes qui, nommées par l'Assemblée, le Conseil, le Secrétaire général de la Société des Nations ou par ses délégués spécialement qualifiés, accomplissent pour son compte ou sous son contrôle des actes de fonction de nature politique ou administrative. 2° Le directeur du B.I.T. et ses collaborateurs immédiats. Il appartient au Conseil de la Société des Nations de préciser si les emplois conférés à certaines personnes réunissent les caractères indiqués ci-dessus'. See *AIDI* 31 (1924): 179.

41 Secrétan, *Les immunités*, 42; Yepes and da Silva, *Commentaire*, 198; Ray, *Commentaire*, 290.

42 Frei, *De la situation*, 30–31.

43 Secrétan, *Les immunités*, 50.

The letter sent by the Federal Council to the SG on 19 Jul. 1921 is the first agreement, or *Modus Vivendi*, concluded with the League.[44] Although it was provisional, it regulated to a great extent the *status* of League officials. The second *Modus Vivendi*, dated 20 Sept. 1926,[45] provided a number of additional details on the *status* of the personnel of Swiss nationality.

Based on the distinction applied to diplomatic missions accredited in Bern, the Federal Government recognized two categories of officials within the meaning of Art. 7(4). These delegations included, on the one hand, diplomatic or 'extraterritorial' personnel, that is heads of missions, embassy counsellors, secretaries and their attachés; on the other hand, auxiliary or 'non extraterritorial' staff, including archivists, translators and clerks. Auxiliary staff enjoyed privileges and immunities only for acts performed in an official capacity.[46]

According to the first *Modus Vivendi*, 'first-category' or 'extraterritorial' officials consisted of personnel who 'by their rank and duties correspond to public officials'.[47] This definition included, with regard to the General Secretariat: the SG, the Deputy SG, Under Secretaries-General, heads of department and League employees of similar rank.[48] Even though divergent views had been expressed by the IDI, the Swiss Government included as personnel of the first category department heads and division members.[49] In the case of the ILO, 'extraterritorial' officials included: the DG, deputy directors, department heads, cabinet chief, division heads, service heads, and division members.[50] This list also included the 12 members of the Governing Body of the ILO appointed by the representatives of employers and workers at the International Labour Conference. Since they were elected by the members of a body of the League and were responsible for directing and controlling the activities of the ILO, as well as for budget estimates, these persons clearly met the criteria to be considered as first-category officials.[51]

The rest of the staff was constituted by second-category personnel, including technical and manual staff, that is, according to the definition used by the Swiss authorities: 'all those who, without being assimilated to public officials, are nevertheless employed and paid by the League of Nations and are at the

44 1921 *Modus Vivendi*.

45 1926 *Modus Vivendi*.

46 Secrétan, *Les immunités*, 53–54.

47 1921 *Modus Vivendi*, Ch. 1.

48 These persons correspond to the 'high officials' referred to in the Decree of the Federal Council of 8 Jun. 1926. See Frei, *De la situation*, 32.

49 *AIDI* 31 (1924): 111.

50 1926 *Modus Vivendi*, Arts. II, IV and VII.

51 Frei, *De la situation*, 38.

exclusive service of the Secretariat or the ILO'.[52] They enjoyed the same benefits as the second-category personnel of missions accredited to the Swiss Government. These people were therefore protected only for the acts performed in their official capacity.

The distinction made by the Federal Government did not raise practical difficulties, since it had been established that the SG and the DG of the ILO would provide a list of persons belonging to each category to the Swiss authorities. However, no clear definition was given for a number of League employees. The question was thus raised as to the *status* of 'temporary collaborators', of persons appointed for very short periods, and of certain consultants and experts working for the Secretariat. The same question applied to the League officials who exercised their functions outside Geneva and came to the headquarters only on rare occasions. After some ILO Members expressed their concerns about the situation,[53] the Swiss authorities decided to assimilate these people to first-category personnel. No practical difficulty appears to have arisen in this connection.[54]

In Austria, the question of the *status* of League officials was raised due to the presence in Vienna of a Commissioner-General of the League, representatives of the High Commissioner for Refugees, the ILO Refugee Service, and several temporary missions of the League. The Austrian authorities did not hesitate to offer them the same treatment reserved for diplomatic missions accredited in Vienna.[55]

On a smaller scale, the presence in Paris of the International Institute of Intellectual Cooperation (IIIC) posed similar problems to the French Government. Art. 11 of the IIIC Statute, approved on 13 Dec. 1924 by the Council of the League with the agreement of the French authorities, provided that: 'The Board of Directors, by resolution approved by the Council of the League of Nations, shall establish which categories of the staff of the Institute enjoy the diplomatic privileges and immunities provided for in Art. 7 of the Covenant'.[56] In accordance with this provision, Art. 19 of the Staff Regulations of the IIIC provided that the director, the heads of departments and divisions and their deputies were granted the privileges and immunities provided for in Art. 7 of the Covenant.[57] Other Member States later adopted the same solution. The Statute

52 1921 *Modus Vivendi*, Ch. 1.

53 International Labour Conference, 10th session, 1927, II: 31.

54 Hill, *Immunities*, 20–21.

55 Secrétan, *Les immunités*, 55.

56 LoN, Council, Minutes of the 32nd session, 13 Dec. 1924.

57 *LNOJ* (1925): 1466.

of UNIDROIT, created by the Council on 16 Mar. 1926 and located in Rome, contained a similar provision in its Art. 14.[58]

Finally, an important issue was the *status* of members of the PCIJ, based in The Hague. Judges derived their authority, rather than from the Covenant, from the Statute of the Court, whose Art. 19 provided that: 'The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities'. The Statute was silent on the rest of the Court staff, namely the members of the Registry, who seemed thus excluded from the prerogatives in question. However, the Court was considered as an organ of the League.[59] Indeed, the Court had been created under Art. 14 of the Covenant and its nine judges, together with the six deputy-judges, were appointed by the Council and the Assembly of the LoN, in accordance with Art. 4 of the Statute of the Court. Moreover, the Court was financially dependent on the Assembly, which, pursuant to Art. 33 of the Statute, approved its budget and voted any necessary expenses. Since the Court was an organ of the League, its members had to be considered as officials under Art. 7 of the Covenant. The Dutch Government and the Court eventually concluded an agreement on the actual *status* of the members of the Registry in 1927, following an exchange of letters started in Apr. 1922. In the agreement, the Dutch Government accepted a very wide definition of 'officials of the League', which included any official of the Registry holding a permanent employment contract.[60]

a.3. A special case is that of the League officials in their home countries. The basis of the privileges and immunities granted to League officials is different from that of representatives of Member States. Officials are granted diplomatic prerogatives in order to protect the interests of the community of Member States, rather than those of a single State. It seemed therefore logical and necessary, in order to ensure the independence of the LoN, that a State could not invoke the nationality of an official as a basis to withhold the privileges and immunities he was entitled to under the Covenant.[61]

As stated by the first SG, privileges granted to League officials were also fully applicable with regard to the relationships the official might have had with

58 Frei, *De la situation*, 37; League of Nations, *Official Journal*, 1928: 1753.

59 As noted in the Court's annual report, the members of the Registry were entitled to diplomatic prerogatives under Art. 7 of the Covenant. See: PCIJ, *Annual Report*, 1922–1925, Series E: 101.

60 Hill, *Immunities*, 21–22; see also Secrétan, *Les immunités*, 57.

61 Hill, *Immunities*, 8–9; Frei, *De la situation*, 20.

their home State. Admitting restriction on the grounds of nationality would, on the other hand, bear the consequence that a State with a large number of nationals among League officials would have fewer obligations towards them. Such a situation would clearly be inconsistent with the very purpose of Art. 7 and with the aims of the LoN in general. All the same, the question was the subject of much controversy.[62]

International practice has long recognized the right of States to refuse to receive one of their nationals as a representative of a foreign government.[63] The main reason for this practice is the lack of any competent jurisdiction to try a representative accredited to the State of which he is a national. As a consequence, Art. 15 of the Regulations on Diplomatic Immunities, adopted by the IDI in 1895, provided that immunity from jurisdiction did not apply to the members of official delegations who 'possess the nationality of the State to which they are accredited'.[64]

Several commentators accepted this approach, recognizing that the representatives of Member States had the right to enjoy diplomatic prerogatives only outside their country of origin.[65] Other authors extended this principle to the LoN officials exercising their functions in the territory of their home country.[66] However, the situation of LoN officials seemed different from that of delegates representing a State other than their home State. As maintained by the IDI, 'le citoyen qui vient dans son propre pays exercer des attributions reçues de la SDN n'est nullement au service d'une diplomatie étrangère'.[67] It is true, however, that several instruments regarding arbitration provide that arbitrators enjoy privileges and immunities only 'when outside their country'.[68] The question was not entirely new[69] when it was examined on the occasion of the

62 In a letter to the Swiss Federal Political Department, Sir Eric Drummond stated that: 'In theory, at any rate, an official might find diplomatic privileges and immunities particularly necessary as far as his own government was concerned'. See Hill, *Immunities*, 9.

63 See, for instance, the Decree adopted on 26 Aug. 1811 by the French Government. Frei, *De la situation*, 76; Secrétan, *Les immunités*, 58–59.

64 *AIDI* 31 (1924): 234–236.

65 See for example Schücking and Wehberg, *Die Satzung*, 383.

66 Ray, *Commentaire*, 291 *et seq*.

67 *AIDI* 31 (1924): 115.

68 As examples, see Art. 24 of the Convention of 28 Jul. 1899 on the Pacific Settlement of International Disputes, Art. 46 of the Convention of 18 Oct. 1907 on the Pacific Settlement of International Disputes, and Art. 13 of the Convention of 18 Oct. 1907 for the establishment of an International Court of Prize.

69 See, for instance: Conférence internationale de la Paix, 1899, 4, 189; Deuxième conférence de la Paix, 1907, I: 363; and II: 663.

adoption of the Statute of the PCIJ. Art. 19 of the preliminary draft Statute presented by the Advisory Committee of Jurists proposed that members of the Court should enjoy the same privileges and immunities as diplomatic agents 'when outside their own country'.[70] The text was discussed by a Subcommittee of the Third Committee of the LoN Assembly. The British delegation proposed to eliminate the provision from the draft, maintaining that it was unreasonable that a judge of the PCIJ should not enjoy diplomatic immunities on the basis of his nationality. On the contrary, Max Huber, representative of Switzerland, argued that '[t]he extension of diplomatic privileges would lead to inadmissible results which the Swiss Government is not prepared to accept as concerns the permanent Secretariat'.[71] He also added that it was certainly necessary to take steps to protect the judges' professional secrets, but that 'a clear distinction must be drawn between their official situation as officers of the League and their personal legal status'. The Subcommittee eventually adopted a text corresponding to that of Art. 7 of the Covenant, without providing for any restrictions, and specifying that the solution adopted did not prejudice the situation of judges in their own countries.

Important discussions on this issue took place also during the Vienna session of the IDI.[72] At the time of the resolution on the interpretation of Art. 7(4) of the Covenant, Messrs Adatci and De Visscher, Rapporteurs of the IDI, proposed a wording of Art. 2 that read as follows: 'In the application of the regime set out above, League members are not allowed to make any distinction between their nationals and those of other States'. However, some members of the Institute objected that, in this case, no law would apply to the officer concerned and no court would ever be competent to try him.[73] Nevertheless, it seemed obvious to a majority of the members of the IDI that, by adhering to the Covenant, the States had undertaken to recognize any official of the LoN as being entitled to all diplomatic privileges, and that an exception based on the nationality of one of the officials, once admitted, would lead to an inadmissible restriction of the scope of Art. 7. Art. 2 of the interpretation proposed by the IDI was eventually retained in its original form. At the same time, it was mitigated by a second sentence, which specified that it was desirable that the

70 League of Nations, 1ère Assemblée, Actes, Séances des commissions, 3ème commission, Avant-projet pour l'établissement de la Cour permanente de Justice internationale présenté par le Comité consultatif de juristes, Annex I: 412.

71 League of Nations, 1ère Assemblée, Actes, Séances des commissions, Discussion de l'Article 19 par la sous-commission de la 3ème commission, 356.

72 *AIDI* 31 (1924): 5, 6, and 115 *et seq*. See also Yepes and da Silva, *Commentaire*, 124–125.

73 See Secrétan, *Les immunités*, 64.

officers of the League should be required to exercise their functions in their own country only when absolutely necessary and with the constant approval of their government.[74] As noted by one of its members, it might seem inappropriate for the Institute to have ruled on a question of principle before determining 'what immunities are here taken into consideration'.[75]

The discussions held at the Assembly of the League and within the IDI failed to provide a clear and definitive answer to this question and left a wide margin of appreciation. Thus, in accordance with its practice for representatives accredited in Bern, the Swiss Government provided for several restrictions to the privileges and immunities of its nationals.[76] As announced by its representative at the Assembly, the prerogatives enjoyed by Swiss officials would be limited to immunity from jurisdiction for acts performed by them in their official capacity and within the limits of their duties.[77]

b ***Scope of Privileges and Immunities***

Art. 7(4) of the Covenant does not provide a specific definition of the expression 'diplomatic privileges and immunities'. By granting them such privileges and immunities, the Covenant simply assimilated LoN officials and representatives of Member States to diplomatic agents. As a consequence, a State that had acceded to the Covenant could not withhold from them the privileges it granted to a State delegation. One cannot, therefore, criticize the decision of the Swiss Government, which assimilated the legal *status* of Member State representatives and 'first-category' officials to that of the diplomatic corps accredited in Bern.[78] However, this system had a drawback in that did not make it possible to address differences in treatment existing in the various Members of the League.[79]

While it does not describe in detail the prerogatives it confers, the Covenant provides that representatives of the Members of the League and officials of the LoN enjoy privileges and immunities in the exercise of their functions (the French version of Art. 7(4) states 'dans l'exercice de leurs fonctions'). Some authors interpreted this expression as restricting the application of diplomatic prerogatives to the acts that LoN officials or representatives of Member States performed

74 See Art. 2(2) of the Resolution concerning interpretation Art. 7(4), IDI 1924.

75 *AIDI* 31 (1924): 118–119.

76 Frei, *De la situation*, 80.

77 See, in this respect, the 1921 *Modus Vivendi*, Ch. 1 (*in fine*) and the 1926 *Modus Vivendi*, Art. IX.

78 Arrangement of 17–21 Sept. 1926, *LNOJ* (1926): 1407, 1422.

79 Kunz, "Privileges," 840.

while exercising their functions. Most commentators, however, maintained that, for diplomatic privileges and immunities to be effective, they should apply to all acts, whether private or official.[80] For this reason, in accordance with the international practice concerning diplomatic agents, it seemed more logical to take the terms used in the Covenant as meaning 'during the actual exercise of their functions'. This interpretation seems more consistent with the English version of the text: 'when engaged on the business of the League'.

Art. 7 makes no distinction between representatives of Member States and League officials as to the scope of the privileges granted. In the absence of an official interpretation of the terms used in the Covenant, the legal *status* of the persons in question could only be examined in the light of the practice relating to diplomatic agents.[81] Once more, Art. 7 left ample room for agreements with the States concerned, especially as regards the scope of the prerogatives of League officials.[82]

b.1. First of all, we consider the privileges and immunities accorded to the representatives of Member States. Some have wondered whether, in this case, the provision of the Covenant was useless, since customary law already conferred privileges and immunities on State representatives. However, it seems that Art. 7 entailed several new obligations.[83] On the one hand, as noted above, the terms used in the Covenant concerned a number of people whose *status* did not exactly correspond to that of 'public ministers' entitled to diplomatic prerogatives. On the other hand, however, a State was obliged to confer privileges and immunities only on diplomatic agents accredited to it and, therefore, could object to a person exercising a diplomatic function within its territory. Finally, since all Member States were bound to respect the privileges and immunities in question, their representatives were entitled to enjoy them not only within the territory of the State where they resided, but also when they had to pass through the territory of any of the Members.[84] However, the Covenant did not modify in any way the content of the privileges and immunities traditionally granted to diplomatic agents, that is, personal inviolability, immunity from jurisdiction and so-called courtesy privileges.

80 *AIDI* 31 (1924): 179; Frei, *De la situation*, 45, Ray, *Commentaire*, 29; Hoijer, *Le Pacte*, 128; Kunz, "Privileges," 855; Grunebaum-Ballin, "De l'utilité," 78.

81 Kunz, "Privileges," 837; Yepes and da Silva, *Commentaire*, 198.

82 Hill, *Immunities*, 12.

83 Kunz, "Privileges," 842–843.

84 Frei, *De la situation*, 57, 58 and 61.

Personal inviolability is one of the oldest and most essential prerogatives attached to the role of a diplomat. Therefore, its enjoyment on the part of representatives of Member States raised very few questions in the literature. Inviolability entails the protection to which the diplomatic agent is entitled as a physical and moral person. It offers him protection from the interference of the authorities of the country where he exercises his duties, as well as from attacks by other individuals, which the local government must prevent in accordance with a standard of 'due diligence'. Personal inviolability extends to all that is necessary for exercising diplomatic functions. Thus, besides the person representing a Member State, immunity covers also the representative's personal belongings, the correspondence, and the premises of the mission, the representative's private residence, and his or her official and non-official entourage.[85]

Respect for inviolability requires the State on whose territory a conference is held to exercise great vigilance and implement special measures. In order to accomplish this, the government of that territory must be informed of the name, role and address of the delegates and members of their official and non-official entourage. As a consequence, offences against the inviolability of representatives of Member States were suppressed with great severity.[86] In the case *Public Ministry of the Confederation v. Ivan de Justh*, the Swiss Federal Court based its decision on Art. 43 of the Swiss Penal Code. It ruled that the scope of that Article, previously limited to 'representatives of a foreign power accredited to the Swiss Confederation', was 'extended to representatives of members of the League of Nations by Art. 7(4) of the Covenant of the League, which has received force of law in Switzerland by its publication in the Official Compendium [of Swiss Federal Laws]'.[87]

Inviolability has traditionally been subject to a number of restrictions. According to the IDI, it may be temporarily suspended in cases of legitimate self-defence on the part of an individual, during a riot or a war, or in the case of reprehensible acts committed by a representative and leading to the adoption of precautionary or protective measures by the local government.[88] Moreover, while the inviolability of the premises of the mission and the private residence of the representative implies that no official of a public administrative

85 Secrétan, *Les immunités*, 68; Frei, *De la situation*, 59–60.

86 Oppenheim, *International*, 560.

87 Jurisprudence pénale, Assises fédérales du 1er arrondissement réunies à Genève les 24 et 25 janvier 1927 dans la cause Ministère public de la Confédération suisse contre Ivan de Justh, *Revue pénale suisse* 40 (1927): 179–190.

88 Art. 6 of the Regulations on diplomatic immunities, IDI 1895.

or judicial authority may enter them without the consent of the representative, exceptions are admitted in extreme cases, such as criminal offences, or the presence of a criminal inside said diplomatic premises or private residence. Finally, the inviolability of the non-official entourage of the representative of a Member State, where such persons are nationals of the State concerned, was granted only if they lived in the same residence as the representative.

Immunity is another fundamental prerogative for the exercise of diplomatic functions. Therefore, customary international law recognizes that a public minister is exempted from the jurisdiction, whether civil or criminal, of the receiving State and can be subject to trial only in the courts of the sending State.[89] In accordance with the theory of representation, it has been maintained that the basis of this privilege was the principle *par in parem non habet iurisdictionem*, under which a State, in the person of one of its representatives, cannot be subjected to the jurisdiction of another State.[90] In this case, the immunity from jurisdiction of representatives of League Members was based on the need to ensure their independence vis-à-vis the State in which they exercised their duties and, therefore, to ensure the proper functioning of the League's decision-making bodies. The functional approach to immunity thus prevailed.

Immunity from jurisdiction protects the person enjoying it from criminal or civil prosecution. It is traditionally accompanied by exemption from giving evidence in proceedings, unless the evidence is heard at the premises of the representative's mission by a specially appointed judge.[91] Moreover, customary law extended immunity from jurisdiction to the official and non-official entourage of a public minister. While the immunity from criminal jurisdiction of Member States representatives was fully assimilated to that of public ministers, there was some disagreement in the literature with regard to the scope of immunity from civil jurisdiction.

Unlike civil immunity, the criminal immunity of representatives of the Member States was not contested in the literature. Indeed, such protection was seen as guaranteeing freedom of action. Representatives of League Members were therefore exempted from the jurisdiction of the Member States in which they resided or through which they were travelling, and only the government of the representative's home State had the right to waive immunity and restore

89 See Arts. 12 and 17 of the Regulations on diplomatic immunities, IDI 1895.

90 This theory was developed mainly by Christian Wolff, *Institution du droit de la nature et des gens* (Leiden: E. Luzac, 1772), 302–303. See also Frei, *De la situation*, 62.

91 Art. 17 of the Regulations on diplomatic immunities, IDI 1895; Frei, *De la situation*, 69–70; Oppenheim, *International*, 570.

jurisdiction to the courts of other Member States.[92] Some authors suggested that a distinction should be made between minor and serious crimes.[93] Such a distinction was however considered dangerous due to its lack of precision, and was not translated into practice. Likewise, immunity from jurisdiction was maintained for offences which, though not serious, were likely to undermine the freedom of action of a representative. Immunity was thus extended to all acts committed during the tenure of office of a representative, who could invoke immunity for any act committed during his term in office, even when prosecuted after the end of that term. Despite the differences in treatment that existed in the various countries concerned, the application of immunity from criminal jurisdiction to Member State representatives gave rise to very few difficulties in practice. Thus, in Switzerland, according to the distinction made by the Federal Government with regard to the missions accredited in Bern, second-category staff was granted immunity only for acts performed in their official capacity.

Representatives of Member States also enjoyed immunity from civil jurisdiction under the same conditions as public ministers, in accordance with customary international law. Therefore, no action could be brought against them in the civil courts of the receiving State. These courts were bound to declare themselves incompetent. In addition, a representative could not be summoned to court or be the subject of execution orders (especially seizure orders). Immunity also protected, under the same conditions, the representative's official and non-official entourage.[94]

Civil immunity could seem less important than criminal immunity, because it affected goods rather than persons. However, even though it often covers acts of minor importance, immunity in civil matters was invoked so frequently that it was deemed essential.[95] All the same, some authors found it necessary to make a distinction between a representative's public and private acts. Such a distinction, however, could not be applied in practice: on the one hand, it was impossible to define it clearly; on the other, submission to local jurisdiction in the case of private acts was also likely to undermine the mission of the representative and, thus, the action of the League itself.

While this distinction was not accepted, several restrictions were however applied in practice to this type of immunity. Some authors considered it necessary that any waiver of immunity from civil jurisdiction be made by the

92 Secrétan, *Les immunités*, 83.

93 Frei, *De la situation*, 67.

94 Oppenheim, *International*, 508; Secrétan, *Les immunités*, 90–91.

95 Frei, *De la situation*, 70.

government of the sending State, as in the case of immunity from criminal jurisdiction.[96] It was later admitted that the government could relinquish this power, without undermining the independence of the League.[97] Another restriction was accepted in practice. In Switzerland, the Geneva Court of First Instance held that the representative of a Member State could not invoke civil immunity for private acts after the termination of his function.[98] Finally, as in the case of criminal immunity, subaltern members of a representative's entourage enjoyed immunity from civil jurisdiction only for acts performed in an official capacity.[99]

Along with these immunities, which were essential for the exercise of diplomatic functions, Art. 7 of the Covenant also recognized the right of representatives of Member States to enjoy diplomatic privileges. International practice generally granted courtesy privileges to diplomatic agents, that is, privileges aimed at removing any dependency on local authorities and whose basis is, above all, a form of homage paid to the role of the diplomatic envoy.[100] Since diplomatic privileges had a relatively slight influence on the freedom of action of public ministers, there were considerable differences in the practices of the different States. Generally accepted international practice mostly amounts to the recognition of the right to private worship; in addition, it affords exemption from taxes and customs duties to public ministers and their official and unofficial entourage. Thus, public ministers were granted exemption from direct personal taxes and general taxes on wealth ('impôts généraux sur la fortune'), as well as customs exemption with respect to items for personal use. On the contrary, diplomatic agents remained subject to indirect taxes.[101]

The granting of these privileges to the representatives of Member States did not raise any new problems. However, the great number of conferences held in the territory of States Parties to the Covenant, conferences which were sometimes convened at very short notice, caused some practical difficulties. Indeed, States usually took elaborate precautions when a diplomatic mission was accredited in their territory.[102]

In Switzerland, the Federal Government granted exemption from direct federal, cantonal and municipal taxes to 'first-category' officials of missions

96 Secrétan, *Les immunités*, 91.

97 Frei, *De la situation*, 71.

98 *Bulletin de la jurisprudence suisse, Immunités diplomatiques*, 1927, 1175–1186.

99 Secrétan, *Les immunités*, 91–93.

100 Frei, *De la situation*, 73.

101 See Arts. 11 and 19 of the Regulations on diplomatic immunities, IDI 1895.

102 Secrétan, *Les immunités*, 98–99.

accredited in Bern. These officials, however, remained subject to property taxes on personal property, as well as to indirect taxes. The executive order of 6 Dec. 1920 concerning the new Emergency War Tax, which was based on the Federal Decree of 28 Sept. 1920, expressly exonerated heads of missions, first-category officials and their unofficial entourage. However, it left the cantons free to decide whether to grant such exemption to second-category staff. The Executive Council of the Canton of Bern eventually granted exemption, subject to reciprocity, to the entire personnel of diplomatic missions, Swiss officials excepted.

Moreover, the heads of diplomatic missions accredited to the Confederation enjoyed complete exemption with respect to all items destined for their personal use and that of their household. General taxation rules applied to other first-category officials, who nevertheless enjoyed certain favourable terms, such as exemption of new items from import duties, provided that, if possible, these were imported on a single trip and were not disposed of without first paying applicable customs duties.

Similar measures were taken by the Canton of Geneva and the Confederation with regard to representatives of Member States residing in Switzerland. Art. 7 of the Geneva Law of 24 Dec. 1924 exempted all non-Swiss representatives from income and wealth taxes. The Order of 6 Dec. 1920 on the War Tax, moreover, expressly exempted representatives of Member States. Finally, with regard to customs duties, a decree of the Federal Council of 8 May 1926 assimilated the representatives of Member State to the members of diplomatic missions, also taking up the distinction between first- and second-category personnel.

b.2. Now we consider the privileges and immunities accorded to League officials. Some general remarks are necessary before examining the situation of League officials on the territory of the different States where they were sent to exercise their functions. The privileges and immunities provided for in the Covenant had the purpose of serving the interests of the League, rather than those of the officials. As a consequence, even though LoN officials were partially exempted from ordinary law thanks to the privileges they enjoyed, their *status* remained subject to the action of the SG of the League or the DG of the ILO, who had power not only to lift the immunity of an official without his consent, but also to refuse to waive that same immunity, even against the official's own wishes.[103] Art. 1 of the 1933 Staff Regulations of the Secretariat of the League provided that, when an official needed to invoke one of the privileges set out in the Covenant, it was for the SG to decide whether it was better to grant or wave

103 Hill, *Immunities*, 25–26.

the immunity in question. In practice, no LoN official was ever tried for a crime or serious offence, and at no time was a waiver of immunity from prosecution requested by local authorities. On the other hand, immunity from civil jurisdiction was often lifted, at the request of the local authorities or the official concerned.

The Covenant made no distinction between Member State representatives and League officials, or between different categories of officials. However, it seemed obvious and consistent with the interests of the LoN that no official should enjoy the same privileges as the SG and heads of missions.[104] Therefore, most of the States where LoN officers resided made a distinction between officials, granting them greater or lesser protection based on their functions. Thus, there were relatively significant differences in treatment according to the States on whose territory the officers of the League performed their duties.

b.3. As regards Switzerland, the agreements concluded between the Swiss Government and the League assimilated LoN officials to the personnel of diplomatic missions accredited to Switzerland. As a consequence, these agreements made a distinction between first- and second-category officials, on the one hand, and, on the other, accorded a special *status* to officials of Swiss nationality.

The first *Modus Vivendi* (1921) granted first category officials 'inviolability, in the technical sense given to this word in international law'.[105] First-category officials were thus protected from any form of duress or coercion by Swiss authorities, which undertook to severely punish any violations of that inviolability. The question arose of the need to introduce an express provision in the Federal Penal Code. In the *de Justh* case, the Federal Court had ruled that the protection afforded by Art. 43 of the Federal Penal Code should be extended to representatives of the Members of the LoN. One of the judges of the Court had argued that this special protection should also apply to League officials, since the Covenant made no distinction between them and the representatives of Member States.[106] Some authors considered the extension of such protection to all LoN officials excessive.[107] A provision was eventually introduced in the Federal Penal Code, namely Art. 297, which entered into force on 1 Jan.

104 Yepes and da Silva, *Commentaire*, 125.

105 1921 *Modus Vivendi*, Ch. 1.

106 Hill, *Immunities*, 29.

107 Secrétan, *Les immunités*, 73–74.

1942 and reserved said special protection to the SG of the League and the DG of the ILO.

Inviolability applied also with regard to the 'Police des étrangers' (Aliens Police): League officials were not subject to expulsion from the Canton of Geneva or from the Confederation. Unlike other foreigners residing in Switzerland, they were not required to obtain residence permits. First-category officials were provided, upon arrival, with special identity cards ('cartes de légitimation'). These cards, countersigned by the SG or the DG of the ILO, indicated the *status* of the officials concerned and thus the privileges to which they were entitled.[108]

Inviolability was traditionally extended to the private residence of public ministers. However, this was not mentioned in the agreements concluded between the League and Switzerland. The issue was quite sensitive, considering the significant number of people involved and the practical difficulties involved in respecting the inviolability of the residences of all LoN officials.[109] In 1921, the Committee on Amendments to the Covenant dealt with the issue in its second report to the Council under Art. 7(5).[110] Having noted the discrepancies between the English and French texts of that Article, the Committee pointed out that only the English version provided for the inviolability of buildings occupied by representatives of Member States. The English text granted inviolability of residence to the representatives of League Members; as a consequence, it was agreed that inviolability should be extended to the residence of League officials.[111]

According to the distinction made by the Swiss authorities, personal inviolability was not granted, in principle, to officials of the second category, except with regard to immunity from jurisdiction, which they enjoyed with respect to acts performed in their official capacity and within the limits of their functions.[112] However, officials of this category, like those of the first category, were not subject to the '*Police des étrangers*' and were provided with special identity cards, marked by a different colour than those identifying first-category officials, so as to make it possible to differentiate between the two.[113] Moreover, by subjecting any action carried out by local authorities on the premises of the League to the consent of the SG, the inviolability granted by Art. 7(5) of the Covenant

108 Hill, *Immunities*, 27–28.

109 Secrétan, *Les immunités*, 75.

110 LoN Doc. A.24 (I), 1921: 6.

111 Hill, *Immunities*, 29–30; Frei, *De la situation*, 61.

112 1926 *Modus Vivendi*, Art. VII.

113 Yepes and da Silva, *Commentaire*, 126; Hill, *Immunities*, 30.

to the buildings and other property occupied by the LoN provided also an indirect protection for its officials, regardless of the privileges and immunities conferred upon them.

As was the case with representatives of League Members, the immunity from jurisdiction of LoN officials was essential to ensure their independence. The *Modus Vivendi* of 1921 granted first-category officials 'immunity from civil and criminal jurisdiction, as this is understood in international law'.[114] The *Modus Vivendi* of 1926 confirmed this principle, providing that they should enjoy immunity from civil and criminal jurisdiction, unless the SG or the DG of the ILO waived such immunity.[115] This agreement also encouraged the organs of the LoN to facilitate the proper administration of justice. Art. 3 of the Staff Regulations of the Secretariat of the LoN addressed this issue by pointing out that the immunities offered no excuse for officials not to perform their private obligations.[116]

The two agreements concluded with the Swiss authorities described first-category officials as 'extraterritorial' staff, a term referring to a theory which assumed that this staff continued to be domiciled in their country of origin, and could thus be tried only in the courts of that country.[117] Extraterritoriality could no longer be considered as the basis for the privileges and immunities attached to diplomatic functions, in particular in the case of League officials, who had to be protected also from their home countries. As a consequence, some authors maintained that, in principle, the only applicable legislation should be that of the League. Therefore, it was necessary to establish a special court to judge such cases.[118] The Geneva courts recognized that extraterritoriality was a fiction, and when the League waved the immunity of an official, it restored jurisdiction to the courts of the place of residence of that official.[119]

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114 1921 *Modus Vivendi*, Ch. 1.

115 1926 *Modus Vivendi*, Art. VII.

116 See also Arts. 4 and 5 of the Staff Regulations of the Secretariat of the League; for the text, see Yepes and da Silva, *Commentaire*, 198.

117 Grotius is considered the father of the theory of extraterritoriality, according to which a diplomatic agent is to be treated as still residing in the territory of the home country, even when he lives in a different State. See Hugo Grotious, *De jure belli ac pacis* (Paris, 1687), T. I, Lib. 2, Ch. 18. The fiction of extraterritoriality dominated in XVII- and XVIII-century the literature on diplomatic law. On this subject, see Edward R. Adair, *The Extraterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries* (London: Longmans, Green & Co., 1929).

118 Frei, *De la situation*, 65.

119 Hill, *Immunities*, 34–35; see also International Labour Conference, 8th session, Geneva, 1926, Report of the DG, Section 44.

The agreements between the League and Swiss authorities provided that a police officer confronted with an offence committed by a LoN official should confine himself to submitting a report to the Department of Justice and Police. The latter would decide whether to inform the SG or the DG of the ILO.[120] The Swiss authorities reserved the right to call the attention of the League to the conduct of any official and ask for the application of disciplinary measures against him, including his dismissal. This system proved to be sufficiently efficient in practice, especially because of the close cooperation between the LoN and Swiss authorities.[121]

Only few civil proceedings were brought against first-category officials. In cases of complaint against non-payment of debts or breach of contracts, the League authorities put pressure on the official concerned so as to remedy the violation. In some cases involving debts, the official authorized the LoN to pay his debt out of his salary. When doing so, the League made it clear that it would not assume any obligation towards the creditors.[122]

In Switzerland, as noted above, officials of the second-category only enjoyed immunity from jurisdiction with respect to acts performed by them in their official capacity and within the limits of their functions. In particular, Art. VII of the 1926 *Modus Vivendi* provided that officials belonging to this category remained 'subject to local laws and jurisdiction in respect of acts performed by them in a private capacity'. This limitation seems understandable, considering the large number of officials involved. The 1921 *Modus Vivendi*, however, specified that if the judicial or police measures taken against a second-category official were of such a nature as to affect the independence of the League, the SG of the LoN or the DG of the ILO could inform the local authorities of the matter, so that a solution could be found to ensure both the independence of the organization and the safeguard of public order. Nevertheless, this type of negotiations occurred only rarely and, in practice, few second-category officials were tried by Swiss courts.[123]

Tax exemption has long been considered a courtesy privilege imposing no obligation on the States. In practice, however, it was universally recognized, as in the case of inviolability and immunity from jurisdiction. With regard to non-Swiss officials, the Federal Government was especially cooperative and granted significant exemptions.

120 Hill, *Immunities*, 31–32.

121 1926 *Modus Vivendi*, Art. XII.

122 Hill, *Immunities*, 33.

123 Hill, *Immunities*, 37.

Under the 1921 *Modus Vivendi*, first-category officials enjoyed the same tax exemption as 'extraterritorial' members of diplomatic missions.[124] The latter were exempted from direct taxes, except from property tax ('impôt foncier'), but were liable to indirect taxes and other charges. Since 1920, first-category officials had been exempted under Art. 7(4) of the Executive Order based on the Federal Decree of 28 Sept. 1920 concerning the new Extraordinary War Tax. Tax exemption for League officials became final with the two Decrees of the Council of State of the Republic and Canton of Geneva dated 14 Jun. 1921 and 18 Apr. 1922, and later with Art. 7 of the Geneva Tax Law of 24 Mar. 1923, modified by the Law of 24 Dec. 1924.[125] The second agreement concluded with Switzerland in 1926 did not challenge these exemptions.[126] First-category officials were also exempted from the Federal Emergency Tax ('impôt fédéral de crise') introduced in 1934, as well as the various taxes levied during the war.[127] Members of the unofficial entourage of first-category officials also enjoyed the same exemptions, provided that they lived with the official and had no occupation in Geneva.[128]

Officials of the second-category were exempted from the tax on salary or professional income ('impôt sur le revenu professionnel'), wealth tax ('impôt sur la fortune'), and the Federal Emergency Tax. Under the first *Modus Vivendi*, wealth tax exemption was granted only when the total amount did not exceed the official's salary. This limitation was abandoned in the 1926 *Modus Vivendi*.[129] Second-category officials were also exempted from the various taxes subsequently introduced, but – unlike first-category officials – they were required to pay a personal tax ('taxe personnelle'), which was relatively low.[130] There were, however, considerable differences with regard to customs duties.

On this point, Art. X of the 1926 *Modus Vivendi* referred to the 'regulations' communicated to the SG on 10 Jan. 1926, which included the relevant provisions of the Federal Customs Law of 1 Nov. 1925. They were supplemented by the Decree of the Federal Council of 8 Jul. 1926, which specified the applicable regime for each category of officials. The high officials of the LoN Secretariat and the ILO were assimilated to head of diplomatic missions. Thus, the SG, Deputy and Under Secretaries-General, department directors and employees

124 1921 *Modus Vivendi*, Ch. 1.

125 Secrétan, *Les immunités*, 104; Hill, *Immunities*, 38.

126 1926 *Modus Vivendi*, Art. VIII.

127 Hill, *Immunities*, 38.

128 Frei, *De la situation*, 88; Secrétan, *Les immunités*, 104.

129 1926 *Modus Vivendi*, Art. VIII.

130 Hill, *Immunities*, 39.

of the League of similar *status*, as well as the DG, Deputy DG and Chiefs of Divisions of the ILO were granted complete customs exemption in respect of items destined for their personal use or that of their household. Their luggage could not be subject to checks upon their entry into the territory of the receiving State.

Other first-category officials remained subject to general rules, but they enjoyed certain privileges. Upon their 'first arrival' ('première installation'), they enjoyed an exemption from customs duties, for one year, on all imported goods, whether new or used. Temporary officials enjoyed the above privilege only with regard to used personal effects. Nevertheless, after six months they could be refunded of any duties paid for importing new goods. Art. 19 of the Customs Law provided for a reservation concerning reciprocity, which however was not applied in these cases. In this way, all first-category officials could enjoy the same privileges. On the other hand, second-category officials enjoyed no customs facilities and, thus, remained subject to the applicable general rules and regulations.

As we have seen, the *status* of League officials of Swiss nationality was the subject of complex negotiations between the Federal Government and the organs of the LoN. During these negotiations, the Swiss authorities specified again that, with regard to the missions accredited in Bern, no privilege or immunity would be granted to persons of Swiss nationality, in accordance with customary international law.

However, officials of Swiss nationality enjoyed certain exemptions from ordinary law. With regard to personal inviolability, they were not required to obtain a residence permit ('permis de séjour') or settlement permit ('permis d'établissement'), which was compulsory for ordinary citizens from other cantons. The Federal Council had always maintained that the role of official did not justify the exemption of Swiss nationals from Swiss laws or their immunity from the jurisdiction of Swiss courts.[131] Like second-category officials, Swiss officials thus enjoyed immunity from jurisdiction only in respect of acts performed in their official capacity and within the limits of their functions.[132] Of course, the SG expressed a desire to obtain the right to suspend judicial proceedings concerning acts performed by Swiss officials in their private capacity, when such proceedings affected the independence of the League. No provision to this effect was adopted, but in practice the Swiss authorities respected this principle.

The most significant difficulties arose with regard to the tax exemption. The Swiss authorities had taken care to point out that tax exemption was merely a

131 Frei, *De la situation*, 90.

132 1926 *Modus Vivendi*, Art. IX.

courtesy privilege and had never been included in the privileges and immunities which States were obliged to grant under customary law. However, some argued that if States could tax the salaries paid to their nationals by the League, that would reimburse them of part of their contributions to the organization. Such a tax would impose a burden on the budget of the LoN, which would thus be required to compensate for differences in taxation. Therefore, the conclusion was reached that, in order for the applicable regime to be consistent with the aims of the League, the assimilation of League officials to missions accredited in Bern had to be subjected to limitations.

Another particularly sensitive issue was the compulsory military service for Swiss nationals. Normally, citizens exempted from military service were required to pay a special tax ('taxe militaire'). League officials were not freed from this obligation, but the 1926 *Modus Vivendi* provided that exemptions would be granted to officials of Swiss nationality if 'their compliance with an order calling them up for military service [was] likely to seriously interfere with the normal work of League services'.[133]

The 1921 *Modus Vivendi* was only a temporary arrangement. While it expressly provided for the possibility of modifying the *status* of Swiss officials, it granted them certain privileges, such as a tax exemption on the salaries paid to them by the League. The Swiss authorities confirmed this regime in the 1926 agreement, granting officials of Swiss nationality an exemption from direct municipal and cantonal taxes.[134] Swiss officials were also temporarily exempted from paying the Federal War Tax. However, the *status* of these officials remained uncertain for a long time, and the SG frequently expressed the desire that a general and steady regime be adopted in this respect.[135] No final agreement was eventually concluded.

b.4. As regards the Netherlands, since the PCIJ was considered an organ of the League, its members had to be granted the privileges and immunities provided for in Art. 7(4) of the Covenant. While Art. 19 of the Court Statute directly accorded diplomatic prerogatives to Judges, members of the Registry enjoyed them only insofar as they were League officials.[136] In this case too, then, an agreement with the local authorities became necessary with regard to both the Judges and the members of the Registry. For several years, in the absence of an agreement with the Government

133 1926 *Modus Vivendi*, Art. XI; Kunz, "Privileges," 857.

134 1926 *Modus Vivendi*, Art. IX(2).

135 Hill, *Immunities*, 48.

136 Frei, *De la situation*, 93.

of the Netherlands, the legal *status* of members of the Court and Registry remained uncertain.[137] The LoN and the Netherlands eventually concluded an Exchange of notes on 5 Jun. 1928, which included General Principles concerning privileges and immunities as well as Rules of Application.[138]

In this Agreement, a distinction was made between the Judges and the Registrar, on the one hand, and 'higher officials' on the other. The *status* of Judges and the Registrar was assimilated to that of heads of missions accredited at The Hague.[139] The authorities of the Netherlands granted the Judges and Registrar not only the diplomatic privileges and immunities traditionally accorded to diplomatic agents, but also a number of special prerogatives.[140] They were exempted from taxation under a series of instruments passed by the Dutch authorities in 1922 and in the following years.[141] Moreover, they enjoyed customs exemption in respect of goods imported for their personal use and were provided with identity cards similar to those issued to heads of diplomatic missions.[142] In addition, the 1928 Agreement provided that the wife and unmarried children of the Judges and Registrar shared the *status* of the head of the family, provided they lived with him and had no occupation.[143]

The Deputy Registrar and drafting secretaries, which fell into the category of 'higher officials', were assimilated to diplomatic officials attached to the legations accredited to the Dutch Government.[144] The 1928 Agreement provided that, in case of doubt, the *status* of officials of the Registry should be as similar as possible to that of second-category officials in Switzerland. In practice, this did not lead to any significant difficulty.[145] Even though subjected to a different

137 Ray, *Commentaire*, 296.

138 General Principles and Rules of Application Regulating the External Status of the Members of the Permanent Court of International Justice, agreed between the Netherlands and the President of the Court, and approved by the Council of the LoN on 5 Jun. 1928 (hereinafter: PCIJ Principles and Rules on External Status).

139 PCIJ Principles and Rules on External Status, Art. A(II)(2)(a).

140 PCIJ Principles and Rules on External Status, Art. I; Hill, *Immunities*, 50.

141 For a list of these instruments, see the *Annual Report of the Permanent Court of International Justice*, 1927, Series E, 59.

142 Hill, *Immunities*, 51–52.

143 PCIJ Principles and Rules on External Status, Art. A(II)(2)(b).

144 PCIJ Principles and Rules on External Status, Art. B(III)(1)(a); see also Manley O. Hudson, *The Permanent Court of International Justice, 1920–1942* (New York: Macmillan, 1943), 325–331.

145 PCIJ Principles and Rules on External Status, Art. B(III)(1).

regime, the members of the Registry enjoyed the same tax and customs exemptions as the Judges and Registrar.[146] The Agreement also provided that the Registrar may, with the approval of the President of the Court and after informing the local authorities, wave the immunity accorded to an official. While the question of waiver presented itself on a number of occasions, the waiver procedure was never implemented and the Dutch authorities never submitted a case to the Court in this regard.[147]

As seen above, the draft Statute of the PCIJ provided that the Judges of the Court enjoyed privileges and immunities only when outside their country of origin. Now, the final version of Art. 19 of the Statute of the Court, just like Art. 7 of the Covenant, did not mention any restriction on the grounds of nationality.[148] In practice, the same distinction introduced in Switzerland was made by the Dutch authorities. Court officials of Dutch nationality, including Judges, enjoyed immunity from jurisdiction only in respect of acts performed by them in their official capacity and within the limits of their powers; as for taxation, they were granted only an exemption from income taxes.[149] This regime did not lead, in practice, to any significant difficulties. Some authors, however, criticized this distinction, arguing that, more than any other officials, Judges should be accorded all privileges and immunities, and be held accountable for acts performed in their private capacity only before international tribunals, even though these tribunals were still to be created.[150]

b.5. In relation to other States, Art. 7 of the Covenant did not limit the enjoyment of privileges and immunities to officials working in the headquarters of the League.[151] It seemed therefore legitimate that League officials should enjoy privileges and immunities also in States other than Switzerland or the Netherlands. Member States undertook to recognize the privileges and immunities of League officials residing on or travelling through their territories. Some States also adopted specific laws and regulations on the privileges and immunities of League officials. In Poland, a 1926

146 *Annual Report of the Permanent Court of International Justice*, 1922–1925, Series E: 103–104.

147 Hill, *Immunities*, 54.

148 Frei, *De la situation*, 92–93.

149 PCIJ Principles and Rules on External Status, Art. A(II)(3).

150 Frei, *De la situation*, 93.

151 In this regard, it should be noted that the draft article presented by the British delegation expressly conferred diplomatic prerogatives to the entire staff of administrative or judicial bodies, as well as to the members of enquiry commissions under the control of the League. See Miller, *The Drafting*, II, 108.

ordinance accorded customs exemption to officials of the League, ILO, PCIJ and other international institutions of similar character.[152] In Czechoslovakia, a 1927 ordinance provided that League and ILO officials should enjoy extraterritoriality and, therefore, be exempted from taxation.[153] In 1927, the Yugoslav Government exempted officials of the Secretariat of the League and ILO from customs duties for imported goods destined for their personal use.[154]

The personnel of international institutions operating under the auspices of the organization were assimilated to League officials and, therefore, enjoyed the same privileges and immunities. In France, the distinction made in Switzerland between first- and second-category officials was applied to the personnel of the IIIC.[155] These officials usually enjoyed the same privileges and immunities as those granted to the diplomatic personnel accredited to the French Government; the high officials of the Institute were provided with special identity cards. On the other hand, officials of French nationality were not exempted from taxation. Therefore, the Institute was obliged to refund them the amount paid for taxes, so as to ensure equality of treatment with regard to remuneration. On the contrary, all the officials of UNIDROIT, located in Rome, were granted tax exemption by the Italian Government.[156]

The High Commissioners of the League enjoyed diplomatic privileges and immunities on the territories of the States in which they operated. Such was the case with the High Commissioner of Danzig[157] and the High Commissioner for the Refugees in Vienna. The two members of the Greek Refugee Settlement Commission appointed by the Council in 1923 enjoyed the same *status*. It is interesting to note that the other two members of the Commission, appointed by the Greek Government with the consent of the Council, enjoyed certain protective measures, such as immunity from jurisdiction, except in the case of proceedings brought by the Minister of Justice. In most cases, High Commissioners were granted privileges and immunities as a result of informal negotiations between the Council of the LoN and the States concerned. In some cases, however, special provisions were introduced.[158]

152 Hill, *Immunities*, 59.

153 Hill, *Immunities*, 60.

154 International Labour Conference, 10th session, 1927, II, Report of the DG, 33.

155 *LNOJ* (1925): 1460; Ray, *Commentaire*, 298.

156 Hill, *Immunities*, 68–69.

157 Secrétan, *Les immunités*, 74.

158 For a discussion of the relevant provisions, see Hill, *Immunities*, 62.

No specific provision granted privileges and immunities to the members of the commissions of enquiry created by the League. Indeed, no such provision was necessary, since those officials were clearly covered by Art. 7(4) of the Covenant.[159] Diplomatic prerogatives were thus conferred upon the members of the Commission of Rapporteurs on the Åland Islands case, of the Chaco Commission of Enquiry, created in 1933 following the war between Bolivia and Paraguay,[160] and of the Lytton Commission, whose task was to study the situation and report all circumstances of the 1931 conflict between Japan and China.[161] On the other hand, the Council of the League expressly granted privileges and immunities to the members of the Saar Governing Commission.[162]

When its officials resided on the territory of non-Member States, the League generally ensured that they enjoyed the privileges and immunities required for the exercise of their functions. The situation of officials travelling through the territory of non-Member States was more complex. The practice of the USA in this regard is particularly enlightening. In 1927, an official of the ILO, while in transit to Australia, was arrested in California for disturbing the public order. The US Government pointed out, and rightly so, that customary international law granted privileges and immunities only to diplomatic agents, and that LoN officials did not fall into that category.[163]

4 Inviolability of the Headquarters

Art. 7(5) of the Covenant guaranteed the inviolability of '[t]he buildings and other property occupied by the League or its officials or by Representatives attending its meetings'. The 'inviolability of residence' of public ministers was traditionally considered a result of their personal inviolability. In the case of the LoN, the applicable principle was different and, to a great extent, new.[164] No organization had so far enjoyed a protection of that kind: even though the 'neutrality and independence' of the European Commission of the Danube (1856)[165] had been recognized, and the Commission established under the Act of Navigation for the Congo (1885) had been granted the 'privilege of inviolability

159 Ray, *Commentaire*, 290; Yepes and da Silva, *Commentaire*, 198.
160 Kunz, "Privileges," 832.
161 Hill, *Immunities*, 65.
162 Secrétan, *Les immunités*, 54; *LNOJ* (1934): 1427.
163 Hill, *Immunities*, 71–72; Kunz, "Privileges," 830.
164 Ray, *Commentaire*, 292.
165 See Art. 16 of the Treaty of Paris of 30 Mar. 1856.

in the exercise of its functions',[166] this practice remained marginal. At the time of the drafting of the Covenant, the procedures to be used in order to ensure the independence of an organization like the League had raised important questions.

At the time, different means to achieve this end were considered.[167] On the one hand, it was suggested that the protection afforded to the League should lead to the internationalization of the territory where the organization had its seat.[168] Since there was actually no precedent for it, this solution was dismissed.[169] Since the organization would establish its seat on the territory of a State, it was proposed that the domestic law of that State should grant special protection to the League. However, this solution was also ruled out, insofar as it did not ensure uniformity of treatment and gave the State in question the opportunity to unilaterally modify its domestic law and, therefore, the *status* of the organization.[170] It was thus necessary to ensure the independence of the League by means of a treaty.

Several authors expressed their reservations about the nature of the two agreements concluded between the LoN and Switzerland in 1921 and 1926, doubting that they could provide a solid legal basis for the independence of the League. However, these instruments are now considered as a first example of an international customary law rule recognizing the legal personality of an international organization, as well as the privileges and immunities entitled to it. Indeed, it is now accepted the international legal personality of United Nations, even though this aspect is not mentioned in the Charter or in the General Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 Feb. 1946.[171]

The recognition of the international legal personality of the League was twofold. On the one hand, the fact that two agreements were concluded with Switzerland implicitly recognized the existence of such a legal personality. On the other hand, these agreements expressly recognized the legal personality of the League. The 1921 *Modus Vivendi* besides recognizing that Art. 7(5) of the

166 See Art. 18 of the Act of Navigation for the Congo (Berlin, 26 Feb. 1885).

167 Kunz, "Privileges," 847–848; see also Clarence Wilfred Jenks, "Some Legal Aspects of the Financing of International Institutions," *Transactions of the Grotius Society* 28 (1943): 87–132.

168 See, in this regard, the position of Mr. Mac White, the Irish representative at the Assembly, League of Nations, A. 1926, C. II: 58.

169 Ray, *Commentaire,* 292; Jean-Flavien Lalive, "L'immunité de juridiction des États et des Organisations Internationales," *RdC* 84 (1953): 297.

170 Kunz, "Privileges," 847–848.

171 Lalive, "L'immunité," 331. See also the *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, *ICJ Reports* 1949: 174.

Covenant did not merely cover the premises of the League provided that 'by application, if not of the letter, at least of the spirit of the Covenant, the League of Nations may claim, in its favour, international personality and legal capacity'.[172] Therefore, the term 'inviolability', as used in the Covenant, should not be understood *stricto sensu*, that is, merely as a privilege preventing the intervention of local authorities on the premises of the League without the consent of the organization. As implied by the use of the concept of 'extraterritoriality' in the first version of Art. 7,[173] inviolability actually referred to the legal personality of the Organization, one of whose main attributes was the enjoyment of the privileges and immunities required to ensure its functioning.[174]

It seemed logical to grant privileges and immunities to the League, and the Swiss Federal Council soon recognized the principle on which they were based. In 1919, in its message concerning the accession of Switzerland to the Covenant, the Federal Council stated that it was 'obvious that the League of Nations should enjoy the same privileges and immunities as any State with which we have diplomatic relations'.[175] The agreements concluded in 1921 and 1926 had the purpose of specifying these privileges: both the League's inviolability – in the strict sense – and its immunity from jurisdiction.

Thus, the first *Modus Vivendi* (1921) set out the scope of the inviolability of the premises of the League, which was not modified in 1926.[176] As a consequence, no agents of local public authorities could enter the premises of the League and the ILO, without the consent of the SG of the League or the DG of the ILO. In practice, no major problems arose with regard to the respect of the inviolability of the premises of the LoN. An example of the good functioning of the regime adopted under the aforementioned agreements is the case of Ivan de Justh, who was arrested in the premises of the LoN on 11 Jun. 1926, after the local authorities had obtained the consent of the SG.[177]

A difference between the French and English versions of Art. 7 should here be noted. The French version provides for the inviolability of the buildings and sites occupied by the services of the LoN or its meetings, while the English version recognizes the inviolability of the premises occupied not only by the League but also by its officials and by the representatives of Member States.

172 1921 *Modus Vivendi*, Ch. 3.

173 The version submitted by the British delegation on 20 Jan. 1919 read as follows: '[they] shall enjoy the benefits of extraterritoriality'.

174 Michael Brandon, "The Legal Status of the Premises of the United Nations," *BYIL* 28 (1951): 101.

175 *Feuille fédérale de la Confédération Suisse*, 1919, IV: 618.

176 1921 *Modus Vivendi*, Ch. 2.A; 1926 *Modus Vivendi*, Art. II.

177 Brandon, "The Legal," 106; Frei, *De la situation*, 61.

This difference, however, did not lead to any significant difficulties. Indeed, the meaning of the term 'reunions' as used in the French version was considered broad enough to include all the meetings of the organs of the LoN, rather than only the sessions of the Assembly and Council.[178]

The two agreements with Switzerland specified in identical terms that the archives of the League, like those of diplomatic missions, were inviolable.[179] It is now admitted that, in this respect, inviolability is a customary prerogative and is beneficial to most modern IOs.[180] Moreover, both the 1921 and the 1926 *Modus Vivendi* provided that the League Secretariat, the ILO and their officials might send and receive their official correspondence by 'cabinet couriers' (*courriers de cabinet*).[181] These communication privileges, aimed at preventing the interference of local or other authorities, derive directly from the privileges granted to diplomatic missions. Of course, the principle has evolved and the inviolability of correspondence enjoyed by the UN, rather than being limited to couriers, now covers a wide range of means of communication.

In addition, the Swiss Government accorded a number of privileges to the League with regard to taxes and customs duties. The 1921 *Modus Vivendi* granted the League customs exemption in respect of all objects destined for its exclusive use,[182] but no tax exemption. The latter, however, was introduced in the 1926 agreement, under which the organization enjoyed full exemption from taxation, in the form of a refund, on its bank assets and real estate securities, as well as exemption from the Swiss stamp duty on coupons.[183]

By recognizing the legal personality of the League, the Swiss Government recognized its immunity from jurisdiction. Immunity was an inevitable requirement for the League and a condition for its proper functioning. However, it was necessary to respect the rule of law and protect the interests of both States and individuals.[184]

Art. 1 of the 1926 *Modus Vivendi* stipulated that the League could not be sued before the Swiss courts without its consent. The first *Modus Vivendi* had been more specific on the implementation of this immunity.[185] It provided that the League, insofar as its *status* was similar to that of a State, could not be sued

178 Ray, *Commentaire*, 292–293.
179 1921 *Modus Vivendi*, Ch. 2.B; 1926 *Modus Vivendi*, Art. III.
180 Brandon, "The Legal," 102.
181 1921 *Modus Vivendi*, Ch. 2.C; 1926 *Modus Vivendi*, Art. IV.
182 1921 *Modus Vivendi*, Ch. 2.D; *1926 Modus Vivendi*, Art. V.
183 1926 *Modus Vivendi*, Art. VI.
184 Lalive, "L'immunité," 299–301.
185 1921 *Modus Vivendi*, Ch. 3.

before the local courts. However, it also stated that, unlike a State, the organization had no courts and, therefore, no action could be brought against it without its consent. The Federal Government added that the League could resort to the Swiss courts by waiving its immunity, whether expressly (by bringing an action as a claimant) or tacitly (by not raising an objection of lack of jurisdiction). In practice, the League never brought any proceedings as a claimant before the Swiss courts.[186]

As a defendant, it has been observed that the League invoked its 'immunity' when officials tried to sue it before the local courts. Such was the case, for instance, of an action brought to establish the liability of the organization with regard to the payment of a pension to five former officials of the Saar Governing Commission. However, since the suit concerned the League's internal relations with its officers, which fell outside the jurisdiction of local courts and domestic law, it would be more appropriate to speak of inadmissibility of the action, rather than of 'immunity from jurisdiction'. On the contrary, the immunity of the LoN was actually at stake in cases concerning its external relations, especially with regard to commercial transactions. On many occasions, the League waived its immunity in advance. As an alternative, it included an arbitration clause in several of the contracts it concluded, especially those related to the supply of electricity.[187] A clause granting jurisdiction to an arbitral tribunal in case of disputes was in fact included in a contract for the construction of the 'Palais des Nations' in Geneva.[188]

5 Conclusion

In the preceding pages, an overview has been given on the evolution of jurisdictional immunities in the ground-breaking experience of the LoN. As the analysis has shown, this must be considered without hesitation as a pioneering experience. Indeed, it was the main source of inspiration for the solutions adopted in the Conventions on the Privileges and Immunities of the United Nations and of its Specialized Agencies, approved by the General Assembly of the United Nations in 1946 and 1947, respectively.

More generally, it is possible to state that the experience of the League was crucial for the definition and development of the law of IOs. The issue of

186 Lalive, "L'immunité," 112.

187 Hugh McKinnon Wood, "Legal Relations between Individuals and a World Organization of States," *Transactions of the Grotius Society* 30 (1944): 144.

188 Lalive, "L'immunité," 317.

immunity is, among others, one example that shows that the League really was what Lord Robert Cecil, one of the creators and most faithful defenders of the Organization, liked to call 'a great experiment',[189] an extraordinary innovative experience which laid the foundations for the future activities of contemporary IOs.

189 Robert Cecil, *A Great Experiment: An Autobiography* (New York: OUP, 1941).

CHAPTER 13

International Organizations and Immunity from Legal Process

An Uncertain Evolution

Massimo Francesco Orzan

1 Introduction

A recurring question in international law is to what extent international organizations (IOs) enjoy immunity from actions being brought against them before national courts. Historically, the reason for such immunity is to allow them to carry out their functions independently. Nevertheless, this goal has to be weighed against individuals' rights to sue IOs before national courts if a dispute arises between them. These disputes may have a private law character (e.g. employment, contractual or tort issues) or a public law character (e.g. the alleged human rights violations committed by an international organization during a peacekeeping operation or in the administration of foreign territories).[1]

This article examines the question of immunity, focusing on two topics: the legal basis of IOs' immunities before national courts and their nature. As to the second topic, the article analyses the evolution from absolute to functional immunity and, with regard to the latter, it discusses the new trend, according to which the immunity may be granted to IOs only if reasonable alternative means allow for the protection of individual rights.

It is worth noting that the expression 'legal process' includes the immunity of IOs both from jurisdiction and from enforcement, but each immunity will be examined separately. The article will discuss first immunity from jurisdiction and then immunity from enforcement. Finally, it will draw a brief conclusion summarising the current situation.

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* The views of the author are entirely personal and in no way represent the views of the CJEU.

1 See Cedric Ryngaert, "The Immunity of International Organizations before Domestic Courts: Recent Trend," *IOLR* 7 (2010): 121.

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2 The Legal Basis of Immunity of International Organizations from Jurisdiction

According to Reinisch, the legal basis of IOs' jurisdictional immunity is a 'perennial problem'.[2] Indeed, scholars dispute whether IOs enjoy immunity from jurisdiction under customary law[3] or treaty law.[4] This uncertainty may also be found in the activity of the International Law Commission (ILC), the Institut de Droit International[5] and the International Law Association.[6] In that regard,

2 See August Reinisch, "Comments on a Decade of Italian Case Law on the Jurisdictional Immunity of International Organizations," *It. YIL* 20 (2009): 101.

3 See Jean-Flavien Lalive, "L'immunité de juridiction des États et des organisations internationales," *RdC* 84 (1953): 303; Christian Dominicé, "La nature et l'étendue de l'immunité de juridiction des organisations internationales," in *Völkerrecht, Recht der Internationalen Organisationen, Welt Wirtschaftsrecht. Festschrift für Ignaz Seidl Hohenveldern*, eds. Karl-Heinz Böckstiegel *et al.* (Köln: Heymann, 1988), 77; Paul Szasz, "International Organizations, Privileges and Immunities," *EPIL* (1995), 1325; Ralph Zacklin, "Diplomatic Relations: Status, Privileges and Immunities," in *A Handbook on International Organizations*, ed. René-Jean Dupuy (2nd edn. Dordrecht: Martinus Nijhoff, 1998), 293; Natalino Ronzitti, *Introduzione al diritto internazionale* (4th edn. Torino: Giappichelli, 2013), 148.

4 See Nguyên Quôc Dinh, "Les privilèges et immunités des organismes internationaux d'après les jurisprudences nationales depuis 1945," *AFDI* 3 (1957): 262; Saverio De Bellis, *L'immunità delle organizzazioni internazionali dalla giurisdizione* (Bari: Cacucci, 1992), 62; Paul Lagarde, *Conclusions générales*, in *Droit des immunités et exigences du procès équitable*, ed. Isabelle Pingel (Paris: Pedone, 2004), 150; Roberto Barsotti, "Organizzazioni internazionali," in *Dizionario di diritto pubblico*, ed. Sabino Cassese (Milano: Giuffrè, 2006), 4038; Sally El Sawah, *Les immunités des États et des organisations internationales. Immunités et procès équitable* (Bruxelles: Larcier, 2012), 213; Marcello Di Filippo, *Immunità dalla giurisdizione* versus *accesso alla giustizia: il caso delle organizzazioni internazionali* (Torino: Giappichelli, 2012), 79; Marcello Di Filippo, "Immunity from Suit of International Organisations Versus Individual Right of Access to Justice: An Overview of Recent Domestic and International Case Law," in *Derecho Internacional de los Derechos Humanos: Manifestaciones, Violaciones y Respuestas Actuales* (Córdoba: Editoriale Universidad Católica de Córdoba, 2014), 203.

5 The issue of the immunity of IOs has never been considered by the Institut de droit international (IDI), except in the debate that preceded the adoption of the Resolution on Contracts concluded by International Organizations with Private Persons. In that debate the IDI made a reference only to the conventional source of IOs' immunities.

6 The International Law Association (ILA) first discussed the topic of IOs immunity in the framework of State immunity, stressing that immunity is primarily a result of international treaty law, rather than customary international law. Subsequently, the ILA once again examined the topic of immunity in the framework of the discussion concerning the accountability of international organizations. Also in that discussion, the ILA confirmed that treaty law is the source of IOs' immunity.

it is relevant that, in 1992, the ILC decided to remove from its programme the topic of IOs' immunity from jurisdiction.[7]

In an attempt to find an answer to this question, it is worth examining the relevant treaty law, domestic law and national courts' case law. The aim of the analysis is to understand whether the rule concerning the jurisdictional immunity of IOs satisfies the conditions set out in international law for inferring the existence of a rule of customary law.

Concerning treaty law, provisions dealing with the immunity of IOs from jurisdiction are contained in multilateral agreements (agreements establishing IOs or multilateral agreements on privileges and immunities) and bilateral agreements (headquarters or host agreements). For instance, among multilateral agreements, the UN Charter, the Statute of the Council of Europe, the Treaty on the Functioning of the European Union and the Organization of American States Charter establish that these Organizations enjoy in the territory of each of their Members such privileges and immunities as are necessary for the fulfillment of their purposes.[8] These provisions are usually complemented by general conventions adopted by organizations, in order to define their scope. In that regard, it must be noted that the two General Conventions adopted by the UN, the Convention on the Privileges and Immunities of the United Nations (referred to herein as the 'General Convention')[9] and the Convention on the Privileges and Immunities of the Specialized Agencies have become a model not only in the UN system. In some constituent agreements, there is reference to the General Convention or its provisions,[10] whereas other IOs have adopted agreements which reflect the General Convention.[11]

Provisions dealing with the immunity of IOs are also contained in bilateral agreements concluded by the organization with the host State; these agreements are called Headquarters (or host) Agreements and they implement the above mentioned multilateral agreements and, in particular, the General Convention. For instance, Italy has concluded numerous agreements with several

7 It should be noted that in 2006, at the request of Giorgio Gaja, the ILC decided to insert into its programme the topic of IOs' immunity from jurisdiction.

8 See Art. 105 of the UN Charter; Art. 40 of the Statute of Council of Europe; Art. 343 TFEU; Art. 133 of the OAS Charter.

9 See Anthony J. Miller, "The Privileges and Immunities of the United Nations," *IOLR* 6 (2009): 7.

10 See, for instance, the Art. 14 of the Treaty Establishing the Central American Institute of Public Administration, reproduced in Amos J. Peaslee, *International Governmental Organizations* (The Hague: Martinus Nijhoff, 1974–1979), I: 256.

11 See, for instance, the General Convention on the Privileges and immunities of the Organization of African Unity, available at www.au.int.

IOs and specialized agencies placed in its territory, in which the principles established in the General Conventions have been reproduced.[12]

In domestic law, there are two different trends: some States have implemented multilateral agreements in their legislation, as there are no specific provisions providing for their transposition, while other States have adopted autonomous legislation without making reference to international law.[13] US, UK and Australian legislations are of particular relevance in that group. In 1946, the USA adopted the International Organizations Immunities Act extending to IOs immunities conferred on States. Subsequently, the USA has adopted the Foreign Sovereign Immunity Act, limiting States' immunity to sovereign acts. As a consequence, there is a debate in legal doctrine whether the limitation of immunity has to be applied to IOs too. According to some authors IOs keep on enjoying absolute immunity,[14] whereas other authors consider it preferable to extend to IOs the rules applicable to States.[15] In 1963, Australia adopted the International Organizations (Privileges and Immunities) Act, Annex 1 of which recognizes the 'immunity of the organization…from suit and from other legal process'; Section 13 thereof clarifies that immunities are implemented through regulations.[16] In 1968, the UK adopted the International Organizations Immunities Act, which does not include substantive rules governing immunities. Indeed, it establishes that, from time to time, the UK government may declare by Order in Council immunities granted to an international organization.

Apart from treaty and domestic law, in the analysis of the issue of IOs' immunity from jurisdiction, a fundamental contribution to determining whether a customary rule exists may be made by national courts' case law.[17] Indeed, when

12 See Francesco Durante and Ersiliagrazia Spatafora, *Gli accordi di sede. Immunità e privilegi degli enti e dei funzionari internazionali in Italia* (Milano: Giuffrè, 1993).

13 On the two trends see Stefano Dorigo, *L'immunità delle organizzazioni internazionali dalla giurisdizione contenziosa ed esecutiva nel diritto internazionale generale* (Torino: Giappichelli, 2008), 43.

14 See Antoinette Farrugia, "International Organizations Immunity Is Absolutely Not Restrictive," *Brooklyn J. Int'l L.* 15 (1989): 497.

15 See John C. Griffith, "Restricting the Immunity of International Organizations in Labor Disputes: Reforming an Obsolete Shibboleth," *VJIL* 25 (1985): 1007.

16 See, for instance, International Organizations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013, in which Australia grants absolute immunity from Australian Courts to the International Committee of the Red Cross. The Regulation is available at www.comlaw.gov.au.

17 See Luigi Ferrari Bravo, "Méthode de recherche de la coutume international dans la pratique des États," *RdC* 192 (1985): 284, and Friedrich Kratochwil, "The Role of Domestic Courts as Agencies of the International Legal Order," in *International Law: A Contemporary*

individuals bring a claim against an international organization, a national court is called upon to establish the legal basis of such immunity, before ruling on the substance of the dispute. Thus, it is worth examining the relevant national courts' case law of different continents, in order to form a general view.[18]

Concerning European domestic courts, the case law of the Italian, Belgian, French, German, Dutch, Swiss, Austrian and UK courts is analyzed.

In Italy, the case law is quite fragmented. In most disputes, Italian courts have recognized the immunity from jurisdiction of IOs on the ground of treaty law, in particular, on the basis of Headquarters Agreements.[19] For instance, the *Corte di Cassazione a S.U.* in the *Drago v. IPGRI* case, held that IOs' immunity from jurisdiction can be based only on treaty law and, in particular, on bilateral agreements between the organizations and a host State.[20] In *Vocino v. Scuola Europea di Varese* and *IUE v. Piette* cases, it ruled that customary rules on immunity do not apply to IOs.[21] However, in other disputes, Italian courts have ruled otherwise, recognising the existence of a customary rule on the immunity of IOs. Indeed, in the *INPDAI v. FAO* and *Carretti v. FAO* cases, the *Corte di Cassazione a S.U.* established that IOs enjoy immunity from jurisdiction by analogy with the immunity of States on the ground of customary law.[22]

Also in Belgium, domestic courts have adopted conflicting decisions. Indeed, whilst in 2001, in the *L.E.A. v. T.M.* case, the *Cour de Cassation* established that there is no general principle of public international law within the meaning of Art. 38(1) of the Statute of the ICJ on the immunity of international organization,[23] in 2009, in the *UEO v. S.M.* case, the same Court reached the opposite conclusion in an *obiter dictum*, stating that provisions contained in

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Perspective, eds. Richard Falk, Friedrich Kratochwil and Saul H. Mendlovitz (London: Westview Press, 1985), 236.

18 For a general overview of national case law see Di Filippo, *Immunità*.

19 On the Italian case law see Giovanna Adinolfi, "L'immunità delle organizzazioni internazionali dalla giurisdizione civile," in *Le immunità internazionali degli Stati e degli altri enti internazionali*, eds. Natalino Ronzitti and Gabriella Venturini (Padova: Cedam, 2008), 135, and Pietro Pustorino, "The Immunity of International Organizations from Civil Jurisdiction in the Recent Italian Case Law," *It. YIL* 20 (2009): 57.

20 *Drago v. International Plant Genetic Resources Institute* (*IPGRI*), 19 Feb. 2007, No. 3718.

21 *Vocino v. Scuola Europea di Varese*, 15 Mar. 1999, No. 138, and *IUE v. Piette*, 18 Mar. 1999, No. 149.

22 *INPDAI v. FAO*, 18 Oct. 1982, No. 196, and *Carretti v. FAO*, 23 Jan. 2004, No. 180.

23 *Ligue des Etats Arabes v. T.M.*, 12 Mar. 2001, No. S.99.0103.F, available at www.cass.be. For the solution of the dispute the Court applied provisions contained in the Headquarters agreement.

multilateral or bilateral agreements concerning immunities reflect generally recognized principles of international law.[24]

Like Italian and Belgian case law, French case law also casts doubt on the legal basis of the jurisdictional immunity of IOs. In its judgment of 19 Apr. 2005, in the *FSA v. BCEAO* case, the *Cour de Cassation* held that an international organization can be sued before a domestic court when it does not enjoy immunity on the ground of treaty law.[25] However, in the *International Institute of Refrigeration v. Elkaim* case, the same Court recognized the immunity of the organization by analogy with a provision contained in the headquarters agreement in favour of its own agents, ruling that it was not possible to grant immunity only to officials and not to the organization. The *Cour de Cassation* did not explicitly recognize the existence of immunity on the ground of a customary rule, but this decision leaves the possibility open of acknowledging the existence of a general principle. In short, despite the absence of provisions in the Headquarter Agreement, the organization enjoyed immunity from jurisdiction on the ground of a general principle.[26]

German case law is similarly uncertain. Indeed, apart from a judgment in 1961, in which the *Amtsgericht* Bonn, ruled that IOs were entitled to immunity under general law,[27] more recently, German courts have adopted conflicting decisions. In the *N. and Others v. European School Munich* case, the *Verwaltungsgerichtshof* Munich ruled that the European School did not enjoy immunity from jurisdiction because there was no provision in the Headquarters Agreement for immunity,[28] whereas some years later, in the *X. et al. v. European School Munich* case, the same Court overturned its earlier ruling, establishing that IOs enjoyed immunity from the jurisdiction on the grounds of customary law.[29]

The same considerations apply to Swiss case law: whilst in the *Groupement d'entreprises Fougerolle v. CERN* case, the *Tribunal fédéral* established that IOs enjoy immunities on the ground of treaty law,[30] in *Z.M. v. Permanent Delegation*

24 *Union européenne Occidentale v. S.M.*, 21 Dec. 2009, No. S.04.0129.F, available at jure.juridat.just.fgov.be.

25 See *FSA v. BCEAO*, 19 Apr. 2005, available at legimobile.fr.

26 See *International Institute of Refrigeration v. Elkaim*, 8 Nov. 1988; *Bulletin des arrêts de la Cour de cassation, chambres civiles* (1988), I, 211, No. 309.

27 See *X v. WEU*, 23 Aug. 1961, *MDR* (1962): 315.

28 See *N. and Others v. European School Munich* case, 23 Aug. 1989, *ILR* 189 (1998): 649.

29 *X et al. v. European School Munich II*, 29 Jun. 1992, M 3 K 90.4137-41 (unpublished). On the issue of the immunity of European School of Munich see the Opinion of 4 Sept. 2014 delivered by Advocate General Mengozzi in Cases C-463/13 and C-464/13, *Oberto and others v. Commission*, Sections 42 and 63.

30 *Groupement d'entreprises Fougerolle v. CERN* case, 21 Dec. 1992.

of the League of Arab States to the United Nations case, the *Cour du travail* Geneva held that customary international law confers immunity on them.[31]

In Europe, it has been the Netherlands that has referred most often to the existence of a customary rule on the immunity of IOs in domestic courts. In the *Eckardt v. EUROCONTROL* case, the *Arrondissementsrechtbank* Maastricht held that Eurocontrol was entitled to immunity from jurisdiction on the grounds of customary international law.[32] The *Hoge Raad* has subsequently confirmed this statement in the *Ary Spaans v. Iran-United States Claims Tribunal* case, establishing that IOs enjoy immunity from jurisdiction on the basis of unwritten international law.[33]

On the contrary, UK and Austrian domestic courts seem to deny, implicitly or explicitly, the existence of a customary rule conferring immunity on IOs. In the well-known *Standard Chartered Bank v. International Tin Council and Others* case, the High Court held that immunities of IOs can be granted only by legislative instrument[34] and in the subsequent case of *Maclaine Watson & Co. Ltd v. Department of Trade and Industry*, the Court of Appeal of England confirmed the previous statement.[35] In Austria, the case law recognizes the immunity of IOs only on the grounds of treaty law. Indeed, in the few decisions by the Austrian courts on IOs' immunity there is no reference to a customary rule.[36]

Concerning the Americas, the analysis addresses US, Argentinian, Mexican and Costa Rican case law. US case law is as uncertain as European case law. Indeed, apart from some isolated rulings, US domestic courts do not have a settled case law on the issue of the legal basis of IOs' immunity. Thus, whilst in the *Weidner v. International Telecommunications Satellite Organizations* and *Mendaro v. The World Bank* cases, US courts have recognized that IOs enjoy immunity from jurisdiction on the grounds of customary law,[37] in the *International Tin Council v. Amalgamet Inc*. case, the Supreme Court of New York ruled that IOs are entitled to the immunity granted by a legislative instrument, thereby excluding a general rule.[38]

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31 Z.*M. v. Permanent Delegation of the League of Arab States to the United Nations*, 17 Nov. 1993, *ILR* 116: 643.

32 *Eckhardt v. EUROCONTROL*, 12 Jan. 1984, *NYIL* 16 (1985), 464.

33 *Ary Spaans v. Iran-United States Claims Tribunal*, 20 Dec. 1985, *ILR* 94: 321.

34 See *Standard Chartered Bank v. International Tin Council and Others*, 17 Apr. 1986, *ILR* 77: 86.

35 See *Maclaine Watson & Co. Ltd v. Department of Trade and Industry*, 9 Jul. 1987, *ILR* 80: 49.

36 See, for instance, *Firma Baumeister Ing. Richard L v. O.*, 14 Dec. 2004, *UNJY* (2004): 397.

37 *Weidner v. International Telecommunications Satellite Organizations*, 21 Sept. 1978, and *Mendaro v. World Bank*, 27 Sept. 1983.

38 *International Tin Council v. Amalgamet Inc.*, 25 Jan. 1988, *ILR* 80: 31.

Conversely, Central and South American case law raises no difficulties: domestic courts deny the existence of a general rule on the immunity of IOs from jurisdiction. Indeed, with the exception of two decisions of the Argentinian and Mexican Supreme Courts of the 1950s, recognizing the existence of a customary rule on immunity from jurisdiction,[39] Argentinian, Brazilian[40] and Costa Rican[41] domestic courts have ruled that IOs enjoy immunities only on the grounds of multilateral or bilateral agreements. In particular, since the 1980s, Argentinian Courts have consistently ruled that IOs' immunity does not find any basis in international general law.[42]

With regard to Asia and Africa, there are few decisions by national courts and also those decisions are conflicting. Indeed, whilst in the Philippines the Supreme Court has recognized the existence of immunity on the grounds of general law, in Malaysia[43] and Japan,[44] domestic courts have established that IOs are entitled to immunity from jurisdiction on the grounds of treaty law, without any reference to a general rule. Finally, with regard to African domestic courts, the most interesting decision concerning the legal basis of IOs' immunity has been made by a Tanzanian Court. In *The East African Development Bank v. Blueline* case, the Court of Appeal Dar es Salaam, ruled that, despite State immunities, IOs enjoy immunities only on the grounds of treaty law.[45]

In the light of this analysis, it is possible to draw some conclusions on the question whether IOs enjoy immunity before national courts on the grounds of customary law. Undoubtedly, several multilateral and bilateral international agreements recognize IOs' jurisdictional immunity. However, the conclusion of numerous agreements is not in itself evidence that the rules laid down in those agreements are an expression of customary law. Concerning national case law, an observation is called for with regard to the fact that, frequently,

39 See Dorigo, *L'immunità*, 55.

40 See *Sabel Fátima de Andrade v. Organizaçao de Aviação Civil International*, 28 Sept. 1988, DJ of 27 Oct. 1989, and *UNIÃO e ONU/PNUD v. Lima Cruz*, 3 Sept. 2009, available at www.tst.gov.br.

41 See *B. v. R. and Corporación Centroamericana de Servicios de Navegación Aérea*, 30 Mar. 2012.

42 See *Duhalde, Mario Alfredo v. Organización Panamericana de la Salud – Organización Mundial de la Salud – Oficina Sanitaria Panamericana*, 1 Aug. 1999, available at www.oas.org.

43 See *Bank Bumiputra Malaysia Bhd. v. International Tin Council and another*, 13 Jan. 1987, *ILR* 80: 24.

44 See *Shigeko Ui v. the United Nations University*, 21 Sept. 1977, *Judicial Reports* 884 (1978): 77.

45 See *The East African Development Bank v. Blueline*, 22 Dec. 2011, available at www.judiciary.go.tz.

national courts apply the existing treaty law in order to establish whether organizations enjoy immunity from their jurisdiction, without there being any need to consider whether such immunity is recognized in customary law. Even if this approach by domestic courts does not rule out the possibility that a customary rule on the immunity of IOs may exist, it makes it difficult to establish the existence of such a rule. That being said, as regards the attitude of national courts, it is clear that in case law there is a growing tendency to recognize that IOs have immunity under general international law. Nevertheless, at the present stage of the development of international law, this does not allow us to conclude that IOs enjoy immunity on the basis of customary rules. First, domestic case law is still rather fragmented: according to Central and South American and African courts, IOs are entitled to immunities only on the grounds of treaty law; in Asia and Europe, there are conflicting decisions among countries and also among domestic courts of the same country, for instance, in Italy and Belgium. Secondly, domestic courts that recognize the existence of a general rule do not really clarify whether the immunity of IOs would be absolute or functional.[46] Lastly, in domestic case law, it is not properly examined whether IOs enjoy immunities by analogy with the rule on State immunity or on the grounds of an autonomous general rule. So, despite this tendency, it seems preferable to consider that IOs are entitled to immunity from jurisdiction on the basis of treaty law.[47]

3 The Nature of the Jurisdictional Immunity of International Organizations

The second topic addresses the nature of the jurisdictional immunity conferred on IOs. Legal literature expresses the view that IOs enjoy functional immunity,[48] namely immunity limited to acts that are necessary for the fulfillment of the IO's purposes. Nevertheless, also on this topic, domestic case law discloses conflicting decisions. Indeed, some national courts have refused to impinge on the absolute immunity of IOs, establishing that, in principle, their

46 See Section 3.

47 See El Sawah, *Les immunités*, 214.

48 Christian Dominicé, "L'immunité de juridiction et d'exécution des organisations internationales," *RdC* 187 (1984): 145; Kay Hailbronner, "Immunity of International Organizations from German National Jurisdiction," *AVR* 42 (2004): 329; Dorigo, *L'immunità*, 170; Pustorino, "The Immunity," 57; Massimo F. Orzan, "Le immunità e i privilegi delle organizzazioni internazionali," in *Diritto delle organizzazioni internazionali*, ed. Angela Del Vecchio (Napoli: ESI, 2012), 265.

immunity is absolute. For instance, in the *Malek v. Ligue des Etats Arabes* and *Groupement X v. Conseil fédéral* cases, the Swiss judge held that IOs enjoy absolute immunity.[49]

Other national courts have held that IOs enjoy only functional immunity: in the *Iran-United States Claims Tribunal v. A.S.* case, the *Hoge Raad* ruled that IOs are entitled to immunities for the performance of their functions and the realization of their purposes.[50] In Italy, case law is quite fragmented. In the past, some Italian judges recognized in several judgments that IOs were entitled to absolute immunity. However, in the recent case law this approach has been abandoned. Indeed, the *Corte di Cassazione* has applied the criterion of functional immunity.[51] Similarly, German,[52] Austrian,[53] French[54] and US[55] judges have ruled that IOs enjoyed a functional immunity.

In the abovementioned line of judgments, a detailed analysis is given of case law concerning employment relationships. In that case law, some domestic courts have applied the distinction established for States between *iure imperii* acts and *iure gestionis* acts. In the same way as States enjoy immunity in the case of sovereign acts, but not with respect to private acts, IOs enjoy immunity only for the acts in which they perform their functions. From a theoretical point of view, the restrictive theory of State immunity cannot be transposed to IOs,[56] because the latter do not have sovereign powers. Nevertheless, it is possible to draw a line between IOs private and public acts and apply the restrictive immunity, recognizing that IOs enjoy immunity for the acts in which they fulfil their purposes. Therefore, with regard to employment relationships, the possibility of granting immunity must be examined taking into account the nature of the claim and the functions of the employee. If the employee holds a high position in the organization, the immunity should be granted, whereas it should be denied for employees of lower level. The recent *Amaratunga v. Northwest Atlantic Fisheries Organization* case, decided by the

49 See *Malek v. Ligue des Etats Arabes*, *Praxis des internationalen Privat-und-Verfahrensrechts* (1999): 257, and *Groupement X v. Conseil fédéral*, 2 Jul. 2004, *RGDIP* 109 (2005): 407.

50 See *Iran-United States Claims Tribunal v. A.S.*, 20 Dec. 1985, *ILM* 25 (1986): 327.

51 On that case law, see Pustorino, "The Immunity," 64, who underlines that this criteria has not been clearly applied.

52 See *T. v. European Patent Organisation*, 13 Nov. 1991.

53 See *E GmbH v. European Patent Organization*, 11 Jun. 1992, *Österreichische Juristenzeitung* (1992).

54 See *International Institute of Refrigeration v. Elkaim*.

55 See *Mendaro v. The World Bank*.

56 See Eric De Brabandere, "Immunity of International Organizations in Post-conflict International Administration," *IOLR* 7 (2010): 89.

Supreme Court of Canada (SCC), shows a very interesting application of this principle.[57] In a claim for wrongful dismissal and separation indemnity, the SCC established that the appellant, the Deputy Executive Secretary of NAFO, was the supervisor of the staff and the person responsible for the scientific aspects of NAFO's tasks. As a consequence, the SCC ruled that to allow employment claims of senior officials of NAFO to be tried before Canadian courts would constitute undue interference with NAFO's autonomy in performing its public functions. However, the SCC rejected NAFO's argument that the separation indemnity claim was inextricably linked to the claim for wrongful dismissal, holding that this indemnity must be paid to any departing employee regardless of the reason for the termination. This judgment shows, firstly, that the nature of the claim has to be taken into account in deciding whether to grant immunity and, secondly, that the position held by the employee is relevant. The reasoning of the SCC is that for employees holding lower positions, who are not involved in the performance of NAFO's tasks, immunity should not be granted. Indeed, in the judgment, the SCC held that to allow NAFO' senior officials to bring a claim against the organization would constitute undue interference, but it was less definitive as to whether immunity will apply to those employees holding lower level positions which are not involved directly in the performance of the organization's tasks.

Moreover, it is worth noting that, in the last two decades, a new trend is developing in domestic case law based on the *Waite and Kennedy* and *Beer and Regan* judgments of the European Court of Human Rights (ECtHR).[58] In those two well-known judgments, the ECtHR established that even if IOs' immunity from jurisdiction is permitted, the granting of the immunity is allowed if IOs provide for individuals reasonable alternative means to protect their interests.

In line with that case law, some domestic courts have held that the granting of functional immunity is subject to the provision of alternative means by IOs; in other words, 'alternative means' become the condition for the granting of such immunity. In that respect, it should be pointed out that in the *Waite and Kennedy* and *Beer and Regan* judgments, the ECtHR did not clarify whether the

57 *Amaratunga v. Northwest Atlantic Fisheries Organization*, 29 Nov. 2013, *Supreme Court Reports* 66 (2013): Vol. 3, 866.

58 See August Reinisch, "Note," *AJIL* 93 (1999): 933; Isabelle Pingel-Lenuzza, "Autonomie juridictionelle et employeur privilégié," *RGDIP* 104 (2000): 445; Pietro Pustorino, "Immunità giurisdizionale delle organizzazioni internazionali e tutela dei diritti fondamentali: le sentenze della Corte europea nei casi Waite et Kennedy e Beer et Regan," *RDI* 83 (2000): 132; Helene Tigroudia, "L'immunité de juridiction des organisations internationales et le droit d'accès à un tribunal," *RTDH* 41 (2000): 83.

existence of alternative means was sufficient to grant immunity or if domestic courts had to examine whether or not those alternative means were effective. This uncertainty had a controversial impact on the domestic case law. For instance, in the *Consortium X v. Swiss Federal Government* case, the *Tribunal Fédéral* found that the inclusion of an arbitral proceedings system in the general contract clauses of CERN pursuant to its Headquarters obligations satisfied the right to fair proceedings under Art. 6 of the ECHR.[59] Conversely, Belgian, French and German courts have examined whether alternative means were effective, by assuming that the inadequacy of the level of protection afforded by internal mechanisms justifies a withdrawal of immunity, in order to avoid a denial of justice contrary to human rights demands. In Belgium, in the *Siedler v. WEU* case, the *Cour d'Appel* Brussels held that provision in that connection made by the WEU was not effective,[60] whereas in the *Energies nouvelles et environment v. ESA* case, the *Tribunal*, Brussels granted immunity to the ESA, considering that alternative means were effective.[61] In France, in the *Banque africain du développement v. M.A. Degboe* case, the *Cour de Cassation* held that the absence of an administrative tribunal constituted a denial of judicial protection.[62] In Germany, in *D. v. Decisions of the EPO Disciplinary Boards* case, the *Bundesverfassungsgericht* ruled that the applicant had not shown that his right to access to a court had been infringed.[63] This finding of the Court by implication acknowledged its competence to examine whether the remedies provided by EPO were effective or not. Also in Italy, in the field of employment disputes in the *Drago v. IPGRI* case, the *Corte di Cassazione* held that the existence of alternative means is the precondition for the granting of the immunity from jurisdiction.[64]

Lastly, in the Netherlands, in the *Mothers of Srebrenica and Others v. The Netherlands and United Nations* case, there has been a very interesting application of the principle of functional immunity. On appeal, the judgment recognized the immunity of the UN, considering that the right of access to the courts is not an absolute right and has to be balanced against the UN role in the fulfillment of peace and security. Following this reasoning, the judgment stated that immunity should prevail over the right of access to the courts. However, it is

59 See *Consortium X v. Swiss Federal Government* (*Conseil federal*), 2. Jul. 2004, *International Law in Domestic Courts* (2004): 344.

60 See *Siedler v. WEU*, 17 Sept. 2003, *Journaux des Tribunaux* (2004): 617.

61 *Energies nouvelles et environment v. ESA*, 1 Dec. 2005, *Journaux des tribunaux* (2006): 171.

62 *Banque africain du développement v. M.A. Degboe*, 25 Jan. 2005, *Journaux des tribunaux* (2005): 454.

63 See *D. v. Decision of the EPO Disciplinary Board*, 28 Nov. 2005, *2 Entscheidungen des Bundesverfassungserichts* 1751/03.

64 *Drago v. IPGRI*, already cited.

worth noting that, even if, on one hand, the *Gerechtshof* The Hague, upheld the immunity of the UN,[65] on the other hand, on a more practical level, it made reference to the possibility of an action against the Netherlands in a separate case.[66] This has been confirmed by the Dutch courts. Indeed, in the parallel proceedings in *Nuhanović v. The Netherlands*, first the *Gerechtshof*,[67] and then the *Hoge Raad*,[68] ruled that the Netherlands had acted unlawfully and was liable for evicting Bosnian nationals in Srebrenica.

With regard to the proceedings brought by the Stitching Mothers of Srebrenica, the latter decided to bring a claim against the Netherlands before the ECtHR for violation of its right of access to the court because of the granting of immunity to the UN. In its judgment of 11 Jun. 2013,[69] the ECtHR ruled that the case was different from previous cases because the dispute between the applicants and the UN was based on the Security Council's powers under Ch. 7 in fulfilling the fundamental mission of the UN to secure international peace and security, with the result that 'the Convention cannot be interpreted in a manner which would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the United Nations'.[70] With regard to the argument of the claimant according to which the UN immunity had to be removed since the prohibition of genocide was a rule of *jus cogens*, the ECtHR dismissed it, referring to the judgment of the ICJ in *Germany v. Italy*; in that case the ICJ ruled that a civil claim cannot override immunity from suit for the sole reason that it is based on an allegation of a violation of a norm of international law, even a norm of *jus cogens*.[71] Finally, the ECtHR ruled

65 See *Mothers of Srebrenica and Others v. The Netherlands and United Nations*, Section 5.10, 30 Mar. 2010, available at www.rechtspraak.nl.

66 *Ibid.*, Section 5.12.

67 See *Nuhanović v. The Netherlands*, 5 Jul. 2011, Section 6.20, available at www.rechtspraak.nl.

68 See *The Netherlands v. Nuhanović*, 6 Sept. 2013, Sections 3.15.1–3.18.3, available at www.rechtspraak.nl.

69 For a commentary, see Maria I. Papa, "Immunità delle Nazioni Unite dalla giurisdizione e rapporti tra CEDU e diritto delle Nazioni Unite: la decisione della Corte europea dei diritti umani nel caso dell'Associazione madri di Srebrenica," *DUDI* 8 (2014): 27; Francesca Andreoli, "Immunità delle Nazioni Unite e protezione equivalente: l'affare Associazione Madri di Srebrenica," *RDI* 97 (2014): 443.

70 *Stitching Mothers of Srebrenica and Others v. The Netherlands*, 11 Jun. 2013, Section 154, available at hudoc.echr.coe.int.

71 For some critical remarks of the ICJ judgment see Riccardo Pisillo Mazzeschi, "Il rapporto tra norme di jus cogens e la regola sull'immunità degli Stati: alcune osservazioni critiche sulla sentenza della Corte internazionale di giustizia del 3 febbraio 2012," *DUDI* 6 (2012): 310; Alex Mills, Kimberley N. Trapp, "Smooth Runs the Water Where the Brook Is Deep: The Obscured Complexities of Germany v Italy," *Cambridge Journal of International and Comparative Law* 1 (2012): 153.

that even if alternative means is a 'material factor' in determining whether to grant immunity from jurisdiction, it does not follow that the absence of alternative remedies can be automatically considered a breach of the Convention, because the '[ECtHR]'s judgments in *Waite and Kennedy* and *Beer and Regan* cannot be interpreted in such absolute terms either'.[72] As a consequence, the ECtHR found that granting to the UN the immunity served a legitimate purpose and was not disproportionate.

The judgment of the ECtHR has been subjected to several critical remarks,[73] among which one of the most pertinent concerns the application by analogy of ICJ case law on State immunity to the UN. Since State and IOs immunities have a different grounding in international law, doubts arise as to the automatic application to IOs of principles established by the ICJ in favour of States. With regard to the balance between the right of access to the courts and the UN role, like the *Gerechtshof* in The Hague, the ECtHR seems to confirm that a once for all approach is not possible and that the different nature and purposes of IOs must be taken into consideration in order to differentiate the effects of the immunity. Also this part of the ECtHR ruling raises some doubts because, even if it may be justified for the fulfillment of peace and security and covered by Ch. 7, it confirms the impunity of the UN.

4 The Immunity of International Organizations from Enforcement

With regard to IOs' immunity from enforcement, a preliminary remark is necessary. If an IO enjoys immunity from jurisdiction, it will enjoy immunity from enforcement too. Conversely, if an IO is not entitled to immunity from jurisdiction, the organization may nonetheless enjoy immunity from enforcement.[74]

According to some authors, the immunity of IOs from enforcement measures is absolute;[75] however, it seems correct to consider the granting of this immunity, taking into account the categories of property, so as to apply the functional principle also to immunity from enforcement. It should be the purpose of the property against which enforcement measures are sought that

72 *Stitching Mothers of Srebrenica*, Section 164.

73 See Papa, "Immunità," 47–49, 50–56; Manuel Ventura and Dapo Akande, "Mothers of Srebrenica: The Obligation to prevent Genocide and Jus Cogens – Implications for Humanaitarian Intervention," available at www.ejiltalk.org.

74 See Andrea Atteritano, "Immunità dalle misure esecutive e cautelari," in *Le immunità internazionali*, 239.

75 Dominicé, "L'immunité," 224, and Alexander S. Muller, *International Organizations and Their Host States* (The Hague: Kluwer, 1995), 167.

determines whether or not immunity will be granted. As for jurisdictional immunity, it is worth examining treaty law and national case law.

With regard to treaty law, once again, the principles established in the General Convention have been inserted in the General Convention on the Privileges and Immunities of the Specialized Agencies and the two Conventions have become a model outside the UN system. Indeed, provisions with the same content can be found in the General Agreement on Privileges and Immunities of the Council of Europe, Convention on the Privileges and Immunities of the League of Arab States and the Agreement on the Privileges and Immunity of the OAS. Those treaties establish that the property and assets of an IO are immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

Immunity from enforcement seems to be broader than immunity from jurisdiction. The explanation can be found in the fact that the IOs' entire properties may be necessary to the latter in the fulfillment of their purposes. To this end, it is worth noting that the only conventional exception to this absolute immunity from enforcement can be found in the agreement establishing economic and financial IOs with regard to commercial activities – that is activities in which IOs are considered as private actors in the financial market.[76]

With regard to bilateral agreements (i.e. Headquarters Agreements), it should be noted that the practice is to restrict absolute immunity. For instance, in several bilateral agreements concluded by Italy as host state, there is a reference to the rules concerning States immunity from enforcement. As is well-known, States are entitled to a restrictive immunity from enforcement; this means that the purpose of the property against which enforcement measures are sought determines whether or not immunity is granted. If assets are necessary for the fulfillment of institutional activities, the IO enjoys immunity from enforcement. Otherwise, assets are not immune from execution.

Turning to the analysis of national case law, we observe that the practical application of the restrictive immunity from enforcement is open to objection. Indeed, even if there should be a clear distinction between property necessary for institutional purposes and assets not falling within this category, national courts seem inclined to interpret the meaning of 'property necessary for institutional purposes' in such a way as to make immunity from enforcement almost absolute.

76 See Art. VI of the Treaty Establishing the IFC; Art. 50 of the Treaty Establishing the Asian Development Bank; Art. 52 of the Treaty Establishing the African Development Bank and Art. 29 of the Central American Bank for Economic Integration.

For instance, in the *Centre for Industrial Development v. Naidu* case, the *Tribunal Civil,* Brussels, proceeded on the basis that, unlike State immunity from enforcement in which it is possible to draw a line between acts *jure imperii* and acts *jure gestionis*, that difference is not acknowledged in the case of IOs, because all assets are necessary for institutional purposes. Also the Italian courts in several cases concerning the Agronomic Mediterranean Institute held that IOs enjoy a restrictive immunity, but subsequently ruled that all property of the organization was immune from execution because it was necessary to its purpose.[77]

5 Conclusion

The analysis of the immunity of IOs from jurisdiction and enforcement shows that there is a growing trend for IOs to be accountable.[78] Nevertheless, it is clear that it is not easy to find a balance between the immunity of IOs and the right of access to the courts. This article stresses that the situation is quite fragmented.

Concerning the immunity from jurisdiction, functional immunity seems to be the preferable approach, because even if it is fundamental that IOs fulfil their purposes independently without any interference, it is as important that, in respect of the activities in which they act as private actors, they can be sued before national courts. In this context, the additional conditions laid down by the ECtHR and followed by some domestic courts, that is the existence of alternative means, strengthens the protection of individual rights. Nevertheless, this case law is still not universally applied.

A different issue arises in the case of the alleged human rights violations committed by IOs during a peace-keeping operation. In the *Stitching Mothers of Srebrenica v. The Netherlands* judgment, the ECtHR recognized that the UN immunity prevailed over the right of access to the courts. As underlined, the ECtHR ruling is not satisfactory. However, it is circumscribed to that specific situation and, hence, it cannot be extended to the entirety of IOs. If it were not so circumscribed, the important evolution in favour of the individual's right of access to the courts, to which the ECtHR has contributed over the years, would be called in question.

77 See, for instance, *Paradiso v. Istituto Agronomico Mediterraneo*, 4 Apr. 1986, No. 2316, *Foro italiano* (1986): 2507. For an overview and an analysis of the Italian case law on the immunity from enforcement see Atteritano, "Immunità dalle misure," 245.

78 See Di Filippo, "Immunity from Suit," 247.

Also in regard to immunity from enforcement, the functional principle continues to be recognized. Nevertheless, in order to render application of the principle effective, it is desirable that in future the notion of IOs' properties will be interpreted in a more restrictive way than now. Otherwise, there is the risk that recognition of functional immunity will not be reflected in its actual application.

CHAPTER 14

Responsibility for Human Rights Violations by International Organizations

Guillaume Le Floch

1 Introduction

Since the end of World War II international organizations (IOs) have contributed to the development and the promotion of human rights. They play a fundamental role in the drafting and in the conclusion of many human rights treaties both at international[1] and regional levels[2] and in the setting up of many international monitoring mechanisms.[3] Numerous IOs dedicate their efforts to protecting human rights. But in the exercise of their activities they are also capable of violating human rights.

In recent decades, indeed, several violations have been committed by IOs. For instance, United Nations (UN) military peacekeepers have been accused of human rights abuses while deployed on UN missions.[4] IOs can breach human rights in the framework of their operational activities but also in that of their normative activities. For example, comprehensive sanctions adopted by the

1 For instance, in addition to the Universal Declaration of Human Rights (1948), the UN GA adopted 16 conventions setting human rights standards, such as the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the Convention on the Elimination of All Forms of Discrimination Against Women (1979), the Convention Against Torture (1984), the Convention on the Rights of the Child (1989) and recently the International Convention for the Protection of All Persons from Enforced Disappearance (2006).

2 Regional organizations have provided the framework for the negotiation and conclusion of many human rights treaties such as the European Convention on Human Rights and Fundamental Freedoms (ECHR, Council of Europe, 1950), the American Convention on Human Rights (Organization of American States, 1969) and the African Charter on Human and Peoples' Rights (Organization of African Unity, 1981).

3 Over the years, human rights monitoring has matured and developed. See for example the United Nations Commission on Human Rights and its successor the Human Rights Council, the Human Rights Committee, the European Court of Human Rights, the Inter-American Court of Human Rights, *etc*.

4 In Bosnia and Kosovo in the 1990s, UN peacekeepers helped to support sex trafficking as customers of brothels relying on forced prostitution. See for example Jennifer Murray, "Who Will Police the Peace-Builders? The Failure to Establish Accountability for the Participation

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Security Council in the '90s against Iraq[5] notably had devastating effects on the population.[6] As a result, recent years have been characterized by attempts to move from comprehensive sanctions applied to States towards targeted sanctions[7] applied against non-State actors and aimed at minimizing the negative effect of the former. They are usually standardised, such as embargoes on weapons and sensitive goods, travel bans and asset freezes. However, these sanctions may affect specific individual rights and freedoms such as property rights, the right to effective judicial review and the right to be heard.[8] That is what the European Court of Justice (ECJ) especially observed in its famous *Kadi* Case[9] dealing with the SC's Res. 1267 sanctions regime.

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of United Nations Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina," *Col. HRLR* 34 (2002/2003): 475. Some 'blue helmets' have been accused of sex crimes also in Haiti, Guinea, Liberia, Sierra Leone, Sudan, Ivory Coast, Cambodia, East Timor, and in the Democratic Republic of the Congo. See UN General Assembly, Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects, UN Doc. A/59/710 (2005), 9. Over the years, however, 'there has been a marked decrease in the overall number of reported instances of sexual exploitation and abuse in all United Nations entities, from a high of 373 in 2005 to 88 in 2012': Special Measures for Protection from Sexual Exploitation and Sexual Abuses, UN Doc. A/67/766 (2013), 2.

5 See *inter alios*: UN SC Resolutions 661 (1990) and 687 (1991).

6 See *inter alios* Thomas G. Weiss *et al.*, *Political Gain and Civilian Pain: Humanitarian Impacts of Economic Sanctions* (Lannham: Rowman&Littlefield, 1997). According to the Committee on Economic, Social and Cultural Rights 'they often cause significant disruption in the distribution of food, pharmaceuticals and sanitation supplies, jeopardize the quality of food and the availability of clean drinking water, severely interfere with the functioning of basic health and education systems, and undermine the right to work. In addition, their unintended consequences can include reinforcement of the power of oppressive élites, the emergence, almost invariably, of a black market and the generation of huge windfall profits for the privileged élites which manage it, enhancement of the control of the governing élites over the population at large, and restriction of opportunities to seek asylum or to manifest political opposition. While the phenomena mentioned in the preceding sentence are essentially political in nature, they also have a major additional impact on the enjoyment of economic, social and cultural rights'. On the relationship between economic sanctions and respect for economic, social and cultural rights see General Comment No. 8 (1997), UN Doc. E/C.12/1997/8, Section 3.

7 See the Millennium Report of the Secretary-General of the United Nations: Kofi A. Annan, "We the Peoples." The Role of the United Nations in the 21st Century (2000), 49–50.

8 Eugenia López-Jacoiste, "The UN Collective Security System and its Relationship with Economic Sanctions and Human Rights," *MPYUNL:* 14 (2010): 322–332.

9 ECJ, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, judgment of 3 Sept. 2008, C-402/05 P

In the '50s, Clyde Eagleton stated that the UN Charter gave little authority under which it could cause harm to others.[10] This statement seems now to be behind us. In the exercise of its powers, the UN, but also many other IOs,[11] is capable of violating human rights. This is even more true with the establishment of international transitional civil administrations like the one in Timor or the one in Kosovo. In these case, the UN is entrusted with legislative and executive powers and exercises prerogatives of public authority within the country like any other State affecting the livelihood and legal status of physical and legal persons.[12]

Because of the intensification of their activities and the extension of their competences, IOs can obviously perpetrate human rights abuses. But over the years, the lack of responsibility for human rights violations by IOs has been regularly denounced.

In its Advisory Opinion on the *Reparation for Injuries suffered in the service of United Nations*, the International Court of Justice (ICJ) recognized the legal personality of IOs as being separate from that of their Members.[13] Thus, they have obligations under international law violations of which can involve their responsibility. Under Art. 3 of the Draft Articles on the Responsibility of International Organizations (DARIO) adopted by the International Law Commission (ILC) in 2011, 'every internationally wrongful act of an international organization entails the international responsibility of that organization'. According to Art. 4, 'there is an internationally wrongful act of an international organization when conduct consisting of an action or omission: (a) is attributable to that organization under international law; and (b) constitutes a breach of an international obligation of that organization'. As with States, two elements are identified. If an action or an omission attributable to an international organization leads to the

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and C-415/05 P. See notably Katja Ziegler, "Strengthening the Rule of Law, but Fragmenting International Law: the Kadi Decision of the ECJ from the Perspective of Human Rights," *HRLR* 9 (2009): 288.

10 Clyde Eagleton, "International Organization and the Law of Responsibility," *RdC* 76 (1950): 385.

11 See for example financial IOs. A loan by one of them may finance a project (like the construction of a dam) that results in human rights violations (destruction of property without compensation, displacement of thousands of people, *etc.*).

12 See *inter alios* Hansjörg Strohmeyer, "Collpase and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor," *AJIL* 95 (2001): 46; Mathias Forteau, "Le droit applicable en matière de droits de l'homme aux administrations territoriales gérées par des organisations internationales," in *La soumission des organisations internationales aux normes internationales relatives aux droits de l'homme*, eds. SFDI/IIDH (Paris: Pedone, 2009), 7.

13 *ICJ Reports* 1949, 179.

violation of an obligation, the organization should be held responsible. But as far as violations concern human rights, things are not so simple. On a legal basis, the problem lies in the fact that most IOs are not bound by human rights treaties and that few mechanisms provide remedies to potential victims. However, the issue of attribution is not a crucial one in this context.[14] That is why this contribution will briefly focus only on the breach of an international obligation (primary rules) and its consequences (secondary rules).

It is thus necessary to determine the human rights obligations binding on IOs and then the consequences of their violation in terms of remedies.

2 Determination of the Human Rights Obligations Binding on International Organizations

As the ICJ stated in its Advisory Opinion on the *Interpretation of the Agreement of March 1951 between the WHO and Egypt*, 'international organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties'.[15] Consequently, IOs are held responsible for their acts in the event of a violation of an applicable international norm. This raises the question of the sources of the law applicable to international organizations. As far as human rights are concerned, conventional international law confers only a few obligations on IOs. These result essentially from non-conventional international law.

a *A Few Obligations From Conventional Law*

As regards conventional law, obligations may arise either from constituent instruments of the IOs or from human rights treaties by which IOs are bound. In practice, constituent instruments contain only a few provisions that refer to human rights (1) and IOs are not bound by human rights treaties (2).

a.1. Constituent instruments rarely impose obligations to respect human rights on the IOs they establish. On this point, the International Criminal Police Organization-INTERPOL Constitution is an exemption. Art. 2(1) of the

14 The question of attribution will not be addressed in this contribution. On this point see Giorgio Gaja, "Responsabilité des Etats et/ou des organisations internationales en cas de violations des droits de l'homme: la question de l'attribution," in *La soumission*, 95; Pierre Klein, "The Attribution of Acts to International Organizations," in *The Law of International Responsibility*, eds. James Crawford, Alain Pellet and Simon Olleson (Oxford: OUP, 2010), 297.

15 *ICJ Reports* 1980, 89–90, Section 37.

> Interpol Constitution states that its action is carried out in the spirit of the Universal Declaration of Human Rights (UDHR).[16] This provision is unique to ICPO-INTERPOL.[17] The powers of this organization, especially in the field of the privacy of persons, justify this situation.[18] This should be the same for other IOs. But their constituent instruments do not impose on them a requirement to respect one or more of several specific texts in the field of human rights such as, for example, the UDHR or the International covenant on civil and political rights (ICCPR). It does not however mean that constituent instruments leave this question systematically unanswered.

The Charter of the United Nations, for instance, refers to human rights in several articles. Art. 1(3) identifies one of the organization's aims as being to promote and encourage 'respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. Art. 55(c) imposes on the UN a duty to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'. Although these provisions are evanescent, the ICJ has held that they do generate a binding obligation on Member States to respect human rights. In *South West Africa* (*Second Phase*) case, the Court stated that 'the preambular parts of the United Nations Charter constitute the moral and political basis for the specific legal provisions thereafter set out'.[19] In its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) *Notwithstanding Security Council Resolution 276* (*1970*), it considered that 'to establish…, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter',[20] while in *United States Diplomatic and Consular Staff in Tehran* (*United States of*

16 Under Art. 2(1) of this constituent instrument, one of the aims of the organization is to 'ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the law existing in the different countries and *in the spirit of the "Universal Declaration of Human Rights" '* (italics added).

17 Responsibility of International Organizations. Comments and Observations Received from Government and International Organizations, ILC, 12 May 2005, UN Doc. A/CN.4/556, 32.

18 'As one main activity of ICPO-Interpol consists of the processing of information for the purpose of international police cooperation, ICPO-Interpol activities come within the range of the privacy of persons protected by the fundamental right enshrined in Art. 12 of the Universal Declaration': Responsibility of International Organizations, 33.

19 *ICJ Reports* 1966, 34, Section 50.

20 *ICJ Reports* 1971, 57, Section 131.

America v. Iran) case, it observed that 'wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights'.[21] Through principles and aims of the Charter, the ICJ requires the UN to respect human rights.[22] For instance, in its Advisory Opinion on the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, the Court concluded that 'it would…hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them'.[23] This interpretation is salutary. It would be particularly open to criticism that an organization whose purpose is to encourage and to promote human rights could ignore them for itself in practice.

In a general way, however, the constitutive acts of the IOs remain rather vague on the question of human rights.[24] For example, they are not mentioned in the Articles of Agreement of the IMF and of the IBRD.[25]

In the end, the constituent instruments of the IOs are far from imposing on IOs obligations to respect human rights. This is all the more problematic as most IOs are not currently parties to international instruments for the protection of human rights.

a.2. IOs are not currently parties to international instruments for the protection of human rights. Admittedly, 'IOs possess the capacity to conclude treaties, which is necessary for the exercise of their functions and the fulfilment of their purposes'.[26] However, IOs are not usually signatories to

21 *ICJ Reports* 1980, 42, Section 91.

22 See Forteau, "Le droit," 16.

23 *ICJ Report*, 1954, 57.

24 On this point see Jean-Marc Sorel, "Institutions économiques internationales et droit international des droits de l'homme: un respect cosmétique en effet miroir," in *La soumission*, 39–41.

25 It must nevertheless be pointed out that one of the purposes of the IMF is 'to facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy'. See also Art. 1 of the Articles of Agreement of the IBRD.

26 Preamble to the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 Mar. 1986.

international human rights conventions.[27] Their functional legal personality cannot just explain this situation.[28]

Many of them exercise competences in the field of human rights without actually acceding to these conventions. Most human rights treaties are open to accession and ratification by States only.[29] Things can change, as the Convention on the rights of persons with disabilities (UNCRPD) adopted on 13 Dec. 2006 proves.[30] This Convention is open for signature by all States but also by 'regional integration organizations'.[31] The European Union (EU) signed the UNCRPD on 30 Mar. 2007. It completed the procedure of conclusion of the Convention by depositing its instrument of formal confirmation with the UN Secretary-General in New York on 23 Dec. 2010. The Convention entered into force with respect to the EU on 22 Jan. 2011. This precedent is unique. But it may prefigure a next evolution. Meanwhile, previous human rights treaties are addressed only to States. To cope with this situation, different answers are conceivable.

The obvious answer is to modify the instruments themselves. The aim of such modification would be to widen the list of potential parties beyond States.

27 See *inter alios* August Reinisch, "Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions," *AJIL* 95 (2001): 854; Robert Kolb, Gabriele Porretto, Sylvain Vité, *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales* (Bruxelles: Bruylant, 2005), 288.

28 According to Pierre Klein, when organizations hesitate about adhering to major multilateral treaties, the obstacles appear, in reality, more political than truly legal: *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruxelles: Bruylant, 1998), 318.

29 See for examples Art. 26(1)(3) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Art. 48(1)(3) of the ICCPR; Art. 59 of the ECHR.

30 See also Art. 33(1) of the Convention for the protection of human rights and dignity of the human being with regard to the application of biology and medicine (4 Apr. 1997) under which 'this Convention shall be open for signature by the member States of the Council of Europe, the non-member States which have participated in its elaboration and by the *European Community*' (italics added). Nevertheless, the European Union has not yet signed the Convention.

31 See Arts. 42 (signature) and 43 (consent to be bound). Under Art. 44, '"regional integration organization" shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention. Such organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by this Convention. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence'.

That is what happened for the ECHR. Since the entry into force of the Lisbon Treaty[32] and of Protocol No. 14 to the EHCR,[33] the EU can now accede to the Convention. The idea that the EU should accede to the ECHR is an old one.[34] It was first proposed by the European Commission in 1979.[35] It raises numerous difficulties[36] and is such a very particular case. Generally, it seems difficult today to amend the various universal and regional treaties to allow IOs to accede to them. It could even be dangerous to the extent that certain States might take the opportunity to try to renegotiate these various treaties. It is thus better not to open Pandora's Box.[37]

An easy answer might be that the international organization make a commitment by an *ad hoc* declaration to respect and implement at least some con-

32 Art. 6(2) of the Treaty on European Union, as amended by the Lisbon Treaty, provides that the European Union 'shall accede' to the ECHR.

33 Art. 59(2) of the ECHR, as amended by Protocol No. 14, provides that 'the European Union may accede to this Convention'.

34 See Jean-Paul Jacqué, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms," *CMLR* 48 (2011): 995; Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Oxford: Hart, 2013).

35 Russia had already urged the EU to accede to the ECHR. For instance, Russia's EU envoy Vladimir Chizhov stated at a parliamentary hearing entitled Human Rights Issue in the EU States that 'We are concerned that the European Union has not as yet joined the main legal instrument of the Council of Europe – the European Convention on Human Rights' (en.rian.ru). On 5 Apr. 2013, the final version of the Draft Agreement on Accession of the EU to the ECHR was presented by negotiators of the 47 Council of Europe Member States and the EU, and constitutes one step closer to a complete accession.

36 See in general on accession to international human rights treaties Olivier de Schutter, "Human Rights and the Rise of International Organisations: The Logic of Sliding Scales in the Law of International Responsibility," in *Accountability for Human Rights Violations by International Organisations*, eds. Jan Wouters *et al.* (Antwerp: Intersentia, 2010), 110–119.

37 According to Gabriele Porretto and Sylvain Vite, "The Application of International Humanitarian Law and Human Rights Law to International Organisations," *Research Papers Series*, University Centre for International Humanitarian Law (2006), www.geneva-academy.ch, 43: 'it may also be possible to achieve such a conventional amendment within the *lex lata*, by virtue of a non-conventional norm or objective procedure. As international organizations have not yet attempted to become parties to these Conventions, it is difficult to evoke generally accepted subsequent practice, to the extent that the concept of "subsequent practice" amending a treaty requires evidence of actual practice. If, on the contrary, the example is taken of certain doctrinal tendencies concerning customary law (of which "subsequent practice" is but one form), it may be possible, in the context of human rights and humanitarian law, for *opinio juris* to play a more prominent role than effective practice, in order to argue that, due to wide acceptance by international opinion, these Conventions must now be regarded as open to adhesion by international organizations'.

ventional obligations[38] in a general and abstract way or on the occasion of an operation (for example during the establishment of an international civil transitional territorial administration). As Gabriele Porretto and Sylvain Vité observe, 'this would overcome any objections to the formal adhesion of organizations to the underlying treaties on an equal footing with State Parties'.[39]

Finally, it might be possible to set up an international human rights treaty open for signature by all IOs. However, 'this would undoubtedly be a very complicated process, leading to futile duplication of law that has already been codified for decades'.[40]

Unlike IOs, many Member States are bound under international human rights treaties. Therefore some suggest that obligations might derive from the pre-existing conventional obligations of their Member States. In other words, IOs should be considered to inherit the human rights obligations imposed on their Member States.[41] This is very difficult to justify on legal grounds. In accordance with the principle of *res inter alios acta*, repeated in Art. 34 of the Vienna Convention of 1986, a treaty cannot create either obligations or rights for a third organization without its consent. Whether or not Member States have ratified the relevant treaties does not change anything. The organization is still a third party to the treaty. Some scholars try to avoid this obstacle by using the theory of transitivity or the States' successions to treaties. None of them seem to be effective.

The theory of transitivity deduces the derivative nature of the international legal personality of IOs that they cannot be granted more powers than those held by their Member States. As a result, they would thus necessarily be bound by the obligations of the Member States: either directly or at least through a due diligence obligation that would prohibit them from putting their Member States in an awkward situation with their treaty obligations.[42] This theory has never been established by case law and its implementation does not necessarily

38 *Mutatis mutandis*, it is a solution which had been considered by the Trusteeship Council. Art. 9(15) of the Statute for the City of Jerusalem stated that 'the Universal Declaration of Human Rights shall be accepted as a standard of achievement for the City'. Moreover, under Art. 9(16), 'at such time as the proposed United Nations Covenant of Human Rights shall come into force the provisions of that Covenant shall enter into force also in the City in accordance with the provisions of Article 37 of this Statute': UN Doc. T/592, 4 Apr. 1950.

39 Porretto and Vité, "The Application," 44.

40 *Ibid*.

41 See the discussion in Forteau, "Le droit," 24–28; de Schutter, "Human Rights," 57–68; Frederik Naert, "Binding International Organisations to Member State Treaties or Responsibility of Member States for their Own Actions in the Framework of International Organisations," in *Accountability*, 130–155.

42 See Forteau, "Le droit," 24.

lead to the expected results.[43] Indeed, under this theory, the international organization is bound only to the conventions to which all its Members are parties. For universal organizations like the UN this statement greatly reduces the impact of the theory. No human rights treaty (even the Convention on the rights of the child) is ratified by all Member States. In addition, the organization is supposed to be bound only by the lowest common denominator. It is therefore necessary to review all reservations and all objections raised by Member States for each treaty to reach the very substance. Finally, this theory 'depends upon the timing of the transfer of power and would only cover a State's obligation existing before such a transfer and exclude agreements concluded after such a transfer'.[44] It is thus unworkable even for regional organizations.

Others are inspired by the existing rules of succession of States in respect of treaties. IOs should respect human rights treaties in the areas in which they replace the States because of the competences that have been attributed to them.[45] This thesis is questionable at different levels.[46] In particular, it is based on an assumption which is the automatic succession to treaties in the field of human rights. But this principle, however desirable it may be, has never been enshrined in positive law.[47] In general, moreover, the rules of succession of States parties to the treaty remain uncertain and have been developed specifically for the States.

With autonomous legal personality, IOs, excepting a specific provision to that effect, could not be bound to treaties to which its Members are parties.[48] For instance, the IMF's General Counsel reported that 'the IMF has rejected the argument that it would be bound by certain human rights treaties despite their

43 Forteau, "Le droit," 24–25.

44 Naert, "Binding International," 134.

45 See Pierre Pescatore, "La Cour de Justice des CE et la Convention européenne des droits de l'homme," in *Protecting Human Rights: the European Dimension, Studies in Honour of Gérard J. Wiarda*, eds. Franz Matscher and Herbert Petzold (2nd edn. Köln: Carl Heymanns, 2000), 450.

46 Under Art. 1(2)(b) of the Vienna Convention on Succession of States in Respect of Treaties of 23 Aug. 1978, the succession of States is 'the replacement of one State by another in the responsibility for the international relations of territory'. As Naert, "Binding International," 132–133, observes, 'it is clear that international organizations hardly ever, not even in the case of EU, entirely replace their Member States in the responsibility for their international relations'.

47 Naert, "Binding International," 132–133; Guillaume Le Floch, "Continuité et discontinuité en matière de succession des Etats aux traités," in *La notion de continuité, des faits au droit*, eds. Geneviève Koubi, Guillaume Le Floch, Gilles Guglielmi (Paris: L'Harmattan, 2011), 197–215.

48 In its Advisory Opinion on *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, the ECJ considered that the European Community is not bound by the provisions of the ECHR, although its Members are party to the Convention: Opinion 2/94, 28 Mar. 1996, *ECJ Reports*, I-1783.

broad ratification by its Member'.[49] In particular, it considered that the ICESCR does not apply to the IMF.[50] As a result, human rights obligations arise primarily from general international law.[51]

b ***Obligations Primarily Arising From Non-Conventional Law***

The application of non-conventional human rights norms raises two issues. The first question is to identify the source of international law on which they are based, i.e. customary international law or general principles of law (1). The second question is to clarify their scope (2).

b.1. In its judgment delivered in *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), the ICJ stated that 'there is no doubt… that the prohibition of inhuman and degrading treatment is among the rules of general international law which are binding on States in all circumstances, even apart from any treaty commitments'.[52] It is therefore an obligation whose basis is not only conventional. Similarly in *East Timor* (*Portugal v. Australia*) case, it considered that 'the principle of self-determination of peoples…is one of the essential principles of contemporary international law'.[53] These statements beg the question of the international law source of these obligations. The ICJ remains carefully silent on this point. Are international human rights based on custom or on general principles of law? Scholars have mixed feelings.

Custom requires both a general practice among States (consistent State practice) and evidence of a belief that doing something is legally obligatory (*opinio juris*). According to some scholars, most, if not all, the rights listed in the UDHR have acquired customary status in international law.[54] In support of their

49 Legal brief dated 30 May 2001 cited in Naert, "Binding International," 154.

50 'The Covenant is a treaty among States which contains obligations addressed to States. Neither by its terms nor by the terms of the Fund's relationship agreement with the United Nations is it possible to conclude that the Covenant is applicable to the Fund': François Gianviti, "Economic, Social and Cultural Human Rights and the International Monetary Fund," Economic and Social Council, UN Doc. E/C.12/2001/WP.5, 7 May 2001, Section 56.

51 Moreover one may wonder if the organizations have the indispensable physical and legal means to implement the obligations set out in the relevant human rights convention.

52 *ICJ Reports* 2010, 671, Section 87.

53 *ICJ Reports* 1995, 102, Section 29.

54 According to Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: OUP, 2006), 100, 'the two Covenants and the Universal Declaration…can be said to have acquired [over time] normative status either as a customary international law or as an

argument, they rely on the resolutions of the UN GA and various statements of other IOs indicating a net commitment towards certain values. This reflects the existence of an *opinio juris*. Utmost importance is attached to expressions of will as revealed through the normative activity of IOs. Violations of some of these principles by States are not an obstacle to the consecration of a custom.[55] State practice is indeed based on a number of indicators such as the sometimes almost universal ratification of conventions on human rights,[56] the widespread adoption of the resolutions of IOs relating to human rights (such as the UN GA), the invocation of human rights repeated in diplomatic practice, *etc.* This conception emphasizes *opinio juris* as opposed to State practice. The commitments are more important than acts.[57]

For others, it would be better to focus on general principles of law.[58] That is to say, the principles enshrined in the internal legal order and raised in the international legal order. Indeed international human rights are enshrined and replicated in a large number of national constitutions throughout the world, across various regions and legal systems.[59] It's also possible to defend a new understanding of the general principals of law and to base them on the principles common to various international conventions on human rights. Compared to custom, the general principles of law can explain the phenomenon of the emergence of a rule widely accepted by the international community and compulsory even though violated.[60] They also have the advantage of promoting the progressive and constructive interpretation of human rights, and finally making connections between different conventional systems.

Other arguments can be developed to support one or the other of these two theses. The ICJ anyway maintains some vagueness on the issue. On a theoretical

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authoritative interpretation of the Charter'. See also for instance Humphrey Waldock, "General Course on Public International Law," *RdC* 106 (1962): 199; Hurst Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law," *Ga. J. Int'l & Comp. L.* 25 (1995–1996): 287.

55 Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989), 106–114.

56 In its judgment delivered in the *Nold* decision of 14 May 1974, case 4–73, the ECJ stated that 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law': *ECJ Reports*, 507.

57 On this modern view of custom see de Schutter, "Human Rights," 69–71.

58 de Schutter, "Human Rights," 71–73.

59 Bruno Simma and Philip Alston, "The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles," *Australian YIL* 12 (1988–1989): 102–108.

60 Simma and Alston, "The Sources," 102.

level, it would be good to decide but in practice this does not have repercussions. Whether human rights law is customary[61] or is rooted in general principles of law[62] does not change anything. The norm is binding on all subjects of international law. IOs are bound to respect human rights on the basis of general international law.[63] Nonetheless, all human rights norms have not acquired a customary *status* or can be considered as a general principle of law.[64]

b.2. IOs have functional legal personality. Consequently, as the ICJ recalled in its Advisory Opinion of 1949, IOs do not possess 'the totality of international rights and duties recognized by international law', but only those which depend 'upon its purposes and functions as specified or implied in its constituent documents and developed in practice'.[65] Thus, general human rights norms are binding on IOs to the extent that they are applicable to the purposes and the functions of each organization.[66] One might ask whether an international organization that is not invested with any specific responsibility regarding human rights can free itself from the respect for these human rights. This is an issue that does not arise for the UN,[67] for example, which is vested with competence in this area. However, there is some question whether international human rights law

61 In this sense for example see Tobias Irmscher, "The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights, and the Law of Occupation," *GYIL* 44 (2001): 369.

62 In this sense for example see de Schutter, "Human Rights," 72–73.

63 *Contra*: Philip Alston, "The 'Not-a-Cat Syndrom': Can International Human Rights Regime Accommodate non-State Actors?" and François Gianviti, "Economic, Social and Cultural Human Rights and the International Monetary Fund," both in *Non-States Actors and Human Rights*, ed. Philip Alston (Oxford: OUP, 2005), 8–9 and 113.

64 Clapham, *Human Rights*, 86. According to Gianviti, "Economic," 56, 'the norms contained in the [ICESCR] have not attained a status under general international law that would make them applicable to the Fund independently of the Covenant'.

65 *ICJ Reports* 1949, 180.

66 See Gerard Cahin, *La coutume internationale et les organisations internationales: l'incidence de la dimension institutionnelle sur le processus coutumier* (Paris: Pedone, 2001), 513.

67 The UN Secretary-General recognized the existence of this obligation: 'where we are mandated to undertake executive or judicial functions, United Nations-operated facilities must scrupulously comply with international standards for human rights in the administration of justice': UN Doc. S/2004/616, 23 Aug. 2004. *Mutatis mutandis*, Art. 20(a) of the Convention on the safety of United Nations and associated persons dated 9 Dec. 1994, recalls the responsibility of the UN and associated personnel to respect international humanitarian law and universally recognized standards of human rights.

> can apply to financial IOs such as the IMF[68] or the IBRD.[69] Both these IOs 'saw themselves as purely technical and financial organizations, whose Articles of Agreement enjoined them (explicitly in the case of the Bank,[70] implicitly in the case of the Fund) from taking political considerations into account in their decisions. Their role as financial institutions was to provide economic assistance, not to dictate political changes'.[71] But, as Andrew Clapham writes, 'the political affairs prohibition cannot be read as excluding concern that governments comply with their international human rights obligations. And, in any event, the prohibition on interference in the political affairs of a state cannot be read to mean that the Bank and IMF have no human rights obligations of their own'.[72]

IOs are not only bound by their internal juridical order. It is necessary to separate the question whether IOs can deploy activities to ensure the protection of human rights (a question which must be examined in the light of the principle of specialty) from the question whether in the achievement of their missions these organizations can have their freedom of action limited by certain rules of international law other than their own legal systems. With respect to human rights, all IOs have a duty of vigilance. Thus international financial institutions must ensure that their actions do not have an effect on the human rights situation in their borrowing members.[73]

IOs are therefore subjects to compliance with certain human rights, and in particular those which have acquired the *status* of peremptory norms, such as

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68 On this topic see Daniel Bradlow, "The World Bank, The IMF and Human Rights," *Transnat'l L. & Contemp. Problems* 6 (1996): 47; Pierre Schmitt, "The Accountability of the International Monetary Fund for Human Rights Violations," in *Accountability*, 431.

69 On this topic see Dana Clark, "The World Bank and Human Rights: The Need for Greater Accountability," *Harv. HRJ* 15 (2002): 205; Galit A. Sarfaty, "Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank," *AJIL* 103 (2009): 647.

70 Under Art. IV(10) of the Articles of Agreement of IBRD 'only economic considerations shall be relevant to their decisions'.

71 Gianviti, "Economic," Section 5.5. However, the former Senior Vice-President and General Counsel of the IBRD, Roberto Dañino considered that human rights may constitute legitimate considerations for the Bank where they have economic ramifications or impacts: Legal Opinion on Human Rights and the Work of the World Bank. See Roberto Dañino, "The Legal Aspects of the World Bank's Work on Human Rights," *The International Lawyer* 41 (2007): 21.

72 Clapham, *Human Rights*, 144.

73 See Pierre Klein, "La responsabilité des organisations financières internationales et les droits de la personne," *RBDI* (1999) 97.

the interdiction of genocide[74] or torture.[75] Furthermore, one of the articles of the DARIO is precisely dedicated to serious breaches of obligations under peremptory norms of general international law.[76]

As indicated in Art. 3 of the DARIO, the wrongful act of an international organization may consist of an action or of an omission. Omissions are wrongful when an international organization is required to take some positive action and fails to do so. This question has provoked heated controversy. Some IOs, like the IMF, underline the difficulties in complying with this type of obligation when action presupposes that a certain majority is reached within a political organ of the organization.[77] The Special Rapporteur did not take account of these difficulties. Giorgio Gaja observes that 'difficulties with compliance due to the political decision-making process are not the prerogative of international organizations'.[78] Taking the example of the failure of the UN to prevent genocide in Rwanda, Giorgio Gaja considers that 'assuming that general international law requires States and other entities to prevent genocide in the same way as the Convention on the Prevention and Punishment of the Crime of Genocide and that the United Nations had been in a position to prevent

74 ICJ, *Armed activities on the Territory of the Congo* (*New application 2002*) (*Democratic Republic of the Congo v. Rwanda*), *ICJ Reports* 2006, 31, Section 64.

75 ICJ, *Questions relating to the obligation to prosecute or extradite* (*Belgium v. Senegal*), 20 Jul. 2012, Section 99.

76 Under Art. 41 of the DARIO: '1. This Chapter applies to the international responsibility which is entailed by a serious breach by an international organization of an obligation arising under a peremptory norm of general international law. 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible international organization to fulfil the obligation'. According to the commentaries of the ILC, 'the risk of such a breach cannot be entirely ruled out. It is not inconceivable, for example, that an international organization commits an aggression or infringes an obligation under a peremptory norm of general international law relating to the protection of human rights. If a serious breach does occur, it calls for the same consequences as in the case of States': *DARIO, with commentaries*, 2011, 66.

77 The General Counsel of the IMF voiced this concern in a letter to the Secretary of the ILC: 'The inclusion of "omissions" along with "actions" that would trigger the organization's responsibility may also lead to some problems that were not necessarily applicable when dealing with responsibility of States. Such omissions may result from the application of the organization's decision-making process under its constitutive instrument. Would an organization be responsible for not taking action, if this non-action is the result of the lawful exercise of their powers by its member States?': Giorgio Gaja, Third Report on Responsibility of International Organizations, UN Doc. A/CN.4/553, 13 Jan. 2005, Section 8.

78 *Ibid*. See also Moshe Hirsch, *The Responsibility of International Organizations toward Third States: Some Basic Principles* (Dordrecht: Martinus Nijhoff, 1995), 63; Klein, *La responsabilité*, 387.

genocide, failure to act would have represented a breach of an international obligation. Difficulties relating to the decision-making process could not exonerate the United Nations'.[79]

From the time when IOs are bound by certain obligations of human rights,[80] it is worth considering the consequences of a possible violation in terms of remedies.

3 Determining the Consequences of the Violation of International Organizations of Their Obligations in the Field of Human Rights in Terms of Remedies

If an international organization breaches its international obligations it is liable for harm inflicted by it on third parties. The ICJ clearly stated this in its Advisory Opinion of 1949.[81] This raises the question of the effective implementation of this responsibility. Does a victim of human rights violation by an international organization seek remedies before an international or national organ? The answer is disappointing. It is very difficult to implement the international organization's responsibility because, above all, of the lack of appropriate mechanisms (a). That is why some suggest turning back to the Member States and holding them responsible for any human rights violations committed by IOs. This workaround is however not fully satisfactory (b).

a *The Difficult Implementation of the Responsibility of International Organizations*

It is particularly difficult for an individual to claim reparations for an injury done to him by an international organization. While in the international legal order few forums are competent (1), in the domestic legal order the problem of the immunity of jurisdiction arises (2).

a.1. In the international legal order few forums are competent. It must be remembered that IOs are not parties to the relevant treaties of human rights. As a result, they are not bound by the monitoring mechanisms

79 Gaja, *Third report*, Section 10.

80 Some scholars temper this rule considering that customary international law in the field of human rights bind IOs as long as they are in a position to comply with them in practice: August Reinisch, "Securing the Accountability of International Organizations," *Global Governance* 7 (2001): 135.

81 *ICJ Reports* 1949, 180.

which these treaties may include, such as the European Court of Human Rights (ECtHR) and the Human Rights Committee (HRC). In spite of the obstacles, claimants have nevertheless brought some cases before judicial or quasi-judicial bodies. All these complaints were dismissed because of the lack of jurisdiction *ratione personae*. It is enough to think for instance of the *Matthews* case[82] before the ECtHR with regard to the European Community or *H.v.d.P. versus Netherlands* case[83] before the HRC with regard to the European Patent Office.[84]

Sometimes, IOs may establish legal remedies available directly to individuals.[85] Thus, many of them have instituted an administrative tribunal. This is an autonomous organ competent to hear and pass judgment upon any application by a member of staff alleging non-observance, in substance or in form, of his rights by the organization. It must be observed that some international administrative tribunals, such as the International Labour Organization Administrative Tribunal, have rejected the applicability of the ECHR or the UDHR, considering that they apply to Member States only, not to IOs.[86] Others, on the contrary, have referred to human rights treaties. The Administrative Tribunal of the Organization of the American States, for example, in its *Hugo Valverde v. Secretary-General of the Organization of American States* case, referred to the American Convention on human rights.[87] It is therefore necessary that the organization has in one way or another incorporated these principles into its legal order. Otherwise, the tribunal will refer to the general principles of law. This is what emerges from the practice.[88]

82 ECtHR [GC], *Matthews v. United-Kingdom*, No. 24833/94, judgment of 18 Feb. 1999, Section 32.

83 HRC, *H. v. d.P. v. Netherlands*, No. 217/1986, UN. Doc. CCPR/C/OP/2.

84 See also ECtHR [GC], *Bankovic and others v. Belgium and others*, No. 52207/99, judgment of 12 Dec. 2001; [GC] *Behrami v. France* and *Saramati v. Norway, France and Germany*, No. 71412/01 and 78166/01, judgments of 2 May 2007; [GC], *Beric and others* v. *Bosnia and Herzegovina*, No. 36357/04, judgment of 16 Oct. 2007. *A contrario:* ECtHR, *Issa and others v. Turkey*, No. 3821/96, judgment of 16 Dec. 2004.

85 See Hervé Ascensio, "Le règlement des différends liés à la violation par les organisations internationales des normes relatives aux droits de l'homme," in *La soumission*, 108–116.

86 See for instance ILO Administrative Tribunal, Judgment No. 2611, 7 Feb. 2007, Section 8. D. Ruzié, "Jurisprudence du tribunal administratif de l'Organisation internationale du travail," *AFDI* 52 (2006): 262.

87 Judgment 125, complaint No. 225, 13 Nov. 1995, Section 3. The Administrative Tribunal of the European Council of Europe refers to the ECHR and to the case law of the ECtHR.

88 On this topic see Giovanni Michele Palmieri, "Fonction publique internationale et droit international des droits de l'homme," in *La soumission*, 59–61.

In addition, some IOs have in their internal legal order established procedures to enable individuals to make a direct claim relating to an alleged violation of human rights.[89] Thus, for instance, after facing criticisms over the Sardar Sarovar Dam project in India, the Board of Executive Directors of the World Bank created an Inspection Panel in 1993 to ensure that people had access to an independent body to express their concerns and seek recourse.[90] The Inspection Panel is an independent complaints mechanism for people who believe that they have been, or are likely to be, adversely affected by a World Bank-funded project.[91]

The measures taken by the UN SC to establish clear and fair procedures for the 1267 sanctions regime are another example. By Res. 1904 (2009) of 17 Dec. 2009 in particular, it established an Office of the Ombudsperson to assist the Committee in considering de-listing requests.[92] Despite this improvement, in its *Commission and others v. Kadi* case, the Grand Chamber of the ECJ stated that the procedure for delisting and *ex officio* re-examination at UN level 'do not provide to the person whose name is listed on the Sanctions Committee Consolidated List and, subsequently, in Annex I to Regulation No. 881/2002, the guarantee of effective judicial protection'.[93]

Other specific mechanisms have also been designed. The UN, for instance, under Section 51 of the Model Status of Forces Agreement for Peacekeeping Operations between the UN and the Host State,[94] agrees to establish a standing claims commission as a mechanism for the settlement of claims of a private law

89 See de Schutter, "Human Rights," 104–110.

90 See Laurence Boisson de Chazournes, "Le panel d'inspection de la Banque Mondiale: à propos de la complexification de l'espace public international," *RGDIP* 105 (2001): 145; Sorel, "Institutions économiques," 45–48; Rekha Oleschak-Pillai, "Accoutability of International Organisations: An Analysis of the World Bank's Inspection Panel," in *Accountability*, 401.

91 See for another example the Commission for the Control of Interpol's Files: Cheah Wui Ling, "Policing Interpol: the Commission for the Control of Interpol's Files and the Right to a Remedy," *IOLR* 7 (2010): 375.

92 Adele J. Kirschner, "Security Council Resolution 1904 (2009): A Significant Step in the Evolution of the Al-Qaida and Taliban Sanctions Regime?," *ZaöRV* 70 (2010): 585; Grant L. Willis, "Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson," *Geo. J. Int'l L.* 42 (2011): 682.

93 ECJ, 18 Jul. 2013, C-584/10 P, Section 133. See also ECtHR, *Nada v. Switzerland*, No. 10593/08, 12 Sept. 2012, Section 211.

94 UN GA, 9 Oct. 1990, A/45/594. See: Bruce Oswald, Helen Durham, Adrian Bates, *Documents on the Law of UN Peace Operations* (Oxford: OUP, 2010), 34–50.

character[95] to which the UN operation or any member thereof is a party and over which the local courts have no jurisdiction because of the immunity of the Organization or its Member. The award of the claims commission shall be binding and final unless the UN Secretary-General or the government concerned permits an appeal to a tribunal. This procedure is not used. Disputes are settled by amicable procedure such as negotiation, mediation or conciliation.[96]

Finally, it is always possible that victims rely on their home State to exercise diplomatic protection. For instance, a number of Belgian nationals notably lodged claims for damage to persons and property arising from the operations of the United Nations Force in the Congo (ONUC). The Belgian government agreed to exercise diplomatic protection. The UN negotiated an agreement with the Belgian government on compensation in the form of a lump sum. The government distributed the lump sum between the individual claimants.[97]

These examples show that some international mechanisms provide remedies for violation of human rights obligation by international organization. It must nonetheless be admitted that they are not legion.

a.2. In the domestic legal order, in order to guarantee their independence from any State, which is seen as necessary in order to enable their proper functioning, IOs are exempt from the jurisdiction of domestic courts.[98]

95 'The claim commission in Art. 51 only has jurisdiction over claims of a private law character. A claim based on a violation of international humanitarian law can only be made if the conduct in question can be simultaneously characterized as falling within standard tort categories. This is not an appropriate procedural regime for claims based on violation of international humanitarian law. The mandate of the permanent claim commission should be enlarged to expressly include violation of international humanitarian law': Marten Zwanenburg, *Accountability of Peace Support Operations* (Leiden: Martinus Nijhoff, 2005), 289.

96 See Ascensio, "Le règlement," 112.

97 'The examination of the claims having now been completed, the Secretary-General shall, without prejudice to the privileges and immunities enjoyed by the United Nations, pay to the Belgian Government one million five hundred thousand United States dollars in lump-sum and final settlement of all claims' filed against the United Nations by Belgians for damage to persons and property caused by the ONUC: Exchange of letters constituting an Agreement between the United Nations and Belgium relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals of 20 Feb. 1965, *UNJY* (1965) 39. UN concluded similar agreements with Switzerland, Greece, Luxembourg, Italy, Zambia, United States, United-Kingdom and France. See Ascensio, "Le règlement," 115.

98 Immunities are based on treaty law. Whether IOs enjoy immunity under customary international law is discussed by scholars. See Cédric Ryngaert, *The Immunity of International*

Acts or omissions of IOs are therefore not subject to review by national courts.[99] Therefore IOs' immunity from domestic jurisdiction could amount to a denial of justice.[100] The International Law Association (ILA) describes it as a 'decisive barrier to remedial action for non-State claimants'.[101] This statement must however be moderated. Firstly, because immunity is of a functional nature, IOs enjoy privileges and immunities only for those acts which are closely related to and implied by their organizational purpose. Some national courts apply to IOs the distinction between acts *jure imperi* and acts *jure gestionis*.[102] Secondly, some constituent instruments provide for a limited immunity.[103] Thirdly, IOs may decide explicitly or implicitly to waive the immunity. This is occasionally the case in disputes arising out of certain kind of commercial contracts.[104]

Despite these exceptions, IOs most of the time enjoy immunity from suit. As far as human rights are concerned, IOs should not enjoy absolute immunity. According to August Reinisch, 'to the extent that one may consider the right of access to court (as contained, or at least implicit, in the Universal Declaration of Human Rights [Art. 10] the International Covenant on Civil and Political Rights [Art. 14] and the European Convention of Human Rights [Art. 6(1)] as

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Organizations before Domestic Courts: Recent trends, Working Paper No. 143, Institute for International Law, University of Leuven, Dec. 2009.

99 On the topic of immunities *inter alios*: Emmanuel Gaillard and Isabelle Pingel-Lenuzza, "International Organizations and Immunities from Jurisdiction: To Restrict or to Bypass," *ICLQ* 51 (2002): 1; Jean-François Flauss, "Immunités des organisations internationales et droit international des droits de l'homme," in *La soumission*, 71. See in the present book Massimo Francesco Orzan, "International Organizations and Immunity form Legal Process: An Uncertain Evolution."

100 Finn Seyersted, "Settlement of Internal Disputes of Intergovernmental Organisations by Internal and External Courts," *ZaöRV* 24 (1964):79.

101 ILA, *Accountability of International Organisations*, Report of the Seventy-First Conference held in Berlin, 16–21 Aug. 2004, 41. See also "The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties," *AIDI* 66-I (1995):251.

102 See Eric Robert, "The Jurisdictional Immunities of International Organizations: The Balance between the Protection of the Organizations Interest and Individuals Rights," in *Droit du pouvoir, pouvoir du droit. Mélanges en l'honneur de Jean Salmon* (Bruxelles: Bruylant, 2007), 1445.

103 See for example Art. VII(3) of the Articles of Agreements of the IBRD and Art. VIII(3) of the International Development Association (IDA) Agreement.

104 Ascensio, "Le règlement," 106.

also forming part of customary human rights law, it becomes apparent that international organizations may be under a duty to provide such access in cases of claims brought against them; should they fail to do so, they may encounter difficulties in insisting on their immunity from suit in national courts'.[105] As the ECtHR recalled, the doctrine of immunity of jurisdiction of an international organization does not constitute a violation of Art. 6(1) of the ECHR to the extent that 'the applicants had available to them reasonable alternative means to protect effectively their rights under the convention'.[106] This position may be additionally based on the obligations enshrined in a number of agreements on privileges and immunities of IOs or headquarters agreements. For instance, under Section 29 of the Convention on the privileges and immunities of the United Nations of 14 Dec. 1946, the UN shall make provisions for an appropriate mode of settlement for certain kinds of disputes. Other agreements contain similar provisions.[107] Consequently, some suggest that a role could be envisaged for domestic courts in the absence of direct access to an international dispute settlement body. The latter should be able to limit even to reject jurisdictional immunity claimed by international organizations.[108] However, in its Advisory Opinion on the *Difference relating to immunity from legal process of a Special Rapporteur of the Commission of Human Rights*, the ICJ stated that 'the United Nations may be required to bear responsibility for the damage arising from such acts'. However, as is clear from Art. VIII, Section 29, of the General Convention, any such claims against the United Nations *shall not be dealt with by national courts* but shall be settled in accordance with the appropriate modes of settlement that '[t]he United Nations shall make provisions for pursuant to Section 29.'[109] Recently, in its *Stitching mothers of Srebrenica and others against the Netherlands* case, the ECtHR had to decide

105 August Reinisch, "The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunal," *Chinese JIL* 7 (2008): 291.

106 ECtHR, *Beer and Reagan v. Germany*, No. 28934/95, judgment of 18 Feb. 1999, Section 62. Reinisch, "The Immunity," 292, stated that 'although the ECtHR did not elaborate on what the specific characteristics of such "reasonable alternative means" might be, and although it did not make the availability of an alternative forum a strict prerequisite for immunity but only regarded it a "material factor," this "conditionality" for granting immunity to an international organization has fallen on fertile ground in the subsequent case law of various national courts in Europe'.

107 See for example Art. 24 of the Agreement between the Swiss Federal Council and The European Organization for Nuclear Research.

108 ILA, *Accountability*, 48–49. See also Luigi Condorelli, "Conclusions," in *La soumission*, 134.

109 *ICJ Reports* 1999, 89, Section 66 (italics added).

whether the Netherlands had violated the applicants' right of 'access to a court', as guaranteed by Art. 6 of the Convention, by granting the UN immunity from domestic jurisdiction.[110] In its judgment, 'the Court finds that since operations established by United Nations Security Council resolutions under Chapter VII of the United Nations Charter are fundamental to the mission of the United Nations to secure international peace and security, *the Convention cannot be interpreted in a manner which would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the United Nations*. To bring such operations within the scope of domestic jurisdiction would be to allow individual States, through their courts, to interfere with the fulfilment of the key mission of the United Nations in this field, including with the effective conduct of its operations'.[111] So as a palliative, some might seek to hold Member States responsible for acts performed by IOs.

110 The case concerned the complaint by relatives of victims of the 1995 Srebrenica massacre and by an NGO representing victims' relatives. A battalion of the UN Protection Force (UNPROFOR), made up of lightly-armed Netherlands soldiers, was present in the enclave during the massacre of Srebrenica. Under-strength and under-equipped, they were unable to stop the VRS from taking control of the enclave. The applicants brought a civil case against the Netherlands State and the UN before the Regional Court of the Hague in June 2007. They alleged that the UNPROFOR battalion had failed to fulfil its duty to provide protection. The applicants alleged that the failure was attributable to the Netherlands State and the UN, and that they were responsible for mass murder and genocide. In Jul. 2008, the District Court of The Hague ruled that it had no jurisdiction to hear the civil case brought against the UN as the organization enjoyed immunity. The decision was confirmed by the Appeal Court in Mar. 2010, and the Netherlands State was allowed to join the proceedings as a defendant. On 13 Apr. 2012, the Supreme Court confirmed that the UN Charter and the Convention on the privileges and immunities of the United Nations provided the UN absolute immunity before the national courts of the countries that were parties to the latter Convention in order to ensure the independent functioning of the UN (www.rechtspraak.nl).

111 ECtHR, No. 65542/12, judgment of 11 Jun. 2013, Section 154 (italics added). Additionally the Court observes, 'Regardless of whether Art. VIII, paragraph 29 of the Convention on the Privileges and Immunities of the United Nations can be construed so as to require a dispute settlement body to be set up in the present case, this state of affairs is not imputable to the Netherlands. Nor does Art. 6 of the Convention require the Netherlands to step in: …the present case is fundamentally different from earlier cases in which the Court has had to consider the immunity from domestic jurisdiction enjoyed by international organisations, and the nature of the applicants' claims did not compel the Netherlands to provide a remedy against the United Nations in its own courts' (Section 165).

b *The Responsibility of States for Acts Performed by International Organizations: An Unsatisfactory Palliative*

A State should not be able to escape its international obligations by acting through IOs. That is why some suggest that Member States should be accountable for the actions and omissions of IOs. In other words, Member States remain accountable for violations of human rights attributed to the international organization of which they are Members.

One might attempt to hold that there is joint responsibility of all the Member States as a whole. This solution raises many difficulties in practice as *The International Tin Council* case proved.[112] As a result, it is better to try to engage the responsibility of a single Member.

Many times the ECtHR has considered whether a State could be held responsible in an area where it had transferred powers to an international organization. This was the case in the well-known *Waites and Kennedy*,[113] *Bosphorus*, *Gasparini*[114] and *Boivin* cases.[115] These cases gave inspiration to the Special Rapporteur of the DARIO. Under the very controversial Art. 61, 'a State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation'.[116] Three conditions are required for international responsibility to arise for a Member State circumventing one of its international obligations.[117] First, the international organization must have competence in relation to the subject matter of an international obligation of a State. Second, the act of the international organization has to be caused by the Member State. Thus there must be a significant link between them. Third, finally, the international organization must commit an act that, if committed by the State, would have constituted a breach of the obligation.

Otherwise, it is also possible to consider that the membership of an international organization gives some responsibility to the States. The Committee on Economic, Social and Cultural Rights, for example, stated that the States parties to the ICESCR have the obligation to ensure that their actions as

112 On this case see Romana Sadurska and Christine M. Chinkin, "The Collapse of the International Tin Council: A Case of State Responsibility," *VJTL* 20 (1989–1990):845.

113 ECtHR, No. 26083/94, judgment of 18 Feb. 1999.

114 ECtHR [GC], No. 45036/98, judgment of 30 Jun. 2005.

115 ECtHR, No. 73250/01, judgment of 9 Sept. 2008.

116 Under Art. 61(2) of the DARIO: 'Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization'.

117 *DARIO, with commentaries*, 95.

members of IOs take into account the right to health or the right to water.[118] The High Commissioner for Human Rights made a similar declaration concerning the WTO.[119]

It is also conceivable to hold a State responsible through the theory of positive obligations. The various conventions relating to human rights require States not only to respect the rights and freedoms enshrined in those instruments but also to ensure that all the rights are fully respected at the national level.[120] States have an obligation to take appropriate positive measures to protect any right guaranteed by these treaties under their jurisdiction. Otherwise they can be held responsible.[121] In others words, States can be held liable for human rights violations perpetrated by IOs within their jurisdiction.[122] For instance, they may violate their human rights obligations by granting immunity to an international organization in the absence of adequate alternative remedial mechanisms.

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118 'States parties should ensure that their actions as members of international organizations take due account of the right to water. Accordingly, States parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should take steps to ensure that the right to water is taken into account in their lending policies, credit agreements and other international measures': General Comment No. 15 (2002), UN Doc. E/C.12/2002/11, Section 36.

119 '5. The legal basis for adopting human rights approaches to trade liberalization is clear. All WTO members have undertaken obligations under human rights law. All 144 members of the WTO have ratified at least one human rights instrument, 112 have ratified the…ICESCR and all but one have ratified the Convention on the Rights of the Child. Further, those areas of human rights law recognized as customary international law take on universal application, which means that trade rules should be interpreted as consistent with those norms and standards whatever the treaty commitments of States in trade matters. In other words, whatever the human rights treaty obligations undertaken by particular States, WTO members have concurrent human rights obligations under international law and should therefore promote and protect human rights during the negotiation and implementation of international rules on trade liberalization': UN Doc. E/CN.4/Sub.2/2002/9.

120 See *inter alios* Art. 2(1) of the ICCPR; Art. 1 of the ECHR; Art. 1 of the American Convention on Human Rights; Art. 2(1) of the Convention against Torture. Most of the human rights treaties contain similar provisions. See Ioannis Panoussis, "L'obligation générale de protection des droits de l'homme dans la jurisprudence des organes internationaux," *RTDH* 70 (2007): 427; Matthias Klatt, "Positive Obligations under the European Convention on Human Rights," *ZaöRV* 71 (2011): 691.

121 See for examples ECtRH [GC], No. 48787/99, *Ilaşcu and others v. Moldova and Russia*, judgment of 8 Jul. 2004, Section 311; IACHR, *Velasquez Rodriguez v. Honduras*, judgment of 29 Jul. 1988, *Serie C*, No. 4, Section 167; General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, Section 7.

122 See Frédéric Sudre, "Les 'obligations positives' dans la jurisprudence de la Cour européenne des droits de l'homme," in *Protecting Human Rights*, 1359.

Finally, a State may be responsible for complying with an unlawful decision of an international organization. That is one of the problem the *Kadi* cases raise.

Thus, there are a number of ways to engage the responsibility of a Member State for acts performed by IOs. But, as Olivier de Schutter observes, 'such an insistence on Member States' responsibility could jeopardise the ability of international organisations to fulfil their functions effectively, since such a development may lead States to tighten their control on the decision-making of the international organisation, or to reserve the right not to comply with its decision'.[123] Consequently, it is better to hold IOs responsible, even it is difficult.

4 Conclusion

Over the last decade, IOs have gained more and more importance in the international legal order. Nevertheless this evolution has not been accompanied by a similar development in their responsibility. Admittedly some mechanisms have been established to provide effective remedies for potential victims in the event of violations of human rights by IOs. However it is still embryonic. As Olivier de Schutter writes, 'the more the organisation itself complies with human rights, and establishes mechanisms, whether internal or external, relying either on international monitoring bodies or on national courts, in order to ensure such compliance, the less there will be reasons to suspect that, by transferring powers to the organization, the Members States have somehow "circumvent" their human rights obligations'.[124] Efforts must continue.[125]

123 de Schutter, "Human Rights," 53.

124 de Schutter, "Human Rights," 128.

125 Meanwhile, some suggest developing the standard of 'accountability'. As Matteo Tondini, "The 'Italian Job': How to Make International Organisations Compliant with Human Rights and Accountable for their Violation by Targeting Member States," in *Accountability*, 176, states, 'the concept of accountability for international organisations may be extended well beyond the principles of responsibility and liability for international wrongful acts, embracing the notion of general answerability in the exercise of lawful powers by any kind of authority'. According to Gerhard Hafner, "Accountability of International Organizations," *American Society of International Law Proceedings* 97 (2003): 236, '"Accountability" is a legal expression of neither the common law nor any other legal system; it cannot be translated into several languages… The absence of equivalent expressions is the best proof of the absence of an established meaning of accountability as a term of law'. On this issue see *Accountability*; Raphael Gellert, "L'*accountability*, un concept adapté aux organisations internationales?," *RBDI* 43 (2010): 476.

CHAPTER 15

The Control Criterion between Responsibility of States and Responsibility of International Organizations

Pietro Pustorino

1 The ILC's Drafts of 2001 and 2011 Compared: Positive and Negative Aspects of Uniform Rules on the Responsibility of States and International Organizations

An analysis of the legal rules and practice in the matter of the control exercised by States or by international organizations (IOs) over the conduct of other entities, be they individuals, States or organizations, presupposes that one briefly mentions the two complementary Drafts on international responsibility: the Draft Articles on the Responsibility of States for Internationally Wrongful Acts[1] and the Draft Articles on the Responsibility of International Organizations,[2] both approved by the International Law Commission (ILC) respectively in 2001 and 2011. It is common knowledge that the content of the two Drafts is very similar. In some cases the rules contained in DARIO merely reproduce, with some necessary adaptations, the corresponding rules set forth in DARS, so much so that one legal writer has alleged that the ILC adopted a 'copy and paste' approach.[3] The reason for the analogous content would seem to lie in the ILC's attempt to lay down a body of uniform rules governing international responsibility, that apply in principle to all subjects of the international community.

The adoption of a set of rules on the responsibility of IOs would also seem to serve the need to limit recourse in practice to rules or criteria 'à la carte',[4] which can give rise to a certain fragmentation of the law of IOs and even situations of *forum shopping* towards the courts of a country more likely to assess

1 See A/RES/56/83, hereinafter DARS.

2 See A/RES/66/100, hereinafter DARIO.

3 Christiane Ahlborn, "The Use of Analogies in Drafting the Articles on State Responsibility of International Organizations – An Appraisal of the 'Copy-Paste' Approach," *IOLR* 9 (2012): 53 *et seq*.

4 Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (5th edn. Leiden: Martinus Nijhoff, 2011), 1020.

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that organizations are responsible on the basis of international rules of dubious existence.

However, one cannot neglect the fact that DARIO is based little on practice, which is actually very limited or in some cases even non-existent, and hence leans towards the aim to progressively develop international law, which, from the standpoint of the ILC's work, would be an exception to the primary and basic aim to codify international law. This approach can entail that practice in the matter of the responsibility of IOs, especially in relation to the criterion of control, may not be consistent with the rules drawn up by the ILC. The possible divergence between practice and the rules of DARIO, as occurred in the past for other Drafts drawn up by the ILC,[5] would weaken not only the specific value of DARIO but also the general value of ILC work. Leaving aside those limits, we maintain that DARIO is pivotal for the reconstruction of some international rules or as an indicator of trends, some well established, others *in fieri*, in the field of the responsibility of IOs, and as such cited in some recent national and international case law.

2 The Criterion of Control in the ILC's Drafts. Common Features of and Differences between Control Exercised by a State and that Exercised by an International Organization

In the matter of international responsibility of States, Art. 6 DARS states that the conduct of an organ of a State placed at the disposal of another State shall be attributed to the latter State if the organ acts in the exercise of elements of the governmental authority of the State at whose disposal it is placed. On the basis of Art. 8 DARS, the conduct of a person or a group of persons shall be attributed to the State if those persons act in fact on the instructions of, or under the direction or control of that State, in carrying out the conduct.

In the matter of responsibility of IOs, Art. 7 DARIO states that the conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization shall be attributed to the latter organization if it exercises effective control over that conduct.

The ILC commentaries to the two Drafts clarify that in the various legal rules set out above, the test for attributing conduct to States or to IOs is chiefly based on the control exercised over the conduct at stake. The existence, in these different circumstances, of a common test for attributing conduct is particularly

5 For example, in relation to the Draft that subsequently was substantially incorporated in the Vienna Convention of 22 Aug. 1978 on Succession of States in respect of Treaties.

useful because, in practice, the responsibility of States may coexist with that of IOs and hence it is better to apply uniform rules in so far as it is possible.

From the standpoint of the general content of the rules cited above, we believe that the criterion of control is an 'overarching' one with respect to the other criteria mentioned, especially with specific reference to the criteria of instructions and of direction referred to in Art. 8 DARS. Any instructions given by a State or direction exercised by it over the conduct of a person or a group of persons are in fact functional to establishing the control exercised by the State over the conduct in question.

The above point would seem to be confirmed by the fact that the criterion of control is a general one and as such applicable to every type of conduct controlled by a State or international organization, be it political, military, economic, terrorist, *etc.* The 'ductility' of the criterion of control is confirmed in the Advisory Opinion of 1 Feb. 2011 adopted by the International Tribunal of the Law of the Sea on the responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, where it is said that the special rules on the responsibility of States sponsoring commercial activities carried out in the Seabed Area, based on the control exercised by such States over the conduct of private entities, are in line with customary international law rules.[6]

That said, it should be noted that States and IOs have quite different structures, competencies and ways of functioning and this can significantly affect how control is effectively exercised over private entities, other States or organizations. In fact, State control is still mainly based on the exercise of sovereign powers in its own territory or of quasi-sovereign powers exercised abroad, for example, in the case of military occupation of foreign countries. It follows that State control is generally 'exclusive' in the sense that the control exercised by a State excludes, even if only in principle, the existence of other forms of control exercised by other entities. Moreover, the control exercised by a State tends to be 'all-inclusive', in the sense that with regard, for example, to military operations set up and conducted directly by the State, it includes both political and military control considered as a whole. Indeed, that is perfectly consistent with the close link that exists within national legal systems between executive power and high-level military figures.

On the contrary, the control exercised by an international organization is not expressed through wielding sovereign power, which is absent,[7] but operates in a functional way manifesting itself through control of a political nature and in

6 Section 182 of the Advisory Opinion.

7 Not even in cases of administration of territories by IOs is it possible to draw a complete analogy with the exercise of sovereign powers by a State.

some cases of an operational nature. It is not also infrequent when evaluating the activities of an international organization to detect a 'split' between types of control because an organization may, for example, maintain some forms of political control but decide to delegate Member States – or be forced to do so for lack of operational means – other forms of control, for example, military control. Consequently, it is not uncommon that the control exercised by an organization can exist 'side by side' with that of other organizations,[8] States or even groups of private individuals. This situation normally occurs in the case of peacekeeping operations, in relation to which matters concerning the safety, discipline and accountability of national troops are reserved to the States that send the military contingents as, for example, happened in relation to the armed conflict in Afghanistan, with the opening of an investigation by the German Federal Prosecutor against two German soldiers responsible for the NATO air strike near Kunduz in Sept. 2009.[9]

Therefore, it is more difficult that control exercised by an organization will be exclusive in the sense clarified above. This means that it is quite natural that conduct in breach of international law might be attributed to both the organization and military contingents' sending States.[10] This situation can easily occur in the cases of military missions set up by organizations[11] but carried out by States on the basis of international agreements whereby the latter make their military contingents available.[12] In addition, during the material carrying

8 For example, in relation to a given military mission, political control by the UN may coexist with parallel operational control by NATO or other regional IOs.

9 On 20 Apr. 2010 the Prosecutor closed the case on the grounds that none of the two soldiers had acted in violation of either international or national criminal law. For a comment, see Constantin von der Groeben, "German Federal Prosecutor Terminates Investigation Against German Soldiers With Respect to NATO Air Strike in Afghanistan," available at www.ejiltalk.org.

10 On this point, with regard to military operations under a UN mandate, see Luigi Condorelli, "Le statut de forces de l'ONU et le droit humanitaire," *RDI* 78 (1995): 893 *et seq*., and, more recently, Luigi Condorelli "De la responsabilité internationale de l'ONU et/ou de l'État d'envoi lors d'actions des Forces de Maintien de la Paix: l'écheveau de l'attribution (double?) devant le juge néerlaindais," *QIL* 1 (2014): 13–14. Similarly, Michael Bothe, "Peacekeeping Operations," in *The Charter of the United Nations. A Commentary*, eds. Bruno Simma *et al.* (3rd edn. Oxford: OUP, 2012), 1185, who states that UN control over peacekeeping forces 'has not in all cases been exclusive'.

11 On this point see Andrea Spagnolo, "Imputazione di condotte lesive dei diritti umani nell'ambito delle operazioni militari delle Nazioni Unite e rimedi per le vittime," *DUDI* 7 (2013): 286 *et seq*.

12 In the UN context the agreements in question are drawn up on the basis of a model used as a legal standard: see UN Doc. A/46/185, 22 May 1991.

out of those missions, States tend to increase the level of control over national troops initially agreed with the organization.

Regarding the difficulties associated with establishing uniformity in the legal regulation of the control criterion, there is also the fact that the type of control exercised by one organization may significantly differ from that of other organizations. This is due to the different structures and functions that organizations may have. That diversity can arise not only when different activities undertaken by the organizations under examination are involved (for example, military or economic) but also in cases where the same type of activities are contemporaneously carried out by a number of organizations. To further complicate the overall picture depicted thus far is the fact, as has been observed,[13] that the type of control exercised by a given organization can vary, at times significantly, depending on which of its numerous activities is effectively involved. This is easily perceivable if one considers the development of the rules and functioning of peacekeeping operations carried out under the auspices of the UN, which have seen their structure and functions radically change over the years and which are organized using models that vary according to the particular needs of the specific situation.

In short, the variables are numerous when it comes to applying the criterion of control over the conduct of States, organizations or private parties. And it is also for this reason that in our view the practice analyzed hereunder is not uniform.

3 Formal Control and Substantive Control of States and International Organizations. Problematic Issues Regarding Military-Type Control

It is by now undisputed that one must adopt a substantive and not merely formal approach for the purposes of establishing whether control is exercised by States or by IOs over the conduct of various entities. However, that does not mean that there is no place for a formal finding based on an *a priori* assessment of the legal relationship between the controlling and controlled entities. On the contrary, it constitutes the first step for conducting the subsequent inquiry for the purposes of establishing substantive control. That second line of inquiry serves to highlight either a correspondence or a divergence between the formal

13 Tom Dannenbaum, "Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers," *HILJ* 51 (2010): 142 *et seq*.

and substantive levels of control in relation to the specific case. The absence of an examination regarding substantive control could thus lead to errors in the attribution of conduct and hence of international responsibility of States[14] or IOs.

From this standpoint, one can criticize the Decision of 31 May 2007 of the Grand Chamber of the European Court of Human Rights (ECtHR) in the *Behrami v. France* and *Saramati v. France, Germany and Norway* cases,[15] which would seem to rule out that KFOR conduct could be also attributed to the States that had made their military contingents available. In fact, the Court ruled that the conduct in question is to be attributed only to the UN, maintaining in particular that the Security Council 'retains ultimate authority and control' over KFOR.[16] The Court did not even consider the issue of attribution of the conduct in question to NATO, to whom the UN had delegated the operational aspects of the international mission, even though it acknowledged that 'effective command of the relevant operational matters was retained by NATO'.[17] In our view, the application of a control test based on substantive and not merely formal factors could have led the Court to attribute the conduct examined also to NATO and to the sending States.[18]

In relation to the specific control over military operations, which in practice constitutes the most important issue in the application of the criterion of control, the question arises as to whether it is necessary to establish control over 'every' single military operation carried out or it is sufficient to prove 'overall'

14 A merely formal assessment – based on the maintenance of links between the military contingent and the sending State – of the activities carried out by the UN peacekeeping force deployed in Cyprus (UNFICYP) would seem, for example, to have led the House of Lords (judgment of 11 Feb. 1969, *Attorney-General v. Nissan*) to rule that solely the United Kingdom was responsible for the actions of its soldiers within the framework of the said military operation. On that case see Jan Wouters and Pierre Schmitt, "Challenging Acts of Other United Nation's Organs, Subsidiary Organs, and Officials," in *Challenging Acts of International Organizations before National Courts*, ed. August Reinisch (Oxford: OUP, 2010), 94.

15 Applications No. 71412/01 and No. 78166/01.

16 Sections 134–135 and 140 of the Decision.

17 Sections 135, 138 and 140. For a criticism of that specific approach adopted by the Court, see Paolo Palchetti, "Azioni di forza istituite o autorizzate dalle Nazioni Unite davanti alla Corte europea dei diritti dell'uomo: i casi Behrami e Saramati," *RDI* 90 (2007): 690, footnote 23.

18 For a comprehensive analysis of the jurisprudence of the ECtHR see Maria Canto Lopez, "Towards Dual or Multiple Attribution. The Strasbourg Court and the Liability of Contracting Parties' Troops Contributed to the United Nations," *IOLR* 10 (2014), 193 *et seq.*

control over military activities conducted as a whole. In this regard, there is a well known divergence of opinion in practice, even though the jurisdiction of the courts that have ruled in the matter is different. According to the settled case law of the International Court of Justice (ICJ), which appears to be in compliance with Art. 8 DARS analyzed above, it is necessary to establish specific control over every single military operation conducted in particular by private entities,[19] whereas according to the case law of both the *ad hoc* International Criminal Tribunal for the Former Yugoslavia[20] and the ECtHR,[21] it is sufficient to establish an overall control over the activities carried out by private entities.

Regarding the issue in question, we believe that it is correct to adopt the approach of control over every single military operation because the overall control test would excessively broaden the scope of international responsibility without adequate grounds or guarantees.[22] Moreover, recourse to the overall control test contrasts with the need to conduct a substantive inquiry into the control exercised in any given situation. Indeed, an analysis of the control over a single military operation could well 'overturn' the results obtained from relying on an assessment of the overall control exercised over the general operation in question. That does not imply, as already pointed out above when discussing the relationship between formal and substantive control, that a finding as to overall control is irrelevant in a given case but simply that it must be adequately confirmed in light of the substantive control over the single military operations examined.

19 Judgment of 27 Jun. 1986, *Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. United States of America*, *ICJ Reports* 1986, 62–63 (Sections 109–110) and 64–65 (Section 115) in relation to the issue of attributing to the United States the activities carried out in Nicaragua by the *Contras* and held to be contrary to various rules of international humanitarian law. Similarly, Judgment of 26 Feb. 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Serbia and Montenegro*, *ICJ Reports* 2007, 208–209 (Section 401), with reference to attributing the crime of genocide to the defendant State.

20 Appeals Chamber, Judgment of 15 Jul. 1999, *Prosecutor v. Duško Tadić*, Sections 120, 122 and 137, in relation to attributing to the Federal Republic of Yugoslavia the activities carried out by the armed forces of the Serbian Republic of Bosnia-Herzegovina, in which the Tribunal applied the overall control test to the actions of military groups or paramilitary units organized on the basis of a hierarchical structure.

21 Judgment of 18 Dec. 1996, *Loizidou v. Turkey*, Section 56; Judgment of 8 Jul. 2004, *Ilaşcu and Others v. Moldova and Russia*, Sections 315–316.

22 This is the view expressed by the ICJ in the aforementioned judgment of 2007, *Bosnia and Herzegovina v. Serbia and Montenegro*, 210 (Section 406).

4 Examination of Practice: The Various Types of Control and Their Coordination

In analyzing the relevant practice on the application of the criterion of control, which mainly concerns cases of military operations conducted by States or IOs, it is worth mentioning at the outset that it is not uncommon for the various courts and tribunals to adopt different principles or rules for the attribution of the conduct being examined. In some circumstances a court, in the very same decision or within the same set of proceedings, applies distinct types of control both because the various forms are considered as complementary to one another or because they are held during the course of the legal proceedings to be more suited to resolving the specific dispute.

From the standpoint of the concrete application of the various types of control, it should be further noted that rarely is the use of such types ever accompanied by an in-depth examination of the political and military structure that the international organization is endowed with in relation to the concrete military operation or by a rigorous examination of the control exercised over the single harmful conduct. In this regard, it is emblematic that when there is a specific analysis of the actual carrying out of the military operations from the standpoint of the political and military control exercised over the contingents used, as happened in the *Srebrenica* case, the result is the 'overturning' of the formal approach regarding the attribution of the harmful conduct with the ensuing attribution of that conduct also to or solely to the sending States.

On the basis of practice, an initial distinction can be drawn between the application of general types of control that could occur in a given case (political, military, *etc.*) and special types that focus on a particular form of control. The first category covers types that establish exclusive control,[23] sometimes called ultimate authority control[24] or effective control,[25] at times labelled as

23 See the UN Secretary-General's Report of 20 Sept. 1996 on Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces Headquarters. Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations: Financing of the United Nations Peacekeeping Operations, UN Doc. A/51/389, Section 17, in which it is stated that the UN's responsibility for the military operations conducted by United Nations Forces is based on the assumption that those operations are conducted 'under the exclusive command and control of the United Nations'.

24 On that test, used as aforesaid by the ECtHR in the *Behrami* and *Saramati* cases, see Kjetil Mujezinović Larsen, "Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test," *EJIL* 19 (2008): 509 *et seq*.

25 House of Lords, Judgment of 12 Dec. 2007, *R* (*on the application of Al-Jedda*) (*FC*) *v. The Secretary of State for Defence*, in particular, the opinion of Lord Bingham of Cornhill,

factual control.[26] Indeed, application of those general tests presupposes an overall examination of the various types of control that can be exercised in a given case. Consequently, bearing in mind the different jurisdiction of the courts concerned, recourse to the types in question assures, at least in principle, an assessment of all of the issues related to the attribution of the harmful conduct, without guaranteeing any 'safe haven' to certain entities (States or organizations), who could take advantage of the fact that some forms of control were not resorted to.

On the other hand the special types refer only to some very particular forms of control exercisable in a given case and hence do not rule out that the application of other types (general or special) lead to a finding of further international responsibility. Falling within this second category is the operational control test.[27]

There are also cases in which the general and special forms of control have been appropriately coordinated with each other. In this regard, one can cite the position adopted by the UN Secretary-General in the Report of the United Nations Interim Mission in Kosovo of 12 Jun. 2008, clarifying that the international responsibility of the UN in Kosovo is 'limited to the extent of its effective operational control'. However, according to the Secretary-General, that control must be established through an examination of the effectiveness of that type of control.[28]

The types of control under consideration here can thus be applied in conjunction with one another or as alternatives in national and international practice in order to establish the responsibility of States and IOs. More

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Section 23, who refers to the test of the UN's 'effective command and control' over the operations of the British military forces engaged in Iraq following the UN Security Council's authorization for a multinational force to be deployed to that country: see Res. 1511, Section 13.

26 Supreme Court of the Netherlands, Judgment of 6 Sept. 2013, *The State of the Netherlands* (*Ministry of Defence and Ministry of Foreign Affairs*) *v. Mustafic-Mujić and Others*, Section 3.11.3.

27 District Court of The Hague, Judgment of 10 Sept. 2008, *H.N. v. The State of the Netherlands* (*Ministry of Defence and Ministry of Foreign Affairs*), Section 4.9, which uses the 'operational command and control' test in relation to the Srebrenica case to attribute solely to the UN the harmful conduct materially engaged in by the Dutch military contingent operating as part of UNPROFOR. On operational control, see also the Comprehensive review of the whole question of peace-keeping operations in all their aspects: Report of the Special Committee on peacekeeping operations, UN Doc. A/50/230, 22 Jun. 1995, Section 11.

28 See UN Doc. S/2008/354, Section 16, delimiting in particular the scope of the UN's responsibility in light of the new competencies and functions assumed by the European Union in Kosovo.

specifically, the types in question are at times applied cumulatively at case law level and contribute to lending support to a given solution on the attribution of the conduct being considered. It is in this sense that one can interpret the judgment of 7 Jul. 2011 of the Grand Chamber of the ECtHR in the *Al-Jedda v. The United Kingdom* case. In its judgment the Court considered that the Security Council 'had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force'[29] set up by the Council in order to take the necessary measures to contribute to the maintenance of security and stability in Iraq.

In other cases, the types of control for attributing responsibility are applied progressively in order to verify the results stemming from the initial application of one given type. In this sense one can interpret the judgment of 5 Jul. 2011 of The Hague Court of Appeal in the *Mustafić-Mujić and Others v. The State of the Netherlands* case. In its judgment the Court first and foremost pointed out that, in conformity with the agreement concluded between the UN and the Netherlands, the battalion made available by the Netherlands was to operate 'according to the UN command structure' and hence be placed 'under the ultimate authority and control of the Security Council'. That, according to the Court, effectively happened in the first phase of the military operation on the basis of Res. 743 of 1992, which provided for the creation of UNPROFOR and in which it was stipulated that this mission would be established under the 'authority' of the Security Council. However, the Court continued, the solution that can be deduced from the application of that test was not conclusive because one had to subsequently determine 'who actually was in possession of "effective control"' of the battalion.[30]

There are even cases in which a court has 'changed tack' in the course of its application of the various control types regarding who to attribute the harmful conduct to. In this sense, at times international case law seems to abandon some forms of control, probably considered as being inadequate to resolve the case in hand, or in any event decides to better elaborate on how they are to be applied in concrete. And so, the ECtHR in its judgment of 23 Mar. 1995 (preliminary objections) in the *Loizidou v. Turkey* case stated that 'the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory'.[31] Subsequently, in its judgment on the merits of 18 Dec. 1996, referred to above, the Court explained what is meant by effective

29 Application No. 27021/08, Section 84.

30 Section 5.7 of the judgment.

31 Application No. 15318/89, Section 62.

control, stating that the existence of a large number of troops engaged in active duties in Northern Cyprus implies that 'her army exercises effective overall control over that part of the island'.[32] In that way the Court 'manipulated' the effective control test in light of the specific circumstances of the case and probably with the aim of achieving what it had already set out to decide regarding the attribution of the harmful conduct. In fact, this manipulation made it easier to assess that Turkey had breached the European Convention on Human Rights.

5 The Practice that Distinguishes Cases Depending on the Nature of the Violation Committed

It is settled in practice that there is no limit to the search for factors from which one can deduce control exercised by a State or international organization. Therefore, control may be inferred from either acts of commission or omission. What counts is that the conduct stem from orders, instructions or other forms of control.

Consistent with what has been stated just now, it is worth noting that in national case law that has addressed the issue of the attribution of harmful conduct to States or IOs, there is a trend according to which what is relevant is not only the entity that ordered certain behavior but also the entity that had the power to prevent the harmful conduct that then actually occurred.[33]

It is also worth stressing that in a given case the inquiry as to who is able to prevent the harmful event may be complementary or ancillary to the examination concerning the material execution of instructions or orders issued by the controlling entity. The ancillary nature of this specific inquiry is evident in the previously cited 2011 judgment of The Hague Court of Appeal in the *Srebrenica* case. According to the Court, in assessing the conduct of the Dutch military contingent by applying the effective control test, it was necessary not only to check 'whether that conduct constituted the execution of a specific instruction, issued by the UN or the State' but also 'whether, if there was no such specific instruction, the UN or the State had the power to prevent the conduct concerned' (Sections 5.9 and 5.18). Although in the case before it the Court found that the Dutch contingent had acted on the instructions of its own government and at

32 Application No. 15318/89, Section 56.

33 The importance of this second line of inquiry had already been suitably pointed out in the literature: see Dannenbaum, "Translating," 156–157, and, above all, Tom Dannenbaum, "Killings at Srebrenica, Effective Control, and the Power to Prevent Unlawful Conduct," *ICLQ* 61 (2012): 713 *et seq*.

the same time had the power to prevent the commission of the harmful conduct, one can assert that if in certain circumstances it is not possible to conclusively prove that the conduct of a State or international organization stemmed from the execution of specific orders or instructions, a valid alternative would be to ascertain who could have prevented that same harmful conduct.

The same approach has been followed by the Belgian courts concerning Belgium's responsibility for the Kigali massacre in Rwanda, which was similar in many respects to that in Srebrenica.[34] In this regard, one can justifiably question whether that line of case law risks excessively broadening the scope for the attribution of harmful conduct because in the cases described above the attribution of the conduct to the sending State is quite automatic 'since there was always the possibility for that State to exercise control in a way that prevents the impugned conduct from occurring'.[35] From this perspective, we maintain that the said recent trend in practice concerning the entity that had the power to prevent the harmful event essentially pursues aims similar to those discernible in the already cited jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the ECtHR concerning overall control over harmful events and consists of an attempt to widen the cases of attribution of those events, considerably alleviating the burden of proof as to the existence of control. This practice could thus contribute to the reopening of the debate on the nature and content of the control exercised by States or IOs.

6 The Practice that Distinguishes Cases Depending on the Particular Phase in Which the Violation Occurs

An examination of the practice regarding the application of the criterion of control reveals another problematic aspect of particular interest. This aspect is highlighted by the Dutch case law regarding Srebrenica and the Belgian case law regarding Kigali: the 'special nature' of the time that the conduct in question

34 First Instance Court of Brussels, Judgment of 8 Dec. 2010, *Mukeshimana-Ngulinzira and Others v. Belgium and Others*, which addressed the issue of whether the Belgian contingent in Kigali was able to impede 'la consommation de crimes de guerre ou d'y mettre fin'. In response to a spurious claim by the defendants that the UNAMIR mission was not offensive in nature, the Court held that 'cet argument tient mal dès lors que la simple présence passive des militaires garantissait déjà une sécurité aux réfugiés et que les contours de leur mission les autorisait à réagir en légitime défense si le cantonnement était attaqué': Section 48.

35 André Nollkaemper, "Dual Attribution. Liability of the Netherlands for Conduct of Dutchbat in Srebrenica," *JICJ* 9 (2011): 1148.

happened. In particular, the conduct occurred at a time when the international mission of UNPROFOR in the former Yugoslavia had totally and irremediably failed and at a time when UNAMIR was in extreme difficulty in Rwanda. These exceptional situations are said to have led to an unusual 'disconnection' between the UN and military contingents such as to 'revive' the role and importance of the States that had made their military contingents available.

In this regard the Hague Court of Appeal stated that 'the Court attaches importance to the fact that the context in which the alleged conduct of Dutchbat took place differs in a significant degree from the situation in which troops placed under the command of the UN normally operate'. The Court went to assert that '[a]fter 11 Jul. 1995, the mission to protect Srebrenica had failed. Srebrenica had fallen that day and it was out of the question that Dutchbat, or UNPROFOR in any other composition, would continue or resume the mission' (Section 5.11). According to the Court it followed that the decision to evacuate the Dutch military contingent could not but be made jointly by the UN and the Netherlands (Section 5.12). In the same case, without however examining the question in any great depth, the Dutch Supreme Court analogously referred to 'the special context of the case' (Sections 3.11.3–3.12.3). Similar considerations, even though not dwelt on at length, can be gleaned from the previously mentioned 2010 judgment of the First Instance Court of Brussels regarding the decision to evacuate the military contingent from the Kigali refugee camp, which according to the Court was unilaterally made by Belgium.

In light of the national case law cited above, it would seem in essence that the failure of a military operation undertaken by the UN (UNPROFOR) or a situation of particular difficulty (UNAMIR) should be a sort of warning signal to check whether control of the operation has changed hands. Or even better an occasion to investigate whether control has returned to the 'mother country': the State that supplied the military contingent.

From an analysis of this case law one can further deduce that in relation to a given military operation, the specific circumstances of the case can imply the use of different criteria for the attribution of the harmful conduct, depending in particular on whether the military operation in question is in its physiological or terminal stages.

From that same case law one can deduce on the contrary that in the absence of special situations apt to give rise to a total or partial interruption of the 'transmission channels' through which political and military control is exercised by the international organization over the military contingents supplied by the States, the general rule remains that of attribution of the relevant conduct solely to the international organization. This is confirmed in German case

law, in particular in the judgment of 9 Feb. 2012 of the German Administrative Court in the *Anonymous v. German Federal Government* case. In its judgment, rejecting an individual application complaining of a violation of some rules of international humanitarian law by the German military contingent deployed as part of ISAF in Afghanistan, the Court held that the actions of German armed forces operating within the NATO chain of command are to be attributed to the UN.[36] As if to say: if there are no elements interfering with the control exercised by the international organization, the general rule to be applied is that the acts of the military contingents made available by the States are to be attributed exclusively to the organization.

This approach is not persuasive. In our view, it is erroneous to maintain that the question of attribution of conduct to the organization or to the States that sent the military contingents becomes problematic solely in the exceptional circumstances that were a feature of the Srebrenica and Kigali cases. Also situations of 'normality' in the carrying out of a given military operation can give rise, in the event of harmful conduct, to cases of attribution in contrast with what is formally envisaged regarding the control exercised by the international entities involved in the operation. Moreover, it can happen even in the exceptional situations described in the Dutch and Belgian case law that there is no 'changing of the guard' at all as regards control over the military activities, which remains in the hands of the entity it is formally vested in.

Consequently, we maintain that cases like Srebrenica and Kigali constitute mere pointers, certainly very relevant ones, along with all of the other relevant factors in the specific case, for the courts when they are called upon to determine which entity exercised substantive control over the conduct actually carried out. It is not even possible to compile a list of the elements that 'interfere' with the normal control exercised by IOs. For example, a further important element of interference could be the fact that the military operation instituted and run by the international organization operates 'side by side' with other military operations instituted and run by other organizations or States and whose functions and goals may at times be analogous. This was the case in the above mentioned ISAF mission, which for a certain period of time exercised its own functions in parallel to the Enduring Freedom operation instituted and run by the United States. For that reason, in practice there were some instances of 'overlapping' between the activities conducted by the various military operations that posed delicate questions of attribution of the respective harmful

36 See Section 72 of the judgment, available at opil.ouplaw.com. Likewise in this case, as in the *Behrami* and *Saramati* ones, the Court does not pose the question as to whether the relevant conduct could be attributed to NATO.

conduct. The issue, although in general terms only, was tackled by the German Constitutional Court in the *Tornado* case, in which it stated that the close co-operation between ISAF and Enduring Freedom implies that possible violations of international law by the latter could be attributed to the former, even though the Court ruled out that in the case then before it such a situation had ever actually happened.[37]

7 Conclusion

An overall examination of practice, in particular national and international case law regarding the application of the control criteria reveals, in our view, a variety of solutions that depend to a large extent on the specific circumstances of the case. An examination of this practice raises doubts as to whether the rule contained in Art. 7 DARIO corresponds to general international law and also could have effects on the application of Art. 8 DARS, which as mentioned before has already witnessed some inconsistent interpretation in international case law.

In particular, the analysis of the case law cited above, which concerns exclusively cases of control over military operations and hence is limited *ratione materiae*,[38] shows how the specific criterion adopted varies depending, above all, on four factors, which can come into play in conjunction with one another or alone: (1) the nature of the entity whose responsibility must be established (States or IOs); (2) the type of military operation examined (peacekeeping, peace-enforcement, UN Security Council authorizations for the use of force, unilateral action by States); (3) the nature of the infringement that occurred, for example, whether they are acts of commission or omission, in the latter case involving a failure by a State or organization, to exercise its power to prevent the harmful event; (4) the specific time at which the unlawful event occurred within the framework of military operations undertaken by IOs. In

37 See Judgment of 3 Jul. 2007, *Parliamentary Group of the PDS/Die Linke in the German Federal Parliament v. Federal Government*, Section 86, available at opil.ouplaw.com.

38 This means that one cannot exclude that the practice on the responsibility of IOs concerning matters other than military ones could suggest further forms of control. On the limited nature of the practice concerning the application of the criterion of control to the realm of IOs, see Blanca Montejo, "The Notion of 'Effective Control' under the Articles on the Responsibility of International Organizations," in *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie*, ed. Maurizio Ragazzi (Leiden: Martinus Nijhoff, 2013), 404.

this case with special reference to: (a) their normal functioning or possible elements of interference due to the definitive failure of the military operation; (b) their particular difficulties in functioning or even to the contemporaneous presence of other military operations in the same context.

In light of the said variables that can be detected in practice, it is not uncommon that the international responsibility of the various entities involved can be established on the basis of different types of control.

An examination of practice also permits one to assert that the formal approach to assessing control has definitely and correctly been substituted by a substantive approach. This means that cases of double or multiple attribution of harmful conduct in a given case can be viewed as the general rule and hence not exceptional at all. As very recently stated by the Hague District Court in the Judgment of 16 Jul. 2014 'the same act and/or acts might be attributed to both the States and the UN under what is called "*dual attributio*n".[39]

Finally, one must ask why there has been a greater willingness in national case law, especially Dutch and Belgian, to attribute responsibility to the States that send the military contingents deployed as part of missions undertaken by IOs. In our view the reason lies not just in a stricter application of the principles and criteria for the attribution of the conduct analyzed in this work. It could well stem from a desire to strike a fairer balance between general interests, consisting of the need for States and organizations to participate in military operations often aimed at reacting to violations of fundamental principles and values of the international community, and individual interests, consisting of the need to safeguard above all the right of private parties' access to justice. In fact, it is well known that private entities cannot bring suit before international courts with a view to establishing the responsibility of IOs. At the same time it is also difficult to obtain a finding of responsibility of organizations before national courts because of the application of the rules on the immunity of those organizations from jurisdiction. This is particularly true for the UN, which is progressively considered in practice as a 'special' organization in view particularly of its fundamental functions exercised by the Security Council under Ch. 7 of the UN Charter and hence subject to a regime of substantially absolute immunity. This is demonstrated by the *Srebrenica* case, where the decisions of both the lower courts[40] and the Dutch Supreme Court

39 See the case *The Mothers of Srebenica and Others v. The State of the Netherlands, Ministry of General Affairs, and the United Nations*, Section 4.34.

40 In particular, see the Judgment of the Court of Appeal of 30 Mar. 2010, Sections 5.11–5.14, which in a totally unsatisfactory manner resolves the issue of the conflict between the right of the victims' relatives to have access to justice (based also on international rules

of 13 Apr. 2012 in the *Mothers of Srebrenica Association v. The State of the Netherlands and the United Nations* case[41] recognized the UN's absolute immunity. This approach would seem to be further confirmed in the same case by the ECtHR.[42]

It follows that domestic courts focus their attention more on establishing the responsibility of the States who send the military contingents involved in operations undertaken by the IOs as a means of affording 'subsidiary protection' to the individual right of access to justice. From this standpoint the case law analyzed in this work could have a significant and welcome impact in finally superseding the doctrine of act of State or act of government that still today can constitute a limit to establishing the responsibility of the national or foreign State for military operations.[43]

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like Art. 6 of the European Convention on Human Rights) and the UN's immunity by referring to the exercise of the right of access to justice against others than the UN such as the Netherlands and the individuals who committed the crimes. Moreover, the Court asserts (Section 5.10) that the UN's responsibility in the case was limited to the hypothesis of not having prevented the genocide and not the separate hypothesis of active involvement in the commission of the crime of genocide. Therefore, the Court left open a 'slight chance' for not recognizing UN immunity in the case of material commission of international crimes.

41 See Sections 4.3.1–4.3.14 of the Judgment. In particular, disregarding the Appeal Court's approach on the point, the Supreme Court recognized that the UN had absolute immunity by virtue of its 'special place in the international legal community' (Section 4.3.4) and 'regardless of the extreme seriousness of the accusations' (Section 4.3.14).

42 See the decision of 11 Jun. 2013 in the *Stichting Mothers of Srebrenica v. The Netherlands* case, Section 141 *et seq*., which values the special importance of operations established by Security Council Resolutions under Ch. 7, to the point of asserting that the European Convention 'cannot be interpreted in a manner which would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the United Nations. To bring such operations within the scope of domestic jurisdiction would be to allow individual States, through their courts, to interfere with the fulfilment of the key mission of the United Nations in this field, including with the effective conduct of its operations' (Section 154).

43 In Italian case law see *Corte di Cassazione a S.U.*, Order No. 8157 of 5 Jun. 2002, *Presidenza del Consiglio dei Ministri v. Marković and Others*, in relation to claims for damages made against Italy for the bombing of Serbian radio and television during the NATO air strikes against Serbia in 1999, *RDI* 85 (2002): 802, Sections 2–4. On the application of the theory of act of government in French case law, with reference to the same conflict against Serbia, see *Conseil d'État*, Judgment No. 328757 of 23 Jul. 2010, *Société Touax et Société Touax Rom*, *RGDIP* 115 (2012): 1001 *et seq*., with note by Jean Matringe.

CHAPTER 16

International Organizations and Gender Discrimination

Supersexing Gender Mainstreaming

Berta Esperanza Hernández-Truyol

1 Introduction

Ever since the international legal system shifted from the Westphalian model to the International Organizations (IOs) model – those organizations formed by a number of States by treaty, charter or constitution – sex equality has been an issue. Indeed, there is documentation that as early as 1946 States raised concerns about women's inclusion to the United Nations' (UN) attention. That year France asked that women's presence in UN delegations be an important consideration.[1] Unfortunately, these, and many other pleas for equality and inclusion have not translated to actuality.

Notwithstanding the reality that the international structure has neither historically nor currently succeeded in effecting sex equality, it has been a location in which women have sought to obtain support in the quest for a world free of sex discrimination. The UN, possibly '[t]he most significant [International Organization] from an international legal perspective',[2] given its size and breadth, has a mandate for sex equality. The UN Charter itself articulates as one of its purposes the promotion and encouragement of 'respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.[3] The UN-sponsored Universal Declaration on Human Rights (UDHR) as well as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) – the so-called International Bill of Human Rights – all mandate sex equality and non-discrimination.

Sex equality as a goal for IOs is significant because these institutions, which play a key role in the creation and application of law in the myriad disciplines of international law, operate within the defined parameters of their constitutive

1 Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (New York: Juris, 2000).

2 Charlesworth and Chinkin, *The Boundaries*, 171.

3 Charter of the United Nations, 26 Jun. 1945.

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document. International Organizations have an increasing presence in the participation in and the formation of treaties.[4] Indeed, IOs are responsible for the drafting and crafting of many of the currently applicable international legal rules as well as for the development, expansion and transformation of what subject matter is appropriate for international regulation.[5] Many such International Organizations are part of the UN system, but some significant organizations are not.[6]

Indeed, actions of the United Nations and its Millennium Development Goals have sought to take measures that will improve the lives of women in the public and private spheres. International programs, such as International Organization-sponsored conferences, have brought to light the plight of women around the world. The studies that these organizations conduct are central to the dissemination of information about the condition of women. Moreover, the sponsored gatherings have served to provide a location for women to network and form a women's movement at a global scale.

While rhetorically committed to women's equality, however, the reality in the practice of IOs reveals continuing and persistent inequality. Neither in the presence of women within the ranks of organizations nor in the focus of the organizations on issues of concern to women have these structures succeeded in the quest for equality. To be sure, these organizations have set standards. Yet, they have failed to meet them with respect to women's full citizenship. One explanation lies the structural or implicit gender bias that exists within these institutions that are statist in focus and largely led by men. The absence of women at decision-making levels in IOs has an impact on the understanding of women's issues, limits the way international concerns are perceived and understood, and serves to retain the status quo which is not a neutral position. In turn, these realities interfere with promoting the change necessary for women to be fully visible and full participants within these institutions. In the end, the lack of women's presence in International Organizations skews the way they carry out their admittedly key roles in the world by reproducing patterns of inequality.

These persistent patterns of inequality are sometimes obscured by the choice of language. Although usage of the term 'gender' commenced in academic circles around 1960, the term did not appear in UN documents regarding

4 Jose Alvarez, *International Organizations as Law-Makers* (Oxford: OUP, 2005).

5 See Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (5th edn. Leiden: Martinus Nijhoff, 2011), 6: 'Most changes in international law since 1945 have occurred within the framework of international organizations'.

6 Alvarez, *International*, 6.

women until 1985, and it was not until 1995 that the UN adopted a gender mainstreaming policy. The goal of these moves was to better the condition of women. Significantly, however, gender is not the same as sex. Although this conclusion is patent in academic realms, it is not apparent in many of the foundational and aspirational documents of international legal organizations. Moreover, while the international legal order is theoretically dedicated to both sex and gender equality, usually as a matter of law, the very same IOs have not always lived up to their own lofty standards.

Part of the difficulty in turning these aspirations of equality into reality is in the usage of the terms. If international law does not recognize the difference between gender and sex, then it cannot resolve the problematics of either sex or gender discrimination. Women who are less likely to get a job or an education because they are women may care little that their country is progressive in allowing them to wear non-traditional clothing. In this chapter, I will examine the international legal order's official stance on these issues, its shortcomings, and suggest a way forward.

In the next Section, titled 'Gender Equality and International Organizations: The Rules', this chapter looks at the relevant legal and organizational frameworks – human rights law and institutional resolutions – that mandate equality and non-discrimination. Section 3, 'Gender Equality and International Organizations: The Realities' turns to the realities of women's lives around the world as well as to the figures on the presence of women in international organizations and finds that equality remains an elusive goal. The realities suggest that the global community generally, as well as organizations, should engage in introspection to ascertain why there exists such persistent sex inequality. The following Section engages in 'Problematizing the Gender Paradigm'. This part explores the women's movement's and international organizations' shift from using the term sex to using of the term gender and provides a critique of such move. The concluding Section, 'Finding Solutions', provides illustrations of the need to expand on the concept of gender and suggests a paradigmatic shift to more embracing, inclusive, and accurate frameworks.

2 Gender Equality and International Organizations: The Rules

This part will present the history of women's involvement in the international discourse, as well as the legal and organizational frameworks governing gender/sex equality. Once the obligations are presented, the next part will explore whether these have effected the desired equality.

a *Women – An International History: Before the Institutions*

Women entered into the international political discourse prior to the existence of modern international institutions. During the 1880s, the international socialist movement experienced a revival that included participation by numerous women who would later become influential figures in the suffragist movement. This led, for example, to women in the 1893 Socialist International meeting siding with the cause of revolutionaries over reformers, realizing that pressing for worker's rights through the ballot box would translate simply into continued subordination even in victory: women would still be unable to vote for the work reforms for which they fought.[7] As the cause of early suffragists became entangled with the international left, including anarchists and anti-colonialists, women participated to a greater degree in the struggles of the era. Women's participation in the 1911 Chinese Revolution even led to universal suffrage and (highly limited) political participation for Chinese women.[8] The bitter irony of Eastern society granting more freedom for women than the 'civilized' Western colonial powers tied the early suffragist movement ever closer to the international left. According to one account, the hunger strikes and nonviolent revolutionary tactics of early suffragists inspired Mahatma Gandhi, who admired them from a South African prison.[9]

By 1902, the international women's suffrage movement had made a strong enough impact that the world was taking notice. That year, powerful Western governments met in The Hague, and adopted a series of conventions to set international standards for marriage, divorce, and custody.[10] This meeting was followed by additional measures to combat trafficking of women.[11] In 1919, The League of Nations adopted a covenant aimed at improving the working conditions of men, women, and children, as well as work to end trafficking in women and children, an aim that was conceptually intertwined with the movement to end slavery worldwide.

Within Latin America, the Pan American Union (PAU), predecessor to the Organization of American States, also noticed the brewing change. In 1923, the PAU met in Santiago, Chile, to discuss removal of constitutional and legal barriers to women's rights. The same year, a meeting in Havana, Cuba, created the

7 Susan Hinley, "The Global 'Parliament of Mothers': History, The Revolutionary Tradition, and International Law in the Pre-War Women's Movement," *Chicago-Kent LR* 87 (2012): 439.

8 Hinley, "The Global," 450.

9 Hinley, "The Global," 451.

10 United Nations, *The United Nations and the Advancement of Women 1945–1996*, UN Department of Public Information, 1996, 9.

11 Berta E. Hernández-Truyol and Jane E. Larson, "Sexual Labor and Human Rights," *Col. HRLR* 37 (2006) 391.

Inter-American Commission of Women (IACW). The IACW's work influenced the 1933 Montevideo Convention on the Nationality of Married Women, declaring for the first time in an international document that the sexes were equals in regard to nationality.[12] The League of Nations endorsed this Convention in 1935.

By 1937, the League of Nations, under pressure from women and nongovernmental organizations, began undertaking a survey to study the status of women worldwide. Before the survey was completed, and long before political action could have been taken as a result of its findings, the world was struck by an event that, as an unintended side effect, displayed the ability and competence of women to fulfill roles traditionally reserved for men by law and culture.[13] World War II unveiled women's abilities in traditional male occupations on a scale never before imagined possible by deleting from the civilian workforce of millions of men who found themselves fighting the war. This wartime necessity, by exposing gender myths about women's suitability for the industrial workforce, generated debate about the 'proper role' of women. Even the 1960's American feminist icon Betty Friedan, who characterized herself as one of the many housewives in the United States suffering from what she termed 'the feminine mystique', actually worked throughout her adult life – a living example of the war's visible and permanent disruption of traditional gendered labor roles.[14] It is the institutions created in the aftermath of the war that established the international rules for sex and gender to this very day.

b *The Legal Framework*

Human rights norms developed after World War II set forth the legal obligations of States, and in some cases IOs as well as private actors[15] with respect to sex discrimination and sex equality. In its Preamble, the UN Charter reaffirms 'the equal rights of men and women' and at Art. 1, which articulates the institution's purposes, the Charter declares that one of its purposes is to achieve

12 United Nations, *The United*, 9.

13 United Nations, *The United*, 10.

14 Shira Tarrant, *When Sex Became Gender* (New York: Routledge, 2006).

15 Convention on the Elimination of All Forms of Discrimination Against Women, 18 Dec. 1979, Preamble, *ILM* 19 (1980), 33 (hereinafter 'CEDAW'). CEDAW also has a general provision prohibiting discrimination: 'For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

nondiscrimination on the basis of 'race, sex, language, or religion'.[16] The UDHR, which formed the template for the foundational human rights documents, established the right to sex equality. The Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex.[17]

Significantly, during the drafting of the Declaration, the UN Secretary-General (SG), at the urging of the Commission on the Status of Women (CSW), intervened to ensure that the Declaration utilized the terms 'people' or 'everyone', rather than using the term 'men' when referring to human beings.[18] Unfortunately, such a sex/gender inclusive linguistic move was not replicated in all languages. In French, the document is titled the *Declaration universelle des droits de l'homme* (Universal Declaration of the Rights of Man). In Spanish, while the document is titled the *Declaración universal de derechos humanos* (Universal Declaration of human rights), the preamble refers to '*el hombre*' – man – rather than '*persona*'. The existence of gendered languages such as French and Spanish certainly creates frictions and possible misunderstandings when we refer to 'sex' or 'gender' discrimination. In fact, some post-structuralist scholars suggest that it is impossible to avoid adopting sexist stereotypes while speaking in a gendered tongue.[19] These linguistic tropes will take on significance when the work problematizes the usage of the term 'gender'.

Beyond the UDHR, the legally binding ICCPR[20] as well as the ICSECR[21] both include non-discrimination and equality mandates. Moreover, all the

16 UN Charter, Art. 1(3) states that a purpose of the UN is: 'To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion…'.

17 UDHR, 10 Dec. 1948, Art. 2 ('Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty').

18 Dianne Otto, "Disconcerting 'Masculinities': Reinventing the Gendered Subjects of International Human Rights Law," in *International Law, Modern Feminist Approaches*, eds. Doris Buss and Ambreena Manji (Oxford: Hart, 2005), 112–113.

19 Toril Moi, *What is a Woman and Other Essays* (Oxford: OUP, 1999).

20 ICCPR, 16 Dec. 1966, Arts. 2(1) (non-discrimination) and 26 (equality and non-discrimination), *UNTS* 999, 171.

21 ICESCR, 16 Dec. 1966, Art. 2(2), *UNTS* 933, 3.

major regional treaties – the American Convention on Human Rights,[22] the European Convention on Human Rights[23] and the African Charter on Human and Peoples Rights[24] – include such non-discrimination/equality mandates. Finally, there is one treaty that is dedicated entirely to women's goals of equality, the Convention on the Elimination of All Forms of Discrimination against Women. This treaty not only applies to State discrimination, but also places obligations on States to restrict discrimination against women by private parties. Significantly it prohibits discrimination on the basis of sex as well as on the basis of gender, prescribing making distinctions based on stereotypes. This brief overview of the international legal framework plainly establishes that it is beyond peradventure that there is a legally binding international mandate for sex equality.

c *Women within the Organizational Framework: From Sex Equality to Gender Mainstreaming*

Notwithstanding the theoretical sex equality declared in the documents generally and specifically in the 1940s by the IOs as they were created,[25] organizations have continued to contribute to the gendered nature of institutions. To be sure, rhetorically, as the prior section sets forth, there has existed much support for equality. This section presents the evolution of that support in theory. The next section, however, will unveil the gendered realities that persist.

c.1. From 1948–1963, CSW sessions adopted draft resolutions concerning the participation of women in institutions. The commission presented

22 American Convention on Human Rights, 22 Nov. 1969, Art. 1, *ILM* 9 (1970): 673; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador," Art. 3, www.oas.org.

23 European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, Art. 14, *UNTS* 213, 222 (amended by Protocol No. 14).

24 African Charter on Human and Peoples' Rights, 27 Jun. 1981, Art. 2, *ILM* 21 (1982): 50.

25 Mary K. Meyer, "The Women's International League for Peace and Freedom," in *Gender Politics in Global Governance*, eds. Mary K. Meyer and Elisa Beth Prugl (Maryland: Rowman&Littlefield, 1999), noting that women have been continually concerned about and involved with international issues since early in the nineteenth century. The struggle for sex equality predates even the existence of the UN. At the beginning of the UN in 1945, of the original Member States (51) only 30 allowed women the vote or the right to hold public office: www.un.org/womenwatch. Also, the UN Commission on the Status of Women actively participated in the drafting of the Universal Declaration and sought 'to ensure that explicit reference was made to rights that were specific to women's experience, but within the framework of women's equality with men rather than as protective measure'. See Otto, "Disconcerting," 112.

the resolutions to the Economic and Social Council (ECOSOC) for adoption. Yet ECOSOC declined, citing that staffing issues at the Secretariat were wholly discretionary with the SG.[26] In 1954, early in the UN history, the second SG, Dag Hammarskjold, expressed his opposition to sex discrimination in employment. Yet he proceeded to seek to explain the miniscule number of women employed at the UN by noting their 'recent emancipation'.[27]

Some years later, a 1970 resolution on UN employment of women sought to ensure equal work opportunities and requested data on employment. In fact, for the first time a 1971 report to the General Assembly (GA) provided information on the number of women employed, by level.[28] In 1974, the institution set 1980 as a target date to attain equitable balance in employment.[29] In fact, in 1977 Kurt Waldheim suggested there should be equal numbers of men and women in the Secretariat by 1980 – the equitable balance target date.[30] In 1982, with the aspirational balance not yet a reality, the UN issued guidelines to establish standards regarding use of sexist language, assignment of work as well as sexual harassment. Three years later, a Report on Women in the Secretariat presented an action program recommending recruitment and promotion of women in professional positions, with a goal of complete parity by 2000.[31] As will be shown below, parity is yet to be achieved.

c.2. 1975 was a landmark year in the international sphere for women's issues and concerns. The UN declared 1975 to be the International Year of the Woman; it became the first year in the United Nations Decade for Women: Equality, Development and Peace.[32] The decade included three conferences, the first of which was held in Mexico City in 1975. That year, women's participation in discussions concerning the role of women in global affairs – ranging from politics to governance – increased monumentally. Tensions surfaced between women from different geographies, races and cultures at the Mexico City conference and the different perspectives and needs of the very diverse women from the North/West, South and East

26 Charlesworth and Chinkin, *The Boundaries*, 180.

27 Charlesworth and Chinkin, *The Boundaries*, 181.

28 Charlesworth and Chinkin, *The Boundaries*, 179.

29 Charlesworth and Chinkin, *The Boundaries*, 181.

30 Charlesworth and Chinkin, *The Boundaries*, 181.

31 Charlesworth and Chinkin, *The Boundaries*, 182.

32 United Nations Decade for Women: Equality, Development and Peace, UN GA, A/RES/36/126, 14 Dec. 1981.

> strained relations between and among them. The conflicts underscored the breadth and complexity of 'women's issues' as well as their indivisibility from and interdependence with larger issues of global politics. In this decade, attention to women started to shift from focusing on targeted activities to integrating consideration of women in all aspects of development.[33] Such approach, however, was not successful as the focus on women occurred only after all the decisions had been made; consideration of women was more of an afterthought. Organizations did not seek women's input into the decision-making or implementation processes; integration of women was illusory.[34]

The second conference, a 1980 meeting in Copenhagen, was also rife with discord.[35] However, the third conference, the 1985 meeting in Nairobi, resulted in the publication of Forward Looking Strategies, a document that centered women in the international agenda. The Strategies included, for the first time ever in an international document, the issue of gender violence – an issue so prevalent across geographies and cultures that it served as a unifying theme for women from around the globe. Parenthetically, because this is significant in the problematization of the gender paradigm in Section IV, the word gender appeared in the Strategies for Women only 16 times in over 350 paragraphs.

A decade after the Nairobi Conference, the United Nations Development Programme (UNDP) unequivocally stated that 'in no society do women enjoy the same opportunities as men'.[36] It was also in 1995 that the Fourth World Conference on Women was held in Beijing. The Declaration and Platform for Action from this conference first articulated and sought to implement the concept of gender mainstreaming. Art. 38 of the Declaration provided for having a

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33 "The Development of the Gender Mainstreaming Strategy," www.un.org/womenwatch.

34 "The Development of the Gender Mainstreaming Strategy": 'However the gains made through the integration strategy were limited by the fact that most efforts were undertaken too late in processes when all important decisions on goals, strategies and resources had already been taken. Equally constraining was the fact that integration was often taken to mean only increasing women's participation in development agendas already decided upon by others without taking their contributions, knowledge, priorities and needs into consideration. The potential for bringing about the types of structural changes required for achieving gender equality was therefore reduced'.

35 "Women's Conference May End in Discord Due to Political Impasse," news.google.com. Second World Conference on Women, Copenhagen, Jul. 1980. Res. 35/136, World Conference of the United Nations Decade for Women, adopted on 11 Dec. 1980 by the GA at its 35th session.

36 UNDP, Human Development Report 2 (New York: OUP, 1995).

gender perspective and Section 25 of the Platform for Action provided for the 'mainstreaming of gender'. It is not surprising with this new mainstreaming goal that the term 'gender' appears throughout this document.

Gender mainstreaming, '[t]he concept of bringing gender issues into the mainstream of society',[37] embodies the organizational framework's call for equality on the basis of sex. Following this Beijing mandate, other organizational promulgations have developed, detailed and refined the gender mainstreaming concept.[38] Central to the idea of gender mainstreaming is the goal of 'gender equality', which is defined as the concept of equality between men and women.[39] Thus, the strategy of gender mainstreaming requires the consideration of gender perspectives at all stages of any process – 'policy development,

37 See www.ilo.org.

38 "The Development of the Gender Mainstreaming Strategy." See also "Intergovernmental mandates on gender mainstreaming," www.un.org/womenwatch, noting that '[t]he strategy of mainstreaming' is defined in the ECOSOC Agreed Conclusions, 1997/2, as 'the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality'. More concrete directives within the UN system were provided with the SG's communication to management in Oct. 1997. Analytical reports and recommendations on policy or operational issues within each area of responsibility should take gender differences and disparities fully into account. Medium-term plans and budgets should be prepared in such a manner that gender perspectives are explicit. Specific strategies should be formulated for gender mainstreaming and priorities established. Systematic use should be made of gender analysis, sex-disaggregation of data, and sector-specific gender studies and surveys should be commissioned as required. The GA in Res. 52/100 (Dec. 1997) requested all bodies within the UN system that deal with programme and budgetary matters to ensure that all programmes, medium-term plans and programmes budgets visibly mainstream a gender perspective. The gender mainstreaming mandate was significantly strengthened in the outcome document of the GA 23rd special session to follow up the Beijing Conference in Jun. 2000 (A/S-23/10/Rev.1). In addition the SC Res. (S/2000/1044) arising from the Council's discussions on Women, peace and security on 24–25 Oct. 2000 provides a strong mandate for gender mainstreaming in all areas of peace support operations. See generally "Intergovernmental mandates on gender mainstreaming," at www.un.org/womenwatch for a comprehensive list of ECOSOC, GA, Commission on the Status of Women, and SC Resolutions on Gender Mainstreaming.

39 "Concepts and definitions," www.un.org/womenwatch. Providing that the concept of men's and women's equality 'refers to the equal rights, responsibilities and opportunities of women and men and girls and boys. Equality does not mean that women and men will

research, advocacy/dialogue, legislation, resource allocation, and planning, implementation and monitoring of programmes and projects'.[40] The UN's strategy of gender mainstreaming embeds the woman question in all aspects of UN life.[41]

Five years after Beijing the UN held the 2000 Millennium Summit at which it established the Millennium Development Goals (MDG) seeking to resolve the most critical challenges in development for the poor and most vulnerable. It is noteworthy that of the UN's eight goals, four are primary aspirations of the core women's agenda: the promotion of gender equality and the empowerment of women (goal 3), reduction of child mortality (goal 4), improvement of maternal health (goal 5), eradication of extreme poverty and hunger (goal 1).[42] Other goals are also directly relevant to feminism's quest for equality – a quest shared by IOs: attainment of universal primary education (goal 2), combating HIV/AIDS, malaria and other diseases (goal 6), and ensuring environmental sustainability (goal 7).[43] Significantly, all 189 UN Members at the time, as well as 23 IOs, agreed to attain the articulated goals by 2015.

Although the MDGs originated from the UN's Millennium Declaration, its origins are broader and IOs played a key role in their articulation. The Organization for Economic Cooperation and Development (OECD), the World Bank and the International Monetary Fund also were major actors in the creation and promulgation of MDGs.

Moreover, although the International Financial Institutions (IFIs) initially insisted that they had nothing to do with human rights[44] and hence the

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become the same but that women's and men's rights, responsibilities and opportunities will not depend on whether they are born male or female. Gender equality implies that the interests, needs and priorities of both women and men are taken into consideration, recognizing the diversity of different groups of women and men. Gender equality is not a women's issue but should concern and fully engage men as well as women. Equality between women and men is seen both as a human rights issue and as a precondition for, and indicator of, sustainable people-centered development'.

40 "Gender Mainstreaming: Strategy for Promoting Gender Equality." Office of the Special Advisor on Gender Issues and Advancement of Women rev. Aug. 2001.

41 Berta E. Hernández-Truyol, "On Que(e)rying Feminism: Reclaiming the F Word," *Issues in Legal Scholarship* 2 (2011), www.issuesinlegalscholarship.org.

42 "The Millennium Development Goals: Eight Goals for 2015," www.undp.org.

43 "The Millennium Development Goals: Eight Goals for 2015," Goal 8 also has a feminist flavor: developing global partnership for development.

44 For a discussion of the World Bank see Berta E. Hernández-Truyol, "Cuba and Good Governance, Symposium: Whither Goes Cuba? Prospects for Economic and Social Development," *Transnat'l L. & Contemp. Problems* 14 (2004): 655–683; Darren Rosenblum, "Feminizing Capital: A Cooperative Imperative," *BBLJ* 5 (2009), No. 5: 55.

condition of women was not deemed to be a relevant issue, IFIs now center women's concerns. For example, the World Bank first insisted that its role was purely economic and human rights were beyond its purview. While the UN centered women with mainstreaming, the Bank was 'informed by the arguments of the feminist school of economics situated within the neoclassical paradigm, which postulate that the market is sexually neutral and that sexual discrimination threatens to compromise the success of structural readjustment policies'.[45] In contrast to the 'soft' morality of UN human rights institutions dedicated to sex equality, the Bank's coldly practical stance was that economic regimes engaging in discrimination against women are only hurting themselves. Nonetheless, the Bank's direct involvement with women followed the UN's request that it attend the Mexico City conference. However, ostensibly pursuing the women and development agenda, the Bank appointed a counselor but it failed to provide support with either power or money.[46] As a commentator has noted, '[w]hen the bank did pay attention to women's needs, it did not show sufficient interest to award them what really mattered – well-financed projects'.[47]

In sum, conferences on women and other topics have developed strategies to pursue the goal of equality. The goal of the gender mainstreaming strategy articulated in the Beijing documents was to integrate women into all aspects of the work and processes of organizations. While the aspiration is admirable, the deployment, as is evident in the World Bank example and as will be further developed in the following part of this chapter, has not yet rendered the desired outcomes.

3 Gender Equality and International Organizations: The Realities

We can both celebrate the progress of women's status around the world and lament women's persistent inequality. Based upon the notion of gender equality embodied in the mainstreaming strategy, at the organizational level the GA called for gender parity at all levels by the year 2000.[48] Notwithstanding this noble, ambitious and, most significantly, proper goal, women's representation is not yet at parity in 2014, even within the institutions that have promulgated these rules.

45 Sophie Bessis, "International Organizations and Gender: New Paradigms and Old Habits," *Signs: Journal of Women in Culture and Society* 29 (2003): 633, 635.

46 Bessis, "International," 639–640.

47 Bessis, "International," 640.

48 "Gender Related United Nations System Policies," www.un.org/womenwatch.

In 2010 SG Ban Ki-moon observed that '[w]herever voices are raised against tyranny and injustice, you can be sure that women are among them'.[49] Yet he had to add that '[i]njustice and discrimination against women persists everywhere'.[50] He reiterated the UN's commitment to 'equal rights, equal opportunities and progress for all'. He also claimed that 'gender equality and women's empowerment are fundamental to the very identity of the United Nations', rights that he labeled 'inalienable'.[51] He singled out the reality that 70% of women experience violence in their lives, rejected the cultural pretexts for such violence by calling out early and forced marriages, honor killings, sexual abuses, and trafficking as plain and simple abuse that is criminal. He also noted other areas that progress has eluded: high maternal mortality, lack of access to family planning, gender stereotyping and discrimination, and the prevalence of poverty and other economic privations.[52]

Since then, the SG's comments on International Women's Day reflect the tension of success and disappointment in the attainment of women's equality. The following year he noted that 'in too many countries and societies, women remain second-class citizens'.[53] He pointed to gaps in education, wealth and health; discrimination; under-representation in government, business and industry; and violence against women at home and in war as locations of such less than full citizenship.

In the 2012 address he noted that 'there is a long way to go before women and girls can be said to enjoy the fundamental rights, freedom and dignity that are their birthright and that will guarantee their well-being'.[54] Focusing on rural women, he observed that they 'make up one quarter of the global population, yet routinely figure at the bottom of every economic, social and political indicator, from income and education to health to participation in decision-making'.[55] This condition, he noted, 'mirrors' the 'plight' of women worldwide.[56]

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49 SG Ban Ki-moon, "Remarks to Commission on the Status of Women High-Level Event marking International Women's Day – Equal Rights, Equal Opportunities and Progress for All," 3 Mar. 2010, www.un.org.

50 Ban Ki-moon, "Remarks."

51 Ban Ki-moon, "Remarks."

52 Berta E. Hernández-Truyol, "Unsex CEDAW? NO! SuperSex It!" *Col. J. of Gender & L* 20 (2011): 195.

53 SG Ban Ki-moon, New York, 8 Mar. 2011, "Secretary-General's Message on International Women's Day," www.un.org.

54 SG Ban Ki-moon, "International Women's Day, 8 Mar. 2012, Secretary-General's Message," www.un.org.

55 Ban Ki-moon, "Remarks."

56 Ban Ki-moon, "Remarks": 'The plight of the world's rural women and girls mirrors that of women and girls throughout society – from the persistence of the glass ceiling to pervasive

In 2013, the theme 'A Promise is a Promise: Time for Action to End Violence Against Women', returned the conversation to the topic that united women in Nairobi in 1985. The Secretary-General lamented the 'year of shocking crimes of violence against women and girls' and urged that we 'ask ourselves how to usher in a better future'. He noted that the specific atrocities confronted during the year are 'part of a much larger problem that pervades virtually every society and every realm of life'[57] the prevalent and unacceptable reality of gendered violence in peacetime and wartime, at work and in schools, at home and in the streets.

Numerous reports confirm that regardless of geography, women's reality worldwide is one of inequality.[58] Up to 70% of women experience physical or sexual assault from an intimate partner, making domestic violence the most common form of violence against women.[59] Beyond violence, women experience disparities in health, education, poverty, home-life where women often are not the decision makers, and work where women toil longer hours for less pay. Women also experience an 'asset gap' – they own only a fraction of land in comparison to men;[60] and a gap in political representation, although studies show that women in politics make a difference.[61] In sum, no matter who reports, or the methodology utilized, the world data shows that women do not fare as well as men in any reporting category – health, education, welfare, economic well-being, work and its conditions, or political participation.[62] Worldwide,

violence at home, at work and in conflict; from the prioritization of sons for education to the hundreds of thousands of women who die each year in the act of giving life for want of basic obstetric care. Even those countries with the best records still maintain disparity in what women and men are paid for the same work, and see continuing underrepresentation of women in political and business decision-making'.

57 SG Ban Ki-moon, "A Promise is a Promise: Time for Action to End Violence Against Women," www.un.org.

58 "Women in Labour Markets: Measuring Progress and Identifying Challenges," www.ilo.org; Asia-Pacific Human Development Report, "Power Voice and Rights: A Turning Point for Gender Equality in Asia and the Pacific," www2.undprcc.lk; "Because I am a Girl: The State of the World's Girls 2007," plan-international.org; The United Nations Children's Fund (UNICEF), "The State of the World's Children 2007: Women and Children – The Double Dividend of Gender Equality, 2006; 2007 Global Gender Gap Index;" Ricardo Hausman, Laura D. Tyson and Saadia Zahidi, *The Global Gender Gap: Report 2007* (Geneva: World Economic Forum, 2007), 3.

59 Ban Ki-moon, "Remarks." But see "World Health Organization says 35% of women worldwide face intimate partner or non-partner violence," www.who.int.

60 Hausman, Tyson and Zahidi, *The Global*.

61 Hausman, Tyson and Zahidi, *The Global*.

62 Hernández-Truyol, "On Que(e)rying."

human beings experience privation at a disproportionate rate *because* they are women. All these realities are global and cut across religion, race, class, and nation.[63]

In light of the gender mainstreaming strategy adopted by the UN for its family of organizations, one might anticipate that the reality of equality for women in international organizations is better. Unfortunately that is not the case. As this work intimated in the gender mainstreaming discussion, the numbers in 2013 are not anywhere near the goal of parity that was set for the year 2000. In fact, women's representation in the Secretariat is at 39% a number that is not consistent throughout the UN system.[64] In addition, 'in the United Nations Secretariat, …the proportion of women at each level of the hierarchy is lower than that in the next level down. . . . The deficit of women at the most senior levels persists, with women comprising only between 20 and 30 per cent of directors, assistant secretaries-general and under-secretaries- general'.[65]

Given that organizations have a mandate to attain equality, and that justice is a huge component of the concept of equality, it is telling that women are also underrepresented in the international and regional courts. The ICC has 39% representation of women, most likely due to the Rome Statute's mandate of fair representation. On the other hand, the ICJ, with no such mandate in its Statute, has only a 7% representation.[66]

All this information simply confirms the persistent inequality of women. To be sure, there has been some progress. The gender mainstreaming policy is in

63 Hernández-Truyol, "Unsex," 195.

64 "Gender Related United Nations System Policies."

65 *The World's Women 2010: Trends and Statistics*, 123, unstats.un.org.

66 *The World's Women 2010: Trends and Statistics*, 121: 'Women are also underrepresented in international and regional courts, with only four of twelve such courts having 30% or more women judges. The highest share is seen in the International Criminal Court (ICC), where seven of eighteen judges (39%) were women (table 5.8). This high representation of women was achieved because the Rome Statute, the governing document of the ICC, calls for a fair representation of female and male judges. In contrast, the International Tribunal for the Law of the Sea was composed entirely of male judges, while in the International Court of Justice only 7 per cent of the judges were women'. UNIFEM, *Progress of the World's Women 2008/2009* (2009), 79, Table 5.8: 'Share of women among judges in international and regional courts, 2006: International Court of Justice (7%); International Tribunal for the Law of the Sea (0%); European Court of Justice (17%); Caribbean Court of Justice (14%); Inter-American Court of Human Rights (14%); International Criminal Tribunal for the former Yugoslavia (11%); European Court of Human Rights (27%); Andean Court of Justice (25%); International Criminal Court (39%); Court of First Instance (36%); International Criminal Tribunal for Rwanda (33%); Special Court of Sierra Leone (30%)'.

effect, although its aim for gender equality has yet to be realized as a reality. The UN has a goal of gender parity although it, too, remains an elusive aspiration. But there are some additional successes that can be noted.

The creation of UNIFEM in 1976, following the Mexico conference, resulted in the existence of the first UN agency to address domestic violence.[67] The UNFPA has played a significant role in making family planning education and resources available to women in the South; has shown linkages between family planning initiatives, the decline of populations, and women's agency and progress; and has sponsored conferences (Cairo) that show the entrenchment of structural hierarchies across society in both the private and the public spheres that perpetuate women's subordination.[68]

The 1979 adoption of CEDAW, which entered into force in 1981, provides a legal basis for the promotion of women's equality and eradication of sex discrimination in the public and private spheres.[69] The subsequent protocol providing for sanctions for violations is also a sign of progress.[70] Rape is now a war crime and rape as well as other violence against women can be prosecuted under the Rome Statute by the ICC.[71] Sexual and other gendered violence is taken seriously – as the creation of the position of Special Rapporteur to the UN on Violence against women attests,[72] although gender violence remains rampant.

The ILO has done much for the advancement of women in the labor force. It has promulgated norms that guarantee the right to equal working conditions and to equal pay.[73] In 1987 it issued an action plan for equal treatment and opportunities for men and women in the work place.[74]

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67 Bessis, "International," 636. United Nations Entity for Gender Equality and the Empowerment of Women, created in Jul. 2010 by the UN GA, Res. 64/289.

68 Bessis, "International," 636–637.

69 Bessis, "International," 636.

70 The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women is a side-agreement to the Convention which allows its parties to recognize the competence of the Committee on the Elimination of Discrimination against Women to consider complaints from individuals. The Optional Protocol was adopted by the UN GA on 6 Oct. 1999 and entered into force on 22 Dec. 2000. Currently it has 80 signatories and 104 parties.

71 Rome Statute of the International Criminal Court, Art. 7(g): 'Rape sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity'.

72 Special Rapporteur on violence against women, its causes and consequences, appointed by the UN Commission on Human Rights, Res. 1994/45, www.ohchr.org.

73 See e.g., ILO Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment, Act No. 113, 1 Jul. 1972; see also Bessis, "International," 636.

74 1987 Governing Body Endorses Plan of Action: www.ilo.org.

Finally, the UN has indirectly promoted women's progress and agency by 'the regular scheduling of international conferences, attended by large numbers of civil society advocates, [which] has been a considerable factor in the emergence of a global feminist network that is increasingly visible at the local, national, and regional levels'.[75] This has been particularly significant for women's organizations in the South that might not otherwise have had the resources for establishing networks. Moreover it had an educational turn for the women of the North/West as the North/South hierarchy had to be disestablished.

These are some of the progresses that indisputably women have enjoyed. Moreover, it is hugely significant that the policies in place have equality as a target. Yet, as the data shows, there is much work to be done to achieve that goal in every day life.

4 Problematizing the Gender Paradigm

This chapter suggests that a major impediment to attaining equality is structural. In that context, it looks at one aspect of that implicit bias: the language used to frame the equality goal. It is inescapable that although the equality policies are framed in terms of gender equality, the problems addressed are about women's inequality: not gender inequality but sex inequality. The UN's definition of gender equality specifically refers to equality of men and women with respect to rights, responsibilities and opportunities. Thus the organizations' deployment of the term 'gender' is but a rhetorical trope to focus on women.

There are salient issues surrounding the term gender. One, as just mentioned, is its usage. In this regard, two related issues are noteworthy. First, as the discussion on international organizations showed, the organizational framework – both international and regional – utilize the term 'gender'. It is interesting that the EU has embraced the term, especially in light of the second concern: the term gender is a contested term, perhaps in part because it might well be an untranslatable term. For example, in Spain, there have been debates about the utility and desirability of using the term – in Spanish '*genero*', which, to the general population, simply refers to grammar. Most French feminists reject the term '*genre*'. Scholars and advocates from many other European States are in disaccord as to its utility and desirability. One significant and pertinent factor is that, while debates persist in the academy about terminology, those conversations do not necessarily resonate with the people the

75 Bessis, "International," 637.

standards seek to protect. In fact, if organizations insist on using the term gender, the general public might not even have a clue as to what the equality concerns are.

With these realities in mind, it is appropriate to turn to how organizations use the term. The mainstreaming literature includes the following definition of 'gender': 'gender refers to the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context/time-specific and changeable. Gender determines what is expected, allowed and valued in a women or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-making opportunities. Gender is part of the broader socio-cultural context. Other important criteria for socio-cultural analysis include class, race, poverty level, ethnic group and age'.[76]

Notwithstanding the definition, institutions are utilizing the terms sex and gender interchangeably. The policies, analysis and information provided in the context of gender equality is about sex, meaning women, not gender. The SG's 2010 address used the concept of gender separate and apart from the concept of sex (woman). He talked about 'gender empowerment and women's equality' and about gender stereotyping. These moves are significant. They presented him with a missed opportunity to educate about the meaning of the terms. Yet, while the observations plainly recognize two interrelated yet different and separate categories, he ultimately collapsed them rather than problematized or critically analyzed them *vis à vis* the principle of equality.[77] With this occurrence, the SG gave credence to the critique that the UN only utilizes 'gender' as a synonym for woman.

To be sure, there has been a shift in the language from the usage of the word sex (woman/women) to the word gender. Within the realm of the UN, it is noteworthy that the documents that emerged from the Mexico and Copenhagen conferences did not use the word 'gender' one single time. Rather than gender roles, the documents address 'sex-role stereotypes'. By the time the Nairobi conference documents were produced, however, the term appears 16 times,

76 "Concepts and definitions," www.un.org/womenwatch.

77 For some literature that underscores the gender/sex *differences* see Kathy Davis, Mary Evans and Judith Lorber, *Handbook of Gender and Women's Studies* (London: SAGE, 2006).

once in each of sixteen (out of over 350) paragraphs.[78] Ten years later, the Beijing Declaration and Platform for Action, which introduced the gender mainstreaming strategy, is, not surprisingly, replete with references to gender.

This linguistic move is both intriguing and problematic. As the gender definition that appears in the gender mainstreaming literature confirms, gender and sex are not the same concept although critical literature both differentiates and collapses the term. Sex is generally understood to be biology although this, too, is contested as will be discussed below. Gender, on the other hand, refers 'to the ideological and material relations which exist' between men and women.[79] Masculine and feminine are descriptions of gender performance which differs across cultures and societies but exists in all. Indeed, '[i]n all societies and all cultures there are certain emotional and psychological characteristics which are held to be essentially "male" or "female"'.[80] Social climate and cultural pressures create expectations of a coincidence of biological sex with what are deemed appropriate gender characteristics and behavior. The pressures are intense and ubiquitous leading sociology and women's studies professors Crawley and Broad to suggest that 'the consistency of *gender performativity causes the belief in discrete biological sex categories,* not vice versa'.[81]

The distinction between sex and gender was originally designed to combat scientific notions of biological determinism. According to Thomas Lacquer, the concept of two sexes existing via biology came into being in the eighteenth century. Prior to this, women were viewed as men with inverted body parts – inversions which, being a manifestation of God's will, placed women in an

78 "Nairobi Forward-looking Strategies for the Advancement of Women," UN GA A/RES/40/108, (Dec. 1985). The word gender appears in Sections 6 (gender-based discrimination); 46 (by virtue of their gender); 115 (gender-bias); 121 (gender roles); 129 (government to compile gender-specific statistics to promote advancement of women); 138 (gender-stereotyping); 161 (gender-specific indicators to monitor health); 167 (gender stereotyping in education); 179 (gender specific statistics to monitor women's contribution to food supply); 199 (eliminate gender bias from labor market); 257 (traditional gender norms); 282 (gender specific data on vulnerable and underprivileged women); 288 (gender specific violence); 312 (gender specific data on economic role of women in society); 333 (UN provide technical assistance at national level to improve gender-specific indicators); 347 (UN develop guidelines to remove gender-specific discriminatory perceptions).

79 Jill Steans, *Gender and International Relations: An Introduction* (New Jersey: Rutgers, 1998).

80 Steans, *Gender*, 10.

81 Sara L. Crawley and Kendal L. Broad, "The Construction of Sex and Sexualities," in *Handbook in Constructionist Research*, eds. Jarber F. Gubrium and James A. Holstein (New York: Gilford, 2007), 545 (emphasis in original).

inferior hierarchical position. As science moved toward a model of two distinct biological sexes, sex became the justification for gender. This view was crystallized by Scottish researchers Patrick Geddes and J. Arthur Thomson, who boldly claimed that 'what was decided among the prehistoric Protozoa cannot be annulled by Act of Parliament'.[82] Male vigor and progressive daring was seen as but an extension of the behavior of sperm, while female passivity merely reflected the conservative behavior of the ovum on a large scale. In this framework, any legal experiment that permitted females to adopt 'male' behaviors, such as certain forms of employment, was bound to end in disaster.

This perspective was challenged by many feminists at the time in practical terms and, by now, has been fully discredited. For one, women in the developed world won political rights for women to participate in traditionally 'male' professions. While the 1940s saw feminists such as Simone de Beauvoir challenging the idea of sex determining destiny in any meaningful sense, sociologists created a powerful rhetorical tool in their 1950s analysis of intersex individuals (then referred to as hermaphrodites), transgendered individuals, and others who did not conform to the expectations of their biological sex. In the 1960s, the psychological and sociological idea of 'gender role' was embraced by feminist analysis, which challenged the relationship of sex and gender and the privileging of male traits and roles in a broader fashion.[83] The break-down of the deeply societally entrenched gendered dichotomies resulted in feminist challenges to what became viewed as socially constructed power hierarchy between men and women with men on top. 'Gender came to be understood in social and political terms as a relationship which had meaning within social practices which, in turn, structured and supported social institutions'.[84] More recently, gender is viewed both as part of the identitarian construct and as part of social structures and practices.[85]

In fact, after the embrace of the term 'gender' by the 'second wave' of feminism, the 1990s saw a 'third wave' of feminist critiques that went far beyond the simple distinction of biology and culture. As Toril Moi details in her essay, "*What is a Woman?*", some feminists of the post-structuralist school, coming full circle, have gone so far as to challenge the idea of a distinction between sex and gender at all. In this view, the very concept of there being two sexes, represented by different physical traits, is a product of cultural constructions rooted in gender. Some modern feminists such as Judith Butler argue that the very

82 Moi, *What*, 15–21.

83 Steans, *Gender*, 11–12.

84 Steans, *Gender*, 12.

85 Steans, *Gender*, 13.

concept of womanhood is inherently an oppressive idea. While these philosophical distinctions are highly debated in the academy, Toril Moi points out that the practical purpose behind such discussions is merely to illustrate why sex is not a proper basis for discrimination in cultural, political, social, and economic roles, an argument that was made as forcefully by the French feminist Simone de Beauvoir in 1949 as by the post-structuralist feminists of the 1990s.[86] The extensive feminist debate over the relation of culture and biology has launched the word 'gender' into the limelight, to the point that the word 'sex' was largely displaced by it. David Haig of Harvard recorded the rise of the word 'gender' compared to 'sex' in academic journal titles from 1945 to 2001, finding that while 'gender' was originally used much more rarely than 'sex' by the new millennium, the term 'gender' was used about twice as often.[87]

While the academic and institutional embrace of the term 'gender' represents a victory for women's advancement, the catch is that in many locations, including in International Organizations, the terms are often used interchangeably. There is little doubt that the term gender not only has contested academic meaning but also complicated and inconsistent usage.[88] Differentiating *gender* from, and equating it with sex, meaning *woman,* may serve to elucidate the utility of addressing the social construction of womanhood, but, unfortunately, collapses different and complex concepts. Utilizing the term *gender* obscures the real differences between being oppressed, subordinated, marginalized or demonized because of one's sex-simply for being a woman and being oppressed, subordinated, marginalized or demonized because of one's gender identity or expression for one's self-presentation in the context of normatively ascribed and socially predetermined notions of femininity and masculinity.

One scholar's suggestion with respect to engaging the sex/gender puzzle is that human rights law be deployed to 'produce gender as a fluid and shifting set of ideas, practices, relationships and possibilities, and in this way succeed in producing gendered subjectivities that are liberatory or "resistive"'.[89] Such an approach embraces 'gender hybridity', the notion that 'human beings are a

86 Moi, *What*, 45–83.

87 David Haig, "The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001," *Archives of Sexual Behavior* 33 (2004), No. 2: 87–96.

88 Meyer and Prugl, *Gender*, 4, confessing that the book's title is itself 'contested'. In particular, the terms *gender* and *global governance* have no plain meaning but 'emerge from specific political debates…about the role of women in society and about political authority in a world that increasingly connects agents' from various and diverse locations.

89 Otto, "Disconcerting,"126.

rich and varied multiplicity of characteristics that are culturally associated with masculinity and femininity…[so that] [g]ender-identity…becomes the hybrid result of choices and desires, rather than either male or female'.[90] This approach, while appealing because it embraces human existence – it acknowledges that there can be girl-boys, boy-girls, girl-girls, boy-boys and everything in between – however, runs the risk of erasing women's realities which include myriad violations and inequalities simply because of their sex.

The evolution of the construction of gender confirms that it is a complex concept that should not be deployed as a synonym for sex. Yet, this is the practice of the UN, as well as other IOs, in both language usage and practice utilize. The conflation of sex and gender can render the gender mainstreaming strategy ineffectual. By utilizing the word gender to refer to women, instead of using the word woman, the real problem of sex inequality is rendered invisible. The deployment of the neutral term gender, which technically – according to the definition – includes men and women, masks the global and epidemic problem of rampant women's inequality, subordination and marginalization.[91] Rather than it being a concern for and about women, it becomes a concern of and about everyone.

So where does that leave us with respect to Gender/Women's equality and International Organizations? To engage this analysis suitably, several observations about women are noteworthy. One, the world data shows that women qua women, regardless of how one conceptualizes womanhood, do not fare as well as men in any reporting category: health, education, welfare, economic well-being, work and its conditions, or political participation. Women currently exist in precarious locations around the world simply because they are women. All these realities, which are the concern of IOs, are global and cut across religion, race, class, and nation. They thus confirm that category of woman, is a relevant and important one.[92]

Two, women are not all the same. Thus, the category of woman must be understood as a non-essentialized, non-monolithic category. Women's race, religion, class, ability, sexuality and geography are intersecting factors that affect their location in global society. Three, the category 'woman' and that can be different people in different cultures and contexts – are less likely to enjoy the trappings of full personhood.[93]

90 Otto, "Disconcerting," 126.

91 Susan Hawthorne, "The Political Uses of Obscurantism: Gender Mainstreaming and Intersectionality," *Development Bulletin* 64 (2004): 87–91.

92 Hernández-Truyol, "Unsex."

93 Hernández-Truyol, "Unsex."

Another separate, but related, point is important: there is no doubt that discrimination's reach is greater than just women – there are also the categories of race, class, sexuality, and gender to name a few of the axes along which there is rampant disparity in status, dignity, and respect. Thus it is important to consider the impact on women of the intersections of these other categories with sex/gender – a consideration that returns us to an evaluation of gender. Contrary to its common (and above-documented) deployment, the term is a complex, multilayered one. It is a category that needs to be considered holistically and to include sex, gender identity, sexuality and the cultural tropes that guide and often mandate. construction of the terms and categories. Moreover, the intersections of sex and gender with sexuality, race, ethnicity and gender identity problematize analysis. The limning of sex and gender serves to obscure such complexities.

Significantly, men can be, indeed are, vulnerable too. Vulnerable men – be they poor; not male-gendered; sexual, religious, or racial minorities – suffer deep privations of civil, political, social economic, and cultural rights. Some US research notes the legal and cultural difficulties faced by men who have been sexually harassed or who seek to embrace more nurturing roles within a family structure.[94] Thus, men who choose non-traditional gender roles may also be socially and legally vulnerable. These men cannot be viewed as having a position of power *vis à vis* the normative man, although they may well be privileged over similarly situated women.

The Human Rights indivisibility paradigm supports, indeed encourages, consideration of the multidimensional being in analyzing structures of power that effect the subordination and marginalization of vulnerable populations. The single-dimension approach is problematic. Thus, this work proposes a paradigmatic shift from a single-axis analytical model to a multidimensiality, antisubordination analysis that considers the condition of persons holistically. Such a model is consonant with the human rights model of indivisibility and interdependence of rights. This methodological move enables considering the status of women – non-essentialized women – *qua* women without erasing, ignoring or obscuring other locations of subordination, disempowerment, marginalization and oppression.

5 Finding Solutions

There is no doubt that persons around the globe suffer discrimination and inequality. As this work has shown, women, simply because they are women,

94 Nancy Levitt, "Feminism for Men," *UCLA L. Rev*. 43 (1996):1037, 1051–1079.

experience discrimination and unequal treatment. But others also experience indignities because of their gender or sexuality. IOs should develop, expand and transform their established strategies for combatting gender inequality and discrimination, strategies that have not optimally achieved their goals, to include not only sex, meaning women, but also inequalities based on sexuality, gender identity and performance, as well as other intersectional locations of vulnerability and subordination.

The following scenario crystallizes the inadequacy of the existing institutional construct. Think about a transgendered (male to female) person. She was male at birth, is female in law. Yet, we have no information about her sexuality, and we have to learn more in order to ascertain her gender identity. She could be 'feminine' or 'masculine'. Of course, the images we generate as to what those terms mean, what this woman looks like, and what is feminine or masculine are hugely driven by our cultural perspective, geography, and life experience. Think then, can the equality or gender mainstreaming strategy as currently constructed and understood ensure her equality? Her place at the global table? The existing strategies are ineffectual to deal with such complex realities.

Around the world, close to eighty countries have laws that criminalize conduct on the basis of sexual orientation or gender identity.[95] So-called 'sodomy laws' penalize male homosexual conduct; half of these nations also have statutes that criminalize lesbianism.[96] Some laws even prohibit people from

95 Lucas Paoli Itaborahy, *State-Sponsored Homophobia: A World Survey of Laws Criminalising Same-Sex Sexual Acts between Consenting Adults* (Brussels: International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA), 2012).

96 The International Gay and Lesbian Human Rights Commission (IGLHRC), *Equal and Indivisible: Crafting Inclusive Shadow Reports for CEDAW*, 2009, 17, www.iglhrc.org, suggests that sexual rights are not 'new rights', but have long been established in international human rights law and are necessary for the enjoyment of 'other rights, including the rights to bodily integrity, health and family' (at 36). Moreover, the IGLHRC recommends that discriminatory laws affecting lesbians be brought to the attention of the Committee on the Elimination of Discrimination against Women (CEDAW Committee) to review for potential violations of the treaty. It is noteworthy that on 17 Jun. 2011 the United Nations Human Rights Council passed the "Human rights, sexual orientation and gender identity" Resolution with a vote of 23 in favor, 19 against, and 3 countries abstaining. Julia Zebley, "UN Rights Council Passes First Gay Rights Resolution," *Jurist* (2011), jurist.org. This is the first resolution that calls for the end to discrimination based on sexuality. There were intense disagreements, mostly drawn along cultural lines, about the propriety of such a measure. Although South Africa introduced the resolution, it was the only African country that voted in its favor. In fact, African and Middle Eastern States leveled accusations on South Africa that it was becoming westernized. Significantly, on 6 Dec. 2011, US Secretary of State Hillary Clinton made a public statement that the USA will be

'imitating the appearance of the opposite sex'.[97] These laws, criminalizing conduct, are deployed to harass and prosecute persons on the basis of their sexuality or non-conforming gender representation. Penalties range from short-term to life imprisonment.[98] In fact, seven countries currently carry the death penalty for homosexual acts, and since 2009, Uganda has been considering a bill that would make it the eighth country to do so.[99] Needless to say, these laws are bold and blatant violations of international human rights law and the human rights problems they entail did not get institutional traction within the current gender and equality framework.

Another example pertains to marriage, an institution that is considered a fundamental right in most places around the world. Yet (Sept. 2014), there are only sixteen countries and some municipalities around the world that allow persons of the same sex to get married.[100] In the USA, there are 19 states where persons of the same sex can legally marry and there are 6 states that prohibit such unions by law and 29 prohibit it by state constitution, although at present

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utilizing foreign financial assistance, 'international diplomacy and political asylum to promote gay rights'. John Paul Putney, "US to Use Foreign Aid, Diplomacy to Advance LGBT Rights Globally," *Jurist* (2011), jurist.org. This public statement followed a presidential executive memorandum that instructed the federal government to analyze ways to challenge the criminalization of sexuality and to utilize sexuality as a consideration in asylum decisions. Following these developments, and arguably as a response thereto, Malawi has decided to review its law that prohibits homosexual acts. Michael Haggerson, "Malawi to Review Controversial Anti-homosexuality Law," *Jurist* (2011), jurist.org.

97 Kuwait's Penal Code was amended in Dec. 2007 with this provision. Human Rights Watch, *Kuwait: Halt Dress-Code Crackdown: Authorities Should Repeal Repressive Law, Free Detainees*, 2008, www.hrw.org.

98 Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, "Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity," UN Doc. A/HRC/19/41, 17 Nov. 2011, Section 40. 'In at least five countries the death penalty may be applied to those found guilty of offences relating to consensual, adult homosexual conduct' (Section 49). See also, generally, Itaborahy, *State-Sponsored*.

99 Lucy Heenan Ewins, "Gross Violation: Why Uganda's Anti-Homosexuality Act Threatens Its Trade Benefits With The United States," *Boston College ICLR* 24 (2012):147.

100 ILGA, *State-Sponsored Homophobia. 2013 ILGA Report*, old.ilga.org. See also "Gay Marriage Legal Nationwide in 10 Countries Around the World," www.huffingtonpost.com and www.freedomtomarry.org. The countries are: The Netherlands (2001); Belgium (2003); Spain (2005); Canada (2005); South Africa (2006); Norway (2009); Sweden (2009); Portugal (2010); Iceland (2010); and Argentina (2010). In Oct. 2011 the top appeals court of Brazil ruled that couples of the same sex can get married. In Mexico City couples of the same sex can get married by virtue of a municipal law.

many of those prohibitions are being challenged in state and federal courts.[101] In only 12 countries around the world is it legal for a couple of the same sex to adopt a child.[102] And in only 18 countries is there a law on the recognition of gender after reassignment surgery.[103]

Moreover, there are myriad locations where persons do not enjoy legal protections against prohibited discrimination because of their sexuality or gender identity. For example, only 6 countries have constitutional prohibitions against discrimination on the basis of sexual orientation.[104] Only 59 States' laws prohibit employment discrimination on the grounds of sexual orientation and only 19 on the grounds of gender identity.[105] This is unfortunate as there is ample evidence of workplace harassment of, and even violence against, GLBT employees.[106] Indeed, gender non-conforming and LGBT individuals are often targets of hate-motivated and hate crimes.[107] And in some instances sex, in addition to sexual orientation or gender identity, can be a factor with respect to who is the target of violence.[108] Neither the existing mainstreaming strategy nor the equality paradigms reach these blatant inequalities.

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101 See Freedom to Marry, Marriage Litigation, freedomtomarry.org. See also Human Rights Campaign Marriage Center, www.hrc.org. "National Conference of State Legislatures," www.ncsl.org. States are California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington as well as in Washington DC. California permitted marriage between people of the same sex and although voters passed Proposition 8 prohibiting such marriages, that Proposition was ruled to be unconstitutional. Mike Sacks, Ryan J. Reilly and Sabrina Siddiqui, "Supreme Court Rules On Prop 8, Lets Gay Marriage Resume In California," *Huffington Post Politics* (2013), www.huffingtonpost.com.

102 ILGA, *State-Sponsored*, 20. Second parent adoption is also available in Finland, Germany and Tasmania (Australia) and Alberta (Canada).

103 ILGA, *State-Sponsored*, 20.

104 ILGA, *State-Sponsored*, 16.

105 ILGA, *State-Sponsored*, 15–16.

106 European Union Agency for Fundamental Rights, "Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: Part II – the Social Situation," 2009, 63–64.

107 A recent Council of Europe report found: "Hate-motivated violence and hate crimes against LGBT persons take place in all Council of Europe Member States." Council of Europe, "Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe," 2011, 52.

108 'A 2011 report of the European Union Agency for Fundamental Rights found that lesbian and bisexual women are more likely to experience sexual and other assaults in private settings than gay or bisexual men, who are more likely to be attacked by unknown perpetrators. The perpetrators are usually young men in groups'. "Annual report of the United

It is evident that notwithstanding the non-discrimination legal norms and the gender mainstreaming organizational strategies, equality at many levels is elusive. This chapter suggests that sex, gender and sexuality variances are not only not protected, but indeed are obscured and rendered invisible by gender mainstreaming strategies or non-sex discrimination norms crafted in neutral 'gender' terminology.

"*UnSex CEDAW? No, SuperSex It!*"[109] suggests some interpretive moves that would broaden CEDAW's reach to protect other vulnerable populations – a move that would also work in the context of international organizations' quest for equality. Interpretive moves can broaden the reach of all normative and regulatory standards to effectively protect individuals and groups on the basis not only of sex, but also sexual orientation and gender identity.

In broad terms, SuperSex suggests that the term sex be defined broadly to include matters of gender, gender identity and sexuality. Specifically, in the case of the Convention, notwithstanding its name, because it addresses sex discrimination it can be utilized by men and women alike to seek protection against discriminations on the basis of sex. Next, the Convention, although it is couched in terms of 'women' which refers to sex, protects against what one can call gender concerns such as use of gendered roles in raising families, in educational paths, in employment choices, in pretextual deployment of cultural tropes, and in customary (as well as conventional) laws. Thus the Convention's protections should reach all those who suffer discrimination or marginalization because of non-conformity with their perceived appropriate gender roles. Third, in considering the reach of the Convention's coverage, international and regional legal decisions support a broad interpretation of its provisions in a way that develops, expands, and transforms them. For example, international bodies have interpreted sex to include sexual orientation. Thus based on those interpretations one can urge that the Convention also protects on broader gender identity grounds. The same can be done in the larger IOs framework.

In light of the possible expansive coverage of the Convention, I have suggested that we further super-sex CEDAW in the same way I now suggest we

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Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity," UN Doc. A/HRC/19/41, 17 Nov. 2011, Section 32. Citing to European Union Agency for Fundamental Rights, "Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Summary of Findings, Trends, Challenges and Promising Practices," 2011, 13.

109 Hernández-Truyol, "UnSex," 195.

SuperSex gender mainstreaming and equality strategies. By this I mean that we should develop, expand and transform the content and meaning of the strategies to include prohibitions against discrimination not only against women, but explicitly on the grounds of sex, sexuality, gender and gender identity. Moreover, just as the category women should be understood as non-essentialized and non-monolithic, so, too, the expanded categories of coverage should be understood and underscored to be non-essentialized and non-monolithic. This approach can be deployed in the context of international organizations to pursue and promote the hitherto elusive goal of equality.

The paradigmatic shift I urge is a change in the focus of institutional priorities and analysis from equality to multidimensionality which includes concern about vulnerability, marginalization, subordination, erasure and voice. I propose a multidimensionality analysis that embraces and protects the intersectionalities of identity. The mainstreaming should be of an anti-subordination paradigm that has at its core the human flourishing of all persons regardless of geography. Of course, this strategy will serve women well – women who as this chapter has established, have not attained the goal of equality.

Globally, people are deemed criminals because they are sexually non-conforming. In some locations, they may be greeted by the death penalty. Some locations criminalize dressing in a gender non-conforming manner. Women remain vulnerable around the world. In no society do they enjoy equality in civil, political, social, cultural or economic matters. Indeed, in most of these locations they suffer deep privations. These affronts to dignity are not addressed through gender mainstreaming, as gender discrimination, or as gender equality. The structures themselves need to be re-envisioned and transformed; the separate spheres to which women and men are relegated must be undone. The proposed anti-subordination, multidimensionality paradigm will engender a holistic approach to the deep seeded problems of inequality and discrimination.

CHAPTER 17

Handle with Care! The Succession between International Organizations

Ivan Ingravallo

1 Introduction

The succession between international organizations (IOs) is not an easy task to deal with, mainly because of two reasons.

First of all, the use of the term 'succession' to describe the transfer of functions between IOs risks confusion with the legal phenomenon of succession between States. Some authors have compared the succession between States and that between IOs and have affirmed that the latter is not a proper kind of succession.[1] This opinion is not convincing because it starts from the concept of succession between States and then applies this concept to the succession between IOs. Obviously the succession between IOs is different from that between States. It is a peculiar situation because the IOs, unlike the States, do not exercise sovereign powers over a territory and a population. They are, in the larger sense, institutions created by groups of States to perform some functions. Furthermore, the latitude and the kind of functions exercised by IOs, as well as their membership, are normally not comparable, unlike the issue of sovereignty in the case of succession between States.[2] In succession between States what changes is the subject that exercises sovereignty, while in succession between IOs there is a change in the institution that performs a specific task.[3]

1 Angelo P. Sereni, *Le organizzazioni internazionali* (Milano: Giuffrè, 1959), 73; Jan Klabbers, *An Introduction to International Institutional Law* (2nd edn. Cambridge: CUP, 2009), 301: 'in a strict sense one can hardly even speak of succession where predecessor and successor exist alongside'.

2 Andrea G. Mochi Onory, "La successione fra organizzazioni internazionali con particolare riguardo al trasferimento dei trattati," *Diritto internazionale* 21 (1967), 350 (also published in English: "The Nature of Succession between International Organizations: Functions and Treaties," *RHDI* 21 (1968), 33 *et seq*.).

3 Mochi Onory, "La successione," 354. Partick R. Myers, *Succession between International Organizations* (London: Kegan Paul International, 1993), 11; Julio D. González Campos, "Algunas consideraciones sobre los problemas de la sucesión de Estados," *Rev. es. der. int.* 16 (1963), 574 *et seq*.

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In summation, we can have legal succession between States, and also between IOs, and the term 'succession' should be interpreted in two different, although similar, ways. Therefore, it doesn't seem correct to evaluate succession between IOs using the same criteria that we apply to succession between States[4]; nor would it be appropriate to apply to the former the legal rules developed with reference to the latter. But – and herein lies the second factor that makes it difficult to examine the topic of the succession between IOs – the problem to define precisely the proper legal meaning of the expression 'succession between IOs' remains unresolved. The same problem arises in relation to the concept of 'international organization', because sometimes the succession (i.e. the transfer of functions) involves two or more IOs, while in other cases at least one of the subjects involved is not properly an international organization, but rather a conference of States or a soft organization. Do we have to choose a more extensive notion of IOs or a restrictive one when we consider the subject of the succession between them? The practice offers many different cases of an international organization exercising functions previously performed by another. Are they all cases of succession between IOs (this is to take an extensive notion of succession and of international organization), or is it necessary to narrow the notion of succession to only some of these cases – i.e. considering the membership of the IOs involved, their respective functions, their legal personalities, *etc.*?

Another disputed question concerns the difference between succession and continuity of IOs, because it is necessary to separate the cases of succession between IOs from those of mere transformation of an international organization, where no succession occurs.

In the next pages these problems will be analysed in an attempt to offer some answers to such complex issues.

2 The Legal Framework of Succession between International Organizations

It is well known that the topic of succession of States in respect of treaties was settled by the Vienna Convention of 23 Aug. 1978, partially reflecting the customary international law rules that exist in relation to this topic. In contrast, the succession between IOs is not regulated by any analogous 'general' treaty.

4 Hungdah Chiu, "Succession in International Organisations," *ICLQ* 14 (1965), 115; Mochi Onory, "La successione," 352; Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (5th edn. Leiden: Martinus Nijhoff, 2011), 1045 *et seq*.

At times the founding treaties of some IOs contain explicit provisions for succession between IOs. For example, Art. 72 of WHO Constitution establishes that the WHO 'may take over from any other international organization or agency whose purpose and activities lie within the field of competence of the Organization such functions, resources and obligations as may be conferred upon the Organization by international agreement or by mutually acceptable arrangements entered into between the competent authorities of the respective organizations'. A similar approach is followed in the Constitutions of IOM[5] and UNESCO,[6] and in the WMO Convention.[7] These norms are not meant to regulate the details of a future succession, but they offer a legal basis for the transfer of powers from other IOs and, politically, they favour this intent.[8]

Moreover, as we will discuss below, inconsistent international practice with regard to succession between IOs, as well as the lack of treaties governing it, also makes it difficult to detect the customary international law rules regarding this issue.[9] As a consequence, the many questions related to succession between IOs (i.e. those concerning its legal basis, the typologies of succession, its effects, *etc*.) must be addressed carefully, with an attempt to evaluate the elements arising from a practice that is arduous to arrange into a coherent scheme.

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5 Art. 32.

6 Art. XI(2).

7 Art. 26(c).

8 Schermers and Blokker, *International*, 1051.

9 Hugo J. Hahn, "Continuity in the Law of International Organization," *ÖZÖR* 13 (1964), 172 (previously published in *Duke L.J.* 11 (1962), 379 *et seq*. and 522 *et seq.*); Chittharanjan F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn. Cambridge: CUP, 2005), 474; Kirsten Schmalenbach, "International Organizations or Institutions, Succession," *MPEPIL* (2006), 6; Ramses A. Wessel, "Dissolution and Succession: The Transmigration of the Soul of International Organizations," in *Research Handbook on the Law of International Organizations*, eds. Jan Klabbers and Åsa Wallendahl (Cheltenham: Edward Elgar, 2011), 355; Ioannis Prezas, "Dissolution et succession de l'organisation internationale," in *Droit des organisations internationales*, eds. Evelyne Lagrange and Jean-Marc Sorel (Paris: LGDJ, 2013), 169; Claudio Zanghì, *Diritto delle Organizzazioni internazionali* (3rd edn. Torino: Giappichelli, 2013), 103 and 111. For a different opinion see Alexandre-Charles Kiss, "Quelques aspects de la substitution d'une organisation internationale à une autre," *AFDI* 7 (1961), 490 *et seq*.; *Bowett's Law on International Institutions* (6th edn., eds. Philippe Sands and Pierre Klein, London: Sweet&Maxwell, 2009), 536.

The complexity of the issue of the succession between IOs emerges from the decision of the International Law Commission (ILC) not to get involved.[10] In 1980, while debating on the drafting of the Convention on the law of treaties between States and international organizations or between international organizations (afterwards concluded on 21 Mar. 1986), the Special Rapporteur, Paul Reuter, proposed to introduce into one of the final clauses of the future Convention a reference to the question of succession between IOs. This was the text of the draft Art. 73 proposed by Reuter: 'The provisions of the present articles shall not prejudge any question that may arise in regard to a treaty from a succession of States, from a succession of international organizations or from a succession of a State to an international organization or of an international organization to a State…'.[11]

Reuter's proposal wasn't accepted by the majority of the members of the ILC. In stating the reasons for their dissent, some of them highlighted the complexity of such an issue, while others emphasized the possible confusion, previously mentioned, arising from the utilization of the same term ('succession') in relation to both the IOs and the States.[12] As a consequence of this divergence of opinions, the Reuter's proposal was abandoned,[13] and Art. 74(2) of the Vienna Convention of 1986 contains only a reference to the question of the extinction of an international organization, remaining silent on the issue of succession between IOs.[14] In subsequent years the ILC did not consider the topic of the succession between IOs, and in its study devoted to the question of the responsibility of IOs it confirmed the intention to exclude this from its activities.[15]

10 For the different working methods adopted by the ILC in the last two decades see the chapter of Jacob Katz Cogan, "The Changing Form of the International Law Commission's Work," in this volume.

11 See the report by Paul Reuter (28 Feb. 1980), UN Doc. A/CN.4/327 and Corr. 1, in *YbILC* 1980, II(1), 142 *et seq*.

12 A debate occurred on 14 May 1980, on the occasion of the 1591st meeting of the ILC. See UN Doc. A/CN.4/SR.1591, in *YbILC* 1980, I, 39 *et seq*.

13 See the Report of the International Law Commission on the work of its thirty-second session (5 May-25 July 1980), UN Doc. A/35/10, in *YbILC* 1980, II(2), 91 *et seq*.

14 See Vienna Convention, 1986, Art. 74(2): 'The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from…the termination of the existence of the organization…'.

15 See the Report of the International Law Commission on the work of its fifty-fourth session (29 April-7 June and 22 July-16 August 2002), UN Doc. A/57/10, in *YbILC* 2002, II(2), 95: 'the question of succession between international organizations raises several issues that do not appear to fall within the topic of responsibility of international organizations and could be left aside'.

3 The Restrictive and the Extensive Notions of Succession between International Organizations

Looking at international practice, the simple closure of an international organization is unusual. This happens when a radical change occurs in the conditions that led to its institution (i.e. in the case of the CMEA/COMECON, dissolved in 1991 after the collapse of the Soviet Union), or (very rarely) when the organization has achieved its purposes.[16] But, and this is the point, it happens quite often that the extinction of an organization is accompanied by the transfer of its powers (or similar ones) to another organization. This is due to the fact that, in most cases, the closure of an international organization does not eliminate the political reasons that led some States to cooperate through that organization with regard to a certain topic or a certain geographical area.[17] As a consequence, the States often decide to continue their cooperation through another organization. However, in some extremely rare occasions there has been a 'privatization' of an international organization, whose functions, technical in nature, have been taken on by private institutions; this was the case for INTELSAT, INMARSAT and EUTELSAT.[18]

The political will of a group of States to continue their cooperation through another international organization involves the topic of succession between IOs – that is, the substitution of one international organization for another in performing certain functions.[19]

As already mentioned, there are at least two different notions of succession between IOs. The restrictive notion points to the ownership of the legal

16 Klabbers, *An Introduction*, 298; Schermers and Blokker, *International*, 1044; Ivan Ingravallo, "Clausole modificative degli atti istitutivi ed estinzione delle organizzazioni internazionali," in *Diritto delle organizzazioni internazionali*, ed. Angela Del Vecchio (Napoli: ESI, 2012), 394 *et seq*.

17 Hahn, "Continuity," 167 *et seq.*; Dandi Gnamou-Petauton, *Dissolution et succession entre organisations internationales* (Bruxelles: Bruylant, 2008), 84; Schermers and Blokker, *International*, 1079; Wessel, "Dissolution," 342 *et seq*.; Prezas, "Dissolution," 169.

18 Zanghì, *Diritto*, 115 *et seq*. See also Régis Bismuth, "La privatisation des organisations internationales," in *Droit des organisations*, 196.

19 See Chiu, "Succession," 84: 'The term "succession" is conveniently used to describe the facts relating to the transfer of functions, rights and duties between international organisations'; Myers, *Succession*, 12; Mario Bettati, "Création et personnalité juridique des organisations internationales," in *Manuel sur les organisations internationales/A Handbook on International Organizations*, ed. René-Jean Dupuy (Dordrecht: Martinus Nijhoff, 1998), 44 *et seq.*; Amerasinghe, *Principles*, 473; Prezas, "Dissolution," 176.

personality of the IOs involved and declares that there is a succession only when all of them possess international legal personality.[20]

The extensive notion points to the functions transferred instead of considering the legal personalities of the entities involved. This extensive approach allows us to include in the notion of succession between IOs – and, as we will discuss below, also in the notion of transformation of an international organization – the cases of transfer of functions between an entity without international legal personality and another that possesses it,[21] cases otherwise excluded by those authors that accept the restrictive notion of succession between IOs. Another possibility is to qualify these latter cases as *de facto* succession[22] and to separate them from the cases of legal succession. This, of course, would be limited to those which involve IOs that possess legal personality. Nonetheless, looking at the functions transferred, it seems reasonable to include both legal succession and *de facto* succession in the notion of succession between IOs.

Applying the extensive concept just mentioned it is therefore possible to define succession, for example: the extinction of the IIA and its substitution with the FAO[23]; the dissolution of the OIHP and the transfer of its functions to the WHO[24]; the closure of the IIIC, the IBE and the IRU and their absorption into UNESCO; the succession of the ICAO to the precedent ICAN and ITCALE. Other examples of succession occurred within regional contexts, as in the substitution of the Pan American Union by the OAS.

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20 Giorgio Cansacchi, "Identité et continuité des sujets internationaux," *RdC* 130 (1970), 83; Giorgio Cansacchi, "Continuità, identità e successione delle organizzazioni internazionali," *Diritto internazionale* 25 (1971), 23; Roberto Virzo, "Note sulla successione tra organizzazioni internazionali, con particolare riferimento alla trasformazione del GATT nell'OMC," *CI* 54 (1999)," 300; Gnamou-Petauton, *Dissolution*, 8; Zanghì, *Diritto*, 102 and 111.

21 Ingravallo, "Clausole," 397 *et seq*. See also the opinion of Schmalenbach, "International," 1: 'The functional loss and assumption must be legally identical in content and nature, whereas the legal personalities of the predecessor and the successor organization must differ'.

22 See, in this volume, the chapter of Angela Di Stasi, "About Soft International Organizations: An Open Question," who affirms: 'the transformation of a soft international organization into a hard international organization…does not cause a succession in a technical-juridical sense. The absolute heterogeneity between the characters of the (old) soft international organization compared with the (new) hard international organization causes, indeed, only a "succession" from a substantial point of view'.

23 See the Resolution on the IIA adopted in 1945 by the First session of the FAO Conference, and Art. VI of the Protocol of 30 Mar. 1946 for the dissolution of the IIA and the transfer of its functions and assets to the FAO.

24 Protocol signed on 22 Jul. 1946.

Following this extensive approach, it is also possible to qualify as succession (*de facto*) the rare cases in which some functions have been transferred from a non-governmental entity to an international organization. For example, in 1950, the WMO, an international organization, replaced the International Meteorological Organization, a non-governmental organization, and the same happened in 1970 between the UNWTO and the IUOTO. In this last case, Art. 1 of UNWTO Statutes provided that, 'an international organization of intergovernmental character resulting from the transformation [of the IUOTO] is hereby established',[25] whereas Art. 36 of these Statutes established its entry into force 'after fifty-one States whose official tourism organizations are Full Members of IUOTO…have formally signified…their approval of the Statutes and their acceptance of the obligations of membership'.

4 Types of Succession

In international practice it is possible to identify various types of succession between IOs.

The most common one is the substitution, that occurs when an organization is dissolved and its functions are given to another organization, either pre-existing or created in view of the succession.[26] In this case, for a limited period of time, the IOs involved in the succession coexist, and the closure of an organization often occurs after the transfer of its functions to another organization is completed.

In addition to those previously mentioned, it is possible to recall some other cases of substitution: the well-known succession between the LoN and the UN in 1946[27]; that between the ICEM and the IOM in 1954[28]; the WIPO, which in

25 In 2005 the UNWTO General Assembly approved an amendment of Art. 1 (not yet entered into force), that doesn't mention the transformation of the IUOTO into the UNWTO and qualifies this organization as a 'specialized agency of the United Nations'.

26 For such a restrictive notion of succession see Cansacchi, "Identité," 75; Dandi Gnamou-Petauton, *Dissolution*, 5: 'c'est le transfert des fonctions, droits et obligations d'une organisation internationale dissoute à une autre organisation internationale, prenant la place de la première dans les fonctions trasférées'; Manuel Diez de Velasco Vallejo, *Las Organizaciones internacionales* (16th edn., coord. José M. Sobrino Heredia, Madrid: Tecnos, 2010), 59; Prezas, "Dissolution," 177.

27 GA Res. 24(I), 12 Feb. 1946, and LoN Assembly Res. of 18 Apr. 1946. On the basis of these Resolutions on 16 and 31 Jul. 1946, 1 Aug. 1946, 11 and 14 Apr. 1947 and 27 Jun. 1947 the two IOs concluded numerous agreements on the transfer of assets, personnel and funds between them.

28 IOM Constitution, Arts. 34–35.

1970 succeeded the BIRPI[29]; and the EPO, instituted in 1973 to replace the IPI.[30] For a recent example, it is possible to refer to the case of the WEU: on 31 Mar. 2010, Member States affirmed that this organization had 'accomplished its historical role' and they decided to terminate its Constitutive Treaty and close the WEU; on 27 May 2011 the Permanent Council of the WEU decided to transfer its residual administrative activities to the EU Satellite Centre.[31]

Sometimes the functions previously exercised by a dissolved organization may be transferred to different IOs, as in the case of UNRRA, when in 1946 its General Congress decided to pass its functions to WHO, FAO, IRO and UN (UNICEF). In 1952, the IRO was closed and its powers were transferred to the ICEM (now IOM) and to the UN (High Commissioner for refugees).

Analogous to the process of complete substitution is absorption. It happens when there is a transfer of functions from an organization that ceases to exist to another pre-existent organization. In addition to the examples already mentioned, this has also occurred in the case of the closure of the IBI and of the transfer of its functions to the UNESCO.[32] The predecessor organization may also turn into an organ of the organization that absorbs it, as was the case with the Pan American Sanitary Organization which in 1949 was absorbed by the WHO.[33]

The substitution may also be partial, as when an international organization continues to exist but some of its functions and competencies are assumed by another organization, either newly created or pre-existent. In the first case, there is the split-up of an international organization, which results in the establishment of a new organization. The original organization continues to exist, but some of its functions are transferred to the newly-formed organization. The main example of this quite rare legal phenomenon is that of the UNIDO: created in 1965 by the UN General Assembly as an organization within the UN for the promotion of industrial development,[34] in the '80s the UNIDO

29 WIPO Convention, Art. 21.

30 See the Protocol on Centralization of the European Patent System and on its Introduction, of 5 Oct. 1973, attached to the EPO Convention.

31 See also Art. 1 of the EU Council Decision 2011/297/CFSP, of 23 May 2011, amending Joint Action 2001/555/CFSP on the establishment of a European Union Satellite Centre, that relates to the 'administrative tasks following the dissolution of the WEU'.

32 Res. R.6E/09, approved on 29 Apr. 1988 by the General Assembly of IBI.

33 WHO Constitution, Art. 54: 'The Pan American Sanitary Organization represented by the Pan American Sanitary Bureau and the Pan American Sanitary Conferences, and all other inter-governmental region al health organizations in existence prior to the date of signature of this Constitution, shall in due course be integrated with the Organization'.

34 GA Resolutions 2089(XX), of 20 Dec. 1965, and 2152(XXI), of 17 Nov. 1966.

become an autonomous international organization following the entry into force of its Constitution approved at the Vienna Conference in 1979.[35]

A case of partial substitution between IOs also occurs when an organ of an international organization (or its functions) is transferred to another organization. This was the case with the Administrative Tribunal of the LoN which was transformed into the Administrative Tribunal of the ILO,[36] and of the PCIJ, whose functions have been assumed by the ICJ as the main judicial organ of the UN.[37]

A case of partial substitution between pre-existing IOs is offered by the WEU, when in the '50s and '60s the Member States of the WEU decided to progressively transfer its competences in the economic, social and cultural fields to the OEEC/OECD and to the Council of Europe, limiting the action of the WEU to some other fields.

Another type of succession, rather rare, occurs when there is a merger of IOs, namely the closure of separate pre-existent IOs and the allocations of their powers to a newly created international organization. The main example has been the merger of ESRO and ELDO into the ESA, decided upon the occasion of the adoption of the ESA Convention which was signed in Paris on 30 May 1975.[38] It is possible to refer also to the troubled and short-lived experience of the OCAM, established in 1965 as a consolidation of two predecessor organizations, the UAMCE and the UAM.[39] An example of the merger of two conferences of States into an international organization is that of the ITU, when in 1932 the International Telegraph Conference and the International Radiotelegraph Conference merged to create this organization.

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35 See also GA Res. 34/96 of 13 Dec. 1979, by which the GA takes note 'with approval of the Constitution' of the UNIDO.

36 For a different opinion see Giorgio Cansacchi, "Identité," 87.

37 Giorgio Cansacchi, "Identità e non continuità fra la Corte Permanente di Giustizia Internazionale e la Corte Internazionale di Giustizia," in *Il processo internazionale. Studi in onore di Gaetano Morelli, Comunicazioni e studi* XIV (1975), 134, qualifies this as 'jurisdictional continuity' and as 'succession in the jurisdiction'. For the qualification of the ICJ as an organ of the LoN see, in this volume, also the chapter of Vittorio Mainetti, "The League of Nations and the Emergence of Privileges and Immunities of International Organizations."

38 ESA Convention, Preamble ('a new organisation, called the "European Space Agency" would be formed out of' the ESRO and the ELDO).

39 On the older cases of succession between IOs in Africa, with special reference to the OCAM, see the 'classical' monograph written by Raimond Ranjeva, *La succession d'organisations internationales en Afrique* (Paris: Pedone, 1978).

5 The Transformation of International Organizations

Notwithstanding the extensive concept of succession accepted in this chapter, no succession exists when an international organization changes its founding treaty or its name but maintains unchanged its membership and adapts its institutional structure to the modified context of the cooperation among its Member States.[40]

In fact, in such a situation there is no succession between IOs, but only a transformation of the international organization. These are cases of continuity of the IOs.[41] For example, in the 1960 Convention that instituted the OECD the Member States decided that it was a reconstitution of the OEEC:[42] the OECD continued the OEEC activities, and the decisions, recommendations and resolutions of the OEEC were submitted for evaluation to the OECD Council.[43] The same is true for the EC, when in 2002 it absorbed the functions of ECSC,[44] and for the EU, which in 2009 took the place of the EC.[45]

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40 Chiu, "Succession," 84; Hahn, "Continuity," 201 *et seq.*; Cansacchi, "Continuità," 15; Myers, *Succession*, 37; Soledad Torrecuadrada García-Lozano, "La sucesión entre Organizaciones Internacionales y la Unión Europea," *AEDI* 21 (2005), 245 and 254; Virzo, "Note," 297; Schmalenbach, "International," 2; Prezas, "Dissolution," 176; Zanghì, *Diritto*, 111.

41 Cansacchi, "Identité," 77 *et seq*.

42 OECD Convention, Preamble.

43 OECD Convention, Art. 15: 'When this Convention comes into force the reconstitution of the Organisation for European Economic Co-operation shall take effect, and its aims, organs, powers and name shall thereupon be as provided herein. The legal personality possessed by the Organisation for European Economic Co-operation shall continue in the Organisation, but decisions, recommendations and resolutions of the Organisation for European Economic Co-operation shall require approval of the Council to be effective after the coming into force of this Convention'.

44 See Benedetta Ubertazzi, "La fine della CECA: i profili giuridici," *DUE* 9 (2004), 417 *et seq*. See, in particular, the Decision 2002/595/EC of the Representatives of the Governments of the Member States, meeting within the Council, of 19 Jul. 2002 on the consequences of the expiry of the European Coal and Steel Community (ECSC) Treaty on international agreements concluded by the ECSC; the Council Decision 2002/596/EC of 19 Jul. 2002 on the consequences of the expiry of the Treaty establishing the European Coal and Steel Community (ECSC) on the international agreements concluded by the ECSC; and the Council Decision 2003/76/EC of 1 Feb. 2003 establishing the measures necessary for the implementation of the Protocol, annexed to the Treaty establishing the European Community, on the financial consequences of the expiry of the ECSC Treaty and on the Research Fund for Coal and Steel.

45 The last sentence of Art. 1 TEU, after the Lisbon Treaty of 2007, reads as follow: 'The Union shall replace and succeed the European Community'. See Ingravallo, "Clausole," 398; Prezas, "Dissolution," 177, affirms that 'aucune rupture majeure n'a eu lieu'. For a different opinion see Torrecuadrada García-Lozano, "La sucesión," 254 *et seq.*; Zanghì, *Diritto*, 115.

Many cases of transformation of IOs also occurred on the African continent: the Constitutive Act of the AU took the place of the OAU Charter,[46] while in Western Africa the UEMOA was instituted by the Treaty of 1994 to repeal the precedent UMOA,[47] and the ECOWAS revised Treaty of 1993 has substituted for the ECOWAS Treaty of 1975.[48] In Central Africa the CEMAC, which took the place of the UDEAC through the founding Treaty of 1994, has been replaced by a new CEMAC established by the revised Treaty signed in 2008.[49]

Other cases of mere transformation of IOs, not of succession between them, concerned: the ALADI, whose Constitutive Treaty of 1980 replaced the ALALC, stating that the ALADI shall continue the legal personality of ALALC, as well as its rights and obligations[50]; and the CARIFTA, that in 1973 was substituted by the CARICOM,[51] that in turn was later substituted by the new CARICOM Single Market and Economy (CSME).[52] In the 2002 Protocol on the revision of the Treaty of 1973, it was decided that the CARICOM 'shall be succeeded by' the CSME, 'which shall assume the rights and obligations' of the precedent organization (Art. I).

Lastly, looking at the transfer of functions and applying the extensive notion previously referred to in relation to succession, we have cases of transformation, i.e. of *de facto* continuity, also between an entity that does not possess

46 Frans Viljoen, "African Union (AU)," *MPEPIL* (2011), 1 and 9. See Art. 33(1) of the Constitutive Act of the AU: 'This Act shall replace the Charter of the Organization of African Unity'; and Art. 28 of this Act: '[it] shall enter into force thirty (30) days after the deposit of the instruments of ratification by two-thirds of the Member States of the OAU'.

47 Art. 2 of the Constitutive Treaty of UEMOA: 'Par le présent Traité, les Hautes Parties Contractantes complètent l'Union Monétaire Ouest Africaine (UMOA) instituée entre elles, de manière à la transformer en Union Economique et Monétaire Ouest Africaine (UEMOA)'.

48 ECOWAS revised Treaty, Art. 92(2): 'The ECOWAS Treaty of 1975 shall be deemed terminated when the Executive Secretariat has received instruments of ratification of this revised Treaty from all Member States'; (3): 'all Community Conventions, Protocols, Decisions and Resolutions made since 1975 shall remain valid and in force, except where they are incompatible with the present Treaty'.

49 Art. 63 of CEMAC revised Treaty of 2008: 'Les dispositions du présent Traité abrogent et remplacent celles du Traité du 16 mars 1994 instituant la CEMAC…ainsi que tout autre texte contraire'.

50 Art. 54 of the Constitutive Treaty of the ALADI.

51 Art. 71 of the Annex to the Treaty establishing the CARICOM (4 Jul. 1973): 'On the entry into force of this Annex…the Agreement establishing the Caribbean Free Trade Association…shall be superseded by the provisions of this Annex…'.

52 For these, and others, examples in the context of regional organizations see, in this volume, also the chapter of Piero Pennetta, "International Regional Organizations: Problems and Issues."

international legal personality and an international organization, that continues its membership and adapts the precedent institutional structure. This was the case of the UPU, transformed into an IO after World War II, and, more recently, the same seems true for the absorption of GATT by the WTO in 1994, and for the transformation of the International Wine Office into the International Organization of Vine and Wine in 2001.[53]

Other examples are: the transformation of the CSCE between 1990 and 1994, during the process of institutionalization of the CSCE following the adoption of the Charter of Paris (21 Nov. 1990), which gave a permanent structure to the precedent periodic conferences of States (the CSCE was renamed OSCE in 1994); the Charter of 5 Jun. 1998, whereby the Member States of the BSEC (Black Sea Economic Cooperation) decided to transform their cooperation into a regional economic organization, named BSEC-OBSEC[54]; the Charter of 2006, by which the Member States of the GUAM Group transformed it into a regional organization called GUAM/ODED (Organization for Democracy and Economic Development)[55]; the Charter of 12 Nov. 2007 that turned the ASEAN into an intergovernmental organization on the occasion of the fortieth anniversary of the founding of ASEAN.[56] Another example of transformation involved the OIC, when the new Charter of 2008 replaced the precedent Charter of the Organization,[57] and the SADC: art. 45 of the SADC Treaty of 1992 provides that it 'replaces the Memorandum of Understanding on the Institutions of the Southern African Development Coordination Conference' (SADCC), a conference of States created in 1981.

A problem of discontinuity for the legal acts of an IO does not emerge in the case of its mere transformation. We can recall Art. XVI(1) of the Agreement establishing the WTO: 'Except as otherwise provided under this Agreement or

53 Agreement establishing the IOVW, Arts. 1 ('The "International Organisation of Vine and Wine" (O.I.V) is hereby established. The O.I.V shall replace the International Vine and Wine Office') and 17 ('The 'International Organisation of Vine and Wine' shall replace the International Vine and Wine Office with regard to all its rights and obligations').

54 In the last sentence of the Preamble of this Charter the Member States declare their determination 'to transform the Black Sea Economic Cooperation into a regional economic organization'.

55 See the last sentence of the Preamble of the GUAM Charter.

56 See the last sentence of the Preamble of the ASEAN Charter.

57 OIC Charter, Art. 39(3): 'This Charter replaces the Charter of the Organisation of the Islamic Conference'.

the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947'.[58] A similar approach emerges in Art. 52 of the ASEAN Charter: 'All treaties, conventions, agreements, concords, declarations, protocols and other ASEAN instruments which have been in effect before the entry into force of this Charter shall continue to be valid'.

6 The Issue of the Automatic Succession

It is generally accepted that the succession between IOs postulates the explicit consent of all the Member States of both organizations, or at least their acquiescence.[59] While the consent or the acquiescence of all Members is not indispensable to dissolve an international organization, it is indispensable for the transfer of functions from one organization to another.[60] This is in line with the rules contained in Arts. 39 e 40(2)(b) of the Vienna Convention of 1969 on the law of treaties.

The consent may be expressed through an agreement among the Member States, without the involvement of the IOs concerned, or the succession can be provided for in an agreement between the predecessor and the successor organizations, or established in the institutive treaty of the succeeding organization as well as in acts approved by the IOs involved in the succession.[61] In some cases there is a combination of different modalities of succession.[62]

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58 As for the personnel, Art. XVI(2) of the WTO Agreement establishes: 'To the extent practicable, the Secretariat of GATT 1947 shall become the Secretariat of the WTO, and the Director-General to the CONTRACTING PARTIES to GATT 1947…shall serve as Director-General of the WTO'. See also Art. 33(4) of the Constitutive Act of the AU: 'Pending the establishment of the Commission, the OAU Secretariat shall be the interim Secretariat of the Union'.

59 Chiu, "Succession," 92 *et seq.*; Myers, *Succession*, 15; Bettati, "Création," 46; Amerasinghe, *Principles*, 474; Gnamou-Petauton, *Dissolution*, 124 ('acquiescement exprès ou tacite des Etats'); Klabbers, *An Introduction*, 302 *et seq.*; Diez de Velasco Vallejo, *Las Organizaciones*, 60; Prezas, "Dissolution," 181; Zanghì, *Diritto*, 103.

60 Myers, *Succession*, 58; Schmalenbach, "International," 4.

61 Kiss, "Quelques," 472 s.; Mochi Onory, "La successione," 355; Cansacchi, "Continuità," 16 *et seq*.

62 Diez de Velasco Vallejo, *Las Organizaciones*, 60.

Conversely, the idea of an automatic succession between IOs,[63] albeit authoritatively supported,[64] is not convincing. The reference goes, in particular, to the well-known Advisory Opinions expressed by the ICJ in the case of the *South-African mandate in Namibia*.[65]

In these Opinions, the ICJ expressed a certain preference for the automatic succession of the UN in the functions of control previously performed by the LoN towards South African action in that territory. In particular, the ICJ affirmed that the 'obligations related to the machinery for implementation… were closely linked to the supervisory functions of the League of Nations', in particular the obligation of South Africa to submit to the supervision and control of the Council of the LoN.[66]

The ICJ wondered if, since the Council disappeared as a result of the dissolution of the League, 'these supervisory functions [were] to be exercised by the new international organization' (the UN) and if South Africa was obliged to submit to supervision by this new organization. It affirmed: 'Some doubts might arise from the fact that the supervisory functions of the League with regard to mandated territories not placed under the new Trusteeship System were neither expressly transferred to the United Nations nor expressly assumed by that organization. Nevertheless, there seem to be decisive reasons for an affirmative answer to the above-mentioned question'. And the ICJ added that the necessity for supervision continues to exist despite the disappearance of the supervisory organ under the Mandates System [the Council of the LoN]' and that, 'the United Nations has another international organ [the UN GA] performing similar, though not identical, supervisory functions'. For these reasons, the Court concluded that the GA 'is legally qualified to exercise the supervisory functions

63 See the opinion of Sereni, *Le organizzazioni*, 74; Chiu, "Succession," 114 *et seq.*; Cansacchi, "Continuità," 16; Torrecuadrada García-Lozano, "La sucesión," 238; Virzo, "Note," 298; Amerasinghe, *Principles*, 474 *et seq.*; Klabbers, *An Introduction*, 302; *Bowett's Law*, 536; Ugo Draetta, *Principi di diritto delle organizzazioni internazionali* (3rd. edn. Milano: Giuffrè, 2010), 39.

64 For this opinion, see Hahn, "Continuity," 193 *et seq.*; Myers, *Succession*, 59 *et seq.*, and Schermers and Blokker, *International*, 1059: 'the most appropriate organization must be considered to be the successor even in the absence of specific provisions'.

65 See in particular the ICJ Advisory Opinions of 11 Jul. 1950, *International Status of South West Africa*, *ICJ Reports* 1950, 128 *et seq.*, and of 21 Jun. 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) *Notwithstanding Security Council Resolution 276* (*1970*), *ICJ Reports* 1971, 16 *et seq*; and the ICJ Judgment of 21 Dec. 1962, *South West Africa Cases* (*Ethiopia v. South Africa*; *Liberia v. South Africa*), *Preliminary Objections*, *ICJ Reports* 1962, 319 *et seq.*

66 Advisory Opinion of 11 Jul. 1950, at 136.

previously exercised by the League of Nations with regard to the administration of the Territory',[67] and that South Africa 'is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it'.[68]

The opinion of the Court, although acceptable for the aim pursued – i.e. to ensure the continuity of the obligations of the (racist) regime of South Africa in regard to Namibia (in the name of 'the sacred trust of civilization', reaffirmed by the ICJ in its Advisory Opinions) –, isn't legally convincing, because the Court underevaluated the absence of the consent of that State to the transfer of functions between the LoN and the UN.[69] Moreover, the Opinions of the Courts seem entirely episodic and haven't set up any customary international law rule.[70]

7 The Legal Consequences Arising from the Succession between International Organizations

The succession between IOs has many legal consequences, mainly relating to the acts, the properties and the personnel of the ceding organization. These issues are usually regulated in agreements between the IOs involved, in the constitutive treaty of the succeeding organization, or in subsequent acts adopted by it.[71]

The acts of the predecessor organization are transferred to the successor organization if the latter so decides.[72] The obligations deriving from acts of the precedent organization, however, will not apply to its Members that do not participate in the succeeding organization.[73]

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67 See also the ICJ Advisory Opinions of 7 Jun. 1955, *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa*, *ICJ Reports* 1955, 67 *et seq*., and of 1 Jun. 1956, *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, *ICJ Reports* 1956, 23 *et seq*.

68 Advisory Opinion of 11 Jul. 1950, at 137.

69 See the critical observations expressed by Chittharanjan F. Amerasinghe, "Dissolution and Succession," in *Manuel*, 374 *et seq*., that nevertheless defines the case of South West Africa mandate as an 'implied conventional succession'.

70 For a similar opinion see Schmalenbach, "International," 6.

71 Marinella Fumagalli Meraviglia, *Studi sulle organizzazioni internazionali* (Milano: Giuffrè, 1997), 162 *et seq*.

72 Ingravallo, "Clausole," 405; "Prezas, "Dissolution," 183. For a different opinion see Kiss, "Quelques," 490: 'Les actes de l'organisation disparue, pris dans l'exercise de fonctions transférées restent en vigueur à l'égard de son successeur'.

73 Schermers and Blokker, *International Institutional*, 1060.

The ICJ has clearly stated in two well-known judgments concerning the declaration of acceptance of the compulsory jurisdiction of the PCIJ, that there is no automatic continuity in relation to this declaration.[74]

If a treaty concluded within the precedent organization assigned the exercise of some powers to it, this treaty may remain in force and these powers may be transferred to the succeeding organization if it decides to take them on.[75] And the consent of the other contracting parties to that treaty is also necessary.

With reference to the treaties concluded by the ceding organization with other international subjects the most convincing opinion is that the succeeding organization is not obliged to respect them, unless this organization decides to act in this way and all the other contracting parties accept this substitution.[76] This solution is preferable to that of considering the content of the treaties and inferring their continuity in some circumstances.[77] In regard to the succession between IOs, there is not convincing rationale for applying the rules on continuity of treaties with regard to succession of States, as set by the Vienna Convention of 1978. Moreover, it is inconsistent with customary international law.

The new organization is not obliged to take on all the rights and duties connected to the functions transferred by the precedent organization,[78] even if it has happened in the case of some IOs of a technical nature.[79]

As regards the legal obligations of national law binding for the predecessor organization, they are not automatically transferred to the successor organization. This does not prevent the latter from assuming the obligations deriving

74 See ICJ, Judgments of 26 May 1959, *Case Concerning the Aerial Incident of July 27th 1955* (*Israel v. Bulgaria*), *Preliminary Objections*, *ICJ Reports* 1959, 127 *et seq.*, and of 26 May 1961, *Case Concerning the Temple of Preah Vihear* (*Cambogia v. Thailand*), *Preliminary Objections*, *ICJ Reports* 1961, 17 *et seq*.

75 See GA Res. 24(I): 'The General Assembly reserves the right to decide, after due examination, not to assume any particular function or power'.

76 Schmalenbach, "International," 5; Gnamou-Petauton, *Dissolution*, 317; Wessel, "Dissolution," 354.

77 For this opinion see Chiu, "Succession," 101 *et seq*.; Mochi Onory, "La successione," 359; Myers, *Succession*, 83; Amerasinghe, *Principles*, 472; Schermers and Blokker, *International*, 1067 *et seq*; Prezas, "Dissolution," 188.

78 Chiu, "Succession," 120; Schmalenbach, "International," 4, differentiates the 'powers indispensable' from the 'ancillary rights and obligations'.

79 Myers, *Succession*, 79. See *ex multis* Art. 21 of WIPO Convention: 'Once all the States members [of the previous organization] have become Members [of the WIPO], the rights, obligations, and property…shall devolve [on the WIPO]'.

from the process of dissolution of the former, neither from declaring itself responsible for the private law obligations of the ceding organization.[80]

The same is true for the properties, the debts and the personnel in case of succession between IOs.[81] In fact, in practice, the transfer of properties and debts to the succeeding one isn't automatic, nor it is compulsory.[82] Usually, it happens for practical purposes.[83] Also the personnel are not guaranteed the right to maintain their employment in the succeeding organization.[84] The continuity of the employment is at the discretion of this organization and fills a practical need.[85] On this topic, another opinion deduces an implicit obligation for the succeeding organization to maintain the personnel of the precedent one from the conventional rules that provide the transfer of rights and obligations between the IOs involved in the succession.[86]

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80 Schmalenbach, "International," 6; Schermers and Blokker, *International*, 1069. When occurred the transfer of the properties in the succession between the LoN and the UN a financial compensation was given to the Member States of the predecessor that didn't become Members of the successor organization.

81 See Section I of the Protocol on Centralization: 'States parties thereto, that are also members [of the IPI] shall take all necessary steps to ensure the trasfer [to the EPO] of all assets and liabilities and all staff members [of the IPI]'.

82 Kiss, "Quelques," 487; Wessel, "Dissolution," 354; Prezas, "Dissolution," 186.

83 See GA Res. 34/96, about the transfer in favour of the autonomous UNIDO of personnel, funds and assets of the UN, previously assigned to the 'old' UNIDO. ESA Convention, Art. XIX: 'On the date when this Convention enters into force, the Agency shall take over all rights and obligations of the European Space Research Organisation and of the European Organisation for the Development and Construction of Space Vehicle Launchers'.

84 Bettati, "Continuité," 48; Schermers and Blokker, *International*, 1069 *et seq.*, Zanghì, *Diritto*, 125.

85 Myers, *Succession*, 95; Schmalenbach, "International," 5; Schermers and Blokker, *International*, 1069 *et seq.* In the case of the UN, the GA Res. 24(I) recommends to the Secretary-General 'to engage…, on appropriate terms, …members of the experienced personnel'.

86 Gnamou-Petauton, *Dissolution*, 286, that however adds: 'Sans deduire de cette pratique une coutume relative au réemploi de l'ensemble du personnel du prédécesseur…'.

CHAPTER 18

Settlement of Disputes by International Courts and Tribunals of Regional International Organizations

Elisa Tino

1 Introduction

The analysis of disputes settlement mechanisms represents one of the main topics in studying the law of international organizations and is strictly related to an assessment of the legal organization models embodied by interstate cooperation. So it has to be taken into consideration the classical distinction between 'soft organizations'[1] and 'hard organizations' and, within the latter category, between 'intergovernmental organizations' and 'supranational organizations'.[2] In the light of their non-institutionalized nature and their main features, in the 'soft organizations' interstates disputes are generally settled through political-diplomatic means[3]; they give a maximum flexibility to the parties which are not bound by the final 'proposal' for a settlement, so that there is little legal certainty but the State's sovereignty is guaranteed.

The States' need for granting their national sovereignty from external interference characterizes also 'intergovernmental organizations'. Generally it translates into the conferral of few not very relevant functions to the regional entity and into a low degree of institutionalization of interstate cooperation. As a consequence, it has important repercussions even on the choice of disputes settlement mechanism.[4] Indeed, founding treaties of

1 About the 'soft organizations', see the chapter of Angela Di Stasi, "About Soft International Organizations: An Open Question," published in this volume.

2 About the distinction between *intergovernmental organizations* and *supranational organizations* see lastly, Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (5th edn. Leiden: Martinus Nijhoff, 2011), 58.

3 Rarely but not unlikely in a 'soft organization' Member States may adopt agreements regulating specific fields of their cooperation thus providing for the establishment of an arbitral mechanism. This was the case of the Association of South east Asian Nations (ASEAN) before the Charter came into force (ASEAN Protocol on Enhanced Dispute settlement Mechanism, Vientiane, 23 Nov. 2004, which substituted the 1996 Protocol).

4 'Intergovernmental organizations' are governed by principles and rules of international law. Generally Member States cooperate adopting non-binding acts or binding agreements creating

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'intergovernmental organizations' often provide for the resort to political and diplomatic methods to settle interstate litigations as they allow States to better preserve their sovereignty. Even when the founding agreements don't regulate conflicts resolution, Member States tend to use political and diplomatic means and only in some cases, in later time, they fill this normative gap adopting an agreement which establishes formally a specific (generally political or arbitral) mechanism. Coherently with its particular legal nature, in 'intergovernmental organizations' the judicial body has a marginal role. In some (not many) cases, statutory treaties may provide for the resort to a judicial mechanism, but generally its establishment is expressed in general terms and deferred to the following adoption of a specific protocol. In practice, Member States often prefer not to establish it and to keep on resorting to negotiation or other political-diplomatic means.

However, recent decades have seen a clear increase in the number of judicial disputes settlement mechanisms established within regional economic organizations.[5] This phenomenon, known as 'judicialization' process, often ranks in a more general trend to strengthening the regional interstate cooperation on normative and institutional level[6] and expresses Member States' will to submit their institutionalized cooperation to the rule of law.[7] Moreover it seems to be strictly related to the concrete realization of economic goals within

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rights and obligations just for signatory parties. Sometimes, they may also adopt secondary acts which need to be incorporated into the domestic law systems. Consequently disputes involve only Member States.

5 See among others *L'evoluzione dei sistemi giurisdizionali regionali ed influenze comunitarie*, ed. Piero Pennetta (Bari: Cacucci, 2010); Karen Alter, "The Evolving International Judiciary," *ARLSS* 7 (2011): 387; Simone Marinai, *La funzione giurisdizionale nelle organizzazioni di integrazione regionale* (Torino: Giappichelli, 2012); *Tribunales en Organizaciones de Integración: Mercosur, Comunidad Andina y Unión Europea* eds. Mario Hernández Ramos (Cizur Menor: Aranzadi Edición, 2012); Elisa Tino, "The Role of Regional Judiciaries in Eastern and Southern Africa," in *Monitoring Regional Integration in Southern Africa. Yearbook 2012*, eds. André du Pisani, Gerhard Erasmus and Trudi Hartzenberg (Stellenbosch: TRALAC, 2013), 140.

6 Werner Schroeder and Andreas Thomas Müller, "Elements of Supranationality in the Law of International Organizations," in *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*, eds. Ulrich Fastenrath *et al.* (Oxford: OUP, 2011), 358.

7 A relevant legal literature deals with 'constitutionalism' of international organizations with reference to their placing under rule of law and the consequent establishment of a judicial system. See *Research Handbook on the Law of Iinternational Organizations*, eds. Jan Klabbers and Åsa Wallendahl (Cheltenham: Edward Elgar, 2011), 13.

the regional organization, such as the establishment of a free trade area or a customs union.[8]

In concrete, this 'judicialization' process has concerned some regional economic organizations in the African continent (Common Market for Eastern and Southern Africa, COMESA[9]; Economic Community of West African States, ECOWAS[10]; East African Community, EAC),[11] in the Central and Latin America (Sistema de Integración Centro-Americano, SICA[12]; Mercado Común del Sur, MERCOSUR)[13] and in the Caribbean (Caribbean Community, CARICOM[14]; Organization of Eastern Caribbean States, OECS).[15] Regarding the latter it is worth putting in evidence that its disputes settlement system, in which adjudication is just one of alternative methods for resolution, seems not to be fully coherent with the normative and institutional features of cooperation introduced by the revised treaty tending to the supranational model.

8 The adoption of secondary trade law creating rights and obligations directly to individuals and its enforcement in each member State determine new kind of disputes concerning also individuals' rights and non-governmental organs' interests. So the demand for legal certainty and homogeneity in protection of different interests raises; that's why the need for an independent judicial body. See Yoram Z. Haftel, *Commerce and Institutions: Trade, Scope, and the Design of Regional Economic Organizations*, paper presented at APSA Annual Meeting, 1–4 Sept 2011.

9 Treaty establishing the Common Market for Eastern and Southern Africa, Kampala, 5 Nov. 1993 (COMESA Treaty).

10 Revised Treaty of the Economic Community of West African States, Cotonou, 24 Jun. 1993 (ECOWAS Rev. Treaty).

11 Treaty for the establishment of the East African Community, Arusha, 30 Nov. 1999, as amended on 14 Dec. 2006 and on 20 Aug. 2007 (EAC Treaty).

12 Protocolo de Tegucigalpa a la Carta de la Organización de los Estados Centroamericanos, Tegucigalpa, 13 Dec. 1991 (PT).

13 Tratado para la constitución de un Mercado Común (Asunción, 26 Mar. 1991) integrated by Protocolo Adicional al Tratado de Asunción sobre la estructura institucional del MERCOSUR (Ouro Preto, 17 Dec. 1994), Protocolo de Olivos para la solución de controversias (Olivos, 18 Feb. 2002), Protocolo costitutivo del Parlamento del MERCOSUR (Montevideo, 8 Dec. 2005).

14 Revised Treaty of Chaguaramas establishing the Caribbean Community, including the CARICOM Single Market and Economy, Nassau, 5 Jul. 2001 (RTC).

15 Revised Treaty of Basseterre establishing the Organization of Eastern Caribbean States Economic Union, St. Lucia, 18 Jun. 2010. The OECS disputes settlement mechanism offers the possibility to the parties to choose the – diplomatic, arbitral or adjudication – method (Annex on settlement of disputes to the Revised Treaty). Regarding adjudication, it confers to the Eastern Caribbean Supreme Court, already operating as Appellate Jurisdiction,

Finally, a complex judicial body operates also in some Euro-Asian organizations, namely the Commonwealth of Independent States (CIS)[16] and the Eurasian Economic Community (EURASEC).[17]

In opposition to the 'judicialization' process within the Southern African Development Community (SADC)[18] Member States decided to suspend and then to close the regional Tribunal[19] pending a review of its role and functions.[20] This was the final decision of a long-term 'diatribe' between the SADC Tribunal and Zimbabwe originating from the latter's failure in complying with the Tribunal's

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the new Treaty Jurisdiction. However, the Rules of the Court to determine its own procedure have not been adopted yet.

16 Agreement on the establishment of the Commonwealth of Independents States, Minsk, 8 Dec. 1991, and Charter of the Commonwealth of Independent States, Minsk, 22 Jan. 1993. The CIS Court (Agreement on the Statute of the Economic Court of Commonwealth of Independent States, Minsk, 6 Jul. 1992) is entitled just to settle interstate economic disputes and to give advisory opinions and delivers non-binding judgments. The difficulty to find translations from Russian of its rulings and other relevant documents makes it impossible to assess the role the CIS Court plays; that's why it won't be investigated in details in this paper.

17 Treaty on the Establishment of the Eurasian Economic Community, Astana, 10 Oct. 2000 as amended. The EURASEC Court (Statute of the Court of the Eurasian Economic Community, Astana, 5 Jul. 2010) is operational since 2012. However, until now all relevant documents as well as its rulings are available only in Russian. This hampers any legal assessment of the role concretely played by the Court; that's why it won't be analyzed in this paper. For a general overview, see Alexei S. Ispolinov, "First Judgment of the Court of the Eurasian Economic Community: Reviewing Private Rights in a New Regional Agreement," *LIEI* 40 (2013): 225.

18 Treaty of the Southern African Development Community, Windhoek, 17 Aug. 1992; Agreement amending the Treaty of the SADC, Blantyre, 14 Aug. 2001.

19 Communiqué of the 30th Jubilee Summit of the SADC Heads of States and Government, Windhoek, 16–17 Aug. 2010; Communiqué of the Extraordinary Summit of the SADC Heads of States and Government, Windhoek, 20 May 2011; Final Communiqué of the 32nd Summit of SADC Heads of State and Government, Maputo, 18 Aug. 2012. In literature, see Werner Scholtz and Gerrit Ferreira, "Much ado about nothing? The SADC Tribunal's Quest for the rule of Law Pursuant to regional integration," *ZaöRV* 71 (2011): 331, and lastly Frederick Cowell, "The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction," *HRLR* 13 (2013): 153. Currently the situation concerning SADC regional justice is still uncertain; that's why it won't be analyzed in this paper.

20 During the 34th Summit of SADC Heads of States and Government (Victoria Falls, 17–18 Aug. 2014) the new Protocol on Tribunal was adopted (it was signed by 9 out of 15 SADC Member States). It confines the new Tribunal's jurisdiction to the interpretation of the SADC law relating to interstate disputes, so individuals' standing is not granted anymore.

judgments asserting violation of human rights.[21] Zimbabwe's non-compliant behavior and SADC States' decision to close the Tribunal reveal their 'intolerance' of rulings significantly affecting their sovereignty. All this represents a clear step backwards in the quest for democracy and rule of law in the SADC and shows Member States' failure in the first test of accountability under these principles.

Unlike the intergovernmental organizations, the judicial disputes settlement mechanism represents an element of particular qualification of 'supranational organizations'. Thus a permanent Court, endowed to broad and complex competences to ensure the correct and uniform interpretation and application of the law of the organization in each member State, operates in the European Union (EU), generally considered the regional organization that better realizes the main features of the supranational organization.[22] Additionally, such a judicial organ is provided for also in some other (not numerous) regional economic organizations which tend to realize the supranational model inspiring to the EU example, such as the Comunidad Andina (CAn),[23] the Union Economique et Monètaire de l'Ouest Africain (UEMOA),[24] the Communauté Economique et Monètaire de l'Afrique Centrale (CEMAC).[25]

Moving from this general framework my paper will explore the judicial disputes settlement mechanisms established and operational within the above mentioned regional economic organizations.[26] I will investigate them from a

21 Zimbabwe failed to comply with the SADC Tribunal's decisions in *Campbell* case (*case no. 2/2007 – SADCT 1, Mike Campbell* (*PVT*) *and others v. Republic of Zimbabwe* (interim order), 13 Dec. 2007; *case no 2/2007 – SADCT 2, Mike Campbell* (*PVT*) *and others v. Republic of Zimbabwe,* 28 Nov. 2008; *case no. 3/2009, Mike Campbell* (*PVT*) *and others v. Republic of Zimbabwe,* 5 Jun. 2009) and in *Gondo* case *case* (*no. 5/2008, Gondo and others v. Republic of Zimbabwe*, 9 Dec. 2010).

22 Regarding the European economic organizations see also the European Free Trade Area (Convention establishing the European Free Trade Association, Stockholm, 4 Jan. 1960, amended in Vaduz, 21 Jun. 2001). It has a permanent Court which is well-known and largely inspired to the ECJ; that's why it won't be analyzed in detailed in this paper. In a wide literature see, among others, Carl Baudenbacher, *The EFTA Court in action: Five lectures* (Stuttgart: German Law, 2010).

23 Acuerdo de Integración subregional andino, Cartagena de Indias, 26 May 1969, as amended and lastly codified by Decisión No. 563 (26 May 2003).

24 Traité modifié de l'Union Economique et Monètaire Ouest Africaine, Dakar, 29 Jan. 2003 (Traité modifié UEMOA).

25 Traité révisé de la Communauté Economique et Monètaire de l'Afrique Centrale, Yaoundé, 25 Jun. 2008 (Traité révisé CEMAC).

26 This paper will not explore either regional human rights courts or judicial bodies established within regional organizations which have specific technical legal competences (e.g. OHADA).

comparative perspective in order to put in evidence similarities and common trends in relation to specific features. In particular they will be analyzed both in their institutional and functioning aspects and in their main jurisprudence. The ECJ won't be explored in details as it's already well-known, but it will be inevitably a constant reference point in the course of this analysis.[27]

2 Regional Courts: Some General Remarks

Generally founding treaties rate the judicial body among the main organs of their regional organization.[28] In some cases, like in the EU as well as in the EAC and COMESA,[29] they also contain detailed rules about their composition, role and competences. More often they just provide for the establishment of a court whose institutional aspects, functions and rules are prescribed in a protocol to be adopted in later time. Additionally, in some regional organizations (SICA, CARICOM and ECOWAS) the principle of variable geometry operates also in relation to the regulation of institutional aspects of the cooperation. So the Corte Centroamericana de Justicia (CCJ),[30] the Caribbean Court of Justice (CaCJ)[31] and the ECOWAS Court of

27 About the EU judicial system there's an immense international literature. Lastly see, Massimo Condinanzi and Roberto Mastroianni, *Il contenzioso dell'Unione europea* (Torino: Giappichelli, 2009); Court of Justice of the European Union (ed.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (The Hague: Springer, 2013).

28 Differently, the Treaty establishing the Caribbean Community (Chaguaramas, 4 Jul. 1973) didn't rate a court within the institutional structure of the organization or prescribed its further establishment. So, in Feb. 2001 the signing of the Agreement establishing the Caribbean Court didn't ensue a statutory provision but answered to new legal needs arisen within the interstate cooperation. Thus, unlike the 1973 Treaty, the RTC, signed in Jul. 2001, indicates the Court among the CARICOM main organs and synthetically regulates its 'original jurisdiction' as provided for by the Agreement.

29 Arts. 251–281 TFEU; Arts. 23–47 EAC Treaty; Arts. 19–44 COMESA Treaty. In the EAC and COMESA Treaties provisions regulating their courts have the same wording.

30 Convenio del Estatuto de la Corte Centroamericana de Justicia, Ciudad de Panamà, 10 Dec. 1992 (Convenio CCJ). See, among other, Ángeles Cano Linares, "La Corte Centroamericana de Justicia: órgano único con diversidad de competencia," in *Tribunales internacionales y espacio iberoamericano*, ed. Carlos Fernández Liesa (Cizur Menor: Thomas Reuters, 2007), 111; Ivan Ingravallo, "La Corte Centroamericana de Justicia," in *L'evoluzione*, 177.

31 Agreement establishing the Caribbean Court of Justice, St. Michael, 14 Feb. 2001 (CCJ Agreement). See, among others, Duke E. Pollard, *The Caribbean Court of Justice. Closing the Circle of Independence* (Kingston: Ian Randle, 2004); Sheldon McDonald, *The*

Justice (ECOWAS CJ)[32] may exercise their jurisdiction exclusively over those States which have accepted it by signing and ratifying its establishment protocol.[33] Generally, whether the founding treaties regulate the judicial organ in details or defer it to a specific external protocol, courts aren't established contextually to their regional organizations.[34]

Most of regional courts – such as the Tribunal de Justicia de la Comunidad Andina (TJCA),[35] the CCJ, the CaCJ, the Cour de Justice UEMOA (CJ UEMOA),[36] the Cour de Justice CEMAC (CJ CEMAC)[37] and ECOWAS CJ – have an unitary structure and their judgments are final. Otherwise the COMESA Court of

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Caribbean Court of Justice: Enhancing the Law of International Organizations (Kingston: Caribbean Law, 2005); Francesco Cherubini, "La Corte Caraibica di Giustizia," in *L'evoluzione*, 71.

32 Protocol A/P1/7/91, Abuja, 6 Jul. 1991, amended by the Supplementary Protocol A/SP/01/05, Abuja, 19 Jan. 2005 – ECOWAS Prot. See Michele Messina, "I modelli di integrazione economica in Europa e in Africa: l'esperienza della CE e dell'ECOWAS a confronto," in *L'evoluzione*, 115; Karen Alter, Laurence Helfer and Jacqueline R. McAllister, "A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice," *AJIL* 107 (2013), 701.

33 The CCJ expressed an opposite opinion pointing out that its jurisdiction extends over all Member States as they signed and ratified the PT that is the founding agreement of the SICA and its judicial organ (Expediente No. 1-30-4-2004, *Reyes Wyld c. Guatemala,* 3 Jan. 2005, 43; lastly, Expediente No. 123-12-06-12-2011, *FONARE y Fundación Nicaraguese para el Desarrollo Sostenible c. Costa Rica*, 21 Jan. 2012, 9 *et seq*.).

34 Differently the European integration process has a permanent and multi-tasked court since its origins (1952, European Coal and Steel Community – ECSC). See, Ditlev Tamm, "The History of the Court of Justice of the European Union Since its Origin," in *The Court of Justice*, 9.

35 The Tratado de creación del Tribunal de Justicia de la Comunidad Andina (Tratado TJCA) was codified by the Decision No. 472 (Cochabamba, 28 May 1996) integrated by the Decision No. 500: Estatuto del TJCA (Valencia, 22 Jun. 2001). In a wide literature see lastly Ricardo Vigil Toledo, *Estructura juridical y el future de la Comunidad Andina* (Madrid: Civitas, 2011); Karen Alter, Laurence Helfer and Osvaldo Saldias, "Transplanting the European Court of Justice: The experience of the Andean Tribunal of Justice," *AJCL* 60 (2012): 629.

36 Protocole Additionnel no. 1 relatif aux organes de contrôle de l'UEMOA, Dakar, 10 Jan. 1994 (Prot. Ad. UEMOA) integrated by Règlement no. 1/96/CM portant le Règlement des procédures de la Cour de Justice de l'UEMOA (Règ. Cour UEMOA). See, among others, Laurent Verbraken, "Les interpretations de la Cour de justice de Luxembourg en matière de droit de douane et de contingentements peuvent-elles utilement inspirer la Cour de justice de l'UEMOA?" *Revue Burkinabé de Droit* 30 (1996): 217; Daniele Amoroso, "L'influenza dei precedenti della Corte di Giustizia Europea nella giurisprudenza della Corte dell'Unione Economica e Monetaria dell'Ovest-Africano (UEMOA)," in *L'evoluzione*, 201.

37 Convention régissant la Cour de Justice de la CEMAC, Libreville, 5 Jul. 1996 (Conv. Cour CEMAC). See Marco Fasciglione, "L'evoluzione dei sistemi giurisdizionali regionali e

Justice (COMESA CJ)[38] and the EAC Court of Justice (EACJ)[39] are articulated into a First Instance Division and an Appellate Division, so every first-instance ruling can be appellate but exclusively for point of law, lack of jurisdiction or procedural irregularity.

The MERCOSUR disputes settlement mechanism has relevant peculiarities[40]; it isn't permanent and has a 'mixed' nature as it combines together political-diplomatic means and arbitral organs. Indeed, when failing disputes settlement resolution through negotiation, the parties may: (1) resort to the Grupo Mercado Común (GMC) acting as conciliator[41]; (2) resort to an *ad hoc* Tribunal (Art. 6.1 PO) or to the Tribunal Permanente de Revisión – TPR – (Art. 23 PO). The rulings of *ad hoc* tribunals can be appellate before the TPR, so that the latter can operate both as first and unique judicial instance and as appellate instance (Art. 17.2 PO).[42] It is worth reminding that in recent years the MERCOSUR Parliament proposed to the Consejo Mercado Común (CMC) the Protocolo Constitutivo de la Corte de Justicia del MERCOSUR[43] in order to

influenze comunitarie: la Corte di Giustizia della Comunità Economica e Monetaria dell'Africa Centrale (CEMAC)," in *L'evoluzione*, 221; Apollin Koagne Zouapet, *La recevabilité des requêtes devant la Cour de Justice de la CEMAC: contribution à l'analyse des conditions d'exercice de la fonction juridictionnelle devant la juridiction communautaire en Afrique Central* (Sarrebruck: Éditions universitaires européennes, 2011).

38 Arts. 19–44 COMESA Treaty. See, among others, Felix Maonera, *Dispute Settlement under COMESA*, Tralac Working Paper, No. 7, 2005; Andrea Torino, "La Corte di Giustizia del Common Market for Eastern and Southern Africa," in *L'evoluzione*, 99.

39 Arts. 23–47 *EAC Treaty*. See, Tom Odhiambo Ojienda, "The East African Court of Justice in the Re-established East African Community: Institutional Structure and Function in the Integration Process," *East Afr. J. Peace HR* 11 (2005): 220; Concetta Piscitelli, "East African Court of Justice," in *L'evoluzione*, 131; John Eudes Ruhangisa, *Rule of Law and Access to Justice in East Africa: The East African Court of Justice*, paper presented at the Premier Course on the EAC, Kampala, 12–15 Sept. 2012.

40 *Protocolo de Olivos para la solución de controversias en el MERCOSUR,* Olivos, 18 Feb. 2002 (PO), integrated by several rules of procedures. See, Liliana Bertoni, *Laudos arbitrales en el Mercosur* (Buenos Aires: Ediciones-Ciudad Argentina, 2006); Nadine Susani, *Le règlement des différends dans le MERCOSUR: un système du droit International pour une organisation d'intégration* (Paris: L'Harmattan, 2008); Felix Fuders, "La solución de controversias en el Mercosur: una evaluación del sistema y de la jurisprudencia," *Prima Facie* 21 (2012): 75.

41 If the GMC fails, the parties may resort to the arbitral tribunal (Arts. 6–8 PO).

42 Alejandro Perotti, *Tribunal Permanente de Revisión y Estado de Derecho en el MERCOSUR* (Buenos Aires: Marcial Pons, 2008).

43 *Proyecto de Norma – Protocolo costitutivo de la Corte de Justicia del MERCOSUR*, MERCOSUR/PM/PN No. 02/2010, 13 Dec. 2010. The regional Court proposed in this *Proyecto de Norma* draws inspiration largely to the EU judicial system and to the TJCA.

establish a permanent court. This proposal, probably elaborated to answer the demand for legal certainty within the MERCOSUR, seems to be coherent with the next creation of a perfect customs union.

Regarding further technical-legal aspects it is not possible to find a common trend, as there are strong differences from a judicial system to another which aren't linked to the legal model of each organization. However the rules of judges' appointment deserve some considerations. Traditionally judges are appointed by the highest intergovernmental organ among candidates recommended by each Member State.[44] However in the SICA and the CARICOM, more or less similarly to the EU recent experience (Arts. 253–255 TFEU), we can find a common trend to 'release' judges' appointment from the political will of Governments. Thus, in the SICA judges are designated by the Supreme Courts of each member State (Art. 2 Reglamento General), whereas in the CARICOM they are selected through a public selection by the Regional Judicial and Legal Services Commission consisting of persons from the legal world and the President of the Court is appointed by the Heads of State and Government (Art. 4 CCJ Agreement).

In the MERCOSUR the arbitral nature of its disputes settlement mechanism influences also arbiters' appointment procedure who are designated by each party in conflict when the dispute arises. Then the parties agree to select the third arbiter who cannot be their national (Arts. 10–11 PO). In contrast the TPR has a quasi-permanent nature so each member State designates its arbiter for a term of two years and then they agree to appoint the fifth arbiter (Art. 18 PO).

Finally, the CAn, UEMOA and CEMAC judicial systems, as the EU one, also provide for the role of the Advocate General who helps judges in the exercise of their powers.[45]

a *The Courts' Jurisdiction*

A systemic assessment of founding treaties reveals the existence of a 'logic' homogeneity among judicial systems regarding their jurisdiction and competences regardless of the supranational or intergovernmental nature of their organizations. Indeed, all these regional courts are entitled to ensure the respect of law in the interpretation and application of founding treaties and the law of the organization.[46]

44 Art. 24(1) EAC Treaty; Art. 20(2) COMESA Treaty; Art. 6(1) Tratado TJCA; Art. 2 Prot. Ad. UEMOA; Art. 12 Conv. Cour CEMAC; Art. 3 ECOWAS Prot.

45 Art. 252 TFEU; Art. 2(3) Prot. Ad. UEMOA; Art. 6 Tratado TJCA and Art. 142 Estatuto TJCA; Arts. 31, 45–46 Statut Cour de Justice de la CEMAC (N'Djamena, 14 Dec. 2000).

46 Art. 19 TEU; Art. 4 Estatuto TJCA; Art. 2 Convenio CCJ; Arts. 187 and 211 RTC; Art. 1(1) PO; Art. 9 ECOWAS Prot.; Art. 1 Prot. Ad. UEMOA; Art. 2 Conv. Cour CEMAC; Art. 27 EAC Treaty; Art. 19 COMESA Treaty.

So, generally, in the light of the principle of attributed competences, their jurisdiction extends to each field falling under the competence of their own organization. However, in some cases, it can be expressly limited; thus the CCJ cannot hear human rights disputes (Art. 25 Convenio CCJ) and trade disputes (Art. 35.3 PT).[47] Conversely, in some other cases, founding treaties may provide for the possibility of its extension through the adoption of a specific protocol (Art. 9.8 ECOWAS Prot.; Art. 27.2 EAC Treaty).

All these regional judicial bodies have undoubtedly in common the binding nature of their jurisdiction for those States which accepted it expressly. Then, another relevant feature of regional courts' jurisdiction concerns its exclusive nature. The exclusive-jurisdiction clause is considered a means of preserving the autonomy of the organization legal order.[48] In this sense, generally it is prescribed in absolute and general terms in founding treaties of supranational organizations, namely the EU, the CAn and the UEMOA, and in those tending to realize this cooperation model, such as the COMESA.[49] A relevant exception is represented by the CEMAC. Indeed, although it can be classified as a supranational organization for its institutional and normative features, its Court seems not to have an exclusive jurisdiction. Indeed it can settle disputes concerning the interpretation of Community law and its violations and actions for damage reparations just in last instance (Arts. 4 and 20 Conv. Cour CEMAC), so it has a residual competence over these issues.[50] In my opinion such provisions are incoherent with the nature of the CEMAC and of its Court and with the reasons for its establishment.

Differently, in founding treaties of intergovernmental organizations the exclusive-jurisdiction clause often tends to be less rigid[51] – the CaCJ, the ECOWAS

47 Enrique Ulate Chacón, "El protocolo de Tegucigalpa y la jurisdicción de la Corte Centroamericana de Justicia," *Revista Electrónica Iberoamericana* 2 (2008), 2: 23.

48 In this sense, ECJ Opinion 1/91, *concerning the draft agreement between the EC, on the one hand, and the countries of the EFTA, on the other, relating to the creation of the European Economic Area*, 12 Dec. 1991, *ECJ Reports*, I-6079, 35; more recently, case C-459/03, *Commission of the European Community v. Ireland*, 30 May 2006, *ECJ Reports*, I-4635, 132. See Tobias Lock, "The European Court of Justice: What are the Limits of its Exclusive Jurisdiction?" *Maastricht JECL* 16 (2009): 291.

49 Art. 42 Tratado TJCA; Art. 34(1) COMESA Treaty. The exclusive jurisdiction of the CJ UEMOA is not expressly provided for by the treaty but it can be inferred by the main feature of the judicial system and by the preamble of the Prot. Ad. UEMOA.

50 Such an interpretation would presume the exhaustion of other judicial remedies as standing condition before the regional court, that is not prescribed by CEMAC rules.

51 About the criteria to classify the 'degree of exclusivity' see Tullio Treves, "Fragmentation of International Law: the Judicial Perspective," *Agenda Internacional* 27 (2009): 213.

CJ, the CCJ and the EACJ – or it is not provided at all. In the latter category the MERCOSUR system ranks unequivocally. Indeed Art. 1 PO provides for the possibility to resort to other international mechanisms (as the WTO one) to settle disputes arising out from the application of MERCOSUR law; this provision is justified both by the intergovernmental nature of the MERCOSUR and the trade goals it pursues.[52]

Where the exclusive-jurisdiction clause is provided for, its degree of rigidity may vary from a judicial system to another. Thus, the CaCJ and the ECOWAS CJ have a wide exclusive jurisdiction (expressly provided for by treaty provisions or indirectly inferred by them), as they may settle every dispute arising out from interpretation and application of the organization law. However the resort to these courts is just one of methods provided for by the treaty to solve regional disputes. Indeed Art. 76 ECOWAS Rev. Treaty subordinates the resort to the Court to direct negotiation between parties. Art. 188 RTC offers the parties the possibility to choose which mechanism (political, diplomatic, arbitral or adjudication) they prefer to solve their disputes; thus the resort to the CaCJ is just one of possible conflicts resolution modes. So the CaCJ and ECOWAS CJ exclusive-jurisdiction clause is less rigid, that is it should apply just in relation to other regional and international courts, not with respect to voluntary political-diplomatic disputes settlement methods.

On the contrary, in the SICA the exclusive-jurisdiction clause hasn't a general extent. Indeed Art. 35 PT, which imposes that any dispute concerning the interpretation and application of SICA law must be referred to the CCJ (2), excludes trade disputes from its jurisdiction (3); they have to be referred to the Mecanismo de Solución de Controversias Comerciales.[53]

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52 Alberto do Amaral Júnior, "Reflexões sobre a solução de controvérsias do Mercosul," *Revista de la Secretaría del Tribunal Permanente de Revisión* 1 (2013): 13.

53 Such arbitral mechanism was established by Resolución no. 106–2003 (17 Feb. 2003) – amended by Resolución no. 170–2006 (28 Jul. 2006) – in order to answer to States' need for celerity in solving trade disputes. See, Orlando Mejía Herrera, "Involución del Sistema Jurisdiccional del SICA: los tribunales arbitrales ad hoc en el proceso de integración económica centroamericana," *Anu. HLA Der. Int.* 19 (2009): 323. In the light of the original formulation of Art. 35 PT, the CCJ expressed a negative opinion about the lawful establishment of this arbitral disputes settlement mechanism (Expediente No. 10-6-21-2001, *Solicitud de Opinión consultiva, sobre las posibiliades de suscribir un Convenio…*, 12 Nov. 2001). Taking into account the binding nature of CCJ's opinions Member States introduced Section 3 to Art. 35 adopting the Emienda al Protocolo de Tegucugalpa a la Carta de la ODECA (Managua, 27 Feb. 2002).

Finally, pursuant to Art. 38(1) EAC Treaty, the EACJ seems to have a wide and absolute exclusive jurisdiction, similarly to that of courts established within supranational organizations. However, in contrast with this provision, the EAC Protocol on Customs Union and Protocol on Common Market establish other parallel dispute resolution mechanisms to solve trade litigations arising out from the application of their provisions.[54] In essence, regarding trade disputes the EACJ still saves its jurisdiction conferred by treaty provisions but, I think, it cannot be qualified as exclusive anymore. In my opinion the establishment of other disputes settlement mechanisms is in breach of Art. 38(1) EAC Treaty, so it could be illegal[55]; moreover it may generate the phenomenon of overlapping and conflict jurisdictions.[56] A partially different opinion was expressed by the EACJ which acknowledged that pursuant to Art. 38 EAC Treaty national courts or any other dispute resolution mechanism cannot be seized of a matter concerning the interpretation and application of the Treaty but then concluded that the dispute settlement mechanisms created under the Customs Union and Common Market Protocol do not exclude, oust or infringe upon the interpretative jurisdiction of the Court, so they are not in contravention of Art. 38.[57] I really don't agree with this EACJ's opinion, because it is contradictory and grounded on an erroneous interpretation of Art. 38 EAC Treaty.

b *The Applicable Law*

The regulation of the applicable law seems not to be influenced by the legal cooperation model embodied by the organization in which the regional court operates. Thus, all the judicial bodies under consideration share the practice to apply firstly the primary and secondary law of the organization and then, just in residual way, the international law – both its general principles and conventional acts – in order to fill normative gaps of the law of the organization in relation to specific issues.

54 Art. 24(1) Protocol on the establishment of the East African Customs Union (Arusha, 2 Mar. 2004); Art. 54(2) Protocol on the establishment of the East African Community Common Market (Arusha, 20 Nov. 2009).

55 In this sense, Ruhangisa, "Rule of Law," 25.

56 John Eudes Ruhangisa, "Parallel Jurisdiction of Courts: The View from the EACJ," *Commonwealth Law Bulletin* 36 (2010): 575.

57 Reference No. 1/2011, *The East African Law Society v. the EAC Secretary-General*, 14 Feb. 2013, Section 37 *et seq*. See also, Reference No. 9/2012, *The East African Centre for Trade Policy and Law v. the EAC Secretary-General*, 9 May 2013, Section 72 *et seq*.

In the SICA and the MERCOSUR this practice is expressly provided for by their founding treaties[58] and then confirmed by jurisprudential developments.[59]

In the other judicial systems founding treaties don't contain specific provisions concerning the applicable law; however an analysis of their main jurisprudence confirms my previous remarks.[60] So, to subsidiary extent with respect to the primary application of the law of the organization, sometimes the EACJ, the ECOWAS CJ and the TJCA apply international law in their rulings. In particular, the EAC and ECOWAS judges use to have regard for rules and agreements of public international law and to refer to the jurisprudence of national supreme courts and other international courts.[61] Particularly, when dealing with human rights violations the ECOWAS CJ often applies the African Charter on Human and Peoples' Rights and some other international human rights instruments and quote the ECHR's main rulings to corroborate its conclusions. Then, in some other cases, the EACJ as well as the TJCA make references *incidenter tantum* both to the general principles of international law and to those common to the law of Member States.

Moreover, as I'll explain in details later, the analysis of jurisprudence reveals the influence the ECJ's case law exercises over the regional courts under consideration.[62] In the SICA this approach lays its legal foundations in Art. 30

58 Art. 30 Convenio CCJ; Art. 34 PO and Laudo VII, *Argentina c. Brasil*, 19 Apr. 2002, Section 8.8; Laudo VI, *Uruguay c. Brasil,* 9 Jan. 2002, Section B. In literature, see Ernesto J. Rey Caro, "El derecho del MERCOSUR y el derecho internacional en la doctrina jurisprudencial de los tribunales arbitrales ad hoc," in *Pacis artes: obra homenaje Gonzáles Campos*, eds. Luis Ignacio Sánchez Rodríguez *et al.* (Madrid: Universidad Autónoma de Madrid, 2005): 529; María Belén Olmos Giupponi, "International Law and Sources of Law in MERCOSUR: An Analysis of a 20-Years Relationship," *LJIL* 25 (2012): 707.

59 MERCOSUR Laudo I, *Argentina c. Brasil*, 28 Apr. 1999, Section 56; Laudo VII, Section 8.10. CCJ Expediente No. 1-30-4-2004, Section 49; Expediente No. 2-11-8-2006, *Portillo Cabrera c. Guatemala*, 5 May 2008, Section 7 *et seq*.; Expediente No. 105-2-26-03-2010, *Suárez Espinoza c. Panamá*, 20 Oct. 2010, Section 12.

60 Until now, the CJ UEMOA, the CJ CEMAC and the COMESA CJ have settled disputes brought before them applying the law of their own organizations exclusively. The jurisprudence of the CJ CEMAC and the COMESA CJ is really scanty and mainly they settle disputes between the organization and its officials.

61 In order to find pertinent and comprehensive answers to particular issues or simply to corroborate their own conclusions, the EACJ quotes rulings of worldwide national supreme courts and of international courts, such as the ICJ, and often refers to the Vienna Convention of the Law of Treaties.

62 Laurence Burgorgue-Larsen, "Prendre les droits communautaires au sérieux ou la force d'attaction de l'expérience européenne en Afrique et en Amérique latine," in *Les dynamiques*

Convenio CCJ which provides for the possibility for the CCJ to apply the 'principios del Derecho de la Integración' as subsidiary source of law. The importance of this unusual provision shouldn't be disregarded as it expresses SICA States' acknowledgement of the existence of common rules and principles to every integration process, which correspond to those elaborated by the EU.

The regulation of the applicable law seems to be partially different in the CARICOM because Art. 17 CCJ Agreement provides that the CaCJ, in exercising its original jurisdiction, applies 'such rules of international law as may be applicable'. However the CaCJ clarified that 'rule of international law' consist not only of customary international law but also of the general principles of law recognized by civilized nations and they have a residual application in its rulings.[63] In practice the CaCJ usually applies the CARICOM law, sometimes referring to the EU law and its main principles.[64] In particular, recently the CaCJ has asserted – almost obscurely – the direct effect of norms approved by a Conference Decision, even if Member States have not yet incorporated them.[65]

3 The Competences of Regional Courts

The comparative analysis of founding treaties reveals that regional courts under consideration are entitled to wide and complex competences which are largely inspired by the ECJ's ones.[66] They may settle: (1) disputes against

du droit européen en début de siècle. Etudes en l'honneur de Jean-Claude Gautron, eds. Claude Blumann *et al.* (Paris: Pedone, 2004), 563; Ricardo Alonso García, *Un paseo por la jurisprudencia supranacional europea y su reflejo en los sistemas suramericanos de integración* (Córdoba: Advocatus, 2008); Simone Marinai, "La Corte di Giustizia e la sua interazione con gli organismi giurisdizionali dei sistemi economici regionali dell'America Latina," in *L'evoluzione*, 286; Stefaan Smis and Stephen Kingah, "The Court of Justice of the European Union and other Regional Courts," in *Intersecting Interregionalism: Regions, Global Governance and the EU*, eds. Francis Baert *et al.* (Dordrecht: Springer, 2014), 151.

63 CaCJ [2009] CCJ 2 (OJ), *Trinidad Cement Limited v. the Caribbean Community*, 5 Feb. 2009, Sections 40–41.

64 CaCJ [2009] CCJ 5 (OJ), *Trinidad Cement Limited, TCL Guyana Incorporated v. Guyana,* 20 Aug. 2009; [2012] CCJ 1 (OJ), *Hummingbird Rice Mills Ltd v. Suriname and The CARICOM*, 23 Mar. 2012. See, Rolston Nelson, "The Applicable Law in the Caribbean Single Market," *Amicus Curiae Issue*, 87 (2011): 8.

65 CaCJ [2013] CCJ 3 (OJ), *Shanique Myrie v. the State of Barbados and the State of Jamaica*, 4 Oct. 2013, Section 50 *et seq*.

66 Among others, see Allan F. Tatham, "Exporting the EU model: A judicial dimension for EU International relations?" *Studia Diplomatica* 63 (2010), No. 3/4: 137; Karen Alter, "The Global Spread of European Style International Courts," *West European Politics* 35 (2012): 135.

Member States; (2) disputes against institutions; (3) disputes between the organization and its officials.[67] Then they may give preliminary rulings and advisory opinions.[68] The regulation of such judicial actions presents some differences from a judicial system to another, so it is difficult to classify them in rigid and homogeneous categories. However, it is to be noted that the more the regional organization tends to realize the main features of supranational model, the more the regulation of such competences tends to be similar to that provided for by the TFEU. In sum, the competences assigned to a regional court and its regulation seem to be related to the cooperation model each considered organization develops.

It is worth noting that, unlike the ECJ, some of the courts under consideration are also entitled to competences other than those of regional judicial bodies. So, pursuant to Art. 22 Convenio CCJ, the CCJ operates also as international tribunal (a), arbitral tribunal (ch, h), national supreme court (f), national and international permanent advisory organ (d, Art. 23) and may promote comparative studies about national legislations in order to enhance mutual legal harmonization (i).

The CaCJ exercises also an appellate jurisdiction acting as a national supreme court (Art. 25 CCJ Agreement).[69] The CJ CEMAC may also determine disputes between the Commission Bancaire d'Afrique Centrale (COBAC) and national banks in last resort (Art. 4.3 Conv. Cour CEMAC).

a ***Contentious Competences***

a.1. As already said, similarly to the ECJ, all the regional courts under consideration may settle disputes against Member States concerning their

67 Art. 21 Conv. Cour CEMAC; Art. 15(4) Règ. Cour UEMOA; Art. 40 Tratado TJCA; Art. 27(1) COMESA Treaty; Art. 31 EAC Treaty; Art. 9(1)(f) ECOWAS Prot.; Art. 22(j) Convenio CCJ. In the MERCOSUR disputes between the organization and its officials are settled by the Tribunal Administrativo-Laboral (Resolución GMC No. 26/01, MERCOSUR/GMC/RES. No. 54/03, Tribunal Administrativo-Laboral del MERCOSUR, Montevideo, 10 Dec. 2003). The CaCJ doesn't have jurisdiction over disputes between the organization and its staff.

68 Similarly to the ECJ (Arts. 272–273 TFEU), the regional courts (with the exception of the CaCJ and the MERCOSUR tribunals) may also determine disputes arising from an arbitration clause (Art. 32 EAC Treaty; Art. 28 COMESA Treaty; Art. 9 ECOWAS Prot.; Art. 22 Conv. Cour CEMAC and Art. 49 Statut Cour CEMAC; Art. 15(8) Règ. Cour UEMOA; Art. 38 Tratado TJCA; Art. 22.ch-h Convenio CCJ).

69 Dereck O'Brien and Sonia Morano-Foadi, "CARICOM and its Court of justice," *Common Law World Review* 4 (2008): 334; Rose-Marie Belle Antoine, "New Directions in Public Law in the Commonwealth Caribbean – some reflections," *Commonwealth Law Bulletin* 35 (2009): 31.

infringement of treaty obligations or, more in general, their violation of the law of the organization.

In the supranational organizations – the CAn and the UEMOA (with the only exception of the CEMAC) – rules governing this action are very similar to those provided for by Arts. 258–260 TFEU.[70] It is divided into two phases (a pre-contentious one and a contentious one)[71] and a central role in initiating this action is played by the executive organ (Secretaría General/Commission) which has a relevant discretionary power.[72] Moreover, both in the CAn and the UEMOA, as in the EU (Art. 259 TFEU), the infringement action can be initiated by another Member State after involving the executive organ in the pre-contentious phase (Art. 24 Tratado TJCA[73]; Art. 15.1.2 Règ. Cour UEMOA). However, unlike the EU and the UEMOA, Art. 25 Tratado TJCA grants *locus standi* also to natural/legal persons who can resort to the TJCA after involving the Secretaría General.[74]

As mentioned above, similarities to the EU infringement action are more veiled in the CEMAC; the founding treaty confers to the CJ CEMAC the power not only to ascertain Member States' violation of Community law (as it is in the EU judicial system), but also to condemn them by imposing sanctions (Art. 4.2 Traité revisé CEMAC).[75] However the synthetic content of this provision makes it difficult to express any further assessment concerning procedural aspects and *locus standi*.

In the judicial systems established within intergovernmental organizations the regulation of the infringement action presents some differences from the

70 Arts. 23–31 Tratado TJCA and Arts. 107–120 Estatuto TJCA; Art. 15(1) Règ. Cour UEMOA.

71 As in the EU, in the CAn and the UEMOA the pre-contentious phase ends with a reasoned opinion delivered by the executive organ. Then, the TJCA and the CJ UEMOA have to ascertain if a Member State is really in breach of treaty obligations (Art. 27 Tratado TJCA; Art. 15.1.4 I Règ. Cour UEMOA).

72 In the CAn the power of the Secretaría General is less discretionary than that one of the UEMOA and the EU Commissions, because if the State goes on failing to fulfill its obligations even after the reasoned opinion, the Secretaría General must resort to the TJCA; so it is under an obligation. Moreover it has to deliver its reasoned opinion in a fixed term.

73 Regarding procedural aspects see Art. 24(2-3) Tratado TJCA and Arts. 107–111 Estatuto TJCA and Proceso 43-AI-99, *S.G. c. Ecuador*, 21 Aug. 2002, 7–12; Proceso 03-AI-2010, *ETB S.A. E.S.P. c. Colombia*, 26 Aug. 2011, 9–11.

74 Art. 31 Tratado TJCA also provides for the individuals' right to resort to national courts when a Member State fails to fulfill treaty obligations thus violating its rights. This procedure cannot be applied contemporary to the one of Art. 25 Tratado TJCA.

75 Georges Taty, "Le recours en manquement d'Etat de l'article 4 du Traité revisé de la CEMAC: analyse critique," *RDUA* 1 (2010): 24.

European one; the more the interstate institutionalized cooperation tends to realize some (more or less relevant) features of supranational model, the more the similarities to the EU judicial system are evident. Thus, in the EAC and COMESA judicial systems this action is divided into a pre-contentious phase and in a contentious one and the executive organ (the Secretary-General) plays an important role in initiating it (Art. 29 EAC Treaty; Art. 25 COMESA Treaty). However the Secretary-General's power is not as discretionary as the European Commission's one, indeed, at the end of the pre-contentious phase, he cannot decide to refer the matter to the Court autonomously, but firstly he has to direct it to the Council.[76] Moreover, the Secretary-General has not an exclusive power to activate the infringement action, because even a Member State or a legal/natural person may initiate it directly to the Court without involving him in a pre-contentious phase.[77] Lastly, unlike the EU, through an infringement action EAC and COMESA legal/natural persons may challenge the legality of national acts directly before the regional court.[78] In particular, the COMESA CJ clarified that they are only permitted to challenge national conduct or measures that are unlawful or an infringement of the Treaty but not the non-fulfillment of a Treaty obligation by a Member State.[79] I really don't agree with this Court's opinion because I think it is founded on an erroneous interpretation of Arts. 24–26 COMESA Treaty. In my opinion there's no difference between 'an infringement of the Treaty' and 'the non-fulfillment of a Treaty provision' because the latter itself represents 'an infringement of the Treaty'.

Even in the ECOWAS regulation of the infringement action it is possible to find some similarities with the European one, particularly regarding the *locus standi* granted to each member State and the Executive Secretary (Art. 10.a ECOWAS Prot.).[80] However founding provisions are too synthetic regarding the procedural aspects and the Executive Secretary's role, so it is not possible to express further considerations. It is worth noting that, unlike the EU and the

76 The Council shall decide whether the matter should be referred by the Secretary-General to the Court immediately or be resolved by the Council itself. In the last case, the matter shall be directed to the Court only if the Council fails to resolve it.

77 Art. 28 and Art. 30 EAC Treaty; Arts. 24 and 26 COMESA Treaty.

78 In the COMESA the natural/legal persons have first to exhaust local judicial remedies before referring the matter of a Member State's infringement to the Court. This provision protects the State's sovereignty and judicial autonomy, on the one hand, and grants to individuals a wider judicial protection of their rights, on the other hand.

79 COMESA CJ Reference No. 1/2012, *Polytol Paints and Adhesives Manufactures co. LTD v. Mauritius*, 31 Aug. 2013, 9.

80 Unlike the EU, in the ECOWAS even the Authority may initiate an infringement action (Art. 7.g ECOWAS Treaty).

other judicial bodies under consideration, the ECOWAS CJ has also jurisdiction to determine case of violation of human rights occurred in any member State brought before it by individuals (Art. 9.4 ECOWAS Prot.).[81]

Even the CCJ's and the CaCJ's founding agreements provide for a synthetic regulation of the action against Member States which is different from the one prescribed by the TFEU, particularly regarding procedural aspects and *locus standi*. Firstly the claimants may resort to the court directly, without involving the executive organ in a pre-contentious phase. Then the access to the judicial body is granted also to natural and legal persons. In particular, the CCJ may adjudicate litigations among Member States (Art. 22.a Convenio CCJ) and disputes concerning the compatibility of national acts with the SICA law brought before it by each member State, SICA institutions and natural/legal persons (Art. 22.c Convenio CCJ).

The CaCJ may settle disputes between Member States or between natural/legal persons and Member States concerning the latter's infringement of the Treaty (Arts. 187.a and 211 RTC).[82]

In the light of its arbitral nature, in the MERCOSUR the access to an *ad hoc* tribunal or to the TPR is open exclusively to Member States which don't have to involve the executive organ previously.[83] Nevertheless, some similarities to the EU infringement action derive from the jurisprudence. Indeed, as the ECJ, MERCOSUR arbiters affirmed the State's liability for actions performed by its own organs and national public entities (Laudo VI). Moreover they maintained that State's infringement also derives from individuals' actions when it fails to take all the necessary measures to prevent them and the damages flowing from them.[84]

As known, the State's infringement of obligations deriving from the law of the organization may also determine, under certain conditions, its liability for

81 Most of the disputes settled by the ECOWAS CJ have concerned violations of human rights. See lastly, Solomon T. Ebobrah, "Critical issues in the human rights mandate of the ECOWAS Court of Justice," *J. Afric. L.* 54 (2010): 1; Ludovica Poli, "La Corte di giustiza dell'ECOWAS: quali prospettive per un concreto miglioramento della tutela dei diritti umani in Africa?" *DUDI* (2014): 133.

82 Pursuant to these provisions, CARICOM institutions may not bring to the Court an action against a Member State for failure of its treaty obligations. This is not 'strange' if we consider that in the CARICOM there isn't an executive organ like the European Commission entitled to monitor the respect of the Treaty. See Dereck O'Brien and Sonia Morano-Foadi, "The Caribbean Court of Justice and Legal Integration within CARICOM: Some Lessons from the European Community," *LPICT* 8 (2009): 399.

83 Parties have only to try an amicable settlement of the dispute through negotiation. If they fail, they are free to choose if involving the GMC or resorting to the arbitral tribunal directly.

84 Laudo XI, *Uruguay c. Argentina*, 6 Sept. 2006, Section 116.

non-compliance with the Community law and its obligation to compensate the damage caused to individuals. This principle, stated by the ECJ in the *Francovich* case,[85] was accepted by some other regional courts independently of the legal nature of their organizations.[86] In particular, the CaCJ and the CCJ reproduced the ECJ's legal reasoning and applied it to the cases under their consideration.[87] The CCJ defined it even as one of 'los principios rectores del derecho comunitario centroamericano'.[88] However, although they drew inspiration from the ECJ's jurisprudence, they reached a partially different conclusion; precisely they pointed out that State's liability may be enforced by individuals through the regional court and not through the national ones as in the EU.

Otherwise in the CAn the principle of State's liability for non-compliance of Community law is currently provided for by Art. 30 Tratado TJCA. This provision incorporates the jurisprudence of the TJCA which derived the State's liability from the application of the principle of loyal cooperation (Art. 4 Tratado TJCA),[89] as the European judges did in *Francovich case*.

a.2. As already said, regional courts may also settle disputes against institutions which may concern: (1) the review of legality of their acts; (2) their omissions; (3) any non-contractual liability of the organization and reparation of damages for official acts or omissions of any institution or its officials in the performance of their official functions.

Once again, similarities to the EU model are more relevant and evident in judicial systems established within supranational organizations. Thus, in the CAn,

85 ECJ joined cases C-6/90 and C-9/90, *Francovich and Bonifaci v. Italy*, 19 Nov. 1991. Among others see, Fabio Ferraro, *La responsabilità risarcitoria degli Stati per violazione del diritto dell'Unione* (2nd edn. Milano: Giuffré, 2012).

86 Consistently with the intergovernmental nature of the MERCOSUR, arbiters recognized only the State's international liability for non-compliance of the MERCOSUR law (Laudo IV, *Brasil c. Argentina*, 21 May 2001, Considerando 17; Laudo VII, Section 7.8; Laudo XI, Section 189). However, a partial 'opening' to the State's liability to compensate damages suffered by individuals is expressed by the TPR in Resolución No. 1/2008, *Respecto del planteo procesal de previo prenunciamiento introducido por la República argentina en el marco asunto no. 1/2008*, 18 Mar. 2008, Considerando III.

87 CaCJ [2009] CCJ 5 (OJ); [2012] CCJ 1 (OJ), Section 30. CCJ Expediente No. 1-30-4-2004, 58 *et seq*.; Expediente No. 2-11-8-2006, 16 *et seq*.; Expediente No. 25-05-29-11-1999, *Nicaragua c. Honduras*, 27 Nov. 2001.

88 CCJ Expediente No. 10-5-11-96, *Coto Ugarte c. El Salvador*, 5 Mar. 1998, 8.

89 TJCA Proceso 6-IP-93, 25 Feb. 1994, 5.

UEMOA and CEMAC the action for review of the legality of institutions' acts is largely inspired by the EU action for annulment (Arts. 263–264 TFEU), in particular regarding the *locus standi* (each Member State, institutions and, under specific conditions, natural/legal persons), the grounds for review[90] and the acts to be challenged. Indeed, the TJCA, the CJ UEMOA and the CJ CEMAC are empowered to review the legality of binding acts adopted by institutions.[91] In general they are expressly indicated in each founding agreement; thus in the CAn this normative 'list' is peremptory[92] while in the UEMOA the Court has accepted to review the legality of any act producing legal effects vis-à-vis third parties,[93] thus embracing the ECJ's substantial perspective.[94] Little differences from the EU action for annulment concern a wider access to the court granted to natural and legal persons who may challenge any act of institutions alleging 'un intérêt certain and légitime' (Art. 14.1 Conv. Cour CEMAC), a damage suffered (Art. 15.2.2 Règ. Cour UEMOA) or the violation of their 'derechos subjetivos o…interéses legitimos' (Art. 19 Tratado TJCA). Moreover, in the CAn Member States aren't privileged claimants because they cannot challenge those acts adopted by their affirmative vote (Art. 18 Tratado TJCA). Finally, similarly to what prescribed by Art. 277 TFEU, the UEMOA and CEMAC judicial systems

90 In particular, Art. 15 Conv. Cour CEMAC reproduces the same grounds for review indicated by Art. 263(2) TFEU. On the contrary, in the CAn the normative gap of Art. 17 Tratado TJCA, which simply mentioned the violation of Andean norms as grounds for review, was filled by the TJCA's jurisprudence (Proceso 5-AN-97, *Venezuela c. Junta*, 8 Jun. 1998, 9 and lastly Proceso 23-AN-2002, *Perú c. S.G.*, 19 Aug. 2003, 14). The latter reproduces literally ECJ's opinion expressed in case C-110/97, *The Netherlands v. Council*, 22 Nov. 2001, Section 137.

91 Arts. 17–22 Tratado TJCA and Arts. 101–105 Estatuto TJCA; Art. 15(2) Règ. Cour UEMOA; Arts. 14–16 Conv. Cour CEMAC.

92 In the CAn only Andean binding acts mentioned in Art. 17 Tratado TJCA, can be challenged (Proceso 39-AN-2004, *Empresa Sistema Satelital Andino Simón Bolívar ANDESAT S.A. E.M.A. c. Comisión de la Comunidad Andina*, 11 Mar. 2005). On the contrary, dealing with 'actes juridiques', Arts. 14–15 Conv. Cour CEMAC give to the Court the power to review the legality of any act listed in Arts. 40–45 Traité revisé CEMAC, even those non-binding (in this sense, arrêt No. 008/CJ/CEMAC/CJ/10, *Société Anonyme des Brasserie du Cameron c. Tchad*, 27 May 2010). However, pursuant to Art. 11 Conv. Cour CEMAC the Parliamentary acts seem to be excluded from the judicial review.

93 CJ UEMOA arrêt No. 3/2005, *Affaire Yaï c. Conférence des Chefs d'Etat et de Gouvernement de l'UEMOA e Commission de l'UEMOA*, 27 Apr. 2005; arrêt No. 1/2006, *Affaire Yaï c. Conférence des Chefs d'Etat et de Gouvernement de l'UEMOA e Commission de l'UEMOA*, 5 Apr. 2006.

94 ECJ case 22/70, *European Commission v. Council of the European Communities*, 31 Mar. 1971, Sections 38–43.

provide for the possibility to challenge the legality of institutions' acts through the plea of illegality (Art. 11 Prot. Ad. UEMOA; Art. 14.2 Conv. Cour CEMAC).

Even the judicial bodies established within intergovernmental organizations are empowered to review the legality of binding acts adopted by institutions[95]; however the regulation of such action, which is often too synthetic, presents some (more or less) relevant differences from the EU model according to the more or less strong 'aspiration' of interstate cooperation to the supranational model. As a consequence, differences are evident also from one judicial system to another.

Thus, in the ECOWAS similarities to the EU annulment action are evident particularly regarding the *locus standi*. Indeed, among the institutions, just the Council of Ministers and the Executive Secretary may challenge the Community acts; they as well as Member States are privileged claimants, because they don't have to allege a specific interest to activate the proceedings and can challenge any ECOWAS act. On the contrary, natural/legal persons can resort to the Court only for determination of an act which violates their rights (Art. 9.1.c; Art. 10.b-c ECOWAS Prot.)

On the contrary, the EAC and the COMESA treaties don't grant to institutions the right to resort to the Court for review of a Community act (Arts. 28 and 30 EAC Treaty; Arts. 24 and 26 COMESA Treaty). They provide that any legal/natural person, who is resident in a member State, and each Member State can challenge the legality of every binding act adopted by institutions without alleging a specific interest or the violation of their own rights.[96] So, unlike the EU, these categories of claimants are on the same level, because they both are supposed to have a general interest in the respect of the law of the organization.

Even in the SICA all the claimants are on the same level; indeed Art. 22(g) Convenio CCJ grants the right to access to the CCJ to 'cualquier afectado por los Acuerdos del Organo u Organismo del SICA', so any claimant (Member State, institution and natural/legal person) has to allege the violation of its/his own right and the damage suffered. However, Member States cannot challenge the legality of SICA acts adopted through their affirmative vote (Art. 60 Ordenanza de Procedimiento).

95 In Expediente No. 5-20-12-2006, 8, the CCJ explained that the term 'acuerdo' in Art. 22(b) Convenio CCJ means any act adopted by institutions. However, it didn't clarify if only binding acts can be challenged, so it can be presumed that even the legality of non-binding acts can be reviewed. According to the wording of Art. 9(1)(c) ECOWAS Prot. the ECOWAS CJ may review also the legality of non-binding acts.

96 In the EAC the claimant (Member State or natural/legal person) may challenge the legality of any act of any institution. In the COMESA only the acts of the Council can be challenged before the Court.

The CaCJ's competence to review the legality of CARICOM acts is provided for synthetically by Arts. 187(c) and 211(b)(d) RTC which confer *locus standi* to each Member State and any natural/legal person, under conditions prescribed by Art. 222 RTC.[97] CARICOM institutions have no right to initiate this kind of judicial action.[98]

Finally, consistently with its strong intergovernmental nature, the MERCOSUR doesn't empower its arbitral tribunals to settle disputes against institutions.[99]

As known in the EU the action for failure to act is another judicial remedy to control the respect of the rule of law by EU institutions (Art. 265 TFEU). Such a similar action is provided for also in a few of regional judicial systems under consideration.[100] In particular, among the courts established within supranational organizations, just the TJCA has jurisdiction to settle disputes concerning an institution's failure to act (Art. 37 Tratado TJCA)[101] and its regulation is really similar to that prescribed by the TFEU.[102] However, differently from the EU model, the TJCA's judgment has a constitutive nature and legal/natural persons may challenge any failure to act even if it concerns a non-binding act and it isn't addressed to them. They just have to allege the violation of their rights or legal interests (Art. 132 Estatuto TJCA).[103]

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97 Treaty provisions don't regulate the CARICOM action for annulment in details and until now the CaCJ's jurisprudence has partially filled normative gaps ([2009] CCJ 04 (OJ), *Trinidad Cement Ltd v. Caribbean Community*, 10 Aug. 2009, Sections 38–41; [2012] CCJ 1 (OJ), Section 30).

98 Art. 13(4)(g) RTC confers to the Council the exclusive power to settle disputes between CARICOM institutions.

99 TPR Opinión consultiva No. 1/2008, *Sucesión Carlos Schnek y otros c. Ministerio de Economia y Finanzas y otro*, 24 Apr. 2009, Section 33. However, pursuant to Art. 3(1) Reglamento Protocolo de Olivos, the TPR seems to have the power to review the legality of MERCOSUR acts by giving an advisory opinion.

100 The CCJ, the CaCJ, the ECOWAS CJ and the MERCOSUR tribunals aren't empowered to hear action for institutions' failure to act probably because their statutory treaties don't provide for strict obligations for the institutions to adopt specific acts. So the latter are granted a broad discretionary power which is strictly related to the intergovernmental nature of inter-state cooperation.

101 The CJ UEMOA and the CJ CEMAC aren't empowered to hear action for institutions' failure to act. This can be regarded as inconsistent with the supranational legal nature of interstate cooperation within such regional organizations.

102 In the CAn as well as in the EU, the action is admissible only if the institution has first been called upon to act within a pre-contentious phase.

103 In the CAn, as well as in the EU, Member States and institutions are privileged claimants because they don't have to allege a specific interest or damage suffered to bring a 'recurso por omisión' before the TJCA.

More broadly the EAC and COMESA treaties provide for the Court's competence to review the legality of any action of institutions on the ground that it is 'unlawful or an infringement of the provisions of this Treaty' (Arts. 28.2 and 30.1 EAC Treaty; Art. 24 COMESA Treaty). If we interpret the term 'action' in a broad sense, it could include also a failure to act in so far as it is an infringement of treaty provisions. The regulation of such action is different from the one prescribed by Art. 265 TFEU particularly regarding procedural aspects and *locus standi*. Firstly the claimant may bring the action directly to the Court and he doesn't have first to call upon the institution to act. Then in the COMESA only Member States may refer this kind of matters to the Court, while in the EAC this right is extended also to natural/legal persons. Additionally, the EACJ is empowered to review the legality of an action of any organ or institution of the organization, while the COMESA CJ's power is limited to the actions of the Council of Ministers.

Finally, similarly to the ECJ (Arts. 268 and 340.2 TFEU) both the courts established within supranational organizations (TJCA, CJ CEMAC, CJ UEMOA)[104] and those operating in the intergovernmental organizations aiming more significantly to the supranational model (ECOWAS CJ and COMESA CJ) have jurisdiction to determine any non-contractual liability of their own organization and to order reparation of damages caused by acts or omissions of any institution or its officials in the performance of their functions.[105] The TJCA's competence over such issues is not prescribed by the Tratado TJCA but it's the result of its jurisprudence.[106] In the other cases, the courts' competence is expressly provided for by each founding treaty. However provisions regulating such judicial action are generally too synthetic, so it is difficult to find out similarities to the EU model.[107] Only the CJ UEMOA tried to fill this normative gap through its judgments taking into relevant account the ECJ's jurisprudence and often reproducing its legal reasoning and main conclusions. In particular, expressly quoting the *Aktien-Zuckerfabrik Schöppenstedt* case,[108] the CJ UEMOA

104 TJCA Proceso 214-AN-2005, *EGAR. c. S.G.*, 21 Mar. 2007; Art. 15(5) Règ. Cour UEMOA; Art. 20 Conv. Cour CEMAC.

105 Art. 9(1)(g) ECOWAS Prot.; Art. 27(2) COMESA Treaty. In the other intergovernmental organizations the lack of the regional court's jurisdiction over issues concerning the non-contractual liability of the organization may be justified by the legal nature of interstate cooperation which translates into the institutions' discretionary power.

106 TJCA Proceso 214-AN-2005, 17–20.

107 Similarly to Art. 340(2) TFEU, the CJ CEMAC has to apply general principles of law common to Member States' law systems (Art. 20.2 Conv. Cour CEMAC).

108 ECJ case 5/71, *Aktien-Zuckerfabrik Schöppenstedt v. Council*, 2 Dec. 1971.

stated the autonomy between the non-contractual liability action and the annulment action.[109] Then it accepted and applied the 'European' conditions so as the non-contractual liability arises.[110]

b *Preliminary Ruling Mechanism*

In the European integration process the decentralized application of the EU law and the direct effect of its norms determine the ECJ's competence on preliminary rulings directed to ensure the correct and uniform interpretation and application of the law within the territory of each Member State (Art. 267 TFEU).[111]

This mechanism fosters a judicial 'dialogue' between the regional court and national judges; as such it characterizes also the judicial systems under consideration regardless of the legal nature of the organization where they operate.[112] Thus, within the supranational organizations (CAn, UEMOA, CEMAC) the preliminary ruling procedure is very similar to the one provided for in the EU.[113] Even these courts' jurisprudence over issues related to this procedure is largely inspired by the ECJ's rulings. In particular the CJ UEMOA excluded that arbiters may request the Court to give a preliminary ruling on a question concerning the UEMOA law, thus embracing the European judges' opinion.[114] Differently, in

109 CJ UEMOA affaire No. 01/98, *Laubhouet Serge c. Commission*, 29 May 1998; affaire No. 03/02, *Kossi Mawuli Agokla c. Commission*, 18 Dec. 2002.

110 CJ UEMOA affaire No. 01/03, *Haoua Toure c. Commission*, 25 May 2003.

111 The TFEU provision regulating such action has been completed by the ECJ's jurisprudence particularly regarding the concept of 'courts and tribunals of Member States' which can operate the preliminary reference (ECJ case C-54/96, *Dorsch*, 17 Sept. 1997, Section 23, the reproduced in a constant jurisprudence) and the exceptions to the last resort judges' obligation to refer to the ECJ (joined cases 28–30/62, *Da Costa*, 27 Mar. 1963, then restated in a constant jurisprudence).

112 Patrick Daillier *et al.*, "La jurisprudence des tribunaux des organisations d'intégration latino-américaines (Chronique no. 2 – Les voies de recours)," *AFDI* 52 (2006): 562; Roberto Virzo, "The Preliminary Ruling Procedures at International Regional Courts and Tribunals," *LPICT* 10 (2011): 285; George Taty, "La procedure de renvoi prejudicial en Droit Communautaire," *RDUA* 2 (2011): 28; Luciane Klein Vieira, *Interpretación y aplicación uniforme del Derecho de la integración* (Buenos Aires: BdeF, 2011); Marie-Colette Kamwe Mouaffo, "Le renvoi prejudiciel devant la court de justice CEMAC: une etude à la lumière du droit communautaire européen," *Penant* 122 (2012): 206.

113 Arts. 32–36 Tratado TJCA; Arts. 17–18 Conv. Cour CEMAC; Art. 15(6) Règ. Cour UEMOA.

114 Avis No. 1/2000, *Demande d'avis de la Commission de l'UEMOA relative au projet de code communautaire des investissements de l'UEMOA* (2 Feb. 2000), where the CJ UEMOA drew inspiration from the *Nordsee* case (ECJ case 2/81, 23 Mar. 1982). However, recently the ECJ seems to have changed its original opinion granting an arbitral tribunal – under

the CAn the preliminary ruling procedure presents some interesting difference from the EU model. Firstly the TJCA may give a preliminary ruling only on a question concerning the interpretation of Andean law.[115] Then, as stated by the TJCA itself, last resort judges are under the absolute obligation to request the preliminary ruling, even when there's a constant TJCA's jurisprudence on the same issue.[116] So the theory of 'acte clair' doesn't apply in the Andean judicial system.[117] Additionally only last resort judges are under the obligation to suspend the national proceeding pending the TJCA's preliminary ruling.[118] Then, according to the TJCA even national arbiters may request a preliminary ruling.[119] In essence, the TJCA interpreted some aspects of this judicial action differently from the ECJ even if the normative provisions are quite similar to the EU ones.

Regarding the regional judicial bodies operating within intergovernmental organizations, the regulation of the preliminary ruling procedure is widely inspired by the EU one, even if it is possible to find some differences which can be more or less relevant according to the more or less strong 'aspiration' of the interstate cooperation to the supranational model.

Thus Art. 30 COMESA Treaty reproduces the content of Art. 267 TFEU quite literally, even if, unlike the ECJ, the COMESA CJ hasn't jurisdiction to give preliminary rulings concerning the interpretation of secondary law. The regulation of preliminary ruling procedure provided for by Art. 34 EAC Treaty is

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certain conditions – the right to request a preliminary ruling (ECJ order case C-555/13, *Merck Canada Inc. v. Accord Healthcare Ldt. and others*, 13 Feb. 2014, Section 25).

115 Art. 20(2)(3) Tratado TJCA seems to confer to the TJCA the competence to determine the legality of Andean secondary acts incidentally. However, unlike Art. 267 TFEU, this provision doesn't make a distinction between national courts against whose judgment there is judicial remedy under the domestic law and the last resort ones. Moreover a national court may refer a preliminary question to the TJCA exclusively at the request of any of the parties to the main action.

116 TJCA Proceso 11-IP-96, *Belmont*, 29 Aug. 1997, sub II, Sections 10–11.

117 If a last resort judge doesn't refer a preliminary question to the TJCA, an infringement action against the Member State he belongs to may be initiated (Proceso 04-IP-94, 7 Aug. 1995, Section 13; Proceso 03-AI-2010, Section 8). Juan Carlos Dueñas Muñoz, "Análisis crítico de la teoría del acto aclarado: su posible aplicación en la interpretación prejudicial andina como garantía de consegración del juez nacional como juez comunitario andino," *Anu. Der. Const. LA* 14 (2008): 523.

118 Arts. 123–124 Estatuto TJCA and TJCA Proceso 6-IP-2001, *Wellcome Foundation Ltd v. Azetavir*, 26. Mar. 2001. On the contrary, in the case of 'a consulta facoltativa': 'Si llegare la oportunidad de dictar sentencia sin que hubiere recibido la interpretación del Tribunal, el juez deberá decidir el proceso' (Art. 122 Estatuto TJCA).

119 TJCA Proceso 03-AI-2010, Sections 11–12; Proceso 57-IP-2012, *Comunicación Celular Comcel S.A.*, 11 Jul. 2012, Section 1.

identical to the one prescribed by the COMESA Treaty with the exception that it doesn't make a distinction between national courts against whose judgment there is a judicial remedy under the domestic law and the last resort ones, and seems to oblige each of them to refer a preliminary ruling to the EACJ, where all conditions are fulfilled.

Similarities to the EU judicial system are softer in the SICA, ECOWAS and CARICOM.[120] Indeed the CCJ, the CaCJ and the ECOWAS CJ have jurisdiction to give preliminary rulings only concerning the interpretation of the law of the organization.[121] Moreover treaty provisions don't distinguish between the national courts against whose judgment there is judicial remedy under the domestic law and the last resort ones, so that in the ECOWAS system every national court is under the mere faculty to refer a preliminary question to the Court. Differently, in the SICA as well as in the CARICOM every national judge is under the obligation to request a preliminary ruling to the regional judicial body.[122] In particular Art. 22(k) Convenio CCJ seems to oblige every national judge to refer to the CCJ whenever he has to apply a SICA norm, apart from its importance to settle the main dispute and its already clear content. So the theory of 'acte clair' doesn't apply in the SICA law system.

Coherently, the most relevant differences from the EU model concern the MERCOSUR system.[123] Indeed the TPR doesn't have a preliminary competence but it is empowered to give advisory opinions regarding the interpretation of MERCOSUR law on request of national supreme courts which act as 'intermediaries' between the *a quo* judge and the TPR.[124] Then, the national judge doesn't

120 Art. 22(k) Convenio CCJ; Art. 14 CCJ Agreement; Arts. 9(1)(a)(b) and 10(f) ECOWAS Prot.

121 The CaCJ may give preliminary rulings concerning only the interpretation of CARICOM primary law, while the CCJ and the ECOWAS CJ may also interpret the secondary law.

122 Scholars think that the CARICOM preliminary ruling procedure is compulsory firstly because national judges refer a question to the CaCJ when they consider that a ruling on the question is necessary to enable them to give a judgment (Art. 211 RTC) and then in the light of the Court's exclusive jurisdiction. See Pollard, *The Caribbean*, 120; Cherubini, "La Corte," 82–84.

123 Comparing its advisory opinions to the ECJ's preliminary rulings the TPR put in evidence the main differences (Opinión consultiva No. 1/2007, *Norte c. Northia*, 3 Apr. 2007, Section B, 1) but also recognized that both procedures pursue the same purpose (Opinión consultiva No. 1/2008, Section 43).

124 Art. 3 PO integrated by MERCOSUR/CMC/DEC no. 37/03 (Montevideo, 15 Dec. 2003) and by MERCOSUR/CMC/DEC. no. 02/07 Reglamento del procedimiento para la solicitud de opiniones consultivas al Tribunal Permanente de Revisión por los Tribunales Superiores de los Estados Partes del MERCOSUR (Rio de Janeiro, 18 Jan. 2007). See, Mateo Cienfuegos, "Opiniones consultivas en el MERCOSUR y cuestiones prejudiciales en la Unión Europea: estudio comparativo," *RDCE* 42 (2012): 433.

have to suspend the proceeding pending the TPR's opinion, so even in the MERCOSUR the theory of 'acte clair' doesn't apply.[125] Finally the TPR's opinions aren't binding.[126]

As the European example teaches, the interaction between the regional judicial bodies and national courts through references for preliminary rulings is essential in making the law of the organization effective and in developing an uniform jurisprudence in the region. However, to date the preliminary ruling mechanism has been rarely tested in most of judicial systems under consideration with the exception of the CAn and the SICA.[127] Firstly this is linked to the limited development of the material secondary law of the organization and to its scanty knowledge within the territory of Member States even by the judicial community. So, maybe national courts, especially those acting in the last resort, should re-conceptualize their own role. Used as they are of being the final arbiters on the meaning of the rule of law, they would have to get used the idea that in the fields covered by the law of the organization they have no longer the last word and are expected to collaborate with the regional court.

c Advisory Opinions

The regional courts under consideration may also give advisory opinions over questions concerning the law of the organization. However the regulation of such competence is heterogeneous from a judicial system to another and, in the meanwhile, is different from the one prescribed by Art. 218(11) TFEU. Each

125 Inconsistently with this perspective Paraguay as well as Uruguay excluded that their national supreme courts may request the TPR to give a 'preliminary' advisory opinion when the MERCOSUR norm to be applied is sufficiently clear. See Suprema Corte de Justicia de Uruguay, *acordada no. 7604*, 24 Aug. 2007; Corte Suprema de Justicia de Paraguay, *acordada no. 549/2008*, 11. Nov. 2008.

126 Few scholars state the binding nature of TPR's advisory opinions pursuant to Art. 38 PO. See Alejandro Daniel Perotti, "La obligatoriedad de las opiniones consultivas emitidas por el Tribunal Permanente de Revisión del MERCOSUR," in *Homenaje a los treinta años del Código Aduanero*, ed. Juan Patricio Cotter (Buenos Aires: Abeledo Perrot, 2011), 453.

127 Within the COMESA, the ECOWAS and the CARICOM the preliminary ruling mechanism has been never used until now – in [2012] CCJ 1 OJ (Section 26) the CaCJ even solicited its application. Maybe this is due to individuals' opportunity to challenge the compliance of national acts with the law of the organization directly before the regional court. The CJ CEMAC and the CJ UEMOA gave just one preliminary ruling (CJ CEMAC arrêt No. 001/CJ/CEMAC/CJ/10-11, *Ecole Inter-etats…c. Djeukam*, 25 Nov. 2010; CJ UEMOA affaire No. 1/04, *Air France c. Syndacat…*, 12 Jan. 2005).

judicial system has its own peculiarity and it is not possible to find common features linked to the legal cooperation model embodied by the organization where the regional court operates.

Thus, regarding supranational organizations, the TJCA has no competence to give advisory opinions. Differently, the CJ CEMAC and the CJ UEMOA may determine the compatibility of international agreements under negotiation or already in force and of projects of Community acts with the law of the organization (Art. 15.2 Règ. Cour UEMOA; Art. 6 Conv. Cour CEMAC).

Regarding the judicial systems in intergovernmental organizations, the EACJ, the COMESA CJ, the ECOWAS CJ and the CaCJ may give advisory opinions over any question concerning the interpretation or application of treaty provisions,[128] while, more broadly, the CCJ's advisory opinions may concern the interpretation and application of the SICA – primary and secondary – law (Art. 22.e Convenio CCJ).[129] In these judicial systems advisory opinions may be requested by each member State and by institutions. In particular, the EAC and the COMESA limit this right only to intergovernmental organs, while in the CARICOM the general term 'Community' used in Art. 13 CCJ Agreement doesn't make it clear what institution may request advisory opinions. It could be the Secretary-General as he 'represents the Community' pursuant to Art. 24 RTC or just the CARICOM intergovernmental organs consistently with the intergovernmental nature of the organization. Differently, in the SICA the right to request advisory opinions to the CCJ acting as regional court is conferred only to institutions.

Regarding the effect of opinions delivered by judicial bodies both in supranational and intergovernmental organizations, the founding treaties don't regulate this aspect and, in practice, they are non-binding. Only Art. 24 Convenio CCJ expressly provides that the CCJ's advisory opinions are binding.

Even in the MERCOSUR tribunals may give advisory opinions, but their regulation presents some original features to be analyzed.[130] The TPR is empowered to exercise a consultative function on request of Member States acting together, MERCOSUR decision-making intergovernmental organs, the Parliament (Art. 13 Protocolo Montevideo) and the national supreme courts. Member States and institutions may request an advisory opinion over any legal question arising from the MERCOSUR law, while it may only concern the interpretation of the MERCOSUR norms when requested by the national supreme

128 Art. 36 EAC Treaty; Art. 32 COMESA Treaty; Art. 11 ECOWAS Prot.; Art. 13 CCJ Agreement.

129 The CCJ may also exercise consultative powers when it acts as international tribunal (Art. 23 Convenio CCJ) and as national supreme court (Art. 22.d Convenio CCJ).

130 Art. 2 MERCOSUR/CMC/DEC no. 37/03; MERCOSUR/CMC/DEC. no. 02/07. In.

courts. In both cases these advisory opinions aren't binding. Over the years the TPR's consultative power has become very relevant in the light of the questions discussed, namely the legal nature of the MERCOSUR law system and its relationship with national and international legal orders.[131] Moreover, in the exercise of its consultative function, maybe the TPR has the power to review the legality of MERCOSUR acts.[132] Indeed if we interpret broadly the expression 'cualquier cuestión jurídica', it is presumable that the TPR could not only determine the right interpretation of MERCOSUR norms but also review their legality. However the TPR's power would be diminished by the opinions' non-binding effect and by the limited standing granted only to Member States and intergovernmental organs.

4 Standing and Preconditions

a *Member States and Institutions*

Independently of the legal nature of the organization, every judicial system grants to Member States a wide and unconditional right to access to the regional court. Indeed they don't have to allege a specific interest to the claim[133] as they are supposed to act in the interest of the organization and its law system.

Regarding the institutions their standing before the regional courts is strictly related to the role they play within the organization, so the more Member States want to create 'powerful' institutions playing an important role in enhancing the integration process, the more their right to access to the court is wide. With reference to this aspect differences between supranational and intergovernmental organizations are more veiled. Thus, similarly to the EU, in the CAn, CEMAC, UEMOA as well as in the SICA and the ECOWAS institutions have as a wide and unconditional right to access to the regional court as the Member States' one.[134] On the contrary, in the EAC, COMESA, MERCOSUR

131 TPR Opinión consultiva No. 1/2007; Opinión consultiva No. 1/2008.

132 Adriana Dreyzin de Klor, "La primera opinión consultiva en MERCOSUR ¿Germen de cuestión prejudicial?" *Rev. es. der. eu.* 23 (2007): 437.

133 As already said, in the CAn and SICA Member States cannot challenge Community acts adopted through their affirmative vote.

134 In general, unlike the EU, judicial systems under consideration don't grant to parliamentary organs the right to access to the court. Only the SICA and the CEMAC, granting the standing before the court to each Community organ, include implicitly even their regional Parliaments.

and CARICOM their *locus standi* is more limited. In particular, in the EAC and in the COMESA institutions may only initiate an infringement action and request an advisory opinion to the court. In the MERCOSUR and in the CARICOM institutions may only request advisory opinions.[135]

b *Legal and Natural Persons' Access to Regional Courts*

The legal/natural persons' access to regional courts is subject to specific conditions changing from one judicial system to another, so it isn't possible to find a common trend[136] or the 'classical' distinction between supranational organizations and intergovernmental organizations is useful to explain the different regulation. However it is to be noted that most of judicial systems grant to individuals a wider and less conditional right to access to regional justice than the one prescribed within the EU.[137]

It is possible to distinguish between: (1) judicial systems where legal/natural persons may bring actions against institutions and Member States; (2) judicial systems where individuals may bring only actions against institutions. The first category includes the CAn, the SICA, the EAC, the COMESA and the CARICOM; however, as already said, each organization regulates individuals' *locus standi* in a different way. Thus, in the EAC and the COMESA legal/natural persons have a broad and unconditional right to access to regional justice because they don't have to allege a specific interest or the violation of their own rights to justify their claim and they may challenge any Community or national act/action.[138] Their right has only a 'territorial' limit, namely just legal/natural persons who are residents in the territory of a

135 Art. 2 Reglamento Protocolo Olivos and Art. 13 Protocolo Montevideo; Art. 13 CCJ Agreement.

136 Marc Jaeger, "Private Parties' Access to the Courts of Regional Economic Integration Organizations: A Comparative Analysis," in *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh*, eds. Pascal Cordonnel *et al.* (Oxford: Hart, 2012), 25; Elisa Tino, "L'accesso diretto dei soggetti privati alla giustizia nelle organizzazioni regionali dei Paesi in via di sviluppo," *DUDI* 7 (2013): 3; Mariolina Eliantonio and Haakon Roer-Eide, "Regional Courts and locus standi for Private Parties: Can the CJEU Learn Something from the Others?" *LPICT* 13 (2014): 27.

137 Marco Gestri, "Portata e limiti del diritto individuale di accesso alla giustizia nell'ordinamento dell'Unione europea," in *Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione europea*, eds. Francesco Francioni *et al.* (Milano: Giuffré, 2008), 463.

138 This was restated by the EACJ in Reference No. 1/2010, *Sitenda Sebalu vs. EAC Secretary...*, 30 Jun. 2011.

Member State may resort to the court.[139] Moreover, when the individuals' claim concerns a member State's failure to fulfill treaty obligation, in the COMESA they have to exhaust domestic judicial remedies before referring the matter to the regional court for determination.

Differently, in the CAn and the SICA, when challenging the legality of acts adopted by institutions, legal/natural persons have to allege the violation of their right.[140] Then, when they bring before the regional court an action against a Member State, in the CAn they have first to carry out the pre-contentious phase alleging the violation of their own right (Art. 25 Tratado TJCA). On the contrary, in the SICA they may challenge the compliance of any national act with the SICA law without alleging a specific interest (Art. 22.g Convenio CCJ)[141] but they have first to exhaust local remedies in domestic courts[142]; so, regarding this action the CCJ has a residual competence.

Even in the CARICOM legal/natural persons may bring before the CaCJ actions against institutions[143] as well as Member States.[144] However their right to access to the court is subject to a special leave of the CaCJ itself,[145] which is granted if: (1) the Treaty intended that a right or benefit conferred on a member State shall entail the benefit of such persons directly[146]; (2) the claimants have been prejudiced in respect of the enjoyment of this right or benefit; (3) the Member State entitled to espouse their claim in proceedings before the Court

139 In the COMESA the requisite of 'residence' is not necessary to challenge 'acts of their servants or employees in the performance of their duties' (Art. 27.2 COMESA Treaty).

140 In the CAn individuals may complain about the violation of 'sus derechos subjetivos' as well as 'sus intereses legítimos' (Art. 19 Tratado TJCA).

141 Pursuant to Art. 22(c) Convenio CCJ each category of claimants (Member States, institutions, legal/natural persons) has the same right to access to the court.

142 The CCJ explained that individuals don't have to exhaust local remedies in the domestic courts when 'sea evidente que el agotamiento de los recursos ordinarios…coloque al solicitante en una clara situación de denegación de justicia' (Expediente No. 6-1-12-96, *Urbina Guerrero c. Nicaragua*, 5 Dec. 1996, Section 5; Expediente No. 10-5-11-96, Section 11).

143 CaCJ [2009] CCJ 2 (OJ), Section 30.

144 Legal/natural persons may bring an infringement action even against their own State (CaCJ [2009] CCJ 1 (OJ), *Trinidad Cement Limited, TCL Guyana Incorporated c. Guyana*, 15 Jan. 2009, Section 41 *et seq*.).

145 Art. 222 RTC grants the right to access to the CaCJ to 'persons, natural or juridical, of a Contracting Party' while Art. 24 CCJ Agreement deals with 'nationals of a Contracting Party'. The CaCJ accepted and applied the RTC provision so granting the right to direct access to regional justice to any legal/natural person of Member States. Nationality of a Member State is not required ([2009] CCJ 1 (OJ), Section 24 *et seq*.).

146 Individuals' *locus standi* extends also to rights conferred by CARICOM secondary legislation (CaCJ [2013] CCJ 3 (OJ), Section 8).

has omitted or declined to espouse it, or expressly agreed that the persons concerned may espouse the claim by themselves[147] (Art. 222 RTC). The latter condition implies that the legal/natural person concerned has first to involve his own State as it protects his right; so he has a residual access to the CaCJ.

Differently, the UEMOA, the CEMAC and the ECOWAS integrate the second category including judicial systems which grant to individuals only the right to bring actions against institutions. Precisely, they may challenge the legality of any act or action provided that they allege a specific interest to the claim or the violation of their own right.[148] In particular the ECOWAS CJ interpreted the treaty provision similarly to what prescribed by the TFEU and clarified that a person may resort to the Court when his interest is directly and immediately affected by the act or inaction that is being contested.[149] Then, in the ECOWAS an individual may also bring before the court actions against Member States (even his own State) concerning the violation of human rights (Arts. 9.4 and 10.d ECOWAS Prot.). In this case, as repeatedly affirmed by the ECOWAS judges, individuals have direct access to the Court when their human rights are violated.[150] The claim is valid if it is not anonymous and the same matter has not been instituted before another international court for adjudication.[151]

Differently from the ECJ as well as from the above mentioned judicial bodies, the MERCOSUR disputes settlement mechanism doesn't grant to individuals direct access to justice (Arts. 39–48 PO). Thus, where a legal/natural person considers that a Member State has infringed the MERCOSUR law violating his right, he may simply involve the 'Sección Nacional del Grupo Mercado Común of his State' as it espouses his claim[152]; the latter negotiates a solution with the 'Sección Nacional' of the failing State. If the dispute is not solved through negotiation, it is

147 The Member State 'entitled to espouse the claim' is the one where the natural person resides/ the legal person has its constitution ([2009] CCJ 1 (OJ)).

148 Art. 10(c) ECOWAS Prot.; Art. 15(2)(2) Règ. Cour UEMOA; Art. 14 Conv. Cour CEMAC.

149 Case No. ECW/CCJ/JUD/07/12, *Oluwatosin Rinu Adewale v. ECOWAS Council...*, 16 May 2012, Section 45 *et seq*.

150 Case No. ECW/CCJ/APP/01/06, *Tidjani v. Nigeria*, 28 Jul. 2007, Section 22. The ECOWAS judges have extended access to NGOs, under specific conditions (case No. ECW/CCJ/APP/08/08, *SERAP* v. *Nigeria*, 27 Oct. 2009, Sections 33–34; case No. ECW/CCJ/APP/08/09, *SERAP* v. *Nigeria*, 10 Dec. 2010, Sections 59–61).

151 Unlike other international human rights courts, within the ECOWAS judicial system individuals don't have first to exhaust local remedies in national courts or tribunals (case No. ECW/CCJ/JUD/06/08, *Hadijatou Mani Koraou* v. *Niger*, 27 Oct. 2008, Section 49).

152 The individual has to allege the violation of a MERCOSUR norm and the damage he has suffered (Art. 40.2 PO). Before espousing the individual's claim the *Sección Nacional* has to ascertain the existence of a real prejudice for the claimant.

brought before the GMC which may summon an Experts Committee. Finally the individual's State may resort to an *ad hoc* tribunal or to the TPR.[153] Clearly, individuals may lodge a complaint only against Member States other than their own, so their rights are not protected fully and adequately.

5 Regional Courts' Jurisprudence: A General Overview

Firstly the analysis of the jurisprudence reveals that, following the example of the ECJ, regional courts under consideration have accepted, implicitly or expressly,[154] and applied the teleological interpretation method. It allows them to go beyond the literal meaning of provisions and to interpret them having regard to the law of the organization as a whole and its state of evolution, functionally to the integration process and its fostering in a legal perspective. However, sometimes, through the teleological approach regional judges reach interpretations which prove to be constraint, not fully coherent with the real meaning of norms and the intergovernmental nature of the organization. In particular, this is the case of the MERCOSUR.[155]

Then, it is to be noted that, with the exception of the TJCA and the CCJ, cases brought before regional courts are relatively few compared to those heard by the ECJ. Clearly, this is due above all to their more recent establishment. Furthermore, until now their utilization to litigate economic integration issues has been scanty, particularly in the African Continent where regional courts usually settle disputes between the organization and its staff,[156] or, in

153 Susani, *Le règlement*, 120 *et seq*.; Ignacio Jovtis, "La legitimación activa en el sistema de solución de diferencias del MERCOSUR," in *Tribunales*, 87.

154 The MERCOSUR tribunals (Laudo I, *Argentina c. Brasil*, 28 Apr. 1999, Sections 58–59) as well as the TJCA (Proceso 1-IP-87, Section 3.5; Proceso 1-IP-88, 25 May 1988), the CCJ (Expediente No. 10-5-11-96, Section 8) and the CaCJ ([2009] CCJ 1 (OJ), *Trinidad Cement Limited, TCL Guyana Incorporated c. Guyana*, 15 Jan. 2009, Section 38) expressly confirmed their adoption of the teleological approach.

155 For example, TPR's opinion in Laudo No. 1/2007, *Uruguay c. Argentina*, 8 Jun. 2007 then contradicted in Laudo No. 1/2012, *Procedimiento excepcional de urgencia solicitado por la República del Paraguay…*, 21 Jul. 2012, Sections 30 and 42. In this case, the arbiters' changing opinion is strictly related to the political importance of the question brought before them concerning the suspension of Paraguay from the membership.

156 Until now the CJ CEMAC and the COMESA CJ have settled almost exclusively disputes between the organization and its staff. Even the CJ UEMOA and the EACJ have often solved this kind of disputes. About the scanty jurisprudence of African regional courts, see Onsado Osiemo, "Lost in Translation: The Role of African Regional Courts in Regional Integration in Africa," *LIEI* 41 (2014): 87.

some cases, concerning human rights violation.[157] Probably this trend depends on the current low level of legal and economic integration, on the low intra-African trade and on peoples' lack of awareness of the integration process and of rights flowing from it.

However, where Member States' will to cooperate is strong and regional organizations develop in a more solid political and socio-economic contest, the gradual evolution of their institutional and normative structure, on the one hand, and the enforcement of trade secondary law, on the other hand, let regional organizations face the same or similar problems faced by the EU over the years. In particular these problems concern institutional and systematic aspects of the integration process, namely the nature of the EU law, its relationship with the national and the international law systems. As in the EU, these questions have been brought before the regional courts which have tried to solve them drawing inspiration from the European judges whose solutions proved to be 'successful' as functional to the integration process. The ECJ's judgments are of enormous persuasive value both for regional courts established within supranational organizations and for those operating within intergovernmental organizations.[158]

Thus, the TJCA, the CCJ, the CJ UEMOA, the CaCJ and the MERCOSUR tribunals have accepted and applied in their own legal systems some of the most relevant principles founding the EU,[159] namely the principles of autonomy and the principle of supremacy of the Community law over national law.[160] Then, the

157 Until now most of disputes settled by the ECOWAS CJ has concerned human rights violations. Even the EACJ has often solved human rights disputes, although it doesn't have a specific jurisdiction over them. It has founded its mandate on such matters on the general engagement in respect and protection of human rights provided for by Arts. 6 and 8 EAC Treaty (EACJ Reference No. 1/2007; Reference No. 3/2010, *Independent Medical Unit* v. *Attorney General of Kenya...*, 29 Jun. 2011; Reference No. 8/2010, *Plaxeda Rugumba v. EAC Secretary-General, Attorney General of Rwanda*, 1. Dec. 2011).

158 In this sense, EACJ Application No. 6/2011, *The Democratic Party, Mukasa Fred Mbidde v. EAC Secretary-General, Attorney General of Uganda*, 11 Nov. 2011, Section 33. COMESA CJ Reference No. 2/2001, *Kabeta Muleya v. COMESA*, 22 Oct. 2002.

159 The supremacy of the CEMAC law over the national law is expressly prescribed by Art. 44 Traité revisé CEMAC.

160 TJCA Proceso 1-IP-87, *Volvo*, 3 Dec. 1987, Sections 2–5, then confirmed in a constant jurisprudence; lastly Proceso 109-IP-2010, *Sociedad Freskaleche SA*, 14 Oct. 2010, Sections 29–30. CCJ Expediente No. 10-5-11-96, 8 *et seq*.; Expediente No. 25-05-29-11-1999, Section 13 *et seq*., then confirmed in a constant jurisprudence; lastly Consulta prejudicial No. 10-23-09-2009, *Artero de Rodríguez*, 28 Oct. 2009, Section 3. TPR Laudo No. 1/2005, *...recurso de*

TJCA and the CCJ have also applied the EU principles of direct applicability[161] and direct effect.[162] Recently, the latter principle has been asserted – even if almost confusedly – also by the CaCJ and the COMESA CJ.[163] Conversely, the MERCOSUR tribunals have excluded the application of the principles of direct applicability and direct effect in their law system because they aren't expressly provided for in treaty provisions and are inconsistent with Member States' constitutional regime[164] and the intergovernmental nature of MERCOSUR decision-making organs.[165] In particular they have stated that MERCOSUR norms aren't direct applicable, so Member States are under the obligation to implement them in their domestic law.[166] On these issues the TPR delivered conflicting opinions: firstly it assimilated the MERCOSUR law to a 'derecho de la integración' which is autonomous from the national and international law systems and stated that the direct effect is one of the most relevant principles of the Community law.[167] However it has never applied this principle and, then, it has even operated a firm *revirement* in its opinion about the MERCOSUR legal nature.[168]

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revisión presentado por la República oriental del Uruguay..., 20 Dec. 2005, Section 9; TPR Opinión consultiva No. 1/2007, Section C No. 3–4; Opinión consultiva No. 1/2008, Section 25 *et seq*. CJ UEMOA Avis No. 2/2000, *Demande d'avis de la Commission de l'UEMOA relative à l'interprétation de l'article 84...*, 2 Feb. 2000; Avis No. 1/2003, *Demande d'avis de la Commission de l'UEMOA relative à la création d'une Cour de Compte au Mali*, 18 Mar. 2003. In [2013] CCJ 3 OJ, Section 69 the CaCJ seems to affirm the principle of supremacy of CARICOM law.

161 TJCA Proceso 30-IP-95, *Productos concentrados Argom Aliños El Cheick*, 8. Nov. 1996, Sections 6–9; Proceso 7-AI-99, *S.G. c. Perú*, 12 Nov. 1999, 44–48. CCJ Expediente No. 10-5-11-96, Section 8 *et seq*.; Expediente No. 25-05-29-11-1999, Section 13 *et seq*.; Expediente No. 1-30-4-2004, Section 48.

162 TJCA Proceso 3-AI-96, *Junta* c. *Venezuela*, 24 Mar. 1997, Sections 12–15; Proceso 34-AI-2001, *S.G.* c. *Ecuador*, 21 Aug. 2002, Sections 42–46. CCJ Expediente No. 10-5-11-96, Section 8 *et seq*.; Expediente No. 25-05-29-11-1999, 13 *et seq*.; Expediente No. 1-30-4-2004, Section 48.

163 See respectively [2013] CCJ 3 OJ, Section 51 *et seq*.; COMESA CJ Reference No. 1/2012, Section 3. In literature see, William Mwanza, *Polytol Paints v Mauritius*: *Evidence of the existence and direct effect of community law in COMESA?*, tralac Trade Brief No. S14TB01/2014, Jan. 2014.

164 In reality it seems that some Argentinian and Brasilian judges granted direct effect to provisions of MERCOSUR treaties which were implemented into the domestic law. See Corte Suprema de Justicia de la Nación (CSJN), 7 Jul. 1992, *Ekmekjian c. Sofovich*; and 5 Mar. 2002, Medida Cautelar No. 2.663 – RS, *Leben Representações Comerciais LTDA c. Estado do Rio Grande do Sul*.

165 Laudo IV, *Brasil c. Argentina*, 21 May 2001, Section 114.

166 Laudo VII, *Argentina c. Brasil*, 19 Apr. 2002, Section 7.

167 TPR Opinión consultiva No. 1/2007, Sections C, D and E.

168 TPR Laudo No. 1/2012, Section 30 and Section 42.

The trend of regional courts to draw inspiration from the ECJ's jurisprudence doesn't consist simply in borrowing the EU founding principles. They often found their legal reasoning on a constant comparison to the EU integration process and its legal system in order to justify their acceptance of the European judges' conclusions[169] or to support their different final solutions.[170] Furthermore they often quote some ECJ's famous judgments, such as *Van Gend & Loos*, *Costa v. Enel*, *Simmenthal*, *Factortame*, *Van Duyn* cases, in order to give an authoritative support to their final conclusions.[171] In some other cases they reproduce literally the maxims of ECJ's rulings without quoting the 'source'.[172] Additionally, in their judgments the TJCA, the CCJ, the EACJ, the ECOWAS CJ and the MERCOSUR tribunals often quote relevant European literature on specific

169 For example, in [2009] CCJ 5 (OJ), Section 25 *et seq*., the CaCJ founded its legal reasoning on similarities between Art. 9 RTC and Art. 10 EEC Treaty (now Art. 4.3 TEU) and quoted the relevant European cases *Francovich*, *Brasserie du Pêcheur*, *Factortame* in its ruling; finally it stated the application of the principle of State liability for damages caused to individuals. In this sense CaCJ [2012] CCJ 4 (OJ), *Trinidad Cement Limited v. Competition Commission*, 12 Nov. 2012, Section 27; [2013] CCJ 3 (OJ), Section 66 *et seq*; [2014] CCJ 1 (OJ), *Rudisa Beverage and Juices N.V. and others v. Guyana*, 8 May 2014, Section 23.

170 For example, in the avis No. 3/2000, *Demande d'avis de la Commission de l'UEMOA relative à l'interprétation des articles 88, 89 et 90 du Traité…*(27 Jun. 2000) the CJ UEMOA based its legal reasoning on the comparison between the EU and the UEMOA rules on competition and, after finding some relevant differences, it concluded that, unlike the EU, the UEMOA has an exclusive competence in such subject. Furthermore, differently from the EU, the TJCA declared that the Andean law doesn't have supremacy over constitutional norms (Proceso 115-IP-2005, 19 Oct. 2005).

171 Regarding the relationship between the SICA law and the domestic law the CCJ quoted the *Frontini case* of the Italian Constitutional Court in its rulings (Expediente No. 10-5-11-96, Section 9; Expediente No. 1-30-4-2004, Section 48). Even the EACJ faced the question of the relationship between the EAC law and the domestic law; in its judgment it quoted the relevant European judgments on this matter (*Van Gend en Loos*, *Costa v. Enel*, *Simmenthal* cases) but it never concluded its legal reasoning stating the direct effect and the primacy of EAC norms as the ECJ did (Reference No. 1/2006; Reference No. 1/2011, Section 28). So the EAC proved to take guidance from the ECJ but with caution; this can be justified by the domestic judicial and constitutional contest it operates in. See Anne Van Der Mei, *The East African Community: A Bumpy Road to Supranationalism*, Maastricht Faculty of Law Working Paper, Maastricht University, No. 7, 2009.

172 For example, in Reference No. 1/2006 (at 44) the EACJ reproduced more or less literally the ECJ's maxim of the *Van Gend en Loos* case but without quoting it. Similarly in avis No. 2/2000 the CJ UEMOA reproduced Sections 16–19 of the ECJ's judgment in the case 22/70, *Commission v. Council*.

matters. This attitude of regional judges outside Europe to take guidance from the ECJ and to 'borrow' its main principles and jurisprudential solutions is going to be systematic and, as already said, doesn't depend on the legal nature of the organizations where courts operate.

It is worth noting that when disputes brought before the courts concern human rights violations, particularly in the case of the ECOWAS CJ, judges refer constantly to the ECtHR, borrowing its principles and jurisprudencial solutions and quoting its judgments in support to their conclusion.

6 Enforcement Mechanisms of Regional Judgments: Law and Practice

As in every judicial system Member States and institutions have to take, without delay, all the measures required to implement binding judgments delivered by the court. To this effect the establishment of enforcement mechanisms is particularly relevant. Rules governing the enforcement of regional judgments are heterogeneous from one judicial system to another and differences seem not to be linked to the legal nature of the organization. Moreover, generally they tend to be different from those prescribed by Art. 260(2) TFEU because of the different degree of 'maturity' reached by the integration process. Thus, the EAC and ECOWAS founding agreements don't provide for a specific mechanism to enforce the rulings of regional courts. So, where a Member State fails to comply with them, simply an infringement action may be brought before the court.[173]

More often regional judicial systems provide for specific enforcement mechanisms which are based on classical principles of international law. Thus, in some cases, any failure of a Member State to comply with a decision of the court is referred to the highest intergovernmental organ by any Member State or institution (Art. 16.2 Conv. Cour CEMAC) or by the executive organ of the organization (Art. 15.1 Règ. Cour UEMOA). In these cases, presumably, the question will have a political solution.

Differently, in the MERCOSUR a party of a dispute may directly impose temporary offsetting measures against the party failing to comply with the arbiters' decision (Art. 31 PO). However, where the non-compliant State considers that

173 It isn't surprising that a regional judicial system doesn't provide for a specific enforcement mechanism of judgments. Even in the European experience the Treaty of Rome didn't regulate such aspect; later the Maastricht Treaty introduced a specific enforcement mechanism.

these measures are excessive, it may resort to the tribunal to assess their proportionality (Art. 32 PO).[174] Similarly, if the Member State takes the measures to comply with the arbiters' decision but the other party of the dispute considers they are not sufficient, it may resort to the TPR to assess them (Art. 30 PO).[175] Clearly, this enforcement mechanism, based on classical principles of the international law, seems to be perfectly consistent with the intergovernmental nature of the MERCOSUR.

In the CAn, SICA, CARICOM and COMESA the founding agreements provide for the involvement of the regional court when a Member State fails to comply with a judgment; however their role in such enforcement mechanisms varies from a judicial system to other. Thus, in the SICA the CCJ just has to communicate a Member State's failure to the other Members so that they may take all the necessary measures. In doing so, they have a wide discretionary power, even if the CCJ excluded that countermeasures may be imposed because of the legal nature of interstate cooperation within the SICA.[176] Quite similarly, in the light of Art. 26 CCJ Agreement as interpreted by the CaCJ,[177] the latter is entitled only to ascertain if the party of a dispute has duly complied with its ruling, but it may not impose sanctions to the non-compliant State.[178]

On the contrary in the CAn and in the COMESA the judicial body plays a more active role in the enforcement mechanism which has some similarities to the EU one. In particular, in the Andean system, if the TJCA finds that a Member State hasn't complied with its decision, it may impose the necessary sanctions determining 'los límites dentro de los cuales el País reclamante o cualquier otro País Miembro podrá restringir o suspender, total o parcialmente, las ventajas del Acuerdo de Cartagena que beneficien al País Miembro remiso' (Art. 27 Tratado TJCA and Arts. 119–120 Estatuto TJCA).[179]

In the COMESA the Court may prescribe sanctions against a party who defaults in implementing its rulings (Art. 34.4 COMESA Treaty); such sanctions consist in a fine whose amount is defined by the Court (Art. 58 Rules of procedure). So, unlike the above mentioned judicial systems, the COMESA enforcement

174 TPR Laudo No. 1/2007.

175 TPR Laudo No. 1/2008, *Divergencia sobre el cumplimiento del Laudo no. 1/2005 iniciada por Uruguay*, 25 Apr. 2008.

176 CCJ Expediente No. 26-06-03-12-1999, *Honduras c. Nicaragua*, 28 Nov. 2002, 24.

177 CaCJ [2010] CCJ 1 (OJ) *Trinidad Cement Limited – TCL Guyana Incorporated c. Guyana*, 29 Mar. 2010, Section 53.

178 CaCJ [2010] CCJ 1 (OJ), Section 42.

179 María Ángela Sasaki Otani, "El sistema de sanciones por incumplimiento en el ámbito de la Comunidad Andina," *Anu. Mex. Der. Int.* 12 (2012): 301.

mechanism seems not to be subject to politics, giving a central and discretionary power to the Court which may ascertain the Member State's failure and decide which sanctions to be imposed. So, this enforcement mechanism tends to have a 'supranational' nature.[180]

Regardless of the different regulation of enforcement mechanisms, the analysis of States' practice reveals their 'reluctance' to accept the decisions of regional courts, particularly if they are legally and politically significant affecting their national interests. So, Member States often don't comply with regional judgments. In this sense, the example of the SADC Tribunal is emblematic; its *pro-integratione* jurisprudence, above all in protection of human rights, was 'thorny' for the SADC States because it collided with their political interests. As a consequence, they decided to close it down. Not rarely, to put an end of their infringement, Member States of regional organizations tend to amend the legal basis of the court's ruling, so that their non-compliant behavior becomes legal.[181] In some other cases they amend treaty provisions establishing the regional court in order to limit its power.[182] As it is evident, Member States' 'reluctance' to comply with regional rulings contradicts their commitment to respect and adhere to the rule of law they made by establishing a regional court. In reality, this is just an apparent paradox: probably Member States accept to subject their cooperation to the rule of law by establishing a judicial body just because they believe that non-compliance with its ruling is possible and not too 'expensive'.[183] This belief is due to the fact that, as described above,

180 Art. 34(4) COMESA Treaty deals with 'a party' who defaults implementing a court's decision, so presumably it refers not only to Member States but also to COMESA institutions.

181 For example, in Proceso 200-AI-05, *Sumario de Incumplimento*, 28 Oct. 2008, and in Proceso 91-AI-2000, *Sumario por Incumplimento*, 17 Jul. 2002, the TJCA suspended the prescribed sanctions in the light of the amended normative framework. In the SICA, in consequence of the CCJ's negative opinion, Member States amended Art. 35 PT in order to make legal the establishment of a new trade disputes settlement mechanism.

182 In response to the EACJ ruling – Reference No. 1/2006 – Member States decided to amend the Treaty introducing limits to the court's jurisdiction (see Arts. 27.2 and 30.3). The EACJ expressed a negative opinion about such amendments as they are inconsistent with the Treaty (Reference No. 9/2012, *the East African Centre…* v. *the EAC Secretary-General*, 9 May 2013). Similarly, in the ECOWAS Gambia didn't comply with two decisions of the court (case No. ECW/CCJ/APP/04/07, *Manneh* v. *Gambia*, 5 Jun. 2008; case No. ECW/CCJ/APP/11/07, *Saidykhan* v. *Gambia*, 16 Dec. 2010) and proposed to revise the ECOWAS Protocol and restrict the Court's authority. The Ministers of Justice rejected unanimously this proposal. See Alter, Helfer, McAllister, "A New," 27–31.

183 In this sense, Christopher Marcoux and Johannes Urpelainen, "Non-compliance by Design: Moribund Hard Law in International Institutions," *Rev. Internat. Org.* 8 (2013): 163.

generally regional organizations lack specific judgments enforcement mechanisms or, where provided, they are often power-oriented.

7 Conclusion

As seen, the strengthening of interstate cooperation and the concrete realization of commercial statutory goals place every regional economic organization *de facto* in front of the same or similar challenges. Firstly the adoption of secondary law addressing to Member States as well as to individuals arises new demand for legal certainty, uniformity in interpretation and application of the law of the organization and homogeneity in protection of different interests. Deep integration needs suitable legal framework, so in any regional organization Member States' reply is the same: the establishment of a judicial body, thus trying to transform their erstwhile interstate cooperation into a rule-based regional system. In particular, in order to create a judicial body able to be instrumental to the integration process, they tend to confer to it more or less the same competences of the ECJ. This is due to the fact that the EU faced the same legal needs arisen within regional economic organizations outside Europe and, thanks to its institutional features and functioning, the ECJ proved to be suitable in answering to them. Precisely, as I have tried to show, similarities to the EU judicial system tend to be related to the legal cooperation model each regional organization embodies. So, the more the latter tends to realize the main features of supranational model and its secondary trade law is developed, the more the judicial body's competences tend to be inspired by those exercised by the ECJ.

Secondly, the implementation of secondary law in each domestic legal system brings these regional courts before the same or similar legal problems, concerning institutional and systematic aspects of the integration process, faced by the EU and its Court over the years. So this similarity in *de facto* situations between the EU and the other regional systems outside Europe makes quite obvious similarities in *de jure* solutions adopted by regional judges. Thus, Member States' intention to establish courts modeled on the ECJ's example is followed by regional judges' attitude to solve legal problems brought before them by drawing inspiration from the ECJ's jurisprudence and borrowing its reasoning and legal arguments. This attitude doesn't depend on the legal nature of the organization and is just conditioned by its degree of material development. Regional courts' transplanting of EU main principles and of European judges' legal solutions into their rulings is associated with different purposes inter-related to each other. It can be a way of filling normative gaps or

a means of clarify obscurities in interpretation of norms, and a way of legitimating their practice both in domestic and international sphere through the authority arising from the ECJ's consolidated jurisprudence. It is worth noting that only in some cases this judicial borrowing is justified by similar or identical content of norms; more often the teleological approach, expressly accepted and applied by regional judges, allows them to reach interpretations which aren't fully coherent with the literal meaning of rules and with the legal nature of interstate cooperation but are instrumental to the integration process.

This sort of trans-regional judicial dialogue between the ECJ and the other regional courts outside Europe sets in the phenomenon of 'cross-fertilization', namely the practice of international tribunals to refer to each other's case law. However, it lacks the element of 'reciprocity' which characterizes the 'cross-fertilization'. Indeed only regional courts outside Europe 'borrow' the ECJ's jurisprudence; there isn't a comparable action in the opposite direction. This is obvious as there isn't a comparable degree of development between the EU and the other regional organizations; the EU legal system is clearly more mature and the ECJ's activity proved to be instrumental to the integration process over the years. So regional judges outside Europe realize the new particular phenomenon of the 'uni-directional fertilization'. Clearly, this doesn't mean slavish obedience to foreign judges or a loss of independence of courts. On the contrary, in contributing to the application of the EU main principles in other regional law systems, the 'uni-directional fertilization' fosters the emergence of an increasingly homogeneous body of rules and principles applied by regional courts relating to similar or identical legal issues. So, in some way, it grants the circulation of common principles to integration processes and, in the future, it could contribute to the gradual realization of a 'common law' of regional integration organizations.

CHAPTER 19

The Right of Access to Justice for the Staff of International Organizations

The Need for a Reform in the Light of the ICJ Advisory Opinion of 1 Feb. 2012

Daniele Gallo

1 The ICJ Advisory Opinion of 1 Feb. 2012 on Judgment No. 2867 of the ILOAT as a Privileged *Sedes Materiae* to Grasp the Main Criticalities Concerning the Relationship Between International Administrative Tribunals and the ICJ, as Well as the Law Governing the Access to Justice of International Officials

As is well known, the statutes of most international organizations (IOs) provide that disputes concerning employment relations between the organization and its staff must be settled, as a last resort – i.e. in compliance with the (customary) rule on the prior exhaustion of internal administrative (non-strictly jurisdictional) remedies –,[1] by administrative tribunals instituted by the same organizations or, alternatively, by tribunals of other IOs.[2] In the latter case, the two organizations in question enter into an agreement that the organization to which the international official belongs will accept and recognize the jurisdiction of the organization that established the tribunal.

1 On both the legal *status* and the application of such rule within international organizations see, *inter alia*, Alain Pellet, *Les voies de recours ouvertes aux fonctionnaires internationaux* (Paris: Pedone, 1982), 84–85; *The Bowett's Law of International Institutions* (6th edn., eds. Philippe Sands and Pierre Klein, London: Sweet&Maxwell, 2009), 426.

2 On the international administrative tribunals see generally and most recently Jan Klabbers, *An Introduction to International Institutional Law* (2nd edn. Cambridge: CUP, 2009), 269–273; *The Bowett's*, 421–434; Anna Riddell, "Administrative Boards, Commissions and Tribunals in International Organizations," *MPEPIL* (2010); Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (5th edn. Leiden: Martinus Nijhoff, 2011), 462–467; Chittharanjan F. Amerasinghe, "Reflections on the Internal Judicial Systems of International Organizations," in *The Development and Effectiveness of International Administrative Law*, ed. Olufemi Elias (Leiden: Martinus Nijhoff, 2012), 33–58; Pedro Dallari, "Administrative Tribunals of International Organizations and World Constitutionalism," in *The Development*, 59–68; Olufemi Elias and Melissa Thomas, "Administrative Tribunals of International Organizations," in *The Rules, Practice, and Jurisprudence of International Courts and Tribunals*, ed. Chiara Giorgetti

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In particular, as provided for by Art. II(5) of its Statute,[3] the Administrative Tribunal of the International Labour Organization (ILOAT)[4] currently exercises its competence over staff disputes involving, besides the International Labour Organization (ILO), 58 international institutions (and their staff).[5]

In accordance with Art. VI(1) of the ILOAT Statute, the judgments rendered by the Tribunal 'shall be final and without appeal'. However, the Statute contains a crucial *caveat*, since Art. XII(1) states that: '[i]n any case in which the Governing Body of the International Labour Office or the Administrative Board of the Pensions Fund challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Governing Body, for an advisory opinion, to the International Court of Justice'. Moreover, Art. XII of the Annex to the Statute extends the jurisdiction of the International Court of Justice (ICJ) to the case in which the challenge of the Tribunal's decision is made by the executive boards of IOs – other than the ILO – which have made the declaration specified in Art. II(5) of the Statute. In this regard, it must be recalled that Art. XII(2) provides that the opinion given by the ICJ 'shall be binding'.

(Leiden: Martinus Nijhoff, 2012), 159–190; Benedict Kingsbury and Richard Stewart, "Administrative Tribunals of International Organizations from the Perspective of the Emerging Global Administrative Law," in *The Development*, 69–104; Angela Del Vecchio, *International Courts and Tribunals between Globalization and Localism* (The Hague: Eleven, 2013), 50–55; Claudio Zanghì, *Diritto delle organizzazioni internazionali* (3rd edn. Torino: Giappichelli, 2013), 234–240.

3 'The Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other international organization…which has addressed to the Director-General a declaration recognizing, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules of Procedure, and which is approved by the Governing Body'.

4 The Tribunal was established on 9 Oct. 1946 in the frame of the International Labour Conference and replaced the Administrative Tribunal of the League of Nations, which was competent from 1927 to 1946. Its Statute was adopted on the same day by the Conference and subsequently amended in 1949, 1986, 1992, 1998 and 2008.

5 In general, on the ILOAT see, *ex multis*, Frank Gutteridge, "The ILO Administrative Tribunal," in *International Administration. Law and Management Practice in International Organizations*, ed. Chris De Cooker (5th edn. Leiden: Martinus Nijhoff, 2009), 1–33; on the ILO see Heiko Sauer, "International Labour Organization," *MPEPIL* (2010).

Art. XII must be read in conjunction with both Art. 65(1) of the ICJ Statute[6] and Art. 96 of the UN Charter.[7] The first provides that '[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request'. The second states, in its Section 1, that: '[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question'. Moreover, in its Section 2, it specifies that '[o]ther organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities'.

Furthermore, when what is at stake is the request of an advisory opinion made by an international organization other than the ILO, the above mentioned provisions apply in conjunction with the relevant rules contained in the Relationship Agreement between the UN and that organization – as approved by the UN General Assembly (GA) – by which the former recognizes the latter as a specialized agency in accordance with Arts. 57 and 63 of the UN Charter and authorizes it to request advisory opinions of the ICJ.

The power to request an advisory opinion of the ICJ on staff disputes is currently available to the ILOAT only, due to the changes occurred within the UN[8]

6 For a comment on such article see, *inter alia*, Jochen A. Frowein and Karin Oellers-Frahm, "Art. 65," in *The Statute of the International Court of Justice. A Commentary*, eds. Andreas Zimmermann *et al.* (2nd edn. Oxford: OUP, 2012), 1605–1637.

7 For a comment on such article see, *inter alia*, "Art. 96," in *The Charter of the United Nations. A Commentary*, eds. Bruno Simma *et al.* (3rd edn. Oxford: OUP, 2012).

8 A procedure for the review of the judgments of the UN Administrative Tribunal (UNAT) by the ICJ was established by GA Res. 957 (X) of 8 Nov. 1955, following the ICJ's Advisory Opinion of 13 Jul. 1954, *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (*ICJ Reports* 1954, 47). This power of review, which was envisaged in Art. 11 of the UNAT Statute, was then abolished by GA Res. 50/54 of 11 Dec. 1995 with effect from 1 Jan. 1996. Over this period, three advisory opinions were given by the ICJ: Advisory Opinion of 12 Jul. 1973, *Application for Review of Judgment n. 158 of the United Nations Administrative Tribunal* (*ICJ Reports* 1973, 166); Advisory Opinion of 20 Jul. 1982, *Application for Review of Judgment n. 237 of the United Nations Administrative Tribunal* (*ICJ Reports* 1982, 325); Advisory Opinion of 27 May 1987, *Application for Review of Judgment n. 333 of the United Nations Administrative Tribunal* (*ICJ Reports* 1982, 18). UNAT (which was established by GA Res. 351 A(IV) of 24 Nov. 1949) was abolished by the GA on 31 Dec. 2009 as result of the GA's decision to establish a new decentralized system including a two-tier formal system comprising a first instance, the UN Dispute Tribunal, and an appellate instance, the UNAT (Resolutions 61/261 of 4 Apr. 2007 and 63/253 of 24 Dec. 2008). On the UNAT, its power to request advisory opinions to the ICJ and, more generally, on the former UN judicial system see, *ex multis*, Michael Wood, "United Nations Administrative Tribunal, Applications for Review (Advisory Opinions)," *MPEPIL* (2009).

system of administration of justice[9] following GA Res. 50/54 of 11 Dec. 1995.[10]

This essay focuses, in particular, on the issue of the validity of Judgment No. 2867 of 3 Feb. 2010, rendered by the ILOAT on a complaint filed against the International Fund for Agricultural Development (IFAD),[11] as challenged by the latter before the ICJ, considering that IFAD's recognition of the Tribunal's jurisdiction, under Art. II(5) of the ILOAT Statute, took effect from 1 Jan. 1989.[12] The ICJ rendered its Opinion on 1 Feb. 2012,[13] under Art. 65 of its Statute, almost 60 years after *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*[14] of 23 Oct. 1956, which is the only other advisory opinion given to date by the ICJ on a decision rendered by the ILOAT.

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9 On the UN internal system of justice currently in force see, *inter alia*, August Reinisch and Christina Knahr, "From the United Nations Administrative Tribunal to the United Nations Appeals Tribunal: Reform of the Administration of Justice System Within the United Nations," *MPYUNL* 12 (2008): 447; Phyllis Hwang, "Reform of the Administration of Justice System at the United Nations," *LPICT* 8 (2009): 181; Paolo Vargiu, "From Advisory Opinions to Binding Decisions: the New Appeal Mechanism of the UN System of Administration of Justice," *IOLR* 7 (2010): 261; Rishi Gulati, "The Internal Dispute Resolution Regime of the United Nations," *MPYUNL* 15 (2011): 489; Louise Otis and Eric H. Reiter, "The Reform of the United Nations Administration of Justice System: The United Nations Appeals Tribunal after One Year," *LPICT* 10 (2011): 405; Maritza Struyvenberg, "The New United Nations System of Administration of Justice," in *The Development*, 243–251.

10 On the ICJ case law on the international civil service see, *ex multis*, David Ruzié, "La CIJ et la fonction publique internationale," in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, ed. Yoram Dinstein (Leiden: Martinus Nijhoff, 1989), 679–698; Joanna Gomula, "The International Court of Justice and Administrative Tribunals of International Organizations," *Mich. J. Int'l L.* 21 (1992): 83; Chittharanjan F. Amerasinghe, "Cases of the International Court of Justice Relating to the Employment in International Organizations," in *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, eds. Robert J. Vaughan Lowe and Malgosia Fitzmaurice (Cambridge: CUP, 1996), 193–209; Kiyan H. Kaikobad, *The International Court of Justice and Judicial Review: A Study of the Court's Powers with Respect to Judgments of the ILO and UN Administrative Tribunals* (Kluwer: The Hague, 2000); Shabtai Rosenne, *The Law and Practice of the International Court 1920–2005. Jurisdiction*, vol. II (Leiden: Martinus Nijhoff, 2006), 949–1020.

11 See www.ilo.org.

12 Following the approval by the ILO Secretariat of 18 Nov. 1988.

13 *ICJ Reports* 2012, 10.

14 *ICJ Reports* 1956, 77. On the case see, amongst others, Langley Hardy, "Jurisdiction of the Administrative Tribunal of the ILO: The Advisory Opinion of the International Court of Justice of October 23 1956," *ICLQ* 6 (1957): 338.

In its Opinion of Feb. 2012, the ICJ carried out an in-depth analysis of the procedure foreseen by Art. XII of the ILOAT Statute and, more in general, of the powers and competences of the ILOAT. The Court's reasoning is grounded on the ICJ's previous jurisprudence concerning both the UNAT and ILOAT. Therefore, the Opinion, insofar as representing a further step in the evolving path drawn so far by the Court in this area of law, will allow me to make some observations on the nature of staff disputes that come under the jurisdiction not only of the ILOAT, but also of other international administrative tribunals. Indeed, the ILOAT is certainly the most representative and paradigmatic international administrative tribunal, as shown by the relevant number of judgments delivered to date and by the impressive number of IOs involved.[15]

As a consequence, I have decided to focus on the ICJ's recent Opinion insofar as it is the privileged *sedes materiae* to highlight the main features of the law governing the access of IOs' staff members to justice before international tribunals, as well as the limits of the relationship between the ICJ and ILOAT, especially in terms of enhancing and protecting both the *jus standi* and *jus locus standi in judicio*[16] of staff members. Moreover, the Opinion is crucial in order to understand the problems which arise from internal judicial systems characterized by the lack of an appellate tribunal for settling staff disputes, such as the one provided by the ILO and other IOs that have recognized the jurisdiction of the ILOAT.

2 The *Mrs Ana Teresa Saez García* v. *International Fund for Agricultural Development* (IFAD) Affair Before the ILOAT: The Factual Background, the History of the Proceedings and the Tribunal's Reasoning

Before venturing into an in-depth analysis of the ICJ Advisory Opinion of Feb. 2012, it is necessary to recall the main facts and features of the Judgment rendered by the ILOAT on 3 Feb. 2010.[17]

The complaint against IFAD was filed with on 8 Jul. 2008 by Mrs Ana Teresa Saez García. She maintained that: (i) the decision not to renew her fixed-term contract as Programme Manager for Latin American and Caribbean within the

15 See *supra*, in the same Section.

16 On the notion of 'standing' before international tribunals see, *ex multis*, Angela Del Vecchio, "Standing," *MPEPIL* (2010).

17 See www.ilo.org.

Global Mechanism[18] was tainted with abuse of authority; (ii) IFAD acted in breach of its duty of care and good faith; and (iii) the termination of her contract was abrupt, unjustified and damaged her professional reputation. That decision, which was taken on 15 Dec. 2005 by the Managing Director of Global Mechanism and was based on the abolition of the complainant's post for reasons of budgetary constraint, was contrary to the recommendation of the Joint Appeals Board. In its report of 13 Dec. 2007, the Board held, *inter alia*, that there was no evidence showing that the Managing Director consulted or obtained the approval of the IFAD President before abolishing Mrs Saez García's post. By a memorandum of 4 Apr. 2008, which is the impugned decision before ILOAT, the President of IFAD departed from the Board's recommendations and, by doing so, rejected Mrs Saez García's appeal, since the decision not to renew her contract was considered to be in accordance with Section 1.21.1 of the Human Resources Procedures Manual, which provides that a fixed-term contract expires on the date mentioned in the contract.

In light of the above, Mrs Saez García asked the Tribunal to quash the decision of the IFAD President dismissing her appeal and to order IFAD to reinstate her, for a minimum of two years, in her previous post or in an equivalent post in IFAD with retroactive effect, claiming reimbursement for loss of salary and various allowances and entitlements.

A preliminary question to be answered by the Tribunal arose as to whether the Tribunal had jurisdiction and, therefore, could review the decision of the President of IFAD. The crucial problem thus revolved around the *status* of the Global Mechanism, in its relationship with IFAD.

The Global Mechanism, as a body of the UNCCD,[19] is housed by IFAD. Its functions are set out in a Memorandum of Understanding (MOU) signed between the Conference of the Parties of the Convention (COP) and IFAD on 26 Nov. 1999. It provides that: 'the Global Mechanism has a separate identity within IFAD and is an organic part of the structure of the Fund directly under the President of the Fund';[20] 'the Managing Director of the Global Mechanism is responsible for preparing the Global Mechanism's programme of work and budget…and his proposals are reviewed and approved by the President of the Fund before being forwarded to the Executive Secretary of the Convention for

18 The Global Mechanism is a specialized body of the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (further referred to as UNCCD), of 17 Jun. 1994, in force since 26 Dec. 1996.

19 See Art. 21(4) of the Convention.

20 See Section II.A of the MOU.

consideration in the preparation of the budget estimates of the Convention';[21] 'the Managing Director, on behalf of the President of the Fund, will submit a report to each ordinary session of the Conference on the activities of the Global Mechanism'.[22]

According to IFAD, the ILOAT was not competent to hear the various arguments raised by the complainant, as this could entail examining the decision-making process in the Global Mechanism. Such an examination could not be admitted because: the Global Mechanism is not an organ of the Fund; it is accountable to the Conference of the Parties; and the acts of its Managing Director are not attributable to the Fund. IFAD consequently took the view that its role should be restricted to housing the Global Mechanism, which has a separate identity within the Fund.[23] Moreover, IFAD first of all argued that the acceptance of the jurisdiction of the Tribunal did not extend to entities that it may host pursuant to international agreements with third parties; secondly, it observed that neither the COP nor the Global Mechanism had recognized the jurisdiction of the Tribunal; thirdly, it underlined that Mrs Saez García was not a staff member of IFAD and, for that reason, the procedures concerning redundancy laid down in the Manual did not apply to her mainly because Section 11(c) of IFAD President's Bulletin No. PB/04/01 of 21 Jan. 2004 provides that 'IFAD's rules and regulations on the provision of career contracts for fixed-term staff shall not apply to staff of the Global Mechanism'; fourthly, it submitted that the Fund had no authority to examine whether the core budget approved by the UN Conference of the Parties warranted the abolition of the complainant's post, because decisions concerning the employment in the frame of the Global Mechanism were not taken by the Fund but by the Conference itself, with the result that IFAD could not be deemed responsible for the decision of the Managing Director.[24]

In this respect, the complainant, on one hand, declared that the denial of ILOAT's jurisdiction would deprive her of any legal redress and, on the other, asserted that she was a staff member of IFAD.[25]

The Tribunal begun its reasoning by stating that: the fact that the Global Mechanism is an integral part of the Convention and is accountable to the Conference does not necessarily imply that it has its own legal identity; the Global Mechanism is simply the mechanism by which the Conference gives effect

21 See Section III.A.4 of the MOU.

22 See Section III.B of the MOU.

23 See Section C(6) of the Judgment.

24 See Section C(6–7) of the Judgment.

25 See Section D(7–8) of the Judgment.

to certain obligations created by the Convention; the statement in the MOU of Nov. 1999 that the Global Mechanism is to have a 'separate identity' does not mean that 'it has a separate legal identity or…that it has separate legal personality'. In this context, the Tribunal, by recalling Section II.A of the MOU, clarified why and to what extent the Global Mechanism must be seen as an 'organic part of the structure of the IFAD': 'the Managing Director is to report to the President of the Fund'; the chain of accountability runs 'directly from the Managing Director to the President of the Fund to the Conference'; 'the Managing Director… reports to the Conference on behalf of the President of the Fund'; the President of the Fund is to review the programme of work and the budget prepared by the Managing Director of the Global Mechanism before it is forwarded to the Executive Secretary of the Convention for consideration; 'the Global Mechanism is not financially autonomous'.[26] As a result, the Tribunal emphasized that the sentence 'an organic part of the structure of the Fund' must be interpreted in the sense that the Global Mechanism must be assimilated to the various administrative units of the Fund for all administrative purposes with the effect that 'administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund'.[27] Therefore, there is no need to amend the Convention or the Agreement establishing IFAD, as claimed by the latter. Moreover, there is no doubt, according to the Tribunal, that the officials of the Global Mechanism are staff members of the Fund.[28]

In light of the above, the Tribunal held that IFAD's administrative decisions on the staff of the Global Mechanism were subject to internal review on the same grounds that applied to the decisions concerning other staff members of the Fund, including the right to resort to the ILOAT.[29]

As for the merits of the case, since the Global Mechanism functions under the authority of the COP and the Conference did not authorize its Managing Director to abolish the complainant's post, the Tribunal concluded that this abolition 'was impliedly forbidden by the Conference decision'.[30] Accordingly, the decision of the Managing Director was taken without authority and thus the President of IFAD erred in law in not so finding when considering Mrs Saez García's internal appeal. It follows that the President's decision of 4 Apr. 2008 dismissing the complainant's internal appeal had to be set aside.[31]

26 See Sections 5–8 of the Judgment.

27 See Section 7 of the Judgment.

28 See Sections 9–11 of the Judgment.

29 See Section 11 of the Judgment.

30 See Section 16 of the Judgment.

31 See Section 17 of the Judgment.

3 The Advisory Opinion of the ICJ: The Scope of the Court's Jurisdiction and Power of Review

Having briefly examined the judgment delivered by the ILOAT, I will now turn to the Opinion of the ICJ concerning its validity.

The ICJ initially focused on the matter of jurisdiction. Then, it considered the extent of its own power of review. Subsequently, it examined the scope of its discretion and, by so doing, dealt with the core issue at stake, that is, the nature and limits of the whole procedure provided for by Art. XII of the ILOAT Statute. Finally, it answered ten questions posed by IFAD concerning the merits of the case.[32] In the present article, the latter issue will be quickly examined after a brief discussion on the question of jurisdiction. The analysis will be, in fact, devoted primarily to the problem of the procedural inequality before the ICJ, which is at the core of the Opinion.

The Court considered whether it had jurisdiction to reply to IFAD's request, first of all by recalling that Mrs Saez García contended that some of the questions posed by IFAD on both the jurisdiction of the ILOAT and the validity of its Judgment of 3 Feb. 2010 did not fall within the scope of Art. XII of the Annex to the ILOAT Statute. The Court subsequently clarified that certain requirements must be met if an opinion is to be requested and, in this regard, maintained that, in light of those requirements, IFAD's request for review of a judgment by the ILOAT which concerned the hosting of the Global Mechanism and the problem of whether Mrs Saez García was its staff member 'do present legal questions' which 'arise within the scope of the Fund's activities'.[33]

The Court then emphasized that the authority to challenge decisions of the ILOAT by a request for an advisory opinion of the ICJ derived from a combination of Art. XII of the Annex to the ILOAT Statute with Art. 96(2) of the UN Charter, Art. 65(1) of the ICJ Statute and Art. XIII(2) of the Relationship Agreement between the UN and IFAD (further referred to as 'the Relationship Agreement').[34] In particular, in Art. XIII(2) of the Relationship Agreement the General Assembly authorized the Fund to request advisory opinions of the ICJ on 'questions arising within the scope of the Fund's activities'. It is thus the GA that is vested with that authority and not the ILO itself – which, after adopting the ILOAT Statute, could not give its organs or other institutions the power to

32 On the meaning of 'merits' and on the limits of the Court's jurisdiction see *infra*, Section 5.

33 See Sections 21–26 of the Advisory Opinion.

34 The Agreement came into force on 15 Dec. 1977, the date of its approval by the GA with Res. 32/107.

challenge judgments passed by the Tribunal.[35] Accordingly, the ICJ finally concluded that IFAD had the power to make the request of an advisory opinion and, therefore, that the Court was competent to consider that request.[36]

With regard to the scope of the ICJ's jurisdiction, the Court made clear that its power to review the ILOAT's judgment on Mrs Saez García was limited to whether the Tribunal wrongly confirmed its jurisdiction or the decision given by the latter was vitiated by a fundamental fault in the procedure followed. By highlighting this aspect, the ICJ intended to distinguish between the merits and jurisdiction, as done in the *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco* of Oct. 1956, where it stated that '[t]he circumstance that the Tribunal may have rightly or wrongly adjudicated on the merits or that it may have rightly or wrongly interpreted and applied the law for the purposes of determining the merits, in no way affects its jurisdiction'.[37] Therefore only those mistakes that ILOAT may make vis-à-vis its jurisdiction could be detected by the Court through its advisory opinion, while errors of fact or of law on the part of the Administrative Tribunal on the merits cannot give rise to the procedure envisaged under Art. XII of the Annex to the ILOAT Statute. As already stated by the Court in *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, the review 'is not in the nature of an appeal on the merits of the judgment'.[38]

As far as the meaning of 'fundamental fault in the procedure followed' – that is, the second ground for challenge – is concerned, the ICJ observed that '[a]n error in procedure is fundamental and constitutes "a failure of justice" when it is of such a kind as to violate the official's right to a fair hearing' and in that sense to deprive him/her of justice.[39]

4 The Merits and the Response(s) to the Questions Submitted by IFAD: The Jurisdiction *Ratione Personae* and *Ratione Materiae* of the ILOAT and the Lack of Any Fundamental Procedural Fault on the Part of the Tribunal

In order to answer the first question posed by IFAD regarding the competence of the ILOAT to hear the complaint brought against the Fund by Mrs Saez García in accordance with Art. 5 of its Statute, the Court had to decide, as

35 See Sections 25–26 of the Advisory Opinion.

36 See Section 27 of the Advisory Opinion.

37 See Section 29 of the Advisory Opinion.

38 On the notion of 'appeal' see *infra*, Section 5.

39 See Sections 30–32 of the Advisory Opinion.

already done by the Tribunal, whether the following two conditions foreseen in that provision were fulfilled: firstly, the complaint should be brought by an official of an organization that has recognized the jurisdiction of the Tribunal and, secondly, it should relate to the non-observance of the terms of appointment for that official and/or of the Staff Regulations of the organization. The two conditions pertain to the competence, respectively, *ratione personae* and *ratione materiae* of the Tribunal.[40]

As to the first condition, the problem is whether Mrs Saez García was to be considered a staff member of the Global Mechanism, that is, of an entity which has not recognized ILOAT's jurisdiction, as contended by IFAD, or an official of the Fund, as maintained by Mrs Saez García.

The Court clarified that the problem revolved around the nature of the relationship between the UNCCD, namely the COP, IFAD and the Global Mechanism. In this connection, it observed that neither the Convention nor the MOU between the COP and IFAD confer legal personality on the Global Mechanism or otherwise accord to it the competence to enter into legal arrangements.[41] Furthermore, according to the Court, the Global Mechanism had no power to enter into contracts, agreements or 'arrangements', at both international and national level. This means that Mrs Saez García was right when she argued that the Managing Director of the Global Mechanism is an officer of the Fund and that his actions are, in law, the actions of the Fund.[42]

In light of the above, the Court, by noting that an employment relationship was established between Mrs Saez García and the Fund and that this relationship qualified her as a staff member of the Fund, concluded that the Tribunal was competent *ratione personae* to consider the complaint filed by Ms Saez García against IFAD.[43]

As for the second condition, the problem is whether Mrs Saez García's complaint may be included, in accordance with the terms of Art. II(5) of ILOAT Statute, among the complaints alleging non-observance, in substance or form, of the terms of appointment of officials or those alleging non-observance of provisions of the Staff Regulations. The Court, by stressing the fact that the Managing Director of the Global Mechanism was a staff member of the Fund when the decision of non-renewal of Mrs Saez García's contract was taken, upheld the official's argument according to which the Tribunal was competent to hear claims that challenge the international organization's decisions due to the consideration that they would be based on wrong reasons or vitiated by

40 See Section 68 of the Advisory Opinion.

41 See Section 61 of the Advisory Opinion.

42 See Sections 87–88 of the Advisory Opinion.

43 See Sections 71–82 of the Advisory Opinion.

substantive or procedural flaws. In both cases, in fact, the allegations would fit within those covered by Art. II(5) of the ILOAT Statute.[44]

As a consequence, the Court held that the Tribunal was competent *ratione personae* because Mrs Saez García was a staff member of the Fund and also *ratione materiae* because her appointment was governed by IFAD's provisions on the terms of appointment of its staff members.

Acknowledging that the ILOAT had jurisdiction, the Court made it clear that it had answered not only the first question, but all the issues regarding the question of jurisdiction raised by the Fund in its other seven questions.[45] With regard to the remaining claim brought by IFAD concerning a 'fundamental fault in the procedure' that may has been committed by ILOAT, the Court limited itself to consider that no fault had been identified.[46]

On the basis of the reasoning briefly described above, the Court responded to the last question posed by IFAD and found 'that the decision given by the ILOAT in its judgment No. 2867 is valid'.[47]

5 The Problems Concerning the Lack of *Jus Standi* and *Jus Locus Standi in Judicio* before the Court

The recent Advisory Opinion rendered by the Court was the occasion for it to deal with the extent and limits of the application of the principle of equality before the ICJ, with regard to the *status* of IOs on one hand and of their staff members on the other. The issue was already at stake in the context of previous requests brought to the Court by way of applications for review of judgments of both the UNAT and ILOAT,[48] in which the ICJ had affirmed, *inter alia*, that not responding to the request for an advisory opinion would endanger the functioning of the regime established by the ILOAT Statute for the judicial protection of officials.[49]

The concerns relate to two sides of the same coin, which is represented by the principle of equality: the notion of *jus standi* and *jus locus standi in judicio*,

44 See Sections 83–95 of the Advisory Opinion.

45 See Sections 96–97 of the Advisory Opinion.

46 See Section 98 of the Advisory Opinion.

47 See Section 99 of the Advisory Opinion.

48 See especially *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, 85; see also the opinions mentioned *supra*, footnotes 8 and 14, and also PCIJ, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City* of 4 Dec. 1935, Series 1935, 40.

49 See Section 36 of the Advisory Opinion and *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*.

that is to say, the (in)equality in the access to the Court and the (in)equalities in the proceedings before it. The crucial problem is that it is only the organization that is entitled to request an opinion of the ICJ and to participate in the proceedings before it.

As far as *jus standi* is concerned, the Court begun its reasoning by making a comparison between the former UN system of administration of justice, in force from 1955 to 1995 as already noted above,[50] and the one established by the Annex to Art. XII(1) of the ILOAT Statute.[51] In fact, Art. 11(1–4) of the former UNAT Statute[52] allowed staff members, as well as their employer, the Secretary-General and Member States of the UN, to object to the Tribunal's judgment and 'make a written application' to a Committee composed of 'the Member States the representatives of which have served on the General Committee of the most recent regular session of the General Assembly', so that the Committee may request an advisory opinion of the ICJ on the matter. This means that even though the official, given the well-known limits *ratione personae* concerning the scope of Art. 96 of UN Charter – that permits only to the GA, the Security Council and other organs of the UN and specialized agencies (so authorized by the GA) to request the opinion –, had no direct power for resorting to the Court, there was a way for him/her to initiate the procedure of request to the ICJ, unlike the system established by the ILOAT Statute.

The Court then focused on the developments occurred at international level in relation to the right of access to justice and did so by recalling two comments, adopted in 1984 and 2007 by the UN Human Rights Committee, on Art 14(1) of the International Covenant on Civil and Political Rights of 19 Dec. 1966, which requires that '[a]ll persons shall be equal before the courts and tribunals'. In particular, in the second comment it is stated that 'if procedural rights are accorded they must be provided to all the parties unless distinctions can be justified on objective and reasonable grounds'.

Further, the ICJ responded to IFAD's statement that the request for an advisory opinion pertained 'not to any dispute between the Fund and Mrs Saez García, but to the relationship between the Fund and the ILO as it relates to the ILOAT, a subsidiary body of the ILO'. In the Court's opinion, the 'real' dispute was between Mrs Saez García and the Fund, not between the Fund and the ILO. Plus, the Court clarified that IFAD would not be able to bring a matter about its relationship with the ILO before the Court, since the General Assembly, when authorizing IFAD to seek advisory opinions, under Art. 96(2)

50 See *supra*, footnote 10.

51 See Section 36 of the Advisory Opinion.

52 It is interesting to clarify that between 1995 and 2009 the UN system contained no provision at all on the review of the decisions of the UNAT.

of the UN Charter, expressly excluded questions concerning the mutual relationships of the Fund and the UN or other specialized agencies.[53]

Moreover, the Court was of the opinion that the argument submitted by IFAD – according to which the procedure set out in Art. XII of the Annex to the ILOAT Statute seemed to have many features in common with investor-State arbitration – was not well founded. IFAD had observed, first of all, that in such arbitrations it is only the investor that may initiate the dispute settlement process, and, secondly, with regard to bilateral free trade and investment treaties, that they contain clauses enabling the State parties to declare, by joint decision, at the request of one of them, their interpretation, which is binding on the tribunal hearing an investment dispute including those brought by the investor. In this connection, the Court made clear that those situations bear little resemblance to the procedure set out in Art. XII of the Annex to the ILOAT Statute. In fact, while 'parties to treaties are in general free to agree on their interpretation', in the present case 'the Court is concerned with the initiation of a review process to be carried out by an independent tribunal'.[54]

In this context, the ICJ acknowledged, as already done in its Advisory Opinion of 1956,[55] that there is a concern about the inequality of access to the Court arising from the combination of Art. XII of the Annex to the ILOAT Statute, Art. 65 of the ICJ Statute and Art. 96 of the UN Charter. It is the system established in 1946 by the UN, with respect to the review of ILOAT's decisions, to be put (at least partially) in question by the Court.[56] Therefore the ICJ seems to implicitly have said that this system is not in line neither with the law governing the UN system of administration of justice now in force nor with the current developments of international law aimed at fostering the individuals' right of access to justice before international and supranational jurisdictions.[57] This is clear also when the Court noted that, in the case of the ILOAT, there wasn't any justification for the provision for review of the Tribunal's decisions which favours the employer to the disadvantage of the staff member.[58]

The ICJ clarified that it cannot reform the system as it stands for what concerns the (in)equality of access, i.e. the *jus standi*, since, as known, for amendments of the UN Charter it must be followed the procedure set out in its Ch. 18. This is

53 See Section 42 of the Advisory Opinion.

54 See Section 43 of the Advisory Opinion.

55 See *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, 85.

56 See Section 44 of the Advisory Opinion.

57 On this topic see the analysis of Judge Cançado Trinidade's separate opinion carried out *infra*, Section 7.

58 See Section 44 of the Advisory Opinion.

why the Court decided to dwell upon the (strongly connected) issue of the *jus locus standi in judicio*, that is of the (in)equality of arms in the proceedings before it. This way the Court tried to balance the problems arising from the inequality of access by diminishing the unequal position before the Court of the employing institution and its official. To this end the ICJ determined: not to admit oral proceedings, since, as known, the Court's Statute does allows only the international organization concerned – not the individual – to appear before the Court[59]; to oblige the President of IFAD to transmit to the Court any statement Mrs Saez García intends to convey to the latter; to fix the same time-limits for the filing of the two parties' written statements.[60]

In the last part of the Opinion concerning the extent and limits of the principle of equality, the Court noted that, notwithstanding its approach aimed at giving more attention to the official's prerogatives, there have been several difficulties throughout the proceedings.[61] However, these difficulties were not decisive as, by the end of the process, it had all information it required to decide upon the request filed by IFAD: 'in essence, the principle of equality in the proceedings before the Court, required by its inherent judicial character and by the good administration of justice, has been met'.[62]

6 Some Remarks on Cançado Trinidade's Innovative Separate Opinion: Is the Recognition of International Subjectivity of Individuals the Only Way to Secure the Right of Access to Justice for International Officials?

Judge Cançado Trinidade appended a very long, accurate Separate Opinion to the Advisory Opinion of the ICJ, which deserves close attention.[63] The Judge's main argument is that cases such as the one at stake show the urgent need for a 'reconsideration' of the whole procedure concerning the review of the ILOAT's judgments by the ICJ.[64] The meaning of 'reconsideration' is not clarified by Cançado Trinidade, who observes as well that '[l]egal instruments,

59 On this aspect see also *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Section 34.

60 See Section 45 of the Advisory Opinion.

61 On this point see *supra*, Section 4.

62 See Sections 46–48 of the Advisory Opinion.

63 *ICJ Reports* 2012, 51; see also the declaration appended by Judge Greenwood (*ICJ Reports* 2012, 94).

64 The term "reconsideration" is used in Section 81 of the Separate Opinion.

whichever their hierarchy, are a product of their time, and I am sure that we all agree as to the need to work for the realization of justice at the level of the challenges of our time, so as to respond properly to them'.[65] It is reasonable to think that Cançado Trinidade is asking for an amendment of the ILOAT Statute, the UN Charter and the ICJ Statute[66] since, quite clearly, a 'simple' (re)interpretation of the relevant provisions would not be enough.

The aim of this radical changeover of perspective would be to grant individuals, like Mrs Saez García, the right to request an advisory opinion (*jus standi*) and participate as a party at the proceedings which take place before the ICJ (*jus locus standi in judicio*). According to Cançado Trinidade, the problem of the inequality of the parties in review procedures before the ICJ was already raised by several judges of the ICJ[67] in their declarations, separate and dissenting opinions, starting with the dissenting opinion of 1956 appended by Judge Córdova[68] to the Court's Advisory Opinion on *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco.*[69] Cançado Trinidade conducted a resolute criticism. He noted, *inter alia*, that '[f]or 56 years the force of inertia and mental lethargy have prevailed',[70] since the ICJ is still deferent to the dogma that individuals cannot appear before the Court because they are not subjects of international law. In Cançado Trinidade's opinion, the procedure set out in Art. XII of the ILOAT Statute, combined with the prohibition for individuals to appear before the ICJ, is 'prehistoric and fossilized' and 'defies logic, common sense and the basic principle of the good administration of justice'.[71]

At the core of Cançado Trinidade's opinion lies the consideration that 'the emergence and consolidation of individuals as subjects of International Law'[72]

65 See Section 118 of the Separate Opinion.

66 Leo Gross, "Participation of Individuals in Advisory Proceedings before the International Court of Justice: Question of Equality between the Parties," *AJIL* 52 (1958): 40, had already suggested the insertion of an additional chapter in the UN Charter.

67 In addition to the judges' scientific essays, as it is the case of Shabtai Rosenne, "Reflections on the Position of the Individual in Inter-State Litigation in the International Court of Justice," in *International Arbitration. Liber Amicorum for M. Domke*, ed. Pieter Sanders (Kluwer: The Hague, 1967), 242 and 249, cited by Cançado Trinidade at Section 81 of the Separate Opinion.

68 *ICJ Reports* 1956, 155.

69 Like M. Zafrulla Khan, R. Córdova, F. de Castro, P. Morozov, A. Gros, H. Mosler, R. Ago; on this point see especially Sections 37–42, 44, 46, 50, of the Separate Opinion.

70 See Section 48 of the Separate Opinion.

71 See Section 48 of the Separate Opinion.

72 See Sectiona 51 and 56 of the Separate Opinion.

solicit the ICJ – as well as the legal scholarship – to secure the right of access to justice of IOs' officials before international tribunals, including the ICJ. Cançado Trinidade's reasoning is grounded on the theories of a number of philosophers and jurists who have emphasized, over the centuries, the role of human beings within the *societas gentium* by stressing that the law governs not only the relationships between States but above all the relationships amongst all members of the 'universal society'.[73]

Cançado Trinidade then noted that at regional level the direct access to international tribunals is extensively granted not only to States but also to individuals. This is the case of the Central American Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court of Human and Peoples' Rights.[74]

The above considerations led Cançado Trinidade to highlight that many cases brought before the ICJ pertained to the condition of individuals whose presence before the Court would have enriched the proceedings and facilitated the work of the Court. He subsequently concluded, as to the case of Mrs Saez García, that, 'keeping…dogmatisms apart, it can hardly be denied that there should have been a hearing', with the presence of both the legal representative of the IFAD and its official's.[75]

As it will be clarified in the following pages, Cançado Trinidade's theory is embraceable in that he calls into question the procedure envisaged under Art. XII of the Annex to the ILOAT Statute on the grounds that it does not secure to the official involved in a dispute against the organization neither the right to initiate the proceedings before the ICJ nor the right to participate as a party. It is true that such procedure seems to infringe the right of access to justice *lato sensu*, that is the right to a fair trial, with its corollaries, amongst which the principle of equality of arms, the principles of good administration of justice and the *principe du contradictoire*. It is also true that international law as it stands grants a great protection to individuals who seek to vindicate their rights before national and international tribunals.

However, two main arguments made by Cançado Trinidade, in my opinion, cannot be sustained. Firstly, according to Cançado Trinidade, it seems that the fact *ex se* that individuals are entitled to exercise rights towards sovereign

73 See Sections 58–63 of the Separate Opinion, where Cançado Trinidade recalled 'the illuminating thoughts and vision of the so-called founding fathers of International Law' (Section 62) such as Franciso de Vitoria, Alberico Gentili, Hugo Grotius, Samuel Pufendorf, Christian Wolff, Bynkershoek.

74 See Sections 64–68 of the Separate Opinion.

75 See Sections 78–109 of the Separate Opinion.

States, at national, regional and also international levels, implies automatically that they are always to be considered as having international juridical personality. Although the aim of this article is clearly not to confront with such issue, what I maintain here is that the argument raised by Cançado Trinidade tends to simplify too much in that it seems to provide a solution that cannot be valid for all legal contexts and scenarios. In this connection, the obstacle for granting to IOs' staff members a full right of access to justice is represented above all by the UN legal order and the ILOAT Statute rather than by mental inertia and lethargy. Secondly (and most importantly), unlike Cançado Trinidade, I believe that the ICJ's competence *ex se* to give advisory opinion on disputes between IOs and their staff system is at odds with the evolving *status* of the right of access to justice under international law and the law of the international civil service. The crucial question, therefore, is not whether international officials, like other categories of individuals, are to be considered as subjects of international law. On the contrary, what it should be investigated is whether the ICJ is the most appropriate *forum* to settle this kind of controversies.

7 A Critical Appraisal of the Court's Reasoning: Is the ICJ the Right Judge to Decide Disputes between International Organizations and Their Staff?

As it has been shown,[76] the ICJ formulated a number of legal remedies to face the problem arising from the lack of *jus standi* upon Mrs Saez García. The solution chosen by the Court was to secure more equality between IFAD and its official in the proceedings before it (*jus locus standi in judicio*). The Court decided not to hold oral hearings and to allow Mrs Saez García to transmit to the Court, through the President of IFAD, any written statement which she might wish to bring to the attention of the Judges. Furthermore, the ICJ fixed the same time-limits for Mrs Saez García as for IFAD for the filing of statements in the first round as well as of comments to the counterpart's arguments in the second round.

Although the above measures reduced inequality between the parties, the Court clearly did not re-establish equality of arms between them. As to the choice not to hold oral hearings, I do not agree with the criticism, made by Cançado Trinidade in his Separate Opinion,[77] according to which by this solution the Court would have deprived itself to instruct better the *dossier* of the

76 See *supra*, Section 6.

77 See Section 52 of the Separate Opinion.

case, with the result to impose, *ex ante*, a limit to the freedom of expression of the actors concerned. In fact, as it happens in other jurisdictional systems where cases are generally settled through written proceedings,[78] the fairness of a trial is not necessarily associated with the oral character of the procedure. The problem concerning the proceedings before the ICJ is the impossibility for the official to interact with the Court autonomously, i.e. without necessarily passing through the pseudo-gatekeeper function exercised by the organization.

For what concerns the obligation imposed upon IFAD to receive any statements made by Mrs Saez García and to transmit it to the Court, it does not seem to be a valid alternative to be applied in the present situation as well as *pro futuro* in other cases by the ICJ. This is demonstrated by a number of circumstances and difficulties occurred during the proceedings. First of all, IFAD's choice to request an advisory opinion has been used as an *escamotage* for not executing Judgment No. 2867 of ILOAT inasmuch as the Fund maintained that it might become entitled to repayment of the amounts due if the Court would declare the ILOAT's decision invalid. Secondly, the filing of 'all documents likely to throw light upon the question' pursuant to Art. 65(2) of the ICJ Statute was completed only after more than 15 months from the submission of the request by IFAD. Thirdly, IFAD failed several times, as indicated by the Court, to inform Mrs Saez García in a timely way of the documents it was transmitting to the Court. Fourthly, IFAD did not transmit to the Court certain communications that Mrs Saez García wished to submit to the ICJ. It is true that the Fund's behavior prompted the Registry of the Court to intervene in order to ensure that Mrs Saez García's statements would be taken into due consideration.[79] However, the issue is not whether the ICJ, in this case, has done its best to reduce the disparities between Mrs Saez García and IFAD, so that the former may receive a fair hearing. The Court's *activism* is not, in itself, a remedy able to conceal the fact that the official's interests will be defended and represented depending on the willingness of the organizations to do so. Moreover, it is likely that IFAD's attitude will be taken also by other organizations in the case of new requests for an advisory opinion which challenge a decision taken by the ILOAT.

The circumstances described above must be read in light of two more features that define the procedure envisaged under the ILOAT Statute, and which differentiate it from other types of requests for advisory opinions made by the GA[80]

78 One example is represented by the European Court of Human Rights.

79 See Section 46 of the Advisory Opinion.

80 On the advisory function of the ICJ more in general see the observations made, amongst others, by Benedetto Conforti and Carlo Focarelli, *The Law and Practice of the United*

in cases such as *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* of 22 July 2010.[81]

The first distinctive element of the advisory opinions of the ICJ regarding staff disputes in the frame of Art. XII of the ILOAT Statute is that such opinions, in accordance with Art. XII(2), are binding, even though formally defined as 'advisory' under Art. 65(1) of the Court's Statute.[82] This means that the ICJ's opinion, if favorable for the organization which filed the request (having the Court recognized that the ILOAT, under Art XII of the ILOAT Statute, has exceeded its jurisdiction, or that there has been a fundamental flaw in procedure), may entail that the staff member will lose the compensation awarded to her. Therefore, in cases regarding the review of the decisions of the ILOAT, what is at stake is always a dispute between the official and the organization, rather than the clarification of a complex legal issue which falls under the competence of the UN specialized agencies.

The second aspect that characterizes the procedure under Art. XII of the ILOAT Statute is that the law at the heart of the ICJ's reasoning – unlike what it happens in the other proceedings initiated by the UN specialized agencies pursuant to Art. 65(1) of the ICJ Statute – is the internal law of IOs, namely the law governing the employment relationships between the staff members and the organization. Now, what I want to stress here is that this branch of law[83] follows *sui generis* principles very much different from those which define international law.[84] It is a self-contained regime, not to be assimilated with international law, even though it does derive from the latter,[85] i.e. from both the treaty which

Nations (4th edn. The Hague: Martinus Nijhoff, 2010), 382–292; Sergio Marchisio, *L'ONU: il diritto delle Nazioni Unite* (2nd edn. Bologna: Il Mulino, 2012), 286–291.

81 *ICJ Reports* 2010, 403.

82 On the (formally advisory) opinions of the ICJ having been given a conclusive and binding *status* also with respect to disputes between international organizations and States, see Roberto Ago, "Binding Advisory Opinions of the International Court of Justice," *AJIL* 85 (1991): 439; Roberto Virzo, "Le organizzazioni internazionali e la soluzione delle controversie," in *Diritto delle organizzazioni internazionali*, ed. Angela Del Vecchio (Napoli: ESI, 2012), 368–372.

83 For what concerns the nature of this discipline, it cannot be shared the opinion of those who deny the legal character of the rules governing the *status* of international organizations' staff members as well as the recognition of the officials as subjects of law; see Giorgio Balladore Pallieri, "Le droit interne des organisations internationals," *RdC* 121 (1969), 13; Rolando Quadri, *Diritto internazionale pubblico* (Napoli: Liguori, 1968), 86.

84 On the topic see recently Daniele Gallo, "*Status*, privilegi, immunità e tutela giurisdizionale dei funzionari delle organizzazioni internazionali," in *Diritto delle organizzazioni*, 280–282.

85 On the subject see Chittharanjan F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn. Cambridge: CUP, 2005), 274.

established the organization and the Staff Regulations and Rules generally adopted by, respectively, the Assembly and the Secretariat of the organization.[86] The legal problems and questions to be investigated by the ICJ under the procedure governed by Art. XII of the ILOAT Statute are very different from those included in the scope of Art. 96(2) of the UN Charter. Furthermore, the applicable law is mainly contained in the organization's founding agreement, in the headquarters agreement between the organization and the host State, in the ILOAT Statute, in the Staff Regulations and Rules, in the contract signed by the official and his/her employer and in the other not written sources of law,[87] rather than in sources of public international law *stricto sensu*.[88]

It does not seem to me that the only way to prevent the risks of fragmentation in the regulation of the *status* of the international civil service (and the arbitrariness of international administrative tribunals) as well as to entail the effectiveness of the law of international administrative tribunals[89] may be to empower the ICJ with the competence to develop a uniform regime governing staff disputes.[90] On the contrary, I maintain that the relationship between the

86 Authors such as Philippe Cahier, "Le droit interne des organisations internationals," *RGDIP* (1963): 573, and Riccardo Pisillo Mazzeschi, "Funzionario internazionale," *Digesto delle discipline pubblicistiche* VII (1991), 48, have already clearly demonstrated that the internal legal order of an international organization can be considered as independent from international law, even though it derives from it: there is no interdependence between the aspect concerning the origin of that legal order and that of its autonomy.

87 On the sources of law governing employment relationships see, *inter alia*, Clarence Wilfred Jenks, *The Proper Law of International Organizations* (London: Stevens, 1962); Michael B. Akehurst, *The Law Governing Employment in International Organizations* (Cambridge: CUP, 1967); Amerasinghe, *Principles*, 282–289; Felice Morgenstern, "The Law Applicable to International Officials," *ICLQ* 18 (1969): 739; Gallo, "*Status*," 282–289.

88 See also the Dissenting Opinion of Judge Córdova, 165–166, as well as the observations by Gross, "Participation," 25–26.

89 Recently, on the role and development of international administrative law see Melissa Thomas, Olufemi Elias, "The Role of International Administrative Law," in *The Development*, 397–410; on the emergence of general principles on the international civil service see Francesco Salerno, *Diritto internazionale* (2nd edn. Padova: Cedam, 2011), 206.

90 On the limits of the ICJ's contribution to the development of international administrative law see Joanna Gomula, "The Review of Decisions of International Administrative Tribunals by the International Court of Justice," in *The Development*, 367–372; *contra* Pierre Pescatore, "Two Tribunals and One Court. Some Current Problems of International Staff Administration in the Jurisdiction of the ILO and UN Administrative Tribunals and the International Court of Justice," in *Towards More Effective Supervision by International Organizations. Essays in Honour of Henry G. Schermers*, eds. Niels Blokker and Sam A. Muller (Leiden: Martinus Nijhoff, 1994), 225 and 230–237; Riddell, "Administrative Boards," 75.

ICJ and ILOAT is grounded on a basic defect, that is, the lack of *jus standi* and *jus locus standi in judicio*. In particular, as to the latter, the remedies provided by the ICJ in its Advisory Opinion of Feb. 2012 are not conclusive; they do not entail a sort of *equivalent protection* of the rights of the individual, such as the doctrine of equivalent protection established by the European Court of Human Rights to address the issue of the compatibility of EU law – including the case law of the Court of Justice of the EU – with the European Convention on Human Rights.[91] As a consequence, I believe that, as long as there is no drastic change of perspective at UN level that may lead to an amendment of the UN Charter as well as of the ICJ Statute, the ICJ is not the right *forum* to resort to in order to determine the validity of a decision by the ILOAT. Only the full exercise of the right of access to the ICJ – on the part of the officials involved in the dispute – and the full respect of general principles of law – such as the equality of arms, the *contradictoire*[92] and the good administration of justice – may secure a fair instruction of the process and above all may ensure that the relationship between the ICJ and ILOAT may be compatible with the modern concepts and dimensions of due process[93] and, ultimately, justice.

8 The Limits of the Law Governing the Relationship between the ILOAT and the ICJ and the Need for the Provision of an Appellate Tribunal within the Internal Justice Systems of International Organizations

If the ICJ is not the right judge to adjudicate staff disputes previously settled by the ILOAT, which would be the right judicial organ to do it?

My opinion is that, as happened in the UN internal justice system, an appellate degree should be established for all staff disputes within IOs. More specifically, as to the ILOAT, it seems to me that a tribunal should be instituted and empowered with the competence to rule as judge of second and last degree

91 On the notion of European 'equivalent protection' of rights see, amongst others, Paul De Hert and Fisnik Korenica, "The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights," *GLJ* 13 (2012): 874.

92 On the topic see the contributions in *Le principe du contradictoire devant les juridictions internationales*, eds. Hélène Ruiz Fabri and Jean-Marc Sorel (Paris: Pedone, 2004).

93 On due process and international administrative tribunals see Maritza Struyvenberg, "International Administrative Law: Due Process in the Justice System," in *International Administrative Tribunals in a Changing World*, eds. Katerina Papanikolaou and Martha Hiskaki (London: Esperia, 2008), 173–180.

vested with power to review appeals against decisions taken by ILOAT within the same limits prescribed by Art. 2 of the Statute of the UN Appeals Tribunal (UNAsT),[94] according to which the UNAsT shall be competent to hear and pass judgment on an appeal filed by the UN Dispute Tribunal if the latter has exceeded its jurisdiction, failed to exercise its jurisdiction, or if it erred on a question of fact, law, or procedure.[95]

Moreover, in the wake of the changes occurred at UN level, the need for a reform within ILO as well as within other IOs through which granting to the IOs' staff members the same right of access to justice than those accorded to their employers is even more urgent if we consider that the ICJ itself seems to act as judge vested with a power of review of a tribunal's decision very much similar to that exercised by a tribunal of appellate degree.[96] Well, such a hybrid – advisory proceedings that are judicial in character, but whose procedural rules do not satisfy the equality of arms – is clearly at odds with the notion of justice at the core of the international principles and norms aimed at safeguarding the individual and his fundamental right of access to justice.

In conclusion, IOs should take measures to establish an appellate tribunal.[97] And it is the ILOAT that, insofar as the most representative of international administrative tribunals, should take the initiative. My main argument is that, with regard to the provisions governing employment relationships, the development, as well as the uniform interpretation and application, of the internal law of IOs must be ensured, rather than by the ICJ, by international administrative tribunals. Due to their nature and mission, the latter are better equipped

94 See *supra*, Section 1.

95 On the need for a double degree within international organizations' internal justice systems see David Ruzié, "Le double degré de juridiction dans le contentieux de la fonction publique internationale," in *Mélanges offerts à Hubert Thierry: l'évolution du droit international* (Paris: Pedone, 1999), 369–381.

96 In this sense see also Gomula, "The Review," 357.

97 To my knowledge, the only alternative (but perhaps, at present, less feasible) solution would be to rely on Art. 2(10) of the UNAsT Statute, according to which '[t]he Appeals Tribunal shall be competent to hear and pass judgment on an application filed against a specialized agency brought into relationship with the United Nations… or other international organization or entity established by a treaty and participating in the common system of conditions of service, where a special agreement has been concluded between the agency, organization or entity concerned and the Secretary-General of the United Nations to accept the terms of the jurisdiction of the Appeals Tribunal, consonant with the present statute'. The Article states as well that '[s]uch special agreement may only be concluded if the agency, organization or entity utilizes a neutral first instance process that includes a written record and a written decision providing reasons, fact and law'.

to settle staff disputes between an international organization and its staff members.[98]

As for the ICJ Advisory Opinion of Feb. 2012 on Judgment No. 2867 of the ILOAT, an important observation must be made on the approach taken by the Court. Not only did the ICJ choose to acknowledge, once and for all, the limits of its relationship with the ILOAT – limits it had already emphasized in previous advisory opinions–, but it also brought attention to the new UN internal justice system and, finally, questioned the compatibility of the procedure provided for by Art. XII of the ILOAT Statute[99] with the 'present-day principle of equality of access to courts and tribunals'.[100] In my opinion, this must be understood as a recognition, by the ICJ itself, of the crucial function performed by international administrative tribunals in promoting, at international level, the right of access to justice. In this respect, I will not be surprised if the ICJ Opinion were interpreted, first of all by IOs, as an implicit invitation for those IOs which have not yet established administrative tribunals or accepted the jurisdiction of the ILOAT or the UN internal judicial bodies to do so in the near future. For the organizations that, on the other hand, have already done so, I believe that from the Opinion there emerges an implicit invitation to establish tribunals that are vested with the power of reviewing appeals against judgments rendered by first instance courts.

98 See also Suzanne Bastid, "Have the U. N. Administrative Tribunals Contributed to the Development of International Law?," in *Transnational Law in a Changing Society. Essays in Honor of Philip C. Jessup*, eds. Wolfgang Friedmann *et al.* (New York: Columbia University Press, 1972), 298–312; August Reinisch, "The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals," *Chinese JIL* 7 (2008): 285, 286.

99 In combination with Art. 65 of the ICJ Statute and Art. 96 of the UN Charter.

100 See Section 44 of the Advisory Opinion.

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