LEGAL DEVELOPMENTS IN THE UNITED NATIONS: THE EMERGENCE OF INTER-ORGANIZATIONAL INSTITUTIONS

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The increased demands on the United Nations for peace-keeping, peace-making and peace-building operations have presented a great challenge to the capacity, logistics, equipment, personnel and finance of the Organization. It has become important for it to seek active support from other competent international organizations in at least two areas: (a) their participation in peace-keeping and peace-making operations taking place within their geographic regions; (b) their cooperation in implementing mandatory measures prescribed by the Security Council. Some of the legal issues involved are discussed in the first two sections. The third section relates to legal questions arising from the creation of inter-organizational institutions.

1. REGIONAL ARRANGEMENTS UNDER CHAPTER VIII OF THE UN CHARTER

Chapter VIII of the UN Charter recognizes that regional arrangements or agencies are appropriate means for maintaining international peace and security, provided that their activities are consistent with the purposes and principles of the Charter. But who are these institutions?

At the San Francisco Conference in 1945, an attempt to define what constitutes a regional arrangement or agency failed.¹ The absence of a definition has, however, allowed the United Nations to adopt a pragmatic approach. Thus, for example, the North Atlantic Treaty Organization (NATO) and the League of Arab States had previously *not* considered themselves as collective

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¹ See *United Nations Conference on International Organizations*, Vol. 12, pp. 673 and 850. Also, L.M. GOODRICH *et al.*, *Charter of the United Nations* (3d edn., 1969) 356.

self-defense organizations under Article 51. But in due course, the Arab League joined the United Nations in peace-keeping operations in Lebanon. NATO is now assisting the United Nations in the maintenance of the 'no-fly zone' in the air space of Bosnia and Herzegovina,² and in the maintenance of the 'safe areas' declared by the Security Council by its resolution 824 (1993) of 6 May 1993.³ In response to the Secretary-General's request in February 1994, the North Atlantic Council decided that, ten days from 10 February 1994, heavy weapons of any of the parties found within the Sarajevo exclusion zone, unless controlled by UNPROFOR, would be subject to NATO air strikes if they were not withdrawn within the deadline fixed. Because of NATO's decision, the Federal Republic of Yugoslavia (FRY), on 16 March 1994, filed an application against the Member States of NATO in the Registry of the International Court of Justice, claiming that the adoption of the decision of air strikes breached Article 2, paragraph 4 and Article 53, paragraph 1 of the UN Charter, by "threatening to use force without the authorization of the Security Council and in the form of an ultimatum."⁴ Since the Government of the FRY based the jurisdiction of the Court on consent to be given by the respondent States, the Court decided to take no action on the Application until and unless the latter expressed consent to the Court's jurisdiction for the purpose of the case. In the absence of such consent, the case was later removed from the Court's list.

Whether the European Community could act as a regional organization with an interest in the maintenance of international peace and security is no longer a question. On 24 July 1992, the Security Council invited the European Community, in cooperation with the Secretary-General of the United Nations, to examine the possibility of broadening and intensifying the European Community's Conference on Yugoslavia with a view to providing a new momentum in the search for negotiated settlements of the various conflicts and disputes in the former Yugoslavia. Subsequently, the International Conference on the Former Yugoslavia was convened in London in August 1992 under the co-chairmanship of the UN Secretary-General and the President of the European Community. The Conference adopted, *inter alia*, the Statement of Principles for a negotiated settlement of the problems of the former Yugoslavia. It also created a Steering Committee to prepare the basis for a general settlement and associated measures. The current Co-Chairmen of the Steering

² Security Council Resolution 781 (1992) of 9 October 1992.

³ The Security Council declared that Sarajevo and other such threatened areas, in particular the towns of Tuzla, Zepa, Gorazde, Bihac, Srebrenica and their surroundings should be treated as safe areas and "should be free from armed attacks and from any other hostile act".

⁴ See *ICJ Communiqué* no. 94/11 of 21 March 1994.

Committee (Mr. DAVID OWEN and Mr. STOLTENBERG) have proceeded on the basis of the principles of the 1992 Conference and have held a series of complex and difficult talks with the parties concerned. While no peace agreement has yet been accepted by all parties concerned, the joint efforts of the Co-Chairmen of the Steering Committee represent a close cooperation between the United Nations and the European Community⁵ in the search for a solution for Bosnia and for the Former Yugoslav Republic of Macedonia.

Recently, the Organization of American States (OAS) and the Economic Community of West African States (ECOWAS) have also been brought into the framework of cooperation of the United Nations. Previously, OAS had recommended to its members to "suspend their economic, financial and commercial ties with Haiti and any aid and technical cooperation except that provided for strictly humanitarian purposes" as well as "action to bring about the diplomatic isolation of all those who held power illegally in Haiti".⁶ ECOWAS had on its own organized a peace-keeping operation in Liberia.⁷ But in due course, the OAS' role in Haiti and ECOWAS' role in Liberia have been acknowledged by the Security Council⁸ and have been brought into cooperation with the United Nations in its peace-keeping operations in Haiti and Liberia.

2. IMPLEMENTING MANDATORY MEASURES

The need to ensure the implementation of Security Council mandatory measures has once again raised the question of cooperation between the United Nations and those inter-governmental agencies providing economic, financial or development assistance to states on which the United Nations has imposed sanctions.

Pursuant to Article 48, paragraph 1 of the UN Charter, all members of the United Nations are obligated to take the action required to carry out the decisions of the Security Council for the maintenance of international peace

⁵ For detailed work of the Co-Chairmen, see *The United Nations and the Situation in the Former Yugoslavia*, a reference paper, UNDPI publication, 15 March 1994.

⁶ See resolution MRE/RES. 1/91, MRE/RES. 3/92 and MRE/RES. 4/92 adopted by the Foreign Ministers of the Organization of American States, and CP/RES. 594 (923/92), and declarations CP/DES.81, CP/DES.9 adopted by the permanent Council of OAS.

⁷ See Statements by the President of the Security Council of the United Nations on 22 January 1991 (S/22133) and 7 May 1992 (S/23886) and the Report of the Secretary-General on the question of Liberia.

⁸ See, for example, Security Council resolutions 841 (1993), 861 (1993), 875 (1993), 917 (1994) with respect to Haiti and resolutions 788 (1992), 813 (1993), 866 (1993) with respect to Liberia.

and security. But what about independent inter-governmental organizations such as the Bretton Woods Institutions (the World Bank and the Fund) which have their own constitutions, memberships, budgets, governing bodies and decision-making processes? Can the Security Council require them to comply with the mandatory measures? Though the Charter recognizes the specific role of regional organizations in maintaining peace and security, the relationship between the Security Council and the specialized agencies is, however, not specified. Reference should be made to Article 48, paragraph 2 and Articles 57 and 63 of the UN Charter.

Article 48, paragraph 2 provides that decisions of the Security Council for the maintenance of international peace and security “shall be” carried out by UN members “through their action in the appropriate international organizations” of which they are members. Clearly, a duty is imposed on UN members. A conflict of treaty obligations may, however, arise since other organizations of which they are also members may impose different obligations. Article 103 of the Charter thus provides that the obligations under the Charter prevail over other treaty obligations. Consequently, it is not a legal excuse for UN Members not to ensure observance of decisions of the Security Council under Chapter VII of the UN Charter in those institutions to which they are also members.

Articles 57 and 63 of the UN Charter provide that specialized agencies established by inter-governmental agreement and having international responsibilities in the economic, social, cultural, educational, health and the related fields ‘shall be brought’ into relationship with the United Nations. The Economic and Social Council may enter into agreements with those agencies defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Pursuant to these Articles, the United Nations entered into Relationship Agreements with all seventeen UN agencies, including the Bank and the Fund.

These Relationship Agreements usually contain provisions for reciprocal representation, proposal of agenda items, consultations and recommendations, exchange of information, relations with the Security Council, the International Court of Justice, administrative relationships and statistical services. Thus, for example, the Relationship Agreements with ILO, FAO, UNESCO and ICAO contain an undertaking whereby the agency:

“[. . .] agrees to cooperate with the Economic and Social Council in furnishing such information and rendering due assistance to the Security Council as the Council may request, including assistance in carrying out decisions of the Security Council for the maintenance or restoration of international peace and security.”

These agencies have thus undertaken to assist the Security Council in implementing its decisions in the field of peace and security.

The wording of Article VI of the Relationship Agreement between the Bank and the United Nations is, however, different. It states that the Bank 'takes note' of the obligations of members of the United Nations in accordance with Article 48, paragraph 2 of the Charter to carry out the decisions of the Security Council through their action in the appropriate specialized agencies of which they are members; and that the Bank in the conduct of its activities 'will have due regard' for decisions of the Security Council under Articles 41 and 42 of the Charter. The wording of Article VI is therefore not as positive as in other Relationship Agreements mentioned earlier, but the Bank at least acknowledges that most of its members (who are also members of the United Nations) have certain specific obligations towards the United Nations, by virtue of Article 48 paragraph 2 of the Charter, and that the Bank 'will have due regard' for Security Council resolutions.

In the past, the Bank has taken the position that the words 'takes note' and 'due regard' were specifically intended to avoid any possible suggestion that there was any obligation between the two organizations.⁹

In 1965, the General Assembly requested the specialized agencies (including the World Bank and the Fund) to refrain from granting Portugal any financial, economic or technical assistance as long as the Portuguese Government failed to implement the Assembly's resolution 1514 of 20 December 1960 on the granting of independence to colonial countries and peoples. A similar recommendation was made regarding assistance to South Africa on account of its policy of apartheid. The Bank, however, rejected both requests. It should be noted that the decisions in question related to General Assembly resolutions (not Security Council decisions under Articles 41 and 42). It is nevertheless of interest to note briefly the legal arguments raised at the time.

The President of the Bank circulated copies of the resolutions to the Bank's Executive Directors and at the same time reminded them that only economic considerations shall be relevant to the decisions of the Bank and its officers, and that they were not to interfere in the political affairs of any member. An exchange of legal arguments then took place between the Secretary-General and the president of the Bank.¹⁰

⁹ The full drafting history of Article IV, section 10, is to be found in *Proceedings and Documents of the United Nations Monetary and Financial Conferences*, Vol. I (1948) 202 *et seq.*

¹⁰ For details on the exchange between the United Nations and the Bank, see *United Nations Juridical Yearbook* (1967) 106-132, which reproduces the arguments on both sides.

The Bank's principal argument for refusing the General Assembly's requests to deny loans to Portugal and South Africa was that it was prevented from doing so by Section 10, Article IV of the Bank's Articles of Agreement:

"The 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 the 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 Article I."

The United Nations disagreed with the Bank's interpretation of Section 10 and pointed out that Section 10 only prohibited interference in the internal political affairs of member States and discrimination against any member country because of the political character of its government. This was one of the reasons why that Section goes on to provide that only 'economic considerations' shall be relevant to the decisions of the Bank and its officers. This latter provision, therefore, merely served to elaborate and emphasize those factors which must be excluded from consideration (i.e. internal political affairs), by making express reference to certain factors (economic considerations) which obviously must be taken into consideration. The last sentence of the Section should therefore not be regarded in isolation from the first sentence and interpreted as expressly confining the Bank to a consideration of nothing but the economic facts relevant to a particular loan, and obliging it to disregard other material factors such as the international conduct of a member country and its repercussions upon international peace and security.

The United Nations further pointed out that under Article VI of the Relationship Agreement, the Bank actually assumed an undertaking to 'have due regard' in the conduct of its activities for the decisions of the Security Council relating to matters of peace and security, and had indeed extended this undertaking to General Assembly resolution 377(V) entitled 'uniting for peace'.¹¹ In that case, the Bank considered that in the conduct of its activities it 'shall have due regard' for recommendations of the General Assembly made pursuant to the 'uniting for peace' resolution. To reject the Assembly's request regarding Portugal and South Africa would therefore be inconsistent with its previous decision.

The above exchange between the Bank and the United Nations continued for some time without, however, resolving the difference. At the end, the Secretary-General acknowledged the Bank's assurances of its desire to

¹¹ Adopted by the General Assembly of the United Nations on 3 November 1950.

cooperate with the United Nations by all 'legitimate means'.¹² Quite clearly, the Bank took the position that United Nations resolutions are not automatically applicable to the Bank and it is for the Bank itself to decide.

Since 1990, the Security Council has imposed under Chapter VII (though no specific articles were cited) comprehensive or specific sanctions against Iraq, the former Yugoslavia, Somalia, Libya, Liberia, Haiti and Angola. Such punitive measures ranged from severing diplomatic relations to prohibition of the imports or exports of certain commodities, to freezing financial assets and to a total arms embargo. Clearly, the implementation of these decisions requires cooperation from UN agencies, particularly the Bank.

A common paragraph is normally included in most of the Security Council resolutions imposing sanctions,¹³ reading as follows:

"Calls upon all States, including States not members of the United Nations, and all international organizations, to act strictly in accordance with the provisions of the present resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreements or any contract entered into any or any license or permit granted prior to the present resolution;"

It may be noted that in this regard, the Security Council treats the States and international organizations in the same manner and that they are all called upon to act in conformity with its resolutions.¹⁴

As mentioned earlier, most of the UN agencies have agreed, under their respective Relationship Agreement with the United Nations, to assist the Security Council in implementing its resolutions regarding peace and security. Legally speaking, their obligations to comply with the relevant Security Council resolutions stem therefore from the Relationship Agreement concerned, not directly from the UN Charter or from the specific resolutions of the Security Council. In the case of the Bank, even though the Bank does not consider that it has a legal obligation to comply with such Security Council

¹² See UN Document A/6825 Annexes IV and V which are reproduced in the *United Nations Juridical Yearbook* (1967) 131-132.

¹³ See for example resolution 757 paragraph 11, regarding Yugoslavia; SC resolution 748 paragraph 7, and resolution 883 paragraph 12, regarding Libya; SC resolutions 841 paragraph 9, and 917 paragraph 12, regarding Haiti.

¹⁴ In Security Council resolution 670 which imposed comprehensive economic sanctions on Iraq, the Council:

Affirms that the UN organization, specialized agencies and other international organizations in the UN system are required to take such measures as maybe necessary to give effect to the terms of resolution 661 (1990) and this resolution;

Resolution 670 may be regarded as a special case.

decisions, it has nevertheless accepted to have 'due regard' for Security Council resolutions adopted in the field of peace and security. Mandatory measures prescribed under Chapter VII would seem to fall within the scope of what the Bank has undertaken to pay 'due regard for'.

3. THE CREATION OF INTER-ORGANIZATIONAL INSTITUTIONS (IOIs)

Inter-governmental organizations (IGOs) themselves are created by States and are the products of States. They have now gathered together and created inter-organizational entities or have granted international status to entities under national laws. The Consultative Group on International Agricultural Research (CGIAR) is an example. CGIAR was created in 1971 to support a system of agricultural research centres and programmes around the world, and was set up jointly by the United Nations Development Programme (UNDP), the Food and Agriculture Organization (FAO) and the World Bank, and financed by 12 sovereign States, three regional development banks as well as private and public foundations. The World Bank and FAO are independent inter-governmental organizations. UNDP, however, is a subsidiary organ of the United Nations and is controlled by a Governing Council composed of States. CGIAR itself comprises nine research centres and four institutions of which (a) seven are organized under national law but with 'international status', (b) one is an inter-governmental organization, (c) three are inter-organizational organizations established by inter-IGO agreements, and (d) one institution was established by CGIAR itself. All these institutions seem to operate at a somewhat imprecise interface between the national and the international, the former reflecting their actual site of operation and the latter the source of their financing, their direction and, generally, of at least some of their staff. Some of the legal issues thus raised are mentioned here to illustrate the range of the problems.

Do IGOs have the necessary competence to create new international entities or to confer international status to entities incorporated under local law? Normally, the constitutive instruments of the relevant IGOs grant them the right to conclude contracts and to create subsidiary organs, though there is no express provision for creating institutions in cooperation with third parties. It may be argued that only States have the necessary competence to create or confer personality or international status, and that IGOs, by their very nature, have only limited functional capabilities which do not include the competence to create independent bodies beyond its control. On the other hand, it may be contended that such arrangements are merely instruments or

tools for the purpose of promoting or furthering certain specific functions entrusted to the IGOs concerned. The creation of institutions to carry out specific functions is therefore not inconsistent with the original goals. A third argument may be that the participation and involvement of States, either as founding members of such creation and/or as the host state to such institutions legitimize such creations.

What is the liability of the founding organizations for an inter-organizational institution (IOI), particularly when the former has no effective control over the latter? Similarly, what, if any, is the liability of the member States of the founding organizations? Most of the constituent instruments of institutions so created have provided that the institutions are to be free from outside influence and to be autonomous, and that the founding members are not expected to exercise any substantial control over the Board of Trustees after the initial period. Thus, should the founding organizations be held responsible even if they have no control over the new entities? Most statutes or constitutions of those institutions contain a provision exempting any liability or responsibility of the founding organizations and member governments thereof. Is it legally sufficient to insulate themselves from liability for acts and debts of an organization they create, merely by saying so? It seems that such provisions in the constituent instruments would serve as an estoppel to entities that contract with those institutions in full knowledge of such exemptions. But what about third-party liability? In the case of CGIAR, agricultural chemicals can cause damage to environment and third parties; crop failures may be caused by improper advice given to farmers. These questions should therefore be studied.

Another category of issues relates to the law applicable to their activities. Of course, their respective statutes serve as the primary guide. But since these institutions are carrying out activities both inside and outside the host countries, numerous legal issues can arise. Unless expressly provided, it is questionable if the rules and regulations of the founding organizations can be applied to them (e.g., auditing, procurement, staffing). Even if they were, which one of the founding organizations should apply?

Another set of issues relate to the host government. As mentioned above, some of the research centres are essentially national institutions governed by the laws of the host countries, but they have informally enjoyed substantive tax and customs exemptions for their imports of scientific and technical equipment, and for goods imported by their foreign staff. At a change of government, some of them have been threatened with the loss of those facilities, unless they could be reorganized as international entities which the respective host government would be prepared to grant international privileges and immunities. But, the possibility of elevating such centres to true international status

(i.e., by agreements to be concluded between those governments and one or more of the IGO sponsors) has proven unacceptable to the other member governments either for political or for financial reasons.

Questions have also been raised regarding the appropriateness of leaving the decisions for creating such entities essentially to international civil servants. It has been contended that Member States of the founding organizations must first be informed and that their approval should be required.

The creation of inter-organizational institutions has therefore generated many legal problems. It is an area that requires further study.