ABHANDLUNGEN

Settlement of Internal Disputes of Intergovernmental Organizations by Internal and External Courts

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CONTENTS

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[1]) Director, Legal Division, International Atomic Energy Agency. All views expressed are the personal views of the writer and should not be attributed to the Agency. Originally written in 1957, the study has been brought up to date on practice until October 1963.

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INTRODUCTION

The exercise by an intergovernmental organization (sometimes referred to as IGO) of its legislative and administrative functions, in the organizational as well as in the functional field, frequently gives rise to internal legal disputes. Such disputes may concern the interpretation of provisions of the constitution, or of regulations enacted by the organization, or of treaties or other acts conferring upon the organization the power to make legislative and administrative acts binding upon states and/or individuals (extended jurisdiction)[2]; or they may concern questions for which no written rules have been laid down. The disputes may arise within or between organs of the organization, between the organization and its members or its officials, or between members or between officials *inter se*. In the case of those organizations which have been given extended jurisdiction by provisions in their constitutions, in other treaties or in unilateral acts[3] – as for example international river commissions or supra-national organizations like the European Communities – disputes of an internal nature, *largo sensu*, may arise also between the organization and individuals other than officials, in those fields where such individuals have been placed under the legislative and/or administrative authority of the organization[4], or between such individuals *inter se*. (The term "extended" jurisdiction is used in opposition to the jurisdiction which is "inherent", *ipso facto*, in any intergovernmental organization, and which mainly comprises jurisdiction over the organs of the organization, including officials and member states in their capacity as members of such organs ["organic" jurisdiction][5]). "Extended" jurisdiction requires specific legal basis, but not necessarily in the constitution of the organization[6]).

It is the purpose of the present paper to discuss the various modes of settlement in relation to these different types of disputes, and in particular to examine the question of the extent to which judicial powers may be

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[2]) For example the (European) Convention on the Establishment of a Security Control in the field of Nuclear Energy, *cf.* below, Chapter III B (1).

[3]) *Cf.* below, Chapter III B (1).

[4]) In working out procedures for the administrative and judicial settlement of internal disputes between the organization and its officials or other individuals under its jurisdiction, guidance may be drawn from a comparative study of the practice of states in this respect, undertaken by the Institut international des sciences administratives (Puget and Maleville, La révision des décisions administratives sur recours des administrés, Bruxelles 1953).

[5]) See an article by the present writer in: The British Year Book of International Law vol. 37 (1961) at pp. 448–9, cited below merely as "BYIL 1961".

[6]) *Ibid.*, p. 459.

exercised in these respects by the organization, even if its constitution does not provide for judicial powers, and by external courts. External disputes of municipal or international law[7]) will only be touched upon in certain special contexts.

Chapter I: CONSTITUTIONAL PROVISIONS

The constitutions of some – but far from all – intergovernmental organizations contain express provisions which prescribe specific procedures for the settlement of disputes concerning the interpretation or application of the constitution. The procedures provided for are usually settlement by decision either of an administrative organ of the organization[8]), or of an external or internal[9]) judicial body (usually an *ad hoc* arbitral tribunal[10]) or the International Court of Justice[11]), or both. Most of these provisions confer compulsory jurisdiction upon the organ or court[9]), but some require agreement between both parties to the dispute[12]). The provisions, however, envisage only disputes arising out of the constitution it-

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[7]) On the inherent capacity of intergovernmental organizations to settle external disputes of international law by international procedures in the same manner as disputes between states, including arbitration or decision by other international courts, see Seyersted, Objective International Personality of Intergovernmental Organizations. Do their Capacities Really Depend upon Their Constitutions? in: Nordisk Tidsskrift for international Ret og Jus gentium vol. 34 (1964) (cited below merely as Nordisk Tidsskrift, 1964) at pp. 26 *et seq.*

[8]) ICAO art. 84, Fund art. XVIII (a)–(b), Bank art. IX (a)–(b), International Wheat Council (Agreement signed on 13 April 1953, UN doc. E/CONF. 20/5) art. XIX (1). A different type of provision is IMCO art. 55 and ITO arts. 94–95.

[9]) Thus art. 89 of the constitution of the European Coal and Steel Community (CECA).

[10]) ICAO arts. 84–86, UNESCO art. XIV, 2, Fund art. XVIII (c), Bank art. IX (c), ITU art. 25, 2, UPU art. 31, WMO art. 29; Danube Commission of 1948, art. 45 (United Nations Treaty Series [UNTS] vol. 33, p. 217).

[11]) Although the International Court of Justice is the principal judicial organ of the UN, the UN Charter contains no such specific reference to the Court. The same applies to many of the specialized agencies of the UN. Provisions referring disputes concerning the interpretation of the constitution to the International Court of Justice may be found, however, in the constitutions of the following specialized agencies: ILO (art. 37, 1), FAO (art. XVI, 1), UNESCO (art. XIV, 2),WHO (art. 75), ICAO (arts. 84 and 86), IAEA (art. XVII A). Similar provisions may be found in the constitutions of the following intergovernmental organizations not related to the UN: IARA (Resolution No. 8 adopted at the constitutive conference), Western European Union (art. X), Bern Union (art. 27 *bis*), European Organization for Nuclear Research (CERN, art. XI), Intergovernmental Committee for European Migration (ICEM, art. 30). The texts of these and other provisions are reproduced in: ICJ Yearbooks, chap. X, third part.

[12]) For example the constitutions of the European Economic Community (CEE) art. 182, and of EURATOM, art. 154.

self [13]). Moreover, several of the provisions envisage disputes between member states only [14]).

In addition to these limited provisions for binding administrative and/or judicial settlement, the constitutions of the UN and of certain specialized agencies provide that the organization may request an advisory opinion from the International Court of Justice on "any legal question" [15]).

Only three existing constitutions [16]) are known to provide for binding judicial settlement of internal disputes other than those relating to the constitution [17]) (and other than those arising between member states). These are the constitutions of the three European Communities – the European Coal and Steel Community (CECA), the European Economic Community (CEE), and the European Atomic Energy Community (EURATOM) – which provide for the establishment of a common Court with wide powers [18]).

Otherwise there is usually no provision in the constitutions of intergovernmental organizations prescribing modes of settlement for internal disputes [19]). Nevertheless, the disputes must be settled if the organization

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[13]) The competence of the Court of Justice of the European Communities extends to other aspects of the internal law of the Communities as well, see for example CECA constitution, arts. 31 and 89. See also arts. 12, second paragraph (*cf.* art. 10, last paragraph) and 33–43. There are also certain examples of constitutional provisions which confer upon international courts jurisdiction in disputes concerning the validity of decisions of intergovernmental organizations, see below, note 307.

[14]) See however, the constitutions of the Fund (art. XVIII) and the Bank (art. IX), which refer also to disputes between the organization and member states. Nor are the constitutions of UNESCO (art. XIV), FAO (art. XVI) or WMO (art. 29) restricted to disputes between member states.

[15]) UN art. 96, FAO art. XVI, 2, WHO art. 76, IMCO art. 56, ITO art. 96, IAEA art. XVII B.

[16]) In addition to those cited below, note 307, and to art. 96,5 of the constitution of the abortive International Trade Organization.

[17]) Art. 5 of the constitution of the Arab League provides for binding settlement by a decision of the Council of the League of any dispute between member states "which does not concern a state's independence, sovereignty, or territorial integrity", but only if the parties agree to refer the dispute to the Council for settlement.

[18]) CECA constitution, arts. 31–45 and 89 (UNTS vol. 261); CEE constitution, arts. 164–188 and 244; EURATOM constitution, arts. 136–60 and 212; see also the three protocols on the Statute of the Court annexed to the three constitutions; and the Convention Relating to Certain Institutions Common to the European Communities of 25 March 1957 (original texts in: UNTS vols. 294–7, English translation in vol. 298).

[19]) The constitutions of the major regional organizations (OAS, Arab League, OECD, Council of Europe etc.) contain no special provisions. Nor do the constitutions of the League of Nations and the UN (apart from the power to request advisory opinions), although the question of who was to interpret the UN Charter was discussed at the San Francisco Conference, see especially United Nations Conference on International Organization, San Francisco 1945 (UNCIO) vol. 7, pp. 709–10, referred to below, notes 150 and

is to be able to carry out its functions. And in practice they are settled, either by administrative or by judicial means.

Chapter II: SETTLEMENT BY ADMINISTRATIVE DECISION OF THE ORGANIZATION

A. Decision by Administrative Organs

Like most disputes within the governments of states, internal disputes of intergovernmental organizations are usually settled, not judicially, but by administrative decision of the deliberative or executive organ where the question arises, or of a superior organ. Thus, where the competence of a deliberative organ to discuss a certain matter or to take specific steps, or the propriety of the procedure adopted by the chairman of the organ, is challenged by a member of the organ concerned, the matter is decided by a vote of the organ itself [20]); and so are disputes concerning the representatives of a member state on the organ – e. g. their credentials or their status. Similarly, disputes with regard to the contributions of a member state, including the effects of non-payment, are, in the first instance, decided by the plenary organ. Furthermore, if two organs, or two departments of the secretariat, disagree with regard to their respective competences in a specific matter, the dispute is decided by the superior organ [21]). – If one of the parties to a dispute is dissatisfied with the decision made by the competent organ, the matter may in many cases be brought before a superior organ [22]).

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159. On the interpretation of the UN Charter, see also ICJ Reports, 1948, p. 61, 1950, pp. 6 and 137–40, and 1962, pp. 155–156; Kopelmanas, L'Organisation des Nations Unies, vol. 1 (Paris 1947), pp. 254–78; and Goodrich and Hambro, Charter of the United Nations, 2d edition (Boston 1949), pp. 547–51. On the question of the interpretation of the League of Nations Covenant, see the documents listed in Walter Schiffer, Répertoire of Questions of General international Law before the League of Nations 1920–40 (Geneva 1942), p. 237.

[20]) *Cf.* the rules of procedure of the General Assembly of the UN, rules 81 and 122 on questions of competence, and rules 73 and 114 on points of order.

[21]) The report of Committee IV/2 of the San Francisco Conference (UNCIO vol.13, pp. 709–10) – discussing differences of opinion between two organs – does not envisage such reference to the superior organ. The rapporteur appears, however, to have been thinking primarily in terms of disputes between the General Assembly and the Security Council, which are, in functional and some organizational matters, on an equal hierarchical level, and which have no common superior organ.

[22]) By a resolution of 17 December 1920 the Assembly of the League of Nations expressly decided, before the establishment of its Administrative Tribunal, to give a right of appeal to the Council, in case of dismissal, to all members of the Secretariat holding five-year appointments (McKinnon Wood in: The Grotius Society, Transactions for

In most of these cases there is no constitutional provision authorizing the organ concerned to settle the dispute. Nevertheless, such administrative settlement has been the prevailing procedure in all intergovernmental organizations, even in those whose constitutions prescribe judicial settlement. And there can be no doubt that, in either case, the several organs of the organization – no less than those of national states – are entitled to decide internal disputes themselves [23]). This was confirmed in a report of Committee IV/2 of the San Francisco Conference (which report was approved unanimously by the Conference) in the following terms:

> In the course of the operations from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers. It will be manifested in the functioning of such a body as the General Assembly, the Security Council, or the International Court of Justice. Accordingly, it is not necessary to include in the Charter a provision either authorizing or approving the normal operation of this principle [24]).

Reference may be made also to the following statement by the International Court of Justice in its advisory opinion on Effect of Awards of Compensation Made by the United Nations Administrative Tribunal:

> In the absence of the establishment of an Administrative Tribunal, the function of resolving disputes between staff and Organization could be discharged by the Secretary-General by virtue of the provisions of Articles 97 and 101. Accordingly, in the three years or more preceding the establishment of the Administrative Tribunal, the Secretary-General coped with this problem by means of joint administrative machinery, leading to ultimate decision by himself [25]).

It is submitted that this power of the Secretary-General existed irrespective of the express provisions cited by the Court. Indeed, the power has

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the Year 1944 vol. 30, p. 144). Similarly, chap. XIII,1 of the Staff Regulations of the Scandinavian Training Hospital in Korea (the National Medical Center in Korea), adopted by the Scandinavian Committee on 7 June 1957, expressly provided that officials may appeal to the Committee in case of disputes between them and the Director of the Hospital concerning the interpretation of the Staff Regulations or concerning the relationship of employment.

[23]) This is expressly provided in the IMCO constitution, art. 55 *in fine*, in respect of the two principal deliberative organs of that organization. Art. 75 of the WHO constitution envisages settlement by the Health Assembly. It would not be proper to interpret either of these self-evident provisions *a contrario* as precluding other deliberative organs or the secretariat from deciding legal disputes arising within the scope of their functions.

[24]) UNCIO vol. 13, p. 709.

[25]) ICJ Reports 1954, p. 61.

been exercised by the administrative heads of all organizations even where the constitutions do not contain any such provisions.

The power to settle internal disputes by administrative decision applies also to internal disputes arising out of extended jurisdiction conferred upon the organization (internal disputes *largo sensu*). Reference may be made to a statement made by the Permanent Court of International Justice in its advisory opinion on the Greco-Turkish Agreement of 1 December 1926. In this opinion the Court settled a dispute "between the two States members" of the Mixed Commission for the Exchange of Greek and Turkish Populations. This dispute concerned the question of who was to invoke the procedure, laid down in art. IV of an annex to an agreement conferring extended jurisdiction upon the Commission, for the settlement of certain disputes. After having pointed out that the disputed provision "expressly contemplates questions which may arise within the Mixed Commission", the Court said:

> But, that being so, it is clear – having regard amongst other things to the principle that, as a general rule, any body possessing jurisdictional powers has the right in the first place itself to determine the extent of its jurisdiction – that questions affecting the extent of the jurisdiction of the Mixed Commission must be settled by the Commission itself without action by any other body being necessary [26]).

Similarly a court in the Saar – rejecting a claim for compensation brought against the Governing Commission of the Saar by a dismissed official – expressed the view that not only sovereign states have the capacity to determine the legal scope of their competence, but that the Governing Commission also had that power. The court, however, based this statement upon the fact that the Governing Commission, although not the government of a sovereign state, exercised the state imperium (*i. e.* territorial jurisdiction) – rather than upon the fact that the Commission was an organ of the League of Nations [27]).

As indicated by the examples given, the power of administrative settlement of internal disputes is not confined to questions of interpretation of the constitution of the organization concerned. It also extends to the interpretation of regulations enacted by the organization (including the terms of reference of the organ concerned) and of customary law developed by it, as well as to the determination of other legal questions concerning the powers and procedure of the organ. Such decisions are preliminary – and

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[26]) PCIJ, Ser. B, No. 16, p. 20, *cf.* p. 8.
[27]) Annual Digest of International Law Cases (1925–26), Case No. 37.

essential – to the exercise of its legislative and administrative powers. The right to make them is therefore inherent in these very powers, whether these have been laid down in the constitution or in another treaty, or whether they devolve upon the organization without specific provision, as inherent organic or membership jurisdiction[28]). This right has been exercised consistently by intergovernmental organizations in respect of both inherent and extended powers.

B. Advisory Opinion from a Legal Body

There is nothing to prevent the organ concerned from submitting the legal question to an internal or external legal organ for advice before it makes its decision.

Such a procedure has in some cases been expressly provided for in the constitution. Thus the General Assembly and the Security Council of the UN are empowered, under art. 96,1 of the Charter, to request an advisory opinion from the International Court of Justice on any legal question. Under art. 96,2 the General Assembly is empowered to extend this authorization to other organs of the UN and to the specialized agencies[29]). This has been done by bilateral agreements between the UN and each specialized agency[30]). In this manner the power to request advisory opinions has been granted not merely to those specialized agencies whose constitutions envisage such procedure[31]), but also to those agencies whose constitutions do not[32]). Advisory opinions have in fact been requested on a number of disputes of an internal nature[33]), also by

[28]) Above, Introduction.

[29]) The International Law Association in 1956 recommended an amendment to art. 96 "to empower the General Assembly to authorize other public international organizations, whether general or regional, to request advisory opinions of the Court" (International Law Association, Report of the Forty-Seventh Conference held at Dubrovnik 1956, p. 104, *cf.* p. 129).

[30]) See for example art. 7,2 of the agreement between the UN and the ITU, approved by GA resolution 124 (II). The power to request advisory opinions has not been granted to the UPU, which has not asked for such authorization, but is has been granted to the International Atomic Energy Agency.

[31]) E. g. IMCO constitution, art. 56.

[32]) E. g. ITU constitution, art. 25.

[33]) See for example the two advisory opinions on the admission of a state to membership in the UN (ICJ Reports, 1948, p. 57, and 1950, p. 4, respectively), the opinion on the Effect of Awards of Compensation made by the UN Administrative Tribunal *(ibid.*, 1954, p. 47), and the opinion on Certain Expenses of the United Nations *(ibid.*, 1962 p. 150). See also the advisory opinion of the Permanent Court of International Justice on the Designation of the Workers' Delegates for the Netherlands at the Third Session of the International Labour Conference (PCIJ, Ser. B, No. 1) and the three advisory opinions on the competence of the ILO in regard to (i) international regulation of

specialized agencies whose constitutions do not provide for resort to such opinions [34]) [35]).

There are also many examples of reference of internal legal questions to *ad hoc* internal legal organs for advice, even when no constitutional provision prescribes or authorizes such procedure. Thus the League of Nations, refusing to submit to proceedings in Swiss courts to determine whether it was liable to pay pensions to five ex-officials of the Saar Territory whom the Governing Commission had failed to bring within the settlement of the pensions of officials which it negotiated with Germany, submitted the case to a legal committee of the Organization itself, which held that there was no legal liability [36]). Similarly, the Secretary-General of the UN had recourse to an *ad hoc* committee of jurists in order to seek a solution to certain problems of principle arising out of his personnel policy [37]).

An example of reference of legal questions to a permanent internal legal organ for advice, is rule 33,1 of the rules of procedure of the General Conference of UNESCO. According to this provision "the legal Committee may be consulted on any question concerning the interpretation of the Constitution and of the Regulations". This procedure is

the conditions of labour of persons employed in agriculture (*ibid.*, No. 2), (ii) organization and development of the methods of agricultural production and other questions of a like character (*ibid.*, No. 3), and (iii) incidental regulation of the personal work of the employer (*ibid.*, No. 13).

[34]) See the advisory opinion on Judgments of the Administrative Tribunal of the ILO upon Complaints Made against the UNESCO (ICJ Reports, 1956, p. 77), given at the request of UNESCO whose constitution merely provides for reference to the International Court of Justice "for determination" of disputes "concerning the interpretation of this Constitution".

[35]) The Soviet Union earlier pleaded that the ICJ was not competent to interpret the UN Charter (ICJ Pleadings, Conditions of Membership in the UN, 1948, p. 28, and ICJ Pleadings, Competence of the General Assembly for the Admission of a State to the UN, 1950, pp. 100–1). But the Court rejected this view (ICJ Reports, 1947–48, p. 61, and 1950, p. 6, *cf.* also *ibid.*, pp. 137–40, and 1962, p. 156) without even the dissenting judges expressing a divergent view on this point (see, notably, *ibid.*, 1946–7, p. 109, and 1950, pp. 10–34).

[36]) McKinnon Wood in: The Grotius Society, Transactions for the Year 1944, vol. 30, p. 144. But for World War II, the case would subsequently have come before the Permanent Court of International Justice for an advisory opinion. The latter procedure – in contradistinction to the reference to the legal committee – was expressly authorized by the terms of art. 14 of the Covenant of the League.

[37]) A/INF/51, 5 December 1952. The contents of the report of the Secretary-General (A/2364) was severely criticized, both inside and outside the Organization, see for example: Henri Rolin, Avis consultatif sur les droits et obligations des fonctionnaires internationaux, avis rédigé sur la demande de la Fédération des associations de fonctionnaires internationaux et approuvé par Tomaso Perassi et Charles Rousseau (mimeographed, 1953).

not expressly authorized in the constitution, art. XIV (2) of which merely provides that such questions "shall be referred for determination to the International Court of Justice or to an arbitral tribunal, as the General Conference may determine under its rules of procedure". Other examples are the appeals boards or committees established by the UN and the specialized agencies to consider and advise their administrative heads regarding appeals made by members of the staff against decisions relating to their employment [38]).

Thus, with or without constitutional provision, those organs of the organization which in the performance of their regular functions have to decide legal questions, often refer such questions to other organs for advice before making their decisions. Such reference is made to administrative and to judicial organs, to permanent as well as to *ad hoc* organs, and even to organs outside the organization insofar as such organs under their own constitutions or terms of reference are able to give legal advice to the organization requesting it. The right to seek such legal advice, even if the constitution does not so provide, was confirmed in the report of Committee IV/2 of the San Francisco Conference in the following terms:

> It would always be open to the General Assembly or to the Security Council, in appropriate circumstances, to ask the International Court of Justice for an advisory opinion concerning the meaning of a provision of the Charter. Should the General Assembly or the Security Council prefer another course, an *ad hoc* committee of jurists might be set up to examine the question and report its views... It would appear neither necessary nor desirable to list or to describe in the Charter the various possible expedients [39]).

C. Is the Administrative Decision Binding?

The modes of settlement discussed so far – which are those employed in the prevailing number of cases – are, however, merely a d m i n i s -

[38]) Thus the Provisional Staff Regulations of the International Atomic Energy Agency, adopted by its Board of Governors, provide, in Regulation 12.01: "The Director General shall establish administrative machinery with staff participation to advise him in case of any appeal by a staff member against an administrative decision in which the staff member alleges the non-observance of the terms of his appointment, including all pertinent Regulations and rules, or of appeals against disciplinary action". The Staff Rules, approved by the Director General, provide, in Rule 12.011 (A): "A Joint Appeals Committee shall be established to advise the Director General regarding appeals by staff members under Provisional Staff Regulation 12.01". (SEC/INS/136, 4 July 1962.) The statutes of the UNESCO Appeals Board were adopted by the General Conference at its 8th session on 8 December 1954 (text in Manuel de l'UNESCO, Appendice 3/A). The "Appeals Board" of the OECD is not an advisory organ, but a judicial body making binding decisions, see below, note 54; but the organization also has an "advisory board", established pursuant to Staff Regulation 22 (a), *cf.* Instructions 122/1.

[39]) UNCIO vol. 13, p. 710.

trative decisions – either express decisions made separately, or preliminary decisions implied in other administrative or legislative decisions made by the organ concerned. Even if advice is sought from another organ, and even if this is judicial, the decision is usually made by the organ where the question arose, or by a superior organ, in the form of an administrative (or legislative) decision. This applies in principle also in those cases where an advisory opinion is obtained from the International Court of Justice[40]). Only in certain cases – where this has been expressly provided in the constitution or in another multilateral, bilateral or unilateral act – is the organization (and the other parties) bound to accept as binding the opinion of the Court or the other legal body to which the dispute is referred[41]).

When express provision is made in the constitution for the reference of certain disputes to a specific administrative organ of the organization, it frequently follows from the provision that the decision of the administrative organ shall be binding upon the parties *ipso facto*[42]) or unless appeal is made to a specified superior administrative organ[43]) or judicial body[44/5]), whose decisions shall then be final (even if still administrative). Thus the decision must be presumed to be binding if the dispute is referred to the organ concerned "for decision" and, usually[46]), if provision is made for further appeal. Otherwise it is not always clear that it has been the intention that the decision shall be any more binding than are administrative decisions generally[47]). And in the great majority of cases, where no express provision has been made for decision by the administrative organ concerned, it is quite clear that the decisions made by this organ – in pursuance of its inherent organic jurisdiction or of the powers inherent in its

[40]) On the binding effect of advisory opinions of the International Court of Justice, see *inter alia* F. B. Sloan in: California Law Review vol. 38 (1950), pp. 830–59; Lissitzyn, The International Court of Justice (New York 1951), pp. 84–85; Kopelmanas, *op. cit.* above, note 19, pp. 274–5; and Humber in: Die Friedens-Warte vol. 51 (1951–53), pp. 143–50. *Cf.* also PCIJ, Ser. B, No. 14, p. 21.

[41]) See below, Chapter X B.

[42]) International Wheat Agreement, 1956, art. XIX,1 (UN doc. E/CONF. 20/5, p. 37).

[43]) The constitutions of the Fund, art. XVIII (a)–(b), and of the Bank, art. IX (a)–(b). However, none of these provisions set a time limit for the appeal. For a criticism of the granting of such powers to one of the parties to the dispute, see Seidl-Hohenveldern in: Österreichische Zeitschrift für öffentliches Recht vol. 8 (1957–58), pp. 82 *et seq.*, *cf.* also Aufricht, *ibid.*, pp. 26 *et seq.*

[44/5]) ICAO constitution, art. 84, which sets a time limit of sixty days for the appeal, and the constitution of the International Commission of the Danube, art. 38 (League of Nations Treaty Series [LNTS] vol. 26, p. 193).

[46]) *Cf.* ITO constitution arts. 94–95.

[47]) This may not have been the intention in art. 55, first sentence, of the IMCO constitution which refers the dispute "for settlement", and certainly not in the second sentence, nor in art. XVI (1) of the FAO constitution.

extended jurisdiction – are not binding upon the parties in the same sense as a judicial decision would have been[48]). They may contest the legality of the decisions if the organ making them has violated the rules governing its competence or its procedure, at least if they do so within a reasonable time after the decision was made[49]). It does not add any more

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[48]) This was pointed out, with regard to differences of opinion concerning the interpretation of the UN Charter, by Committee IV/2 of the San Francisco Conference, in the following terms: "It is to be understood, of course, that if an interpretation made by any organ of the Organization or by a committee of jurists is not generally acceptable it will be without binding force" (UNCIO vol. 13, p. 710). Kopelmanas, *op. cit.* above, note 19, par. 137, makes two important reservations to the statement of the Committee on this point. He points out, in particular, that «le fait pour un organe d'émettre un vote dans les conditions établies par les dispositions qui régissent sa compétence et son fonctionnement, confère à l'interprétation qu'implique le contenu de son acte une valeur identique à celle qui est reconnue à l'acte lui-même et si l'acte doit s'imposer à l'observation de tous les Membres de l'Organisation, l'interprétation impliquée produira automatiquement le même effet». If no judicial recourse is open to the state contesting the validity of the decision, «il devra se soumettre à la décision de l'organe et accepter l'interprétation qu'elle contient. S'il persiste à ne pas la reconnaître, le problème changerait entièrement d'aspect, car il ne s'agirait plus d'un conflit d'interprétations, mais de l'inexécution par l'Etat d'une décision valablement prise aux termes de la Charte». On the other hand, Kopelmanas points out that any binding force resulting from the express or tacit acceptance by all the member states would apply only to the concrete conflict which has given rise to the question of interpretation. That an administrative decision is not binding as a precedent in another, analogous case was confirmed in the judgment of the Hungarian-Czechoslovak Mixed Arbitral Tribunal of 31 January 1929 in *Pallavicini* v. *the Czechoslovak State* (The American Journal of International Law vol. 33, 1929, cited below merely as AJIL, p. 857, and Annual Digest of International Law Cases (1929–30), p. 443).

In its advisory opinion on Certain Expenses of the United Nations, The International Court of Justice stated: "Each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute 'expenses of the Organization'." (ICJ Reports 1962, p. 168; see also ICJ Pleadings, Certain Expenses of the United Nations, pp. 220–2, *cf.* p. 205.)

The International Court of Justice, in its advisory opinion on Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, stated: "Should the General Assembly contemplate, for dealing with future disputes, the making of some provision for the review of the awards of the Tribunal, the Court is of opinion that the General Assembly itself, in view of its composition and functions, could hardly act as a judicial organ – considering the arguments of the parties, appraising the evidence produced by them, establishing the facts and declaring the law applicable to them – all the more so as one party to the disputes is the United Nations Organization itself" (ICJ Reports 1954, p. 56, *cf.* also p. 89).

[49]) The first of the draft articles on «Recours judiciaire à instituer contre les décisions d'organes internationaux», submitted by Wengler to the Institut de droit international, reads in part: «A défaut d'un recours judiciaire spécial contre les décisions d'un organe international, et à défaut de dispositions les rendant définitives, la validité de ces décisions pourra être contestée à tout moment et devant toute instance d'après les règles générales

binding force to the decision if it is made in the form of a distinct resolution of (abstract) "interpretation", as is the custom of the General Assembly of the International Institute for the Unification of Private Law, except that in this case its applicability is not confined to any concrete dispute [50]).

Nevertheless, as long as there is no judicial authority having compulsory jurisdiction in the matter, the organization cannot be prevented from acting in accordance with its own decision. Since the execution in internal matters rests, in most cases, with the organization, this means that the decision is in fact binding, unless the organization voluntarily agrees to submit the dispute to a judicial organ for final determination.

Such administrative decision is sufficient for the purposes of most organizations, in most respects, especially with regard to organizational matters. This is particularly true if the dispute is one within or between its own organs and does not involve parties which have a distinct legal existence outside the organization.

Chapter III: THE ORGANIZATION'S COMPETENCE TO ESTABLISH INTERNAL COURTS [51]). THEIR COMPETENCE AND THE EXTERNAL EFFECTS OF THEIR JUDGMENTS

Intergovernmental organizations are, however, also free to establish judicial organs for the settlement of internal disputes, if this proves desirable, although their competence to do so has been denied on the basis of the obtaining view that each organization can only perform such acts as are authorized, expressly or by implication, in its particular constitution [52]).

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du droit international, si l'organe a violé les règles déterminant sa compétence, sa procédure, ou le contenu de ses décisions» (Annuaire de l'Institut de droit international vol. 45 (1954 I), p. 266, *cf.* pp. 283–4). The final resolution of the Institut (*ibid.*, vol. 47 [1957 II], p. 476) does not refer to this problem. See also Wengler's report, *ibid.*, vol. 44 (1952 I), pp. 268–70, *cf.* pp. 293 (par. 9), 315–6, 323, 347, 350 and 357. *Cf.* also art. 38 of the Convention Instituting the Definitive Statute of the Danube of 23 July 1921 (LNTS vol. 26, p. 178). On the possibility of challenging the validity of the decisions in national courts, see below, Chapters VII–VIII.

[50]) See the resolution adopted by the General Assembly on 30 April 1953, which interprets art. 7 *bis* of the constitution. Another resolution, which was adopted by the General Assembly on 29 April 1957, and which gives an "authentic interpretation" of art. 46,3 of the (Staff) Regulations of the Institute, is binding in the same manner as the Regulations themselves, since the resolution was approved by the same organs and by the same majority as prescribed for amendments of the Regulations, see art. 17 of the constitution (Statute) of the Institute.

[51]) On the distinction between internal and international courts, see below, Chapter IV.

[52]) Thus, during the discussion in the Sixth Committee of the General Assembly, at its fifth session, of the power of the UN to enact headquarters regulations pursuant to § 8 of

The practical need for judicial decision has arisen mostly in those cases where the dispute involves parties which, although forming part of the organization and acting in that capacity, also have a legal existence outside the organization, viz. officials and member states.

A. Disputes Involving Officials

(1) Actions by officials against the organization: Administrative tribunals

A number of organizations – including the League of Nations, the International Institute of Agriculture, the International Labour Organization (ILO), the United Nations, the Organization for European Economic Co-operation (OEEC), the Organization for Economic Co-operation and Development (OECD), and the International Institute for the Unification of Private Law – have established so-called administrative tribunals or similar judicial organs, where officials [53]) may sue the organization in matters concerning the relationship of employment [54]). This they have done al-

its headquarters agreement with the United States, the Syrian representative stated that "the Secretary-General would never be able to promulgate laws, impose penalties or set up judicial organs, as under the Charter neither he nor the General Assembly had the power to do that" (OR GA V, 6th Committee, 248th meeting, p. 265, *cf.* below, note 131). See, on the other hand, a study by the present writer on "Objective International Personality of Intergovernmental Organizations, Do Their Capacities Really Depend upon Their Constitutions?" in: Nordisk Tidsskrift, 1964, at pp. 15 ff.

[53]) Also former officials and third persons entitled to rights under their contracts or terms of appointment are entitled to sue, see e. g. the statutes of the ILO Administrative Tribunal, art. II, 6; of the UN Administrative Tribunal, art. 2; and of the OEEC–OECD "Appeals Board", art. 1.

[54]) The Statute of the League of Nations Administrative Tribunal was adopted by the Assembly on 26 September 1927 (text in Aufricht, Guide, p. 485, and in: Clunet vol. 77 [1950], p. 346). The documents relating to the establishment of the Tribunal are listed in: ICJ Pleadings, Judgments of the ILO Administrative Tribunal (1956), pp. 22–23. Its Rules were adopted by the Tribunal on 2 February 1928 (text in: Clunet vol. 77 [1950], p. 352). An *ad hoc* forerunner of the Tribunal was the «collège» established by the Council's resolution of 8 June 1925, reported above, Chapter II B.

By a resolution adopted by the Assembly of the League on 18 April 1946 on the dissolution of the League, the League of Nations administrative Tribunal was transformed into the International Labour Organization Administrative Tribunal. The statute of this Tribunal was adopted by the International Labour Conference on 9 October 1946 and 10 July 1947, and was amended by the Conference on 29 June 1949 (text in: Revue générale de droit international public vol. 58 [1954], p. 305). The Rules were adopted by the Tribunal on 22 February 1947 and were amended on 10 August 1953 and 11 July 1957 (the 1953 version was published in: Archiv des Völkerrechts vol. 7 [1958–59], p. 179). The Tribunal also acts as administrative tribunal for nine other organizations, see below, Chapter VI.

The Statute of the United Nations Administrative Tribunal was adopted by GA resolution 351 A (IV) and was amended by GA resolutions 782 B (VIII) and 957 (X) (text also in: Clunet vol. 77 [1950], p. 360). The documents relating to the establishment

though the constitution in most cases contains no provision authorizing

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of the Tribunal are listed in: ICJ Pleadings, UN Administrative Tribunal (1954), pp. 12–14. Its Rules were adopted by the Tribunal on 7 June 1950 and amended on 20 December 1951, 9 December 1954 and 30 November 1955 (text in: UN doc. AT/11/Rev. 2).

The Statute of the "Appeals Board" of the OEEC, which – in contradistinction to the appeals boards of other organizations – is a real judicial body, was enacted by the Secretary-General of the OEEC on 8 January 1950 (text in: Clunet vol. 77 [1950], p. 368), pursuant to art. 19 (now art. 16) of the Staff Regulations of the OEEC adopted by the Council's resolution of 17 April 1948 (subsequently amended and renumbered art. 16). The provisions on the Appeals Board of the O E C D are contained in Staff Regulation 22 (a) and in the Council's Resolution on the Operation of the Appeals Board of 30 January 1962 (OECD, Acts of the Organization vol. 2 [1962], p.105). Rules of Procedure were adopted by the Appeals Board on 20 December 1962.

The Administrative Tribunal of the International Institute for the Unification of Private Law was established by an amendment, adopted on 18 January 1952, to arts. 4 (5) and 7 *bis* of the constitution (quoted below, p. 23).

These are all standing tribunals. The statute of the administrative tribunal of the International Institute of Agriculture, adopted by its General Assembly in 1932, merely provides for the establishment of an *ad hoc* tribunal for each case. See Chiesa in: Revue internationale des sciences administratives vol. 20 (1954), pp. 77–80.

The staff regulations of the Council of Europe, art. 25 (quoted below, under (2) and commented upon by Huet in: Clunet vol. 77 [1950], pp. 345–7), provides for the establishment of an arbitral tribunal for the settlement of disputes between the organization and its officials arising out of the relationship of employment.

The League of Nations Administrative Tribunal rendered thirty-seven judgments. The ILO Administrative Tribunal had, at the time of writing, rendered sixty-seven judgments (the first twenty-four judgments were listed in: ICJ Pleadings, Judgments of the ILO Administrative Tribunal [1956], pp. 23–25). The OEEC Appeals Board has also rendered a great number of judgments. The first seventy judgments rendered by the UN Administrative Tribunal have been published in: Judgments of the United Nations Administrative Tribunal, Numbers 1–70, 1950–7 (UN Publication Sales No. 58. X. 1, AT/DEC/1 to 70). The Administrative Tribunal of the International Institute of Agriculture apparently rendered no judgments. The total number of judgments rendered at the time of writing exceeds 200. In addition the Court of Justice of the European Communities (below, p. 18) has rendered a number of judgments in disputes with officials, all of which have been published in: Recueil de la jurisprudence de la Cour.

See on administrative tribunals in general, Huet, Tribunaux administratifs des organisations internationales in: Clunet vol. 77 (1950), pp. 336 *seq.*, who reproduces the texts in French, English and German of certain of the statutes and rules; Chiesa in: Revue internationale des sciences administratives vol. 20 (1954), pp. 67–88; Suzanne Bastid, Les tribunaux administratifs internationaux et leur jurisprudence in: Recueil des Cours vol. 92 (1957 II), pp. 347–517. On the ILO Administrative Tribunal, see Wolf in: Revue générale de droit international public vol. 58 (1954), pp. 279–305, who also cites (p. 279, note) a number of works on the League of Nations Administrative Tribunal. On the UN Administrative Tribunal, see Langrod in: Revue du droit public et de la science politique vol. 57 (1951), pp. 71–104, and Friedmann and Fatouros in: International Organization vol. 11 (1957), pp. 13–29. Current reports of judgments rendered by administrative tribunals may be found in: Annuaire français de droit international (by Lemoine).

On proposals to extend the competence of the International Court of Justice to disputes between intergovernmental organizations and their officials, see below, Chapter IX C (1).

the establishment of such tribunals[55]). Some organizations, which have only a limited number of officials, and which therefore do not require permanent administrative tribunals, have included in their staff regulations less elaborate provisions for the settlement of disputes with their officials, by means of an *ad hoc* court of arbitration[56]) or before a court established for other purposes[57]). In most of these cases, too, there is no relevant provision in the constitution[58]). The European Coal and Steel Community, which has an internal Court of Justice established for other purposes under the constitution of the Community, has conferred upon this court compulsory jurisdiction in disputes between the organization and its officials. This was done by simple regulation[59]), although the Court subsequently has held (unnecessarily) that its competence could be deduced from certain articles of the constitution[60]). The constitutions of the two other European

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[55]) The Administrative Tribunal of the International Institute for Unification of Private Law was established by an amendment to the constitution (arts. 4 (5) and 7 *bis*). Before the entry into force of the amendment, an Arbitral Commission exercised the functions and the powers of an arbitral tribunal, pursuant to a decision by the Governing Council of the Institute and to a clause inserted in each contract of employment. Other constitutions do not provide for administrative tribunals, but merely contain a general provision for legislative power in staff matters. Thus the constitutions of the UN (art. 101 [1]) and the ILO (art. 9) provide that the staff shall be appointed by the Secretary-General under regulations established by the plenary organ. The constitutions of the Council of Europe (arts. 16 and 36 [c]) and the OEEC (art. 18 [a]) contain similar references to staff regulations. The constitution of the International Institute of Agriculture merely contained a general provision (art. 5) that the General Assembly shall approve «les projets ... relatifs à l'organisation et au fonctionnement intérieur de l'Institut». The Covenant of the League of Nations did not even provide for a legislative power.

[56]) See chap. XIII (2)–(3) of the staff regulations of the Scandinavian Training Hospital in Korea (the National Medical Center in Korea), adopted by the (Scandinavian) Committee on 7 June 1957. It may be questioned whether the court of arbitration established by this provision is an internal court of the organization. However, it is still less a municipal or an international court. – The arbitral tribunal of the Council of Europe also apparently is intended to be set up *ad hoc*, like that of the International Institute of Agriculture.

[57]) Art. 17 of the staff regulations of the International Court of Justice, quoted below, under (2), and art. 11 of the Staff Regulations of the Permanent Court of International Justice, cited *loc. cit.*

[58]) The Statute of the International Court of Justice contains no provision (but see below, note 77). Nor did that of the Permanent Court of International Justice. The constitution of the Scandinavian Training Hospital in Korea, signed at Oslo on 21 December 1956, merely provides, in art. VI, for the determination of "terms of employment." However, pursuant to the same article, the staff regulations were approved by the three member states.

[59]) Now art. 89 of the staff regulations in force from 1 January 1962, *cf.* § 7 of the Convention Relating to the Transitional Provisions.

[60]) See below, under F (1).

Communities expressly provide that the Court shall decide disputes between the Community and its employees [61]). Other organizations, instead of relying upon tribunals of their own, make use of the administrative tribunals established by other organizations [62]), also without express constitutional authorization [63]).

The judicial nature, and the binding character *vis-à-vis* the administrative organs of the organization, of the judgments of such administrative tribunals, was confirmed by the International Court of Justice in its Advisory Opinion on Effect of Awards of Compensation Made by the UN Administrative Tribunal. In this the Court held that an

> examination of the relevant provisions of the Statute [enacted by the General Assembly] shows that the Tribunal is established, not as an advisory organ or a mere subordinate committee of the General Assembly, but as an independent and truly judicial body pronouncing final judgments without appeal [64]) within the limited field of its functions [65]).

The Court thus rejected the contention that the Tribunal is a "subsidiary organ" of the General Assembly which has been established pursuant to art. 22 of the Charter and to which the Assembly had delegated its own powers, indeed the power to adjudicate had not been given to the General Assembly by the Charter [66]). The Court concluded, by nine votes to three,

> that the General Assembly has not the right on any grounds to refuse to give effect to an award of compensation made by the Administrative Tribunal of the United Nations in favour of a staff member of the United Nations whose contract of service has been terminated without his assent [67]).

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[61]) CEE constitution art. 179, EURATOM constitution art. 152. The judgments of the Court are published in: Recueil de la Jurisprudence de la Cour.

[62]) See below, Chapter VI.

[63]) The constitution of FAO, however, contains an express provision in art. XV (3). The constitutions of the other organizations merely contain the usual provision that the staff shall be appointed in accordance with regulations to be approved by the plenary organ (ITU art. 9, 2 [a], WHO art. 35, UNESCO art. VI [4], WMO art. 21 [2], CERN art. VI [3]).

[64]) A right of appeal, by seeking an advisory opinion from the International Court of Justice, was instituted subsequently by GA resolution 957 (X). Such right of appeal had been established earlier in respect of the ILO Administrative Tribunal by art. XII of its Statute. See below, Chapter X B.

[65]) ICJ Reports, 1954, pp. 51–53.

[66]) *Ibid.*, p. 61, see also the passage quoted above, Chapter II C, note 48 *in fine*.

[67]) *Ibid.*, p. 62. *Cf.* GA resolution 888 (IX), which accepts the advisory opinion, while raising the question of judicial review of the judgments of the Administrative Tribunal. For a summary and an unconvincing criticism of the written and oral statements submitted to the Court and of the opinion of the Court, see L. C. Green in: The Grotius Society, Transactions for the Year 1954, vol. 40, pp. 158–68.

The Court thus recognized that the Administrative Tribunal of the UN has in this respect a position *vis-à-vis* the General Assembly similar to that of the municipal courts of, for example, Norway [68]) *vis-à-vis* Parliament. The Statutes of some of the other tribunals contain express provisions to this effect [69]).

In its advisory opinion the Court also discussed the preliminary question of whether the UN had "been given ... by the Charter" the power to establish "a judicial tribunal to adjudicate upon disputes arising out of the contracts of service". The Court found that

> the power to establish a tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter [70]).

The Court based this partly upon the principle it had adopted in earlier advisory opinions – that the organization must be deemed to have those powers which are conferred upon it by necessary implication as being "essential to the performance of its duties" [71]) – and partly upon specific provisions of the UN Charter, including in particular art. 101,3, quoted above ("the paramount consideration ... of securing the highest standards of efficiency, competence and integrity"). In so doing the Court was, it is submitted, acting *ex abundante cautela.* It was not necessary to rely upon either of these considerations in order to establish the power of the

[68]) Castberg (Norges statsforfatning, 2nd edition, Oslo 1947, p. 122) points out that Parliament is under a legal obligation to appropriate funds to meet the contractual obligations undertaken by the Administration. If the claim has been sanctioned by a municipal court, both the Administration and Parliament are under a legal obligation to comply with the decision of the court. Should Parliament still refuse to make the appropriation, Castberg considers that the Administration must pay nevertheless.

[69]) Art. 14 of the Statute of the UN Administrative Tribunal provides expressly that agreements concluded with specialized agencies, extending the competence of the Tribunal to internal disputes of these organizations, "shall provide that the agency concerned shall be bound by the judgments of the Tribunal and be responsible for the payment of any compensation awarded by the Tribunal in respect of a staff member of that agency". The agreements extending the jurisdiction of the Tribunal to the specialized agencies with respect to applications by their staff members alleging non-observance of the Regulations of the UN Joint Staff Pension Fund merely provide, in art. II that the agency "agrees, insofar as it is affected by any such judgment, to give full effect to its terms" (see, for example, UNTS vol. 394, p. 336, and vol. 219, pp. 390 and 394), because liability for payment vests in the UN Joint Staff Pension Fund rather than in the specialized agency concerned. – Art. IX,3 of the ILO Administrative Tribunal and its annex merely provide that any compensation awarded by the Tribunal shall be chargeable to the budget of the organization.

[70]) ICJ Reports, 1954, p. 57.

[71]) *Ibid.*, p. 56; *cf. ibid.*, 1949, p. 182, and PCIJ, Ser. B, No. 13, p. 18.

UN to create an administrative tribunal. The constitutions of the League of Nations and the International Institute of Agriculture contain no similar provisions. And yet both these organizations established administrative tribunals. The Italian Court of Cassation in *Profili* v. *International Institute of Agriculture* referred to the fact that the League had established a tribunal and that the Institute might do likewise, without questioning their competence to do so[72]).

There is no reason why other intergovernmental organizations should not have the same power. Indeed, it is submitted that no such organization can be denied the power to establish an administrative tribunal on the ground that its constitution does not contain clauses which could (be stretched to) provide some basis for this power, as long as the constitution does not contain any provision which excludes the creation of administrative tribunals. Nor can an organization be denied this power on the ground that an administrative tribunal could not be considered "essential to ensure the effective working of the Secretariat" or to the performance of the duties of the organization. Indeed, it would have been quite possible for the UN, as well as for the other organizations concerned, to carry out their functions without administrative tribunals – as in fact they did for many years before they established such tribunals. The true theoretical basis for the power to establish administrative tribunals which may render binding judgments, it is submitted, is the inherent and exclusive jurisdiction which intergovernmental organizations, like states, possess over their organs and their officials as such[73]), rather than a "necessary intendment" on the part of the drafters of the constitution[74]).

In most cases administrative tribunals have been given jurisdiction only in actions brought a g a i n s t the organization. They thus have compulsory jurisdiction over the organization, but not over the officials, who are free to decide for themselves whether they want to sue the organization. However, if they do not sue, they have to accept its administrative decision, which it usually has the power to carry out. Since the organization cannot be sued elsewhere[75]), the officials have no alternative but to accept the

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[72]) Rivista di diritto internazionale vol. 23 (1931), p. 386. The judgment was rendered in 1931, four years after the establishment of the Administrative Tribunal of the League of Nations and two years before the establishment of that of the International Institute of Agriculture.

[73]) BYIL 1961, pp. 448–9. A contractual basis may also be found in many cases.

[74]) See, in this sense, generally, BYIL, 1961, pp. 448–460, Nordisk Tidsskrift, 1964, pp. 15 *et seq.*, and ICJ Reports, 1962, p. 168.

[75]) Because of its immunity from suit *(ratione personae)*. It is submitted that intergovernmental organizations, like states, are entitled to such immunity under general inter-

jurisdiction of the administrative tribunal if they want a judicial settlement of their claims. The jurisdiction is thus compulsory as far as the organization is concerned, and exclusive as far as the officials are concerned.

(2) Actions by the organization against its officials

There is usually no need for the organization to sue its officials. Most disputes concern matters to be performed by the organization, and it can then make an administrative decision, and leave it for the official to bring an action before the administrative tribunal if he wants to challenge the decision. Indeed, no intergovernmental organization is known to have sued its officials before its administrative tribunal, although in some cases the tribunal has had to establish specific obligations of the official who originally brought an action against the organization[76]).

Nevertheless, the competence of internal courts of intergovernmental organizations is not always confined to actions brought by the officials. Thus it is provided in art. 17 of the staff rules of the International Court of Justice:

> Any dispute arising between the Registrar and a member of the staff of the Registry regarding the application of these Regulations or the conditions laid down in the letter of appointment may be submitted, either by the Registrar or by the person concerned, to the Court, for settlement according to the procedure which the Court may prescribe[77]).

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national law even if no convention so provides (*cf.* the cases reported in The Times, 13 March 1940, and in AJIL vol. 20 [1926], p. 257, although these in themselves are not conclusive) as long as no provision has been made for renunciation of this immunity (examples of this are art. 183 of the CEE constitution, art. 155 of the EURATOM constitution, art. 40 of the CECA constitution and art. VII [3] of the Bank constitution). Acts performed by intergovernmental organizations or states *vis-à-vis* their officials as such are acts *jure imperii* and are thus covered by the immunity whatever doctrine is applied by the state concerned. Moreover, as has been explained in BYIL, 1961, pp. 448–9, intergovernmental organizations, like states, enjoy exclusive jurisdiction over their organs and officials as such, and other courts are therefore incompetent *ratione materiae* in respect of such relations, *cf.* below, pp. 78–80 and 109.

[76]) See the examples cited by Suzanne Bastid in: Recueil des Cours vol. 92 (1957 II), p. 445.

[77]) ICJ Yearbook, 1946–47, p. 68. Emphasis added. The corresponding provision (art. 11) in the staff regulations of the Permanent Court of International Justice merely provided that the official could appeal to the Court (CPJI, Rapport annuel, 1922–25, p. 83). The Court has not prescribed the procedure for settlement of disputes submitted to it in accordance with art. 17 of the new staff rules, no dispute having ever been brought before it, either by the Registrar or by an official (by 1963). Rosenne (The International Court of Justice, Leyden 1957, p. 201) suggests that the Court may decide the dispute itself, "or it may remit it either to a Chamber, or to the United Nations, or I.L.O. Administrative Tribunal. No instances of the application of this provision have

Reference may also be made to art. 7 *bis* of the constitution of the International Institute for the Unification of Private Law, which reads:

> Le Tribunal administratif est compétent pour statuer sur les différends entre l'Institut et ses fonctionnaires ou employés, ou leurs ayant droit, portant notamment sur l'interprétation ou l'application du Règlement du personnel,

and to art. 25 of the Staff Regulations of the Council of Europe, which reads:

> Disputes between the Secretary-General and any member of the staff relating to the application of these regulations or of the contract of service shall be submitted to an arbitral tribunal [l'arbitrage d'une commission] of three members, of which one shall be appointed by the Committee of Ministers, the second by the Secretary-General and the third by the members of the staff collectively[78]),

and to article 179 of the constitution of the European Economic Community and article 152 of the constitution of EURATOM, which read:

> La Cour de Justice est compétente pour statuer sur tout litige entre la Communauté et ses agents dans les limites et conditions déterminées au statut ou résultant du régime applicable à ces derniers,

and, finally, as for the European Coal and Steel Community, to article 89 (1) of the Staff Regulations, which reads:

> Tout litige opposant la Communauté à l'un de ses fonctionnaires est soumis à la Cour de justice des Communautés européennes qui a pour les litiges une compétence de pleine juridiction[79]).

The effect of these provisions, too, would seem to be to allow actions brought by the organization against its officials, although the drafters of the two former provisions may have had in mind only actions brought by the officials against the organization.

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been reported". On the nature of the powers of the Court under art. 17, see also Basdevant, p. 285; Langrod in: Revue du droit public et de la science politique vol. 57 (1951), pp. 81–82, note, and OR GA, IV, 5th Committee, Annex I, p. 159.

[78]) Huet (Clunet vol. 77 [1950], pp. 344–7) feels that the term *arbitrage* may suggest that the tribunal shall act as *amiable compositeur* rather than as a court of law, but this interpretation is hardly reconcilable with the English text. As far as art. 17 of the staff regulations of the International Court of Justice is concerned, Huet appears to have no such doubts, inasmuch as he states that the effect of this provision is to turn the Court into an administrative tribunal. *Cf.* also Friedmann and Fatouros in: International Organization vol. 11 (1957), p. 17.

[79]) Statut des fonctionnaires, entered into force on 1 January 1962, Journal officiel des Communautés européennes vol. 4, No. 73, 1357/61. The rules of procedure for the disputes, envisaged in the corresponding provision in art. 58 of the earlier Staff Regulations and adopted by the Court on 21 February 1957 (Journal Officiel de la Communauté Européenne du Charbon et de l'Acier vol. 6 [1957], p. 110), contain no further indication of what types of disputes may be brought before the Court.

A provision in the same sense is contained in art. 21 of the Staff Regulations of the European Coal and Steel Community and in art. 22 of those of the other European Communities[79a]), which reads:

> Le fonctionnaire peut être tenu de réparer, en totalité ou en partie, le préjudice subi par la Communauté en raison de fautes personnelles graves qu'il aurait commises dans l'exercice ou à l'occasion de l'exercice de ses fonctions.
>
> La décision motivée est prise par l'autorité investie du pouvoir de nomination, après observation des formalités prescrites en matière disciplinaire.
>
> La Cour de justice des Communautés européennes a une compétence de pleine juridiction pour statuer sur les litiges nés de la présente disposition.

Although this provision, too, authorizes the organization to sue its officials, it is more likely that the organization will make an administrative decision pursuant to the second paragraph and that it will then be for the official to sue the organization pursuant to the third paragraph if he wants the Court's decision. In the case of the CEE and EURATOM this provision of their Staff Regulations may find a basis in articles 179 and 152, respectively, of their constitutions as quoted above. In the case of the CECA, it may find a basis in article 42, if the contract of employment, which refers to the Staff Regulations, is considered as a *clause compromissoire*[80]). Or article 40, second paragraph[81]), might be interpreted to confer jurisdiction upon the Court, although this provision was drafted with a view to enabling third parties to sue (the Community and) officials of the Community, before its internal Court, for reparation for damage caused by them in the exercise of their functions.

A more explicit, but limited, provision is contained in art. 12 of the constitution of the Community, which reads:

> Peuvent être déclarés démissionnaires d'office par la Cour, à la requête de la Haute Autorité ou du Conseil, les membres de la Haute Autorité ne remplissant plus les conditions nécessaires pour exercer leurs fonctions ou ayant commis une faute grave.

Three of the provisions cited above are laid down in the constitution of the organization concerned (UNIDROIT, CEE, EURATOM), and those of the CECA have been considered to be based upon constitutional articles[82]). The other two provisions, including the most explicit of the general provisions (the one relating to the International Court of Justice),

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[79a]) Amtsblatt der Europäischen Gemeinschaften, 1962, p. 1393.

[80]) In this sense, see Much, Die Amtshaftung im Recht der Europäischen Gemeinschaft für Kohle und Stahl (Frankfurt 1952), p. 86.

[81]) Discussed below, under (3).

[82]) See below, under F (1).

have been established by regulation, without constitutional authorization [83]).

It is submitted that these examples reflect a general principle – applicable to all intergovernmental organizations whose constitutions do not provide otherwise – to the effect that such organizations have the power to confer upon their internal courts compulsory jurisdiction in disputes between the organization and its officials arising out of the relationship of employment or of their official acts, even if the action is brought by the organization. It has been clearly established in practice that the organization has exclusive legislative and administrative jurisdiction over its officials with respect to the relationship of employment [84]). This jurisdiction probably extends to all relations between the organization and its officials acting as such. Thus the UN and the specialized agencies have, in their staff rules, reserved the right to require reimbursement for any financial loss suffered by the organization as the result of the negligence of an official or of his having violated any regulation or instruction [85]). Such reparation is effected by administrative decision. But from an internal point of view [86]) there is no substantive reason why the organization could not do this instead by bringing an action before its administrative tribunal.

The legal basis for the compulsory judicial power of organizations over their officials in internal matters may be sought in their inherent (unilateral) legislative power over their organs and officials as such [87]). But

[83]) The constitution of the Council of Europe merely provides (in art. 36 [c], *cf.* art. 16) that the staff shall be appointed by the Secretary-General in accordance with the administrative regulations adopted by the Committee of Ministers. The Statute of the International Court of Justice does not provide even that. It merely stipulates that the Court "may provide for the appointment of such ... officers as may be necessary" (art. 21,2) and, generally that "the Court shall frame rules for carrying out its functions" (art. 30,1). The President of the Court has relied upon these articles in arguing (successfully) that it is not for the General Assembly of the UN, but for the Court itself, to establish judicial procedures for the settlement of disputes with officials of the Registry (OR GA IV, 5th Committee, Annex 1, p. 158). Whatever it may be possible to deduce from these articles, it should be noted that they do not say more than applies to any intergovernmental organization – whether or not its constitution says so *(cf.* BYIL, 1961, pp. 448 *seq.)*.

[84]) *Cf.* BYIL, 1961, pp. 448–9.

[85]) See, for example, rule 13.034 of the Staff Rules of the International Atomic Energy Agency (SEC/INS/136, 4 July 1962). This rule is not necessarily based upon a genuine legislative power. In substance it says no more than what would follow from general principles of civil law on reparation for damage. – Art. 64 of the Regulations of the International Institute for the Unification of Private Law contains a provision of a different kind. It provides that the Secretary-General may, as a disciplinary sanction, reduce the salary of an official for not more than two months, if the official is «coupable de faute grave, de manquement ou de négligence volontaire dans le service».

[86]) The external effects of internal judgments are discussed below, under (4).

[87]) BYIL, 1961, p. 448.

it may also be sought in the (bilateral) contract concluded between the official and the organization. In the former case, the regulations which establish the administrative tribunals are regarded as binding legislative acts. In the second case they are regarded as binding parts of the contract of employment, in which they have been incorporated by express reference or tacit understanding. The substantive difference between the two doctrines, and the test case of their validity, will appear if the regulations are amended with retroactive effect although the contract or the original regulations did not specify that they might be so amended [88]). The UN Administrative Tribunal has held that matters which affect the personal status of each staff member (e. g. nature of his contract, salary, grade) are contractual, but that matters which affect in general the organization of the international civil service (e. g. general rules that have no personal reference) are statutory. Administrative tribunals and other judicial matters clearly fall within the latter category [89]).

(3) Actions by third parties against officials or members of a UN Force

Certain organizations exercise extended jurisdiction over individuals and other "external" subjects of law in certain limited respects. This is *per definitionem* the case of the so-called supra-national organizations. In such cases it depends upon the constitution or the other act conferring the extended jurisdiction upon the organization whether it also has the power to exercise compulsory j u d i c i a l powers over them.

In the usual case, where the organization has no extended jurisdiction, disputes with external parties are not internal, but external disputes, and are governed, not by the internal law of the organization, but by municipal law. In such cases the organization cannot exercise compulsory jurisdiction over these external parties without authorization from the state under whose jurisdiction they belong. Thus the organization clearly could not unilaterally confer upon its courts jurisdiction in actions brought by officials against third parties without their consent.

Actions brought by third parties against officials in respect of their official acts are in a different position. Jurisdiction in these cases implies

[88]) The staff regulations of, for example, the International Court of Justice provide that appointments "shall be made on the basis of these Regulations" (art. 2), that the regulations "may be amended", and that "the amended provisions shall replace the old provisions in respect of all members of the staff" (art. 19).

[89]) See, however, art. 65 of the Regulations of the International Institute for the Unification of Private Law, which provides: «Dans tous les contrats conclus par l'Institut avec les membres du personnel il sera inséré une clause prévoyant la compétence du Tribunal administratif, conformément aux dispositions de l'article 7 *bis* du Statut Organique».

compulsory jurisdiction only over the officials, and only in respect of acts with regard to which they are subject to the organic jurisdiction of the organization. This, it has been demonstrated, comprises not only legislative and administrative, but also judicial powers. The latter, as was submitted under (2) on the basis of the practice of some organizations, comprise the power to confer upon the internal courts of the organization compulsory jurisdiction over its officials in internal disputes with the organization, whether this be considered as a unilateral or a contractual power. Are disputes with third parties in any different position?

There is no doubt that organizations exercise their legislative and administrative jurisdiction over their officials in respect of any official acts performed by them, whether these form part of relations with organs or members of the organization or with third parties. In one case as in the other the official – but not the third party – is bound by the regulations and the administrative decisions of the organization. Is the judicial power any more limited? Or can the organization confer upon its courts jurisdiction even in respect of external acts, making such jurisdiction compulsory for its officials, but not for third parties?

In the case of the European Coal and Steel Community, it is expressly provided in the constitution, art. 40, second paragraph, that its (internal) Court of Justice is

> compétente pour accorder une réparation à la charge d'un agent des services de la Communauté, en cas de préjudice causé par une faute personnelle de cet agent dans l'exercice de ses fonctions. Si la partie lésée n'a pu obtenir cette réparation de la part de l'agent, la Cour peut mettre une indemnité équitable à la charge de la Communauté.

This provision does not confer upon the Court compulsory jurisdiction over the third parties concerned, only over the officials, and only with regard to their official acts[90]), in respect of which they are subject to the organic jurisdiction of the Organization.

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[90]) The provision is not confined to acts performed in the exercise of the "jurisdictional" powers of the Organization, but comprises also acts of a private law character performed for the organization. Much, Die Amtshaftung im Recht der Europäischen Gemeinschaft für Kohle und Stahl (Frankfurt 1952), pp. 79–82, similarly does not appear to make any such distinction when discussing the concepts of *exercice des fonctions* and *Amtsausübung* in French and German law. The immunity of international officials from suit in municipal courts, as laid down in article 11 (a) of the general convention on the privileges and immunities of the Community, extends to all acts performed by them *en leur qualité officielle*, a term which must be taken as synonymous with *dans l'exercice de ses fonctions* as used in article 40 (*cf.* Valentine, The Court of Justice of the European Coal and Steel Community, The Hague 1955, p. 118).

The constitutions of the other European Communities do not contain any similar provision [91]). Indeed, no other organization is known to have courts with this competence [92]). Yet, they all have, even without constitutional provision, the same legislative and administrative jurisdiction over the official acts of their officials as has the European Coal and Steel Community, and the same judicial power in internal disputes. It is submitted that they have the same power in external disputes as well. As long as their constitutions do not provide to the contrary, the organizations may confer such jurisdiction upon their internal courts by simple regulation – whether such regulations be considered as genuine legislation or as parts of the contracts of employment. If no organizations are known to have done so, this is not because they lack the power, but because there has not been sufficient practical need for it, notably because the organizations have considered it more appropriate to assume responsibility themselves for acts performed on their behalf. These are, indeed, the acts of the organization itself, and in most non-Anglo-Saxon countries it is customary to sue the institutions rather than any person thereof.

The inherent power of intergovernmental organizations to establish internal courts for this purpose appears to impose itself at least if the officials enjoy immunity from suit in municipal courts, since there is then no alternative jurisdiction which could reasonably contest the jurisdiction of the organization. Indeed, all detailed treaties which have been concluded on the privileges and immunities of intergovernmental organizations expressly provide that the officials shall enjoy immunity in respect of their official acts. However, it is submitted that international officials are entitled to such immunity even if there is no relevant treaty provision. A number of the treaties which provide for immunity for officials in respect of their official acts provide at the same time that the organization shall make provision for appropriate modes of settlement of disputes involving any official who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General [93]). In such cases the organization may support its judicial power upon this provision, *vis-à-vis* states which are contracting parties to the treaty concerned. It is submitted, however, that the organization will have the power to confer jurisdiction upon its own courts even if there is no such additional provision.

[91]) *Cf.* arts. 178, 179 and 215 of the CEE constitution.

[92]) The (European) Convention on the Establishment of a Security Control in the Field of Nuclear Energy provides only for submission to the Tribunal of claims for reparation from the European Nuclear Energy Agency (art. 13).

[93]) See e.g. the general Convention on the Privileges and Immunities of the Specialized Agencies, § 31 (b).

The immunity of international officials extends in certain cases even to their private acts. It is possible that the organization may, in these special cases, derive a power to extend its compulsory jurisdiction to disputes arising out of such acts from the provisions granting the extended immunity or from companion clauses requiring the organization to provide alternative modes of settlement (in order to avoid a denial of justice) [94]). With this reservation, the jurisdiction which the organization may assume unilaterally over its officials extends only to disputes arising out of their official acts. The jurisdiction is compulsory as far as the officials are concerned. The third parties involved are free to decide whether they want to submit to the jurisdiction of the court. However, if the officials enjoy immunity, the third parties will have no choice if they want to seek a judicial settlement of their claims. Thus, even *vis-à-vis* third parties the jurisdiction is exclusive.

It has been proposed to amend the Statute of the International Court of Justice "so as to bring employees of international organizations enjoying immunity in the several member countries under the jurisdiction of the Court" [95]). However, it would rather alter the nature of the International Court of Justice, which is primarily an international court, concerned with international law disputes between subjects of international law [96]), to bring within its competence such disputes of internal law *stricto sensu* [97]). In any case this would require a revision of the Statute, which is not so easily done. It appears more natural, and easier, to establish internal courts of the organization for the purpose, since this may be done without

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[94]) Or in order to avoid that the national courts of their home country assume jurisdiction as if they were diplomats of that country, as a French court did in respect of the Secretary-General of the League of Nations, *Avenol* v. *Avenol*, Annual Digest of International Law Cases, 1935–37, Case No. 185. This case was reported in a New York judgment as follows: "It is interesting to note that research discloses a similar attempt to escape punishment by one *[sic]* Avenol in the Courts of the Republic of France in 1934, when he was being held to account for alleged failure to support his family, he then being the Secretary-General of the ill-fated *[sic]* predecessor to the present international organization – namely, the League of Nations. The judgment in that instance refused to accord the claimed immunity, with the comment, 'No one may claim to be immune from suit in fifty States. That is practically in all the world. Such a privilege would be abhorrent to the fundamental idea of justice'". (Ranallo case, City Court of New Rochelle, N.Y., OR GA, I, Second Part, Sixth Committee, Summary Records, p. 223.)

[95]) International Law Association, Second Report on the Review of the United Nations, London 1956, p. 43 (Austrian Branch Committee proposal).

[96]) See below, Chapters IV–V and IX C (2).

[97]) See below, pp. 64 *et seq.*, on the dangers involved in this.

constitutional amendment or other treaty provision. This may also be done jointly by several organizations by agreement between them [98]).

What has been said above probably applies also to actions by third parties against members of a United Nations Force. This is obvious in the case of those members of the Force who have been individually enlisted, since these normally will be officials of the organization. But members of national contingents, too, have temporarily been placed under the jurisdiction of the organization, to the extent that their national states have not retained powers over them. Their position *vis-à-vis* the UN has been defined as follows:

> The United Nations Force in the Congo is part of the subsidiary organ of the United Nations referred to in Regulation 5 (b) above (ONUC) and consists of the Commander and all military personnel placed under his command by Member States. The members of the Force, although remaining in their national service, are, during the period of their assignment to the Force, international personnel under the authority of the United Nations and subject to the instructions of the Commander, through the chain of command [99]).

Moreover, the members of national contingents have been granted immunity from suit in the courts of the host state "in any matter relating to their official duties" and, partly, even in respect of their private acts [100]).

The UN has in fact assumed the power to establish commissions for the binding settlement of claims against the members of the Force. Thus the Regulations for the UN Force in the Congo provide, in Regulation 29 (d):

> Disputes involving the Force and its members shall be settled in accordance with such procedures provided by the Secretary-General as may be required, including the establishment of a claims commission or commissions or such arbitral procedures as may be agreed between the United Nations and the Host Government. Supplemental instructions defining the jurisdiction of such commissions or other bodies as may be established shall be issued by the Secretary-General in accordance with article 3 of these Regulations.

Such procedures, providing for courts of arbitration and claims commissions with compulsory jurisdiction to be established by the UN and the Congolese Government, had already been agreed upon twenty months

[98]) *Cf.* below, Chapter VI.

[99]) ONUC Reg. 6 (ST/SGB/ONUC/1, 15 July 1963). See also the similar provision in UNEF Reg. 6, UNTS, vol. 271, p. 174.

[100]) See the more narrow provisions in the host agreement with Egypt, par. 12, and UNEF Reg. 34 (UNTS vol. 271, pp. 148 and 182) on the one hand, and the broader provisions in the host agreement with the Congo, pars. 10–11 (OR SC, Supplement for October-December 1961, p. 154) and the Regulations for the UN Force in the Congo (ST/SGB/ONUC/1) par. 29, on the other hand.

earlier in pars. 10–11 of the host agreement with the Congo. Similar provisions had earlier been made in par. 38 of the host agreement with Egypt and in UNEF Regulation 34. In the case of UNEF, these documents were incorporated as annexes to the agreements concluded by the UN with the states providing contingents [101]). However, this was in most cases done only subsequently. Thus, at least from a formal point of view, the UN assumed the power unilaterally, merely on the basis of the general placing of the contingents under its authority.

It is true that in the case of the UN Forces in the Middle East and in the Congo the UN chose to establish external courts of arbitration or commissions rather than internal courts of the organization. However, from the point of view of the powers of the organization *vis-à-vis* the members of the Force it can hardly make any difference what kind of courts it establishes. The crucial fact is that the courts are established and given compulsory jurisdiction *vis-à-vis* the officials without their prior consent.

(4) Internal enforcement of judgments

The real problem is, however, not whether the organization is entitled, *vis-à-vis* its officials, to establish internal courts with compulsory jurisdiction over them – but how the judgments rendered by such courts can be enforced. One may first examine whether they can be enforced by internal action within the organization.

Those organizations which have established administrative tribunals are not known to have made provision for internal execution of the judgments rendered by these tribunals. Thus the Statute of the UN Administrative Tribunal merely provides, in art. 9(3), that the compensation awarded by the Tribunal shall be "paid by the United Nations". And the Statute of the Administrative Tribunal of the International Labour Organization, which is also competent in respect of most of the specialized agencies in Europe, provides that "any compensation awarded by the Tribunal shall be chargeable to the budget of the international organization against which the complaint is filed".

In the absence of any provision for execution – and since intergovernmental organizations, unless otherwise provided, enjoy immunity from municipal measures of enforcement without their consent [102]) – there are no

[101]) UNTS vol. 271.

[102]) *Cf.* above, note 75. According to art. 1 of the protocols on the privileges and immunities of the European Communities, measures of enforcement may be undertaken against their assets with the consent of their own Court of Justice *(cf.* art. 44 of the CECA

means whereby officials and third parties may have judgments enforced against the organization without its consent. As was pointed out in the United Kingdom oral statement during the hearings preceding the advisory opinion on Effect of Awards of Compensation Made by the UN Administrative Tribunal, the General Assembly has no legal right to refuse to meet a liability arising from a judgment of the Administrative Tribunal, "though it has the power to omit to make provision for it in its Budget" [103]). However, the organization will usually comply with judgments rendered against it by its own tribunals [104]), and the question of enforcement against the organization is therefore hardly a practical one.

Enforcement against the officials may be done by the organization itself by measures within the framework of its organic jurisdiction – or, more specifically, within the framework of the relationship of employment. In particular the organization may apply disciplinary measures, including dismissal, and salary deductions [105]). But the territorial

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constitution and art. 187 of the CEE constitution). In the case of other intergovernmental organizations, municipal enforcement of judgments rendered by their internal courts will be precluded already by the fact that states do not enforce foreign judgments unless they have specifically agreed to do so.

[103]) ICJ Pleadings, UN Administrative Tribunal (1954), p. 362, *cf.* p. 361, emphasis added. In Norwegian constitutional law it is assumed that the Administration must comply with a judgment rendered by a Norwegian court, even if Parliament refuses to appropriate the money, *cf.* above, note 68.

[104]) The only known exception in practice is the refusal of the Assembly of the League of Nations on 13 April 1946 to pay compensations awarded in thirteen judgments rendered by the League of Nations Administrative Tribunal. The basis of this decision, however, was a holding by a sub-committee of the Second (Finance) Committee of the Assembly, that the awards made by the Tribunal were invalid because they sought to set aside a legislative act of the Assembly, viz. its resolution of 14 December 1939 amending the staff regulations (Société des Nations, Journal officiel, 1939, p. 424). The decision, which was an administrative one, was made during the winding up of the League, by 16 votes to 8 (mostly Benelux and Scandinavian members constituting the minority), with 5 abstentions (*ibid.*, Supplément spécial No. 194, pp. 130–33; text of the report of the Secretary-General at pp. 245–9 and of the sub-committee and the Second Committee at pp. 261–4; for a summary and an evaluation of the case, see ICJ Pleadings, UN Administrative Tribunal [1954], pp. 129 and 171–81).

[105]) If the official is no longer employed with the organization, these measures cannot be applied. He is then no longer subject to the organic jurisdiction of the organization, and must be sued in the municipal courts which have territorial jurisdiction over him and his assets. The UN has done this on at least two occasions in respect of claims for reimbursement of overpayment of salary (Annual Report of the Secretary-General, 1952–53, p. 149. The text of one of the judgments is printed in the Pasicrisie Belge, 1953, No. 10, p. 65). The available texts of the relevant judgments do not indicate what law was applied. It is submitted, however, that the municipal court in such cases must apply the internal law of the organization in order to determine the basis of the claim. But it will apply municipal

sovereignty of states prevents the use of regular measures of execution against individuals, property or rights within their territory by the organization itself [106]). These are measures which only the territorial sovereign may perform and which he usually will not delegate. Thus, if measures within the framework of the relationship of employment do not suffice, the organization will have to look to states for assistance. This raises the question of the external effects of judgments.

(5) External effects of judgments

States are under no obligation to execute judgments rendered by courts of another jurisdiction, unless this has been specifically provided for. This applies to judgments of internal courts of intergovernmental organizations no less than to judgments of foreign municipal courts. In the case of the European Communities, there is a specific provision in the constitutions that the judgments of the Court of Justice shall be enforcable in the member states [107]). Other organizations are not known to have any similar arrangements. In their case, therefore, neither the host state, nor other member or non-member states, are under any obligation to execute the judgments of the internal courts of the organization.

On the other hand, municipal courts do not completely ignore foreign judgments [108]). The municipal courts of several countries will recognize them as binding *(res judicata)* under certain conditions, if they have been given by a court which had "international competence" according to the procedural international law of the state where execution is sought, *i. e.* according to the rules governing the international competence of its own courts [109]). In these cases, even if it is necessary to obtain a new judgment

law in order to determine whether the claim is still recoverable *(condictio indebiti,* prescription, compensation), since the claim is no longer internal, between parties both of whom form part of the organization.

[106]) The position is different in respect of organizations having (extended) territorial jurisdiction.

[107]) CECA, art. 44; CEE, art. 187; EURATOM art. 159. *Cf.* art. 1 of the Protocols (general agreements) on the Privileges and Immunities of the Communities. – Moser, Die überstaatliche Gerichtsbarkeit der Montanunion (Vienna 1955), p. 65, interprets a reference (in art. 44) to art. 92 of the constitution of the CECA in the sense that the judgments of the Court are to be executory only if they involve *obligations pécuniaires.* Others do not appear to draw this conclusion. *Cf.* Reuter, La Communauté européenne du charbon et de l'acier (Paris 1953), p. 106; Rapport de la Délégation française sur le Traité instituant la CECA (Paris 1951), p. 59; and Cahiers de la fondation nationale des sciences politiques vol. 41 (Paris 1953), p. 223 note.

[108]) See the account of the law of several Western European countries given in: Hambro, Jurisdiksjonsvalg og lovvalg (Oslo 1957), pp. 100–170.

[109]) Riad, La valeur internationale des jugements en droit comparé (Paris 1955), pp. 184–6. See also Riezler, Internationales Zivilprozeßrecht (Berlin 1949), § 52, *cf.* p.

in the state where execution is sought, such judgment is granted without enquiring into the merits of the case ("action on the judgment", *actio judicati*) [110]). In other cases an examination of the substance is admitted, but the foreign judgment is considered as proof of the validity of the claim, subject to the right of the losing party to submit counterproof [111]).

It has been held in certain English judgments, and by certain writers of other countries [112]), that states are under an obligation of international law to accord such binding effect to foreign judgments. However, this assumption is not supported by any uniform practice. But, whether the problem arises as a question of international law or as one of the municipal law of the state concerned, it is submitted that the same principles should be applied to judgments of internal courts of intergovernmental organizations as are applied to those of foreign municipal courts. Thus, if judgments of foreign courts of competent jurisdiction are recognized as binding under certain conditions, then judgments of internal courts of intergovernmental organizations, too, should be so recognized if they fulfil these conditions [113]), including in particular the condition that the courts are "internationally competent" [114]). It is submitted further-

453, and the German Zivilprozeßordnung, § 328. – § 223 a of the Danish law on civil procedure of 11 April 1930 authorizes the King to enact regulations making foreign judgments binding in Denmark, even if no treaty has been concluded to this effect, but on condition of reciprocity.

[110]) See Riezler, *op. cit.*, § 58, *in initio*, and the German Zivilprozeßordnung, § 732. *Cf.* Hambro in: International and Comparative Law Quarterly, vol. 6 (1957), pp. 606–7, and also the English case *Goddard* v. *Gray* (1870 L.R.Q.B. 138) and the French case *Charr* c. *Hasim Ullasahim* (Clunet, vol. 83 [1956], p. 165), both cited by Hambro, *op. cit.* above note 108, pp. 148, 155 and 366. See also the draft principles, discussed by the International Law Association, Report of the Forty-Eighth Conference, New York 1958, p. 118 ("shall be given conclusive effect"), *cf.* p. X.

[111]) *Cf.* Riezler, *op. cit.*, § 50, no. 10, and Rammos, Die Beweiskraft ausländischer Urteile vor den griechischen Zivilgerichten in: Grundprobleme des internationalen Rechts (Bonn 1957), pp. 363–8.

[112]) Cited by Riad, *op. cit.* above note 109, p. 53, and by Skeie, Den norske civilprosess, vol. 2 (Oslo 1940), pp. 32–36.

[113]) The condition of reciprocity would probably be met, in theory, by intergovernmental organizations and their courts, *cf.* below, Chapter VIII C. Since in practice these will only rarely be faced with questions of municipal law, the condition of reciprocity may be more simply satisfied, formally, by a provision in the statute or the rules of the IGO court concerned that it shall be bound by judgments of foreign (state or IGO) courts of competent jurisdiction. It may be noted, however, that the International Law Association in 1958 adopted a resolution approving "the principle that recognition and enforcement of foreign judgments ought not to depend on reciprocity" (Report of the Forty-Eighth Conference, New York 1958, p. X).

[114]) The question of whether the courts of member states should recognize as binding judgments of the internal courts of the organization even if they do not so recognize judgments of courts of foreign states, is left aside.

more, that internal courts of intergovernmental organizations are internationally competent in respect of actions against (the organization and against) officials arising out of their official acts – in respect of which they are subject to the organic jurisdiction of the organization.

It might be objected that the procedural international law of the state where execution is sought, which defines the international competence of the courts of that state, is based upon territorial and personal criteria, and that these are of no relevance to courts of intergovernmental organizations except to the extent that these may have been granted extended territorial and/or personal jurisdiction. Indeed, except for the important criterion of the consent of the parties, the jurisdiction of internal courts of such organizations as do not exercise extended jurisdiction is based upon the inherent jurisdiction of the organization over its organs (organic jurisdiction) [115]).

However, a closer examination reveals that the procedural international law of states is in fact based also upon organic criteria. Indeed, national courts will always assume jurisdiction in disputes arising out of matters falling within the organic jurisdiction of their state, such as disputes between the government and its officials arising out of the relationship of employment, even if they involve officials of foreign nationality and arise in foreign territory. On the other hand, national courts decline jurisdiction in matters falling under the organic jurisdiction of a foreign state, even if the matter would otherwise fall under the territorial (and personal) jurisdiction of the court. A striking example is actions brought against a government by its employees who are employed in a foreign country and who themselves are nationals of that country, in respect of the relationship of employment [116]). Thus, an organic link with one legal system overrides territorial (and personal) links with another system. Similarly, national courts have declared themselves incompetent in disputes concerning matters falling under the organic jurisdiction of an intergovernmental organization, even if the matter would otherwise fall under the territorial (and personal) jurisdiction of the state concerned, as in the case of the relationship of employment of their nationals working for the organization in their own national territory [117]). It is thus clear that national courts, in determining questions of their international competence, pay due attention to the organic jurisdiction of states as well as of organizations; indeed, they allow it to override otherwise applicable territorial jurisdiction.

[115]) BYIL 1961, p. 448.

[116]) See, for example, the cases reported in Hackworth, Digest of International Law (Washington 1940–43), vol. 4, pp. 732–4.

[117]) See the cases cited in BYIL, 1961, p. 448, note, and below, Chapter VII A.

It is submitted, accordingly, that internal courts of intergovernmental organizations are "internationally competent" in disputes falling under the organic jurisdiction of the organization concerned [118]). Indeed, they are the only courts which are internationally competent in disputes between parties under the jurisdiction of the organization arising out of matters falling under its organic jurisdiction. Thus, if an official whose contract of service has been terminated by the organization sues the organization before its administrative tribunal for terminal indemnities, if the tribunal rejects this claim, and if, subsequently, the organization sues him in a national court for reparation for injury caused by him during his service or for reimbursement of overpayment of salary, the national court cannot grant a counterclaim for such terminal indemnities as were refused by the administrative tribunal, if the national court concerned recognizes as binding judgments delivered by foreign national courts in similar circumstances. Indeed, judgments rendered by foreign (state or IGO) courts on the basis of exclusive organic jurisdiction probably must be recognized as binding (*res judicata*, but not as enforceable) even in countries which do not normally recognize foreign judgments as binding [119]).

If only one of the parties to the dispute is subject to the jurisdiction of the organization, the dispute is no longer internal, and its courts are not the only competent courts. But even in such external disputes they are still courts of competent jurisdiction if the dispute concerns official acts (including private law acts, e. g. contracts, performed on behalf of the organization) or private acts in respect of which the official enjoys immunity because of his official statuts – and the other party himself institutes proceedings before the court of the organization or otherwise voluntarily submits to its jurisdiction. This is in accordance with the principle of consent, recognized in the procedural international law of most or all states [120]). This covers the case, dealt with under (3), of third

[118]) Although the drafts submitted to the International Law Association's Conference in 1958 were concerned with commercial judgments and thus obviously did not have in mind claims involving state and IGO officials, they do not preclude organic criteria. Thus the Model Act on enforcement of foreign money judgments provides, in par. 3 that "The foreign court which rendered the judgment shall be deemed to have had international jurisdiction, if ... (b) The whole cause of action arose within the foreign jurisdiction;" ... (See Report of the Forty-Eighth Conference, New York 1958, p. 120, *cf.* also pp. 119, under (4), and 129, under 1°.) The final text, as adopted at the 1960 Conference, is confined to judgments of courts of "a foreign s t a t e", and does not contain the provision in par. 3 (b) of the draft, but merely a provision that the bases for recognition listed are not exclusive (Report of the Forty-Ninth Conference, Hamburg 1960, p. ix).

[119]) *Cf.* below, Chapter VIII F.

[120]) *Cf.* also the Model Act adopted by the International Law Association (Report of the Forty-Ninth Conference, Hamburg 1960, pp. vii-viii). It may also be argued that a

parties suing officials in respect of their official acts. It also covers the case, dealt with below, under B(3), of third parties suing the organization itself in disputes of municipal law.

The question of the external effects of judgments of internal courts of intergovernmental organizations is a new one. However, the general question of the recognition of judgments rendered by foreign judicial authorities other than courts of states is not new. It has arisen e. g. in respect of judgments rendered by religious courts, although these are not comparable to courts of intergovernmental organizations unless they are organs of a subject of international law (the Holy See); otherwise they will presumably be considered binding abroad only if they are binding under the law of the country where they were rendered, and for that reason [121]). It may also be mentioned, in this connection, that the UN Joint Staff Pension

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judgment given with the consent of the third party concerned cannot be given less effect than a foreign arbitral award.

[121]) According to Riad, *op. cit.* above note 109, pp. 99–100, the majority of German writers consider that no distinction can be made between judgments of courts of foreign states and judgments of other foreign authorities, such as religious courts. At least the case cited by Riad (Wärneyer, Die Rechtsprechung des Reichsgerichts, vol. 17 [1925] No. 133 [p. 178]), which is merely an *obiter dictum* concerning a divorce by ecclesiastical administrative act, was concerned with an act which apparently was recognized as binding by the state in which it was rendered, and which could, on that basis, be assimilated to judgments rendered by the regular courts of that state. *Cf.* also Riezler, *op. cit.* above note 109, p. 117. Riad adds that the *Reichsgericht* has taken a contrary view more recently. However, the case he cites [*Ehem. M.* v. *Ehefr. M.*, Entscheidungen des Reichsgerichts in Zivilsachen vol. 136, p. 142] is not in point. It concerns, not a judgment of a foreign religious court, but a simple administrative act of an administrative authority of a foreign state. Indeed, the refusal of the *Reichsgericht* to recognize the act as binding in Germany was based on the fact that the act was administrative and not judicial. The relevant provision in German law (Zivilprozeßordnung, § 328) speaks of "the recognition of the judgment of a foreign court".

Reference may be made also to the provisions governing the effects in Italy of judgments pronounced (in that country) by ecclesiastical authorities. The Law of Guarantees of 13 May 1871 (Legge sulle prerogative del Sommo Pontifice e della Santa Sede, e sulle relazioni dello Stato con la Chiesa, Leggi e Decreti del Regno d'Italia vol. 31 [1871], p. 1014 No. 214 [Serie 2 a]; French translation in: Martens; Nouveau Recueil Général, 2e série vol. 18, p. 41) merely provided, in art. 17, that acts of the ecclesiastical authorities were not to be enforced in Italy, and that it was for the civil courts to determine their legal effects. The Lateran Treaty of 11 February 1929 gave such acts made in pursuance of organic or (extended) personal jurisdiction executory force, by its art. 23, which provides that: "sentences and decisions pronounced by ecclesiastical authorities, which have to do with ecclesiastical or religious persons in spiritual or disciplinary matters, and which are officially communicated to the civil authorities, will have full juridical efficacy immediately in Italy even so far as the civil effects are concerned" (Italian text in: Martens, *op. cit.*, 3e série, p. 18. English translation in AJIL vol. 23 [1929], Suppl., p. 194). This provision does not apply to judgments pronounced by the courts of the State of the Vatican. Art. 23 provides that for the execution of these "the principles of international law will be applied".

Board has taken the position that the UN Administrative Tribunal, in passing judgments upon applications alleging non-observance of the Regulations of the UN Joint Staff Pension Fund, shall give "full faith, credit and respect" to the "proceedings, decisions and jurisprudence" of the administrative tribunals of the several specialized agencies concerned, relating to their own staff regulations [122]).

By bringing a new action in the courts of a state which recognizes the binding force of foreign judgments – in general or when based upon organic jurisdiction – the winning party can have the judgment of the internal court of the organization enforced by execution of the authorities of the state under which the court belongs. It is, however, a condition for this procedure that the organization waives the immunity of the official (if he is the defendant before the national court). It is, furthermore, a condition that the municipal court concerned does not consider itself incompetent *ratione materiae* [123]). This it must do if the dispute is one between the organization and its official and is exclusively concerned with the relationship of employment, since this is under the exclusive organic jurisdiction of the organization [124]). But municipal courts cannot as such consider themselves incompetent if the dispute involves a third party, since external disputes are not subject to the exclusive organic jurisdiction of the organization [125]). In this case only the question of immunity *(ratione personae)* arises.

(6) Conclusions

It is submitted, in conclusion, that intergovernmental organizations, in the absence of any contrary provision in their constitutions, have an inherent capacity to establish courts to adjudicate upon disputes between the organization and its officials.

There can be no doubt that the organizations can establish such courts to decide actions brought against them by their officials, and this is confirmed in practice by the fact that many organizations have established administrative tribunals for this purpose, despite the absence in their constitutions of any provision authorizing them to do so.

However, intergovernmental organizations must also be entitled to

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[122]) Below, Chapters VI and VIII B (1).

[123]) On the distinction between immunity *ratione personae* and incompetence *ratione materiae*, see BYIL 1961, p. 454, note.

[124]) *Ibid.*, pp. 448–9, and below, Chapter VII A.

[125]) Indeed municipal courts have assumed jurisdiction in disputes between the organization and its former officials, see above, note 105.

establish tribunals to adjudicate upon actions which they bring against the officials in that capacity, *i. e.* if the action relates to their service or their relationship of employment. The statutes of some internal courts of intergovernmental organizations allow such actions, and some of these statutes have been enacted by the organization concerned without basis in a relevant constitutional provision. If most organizations have in fact refrained from establishing courts for this purpose or from actually bringing actions against their officials in their internal courts, this is not because the organizations lack the power to do so, but because they do not need to do so or because the judgments of such courts would not be directly enforceable by the authorities of the host state. It is much simpler, and equally fair to the officials, for the organization to make an administrative decision, which the official may challenge before the administrative tribunal if he wants to seek a judicial settlement.

It is also submitted that intergovernmental organizations, in the absence of any contrary provision in their constitution or in another treaty, have the inherent competence to confer upon their internal courts the power to adjudicate upon disputes between their officials acting as such and third parties, although such jurisdiction can be made compulsory only in respect of actions brought against the officials. Only one organization is known to have done this, by virtue of an express constitutional provision. However, if other organizations have not done the same, it is submitted to be, not because of an inherent incapacity, but because claims advanced against officials by third parties will usually be settled by the organization itself if they arise from official acts, since such acts are properly the acts of the organization. If not, the organization may waive the immunity of its officials from suit in municipal courts.

Within the limits indicated above, it is submitted that the internal courts of the organization must be considered as courts of competent jurisdiction and that their judgments must be given effect by national authorities on the same conditions and to the same extent as these give effect to judgments of other foreign courts, unless there is a basis in an applicable treaty or in the law of the state concerned for treating them differently [126]).

In respect of the private acts of the officials, the organization can only confer compulsory jurisdiction upon its own courts if the states concerned have conferred upon it the power to do so, for example by a provision

[126]) The constitutions of the European Communities provide for full executory force, see above, under (5).

in the constitution or in a convention on privileges and immunities that the official shall enjoy immunity also in respect of such acts and a companion provision that the organization shall establish alternative modes of settlement of disputes involving such officials. The judgments rendered by the courts of the organization in such cases must probably be given the same effect as other judgments of foreign courts of competent jurisdiction are given by the authorities of those states which have, expressly or by implication, conferred the power upon the organization.

B. Disputes with Private Individuals

It has been pointed out under A (3) that the organization may confer upon its internal courts competence to adjudicate upon disputes between third parties and officials of the organization, but that such jurisdiction may be made compulsory only upon the officials. The question which shall now be discussed is whether the organization may confer jurisdiction upon its internal courts in disputes between itself and physical or legal persons other than officials.

(1) Individuals under the extended jurisdiction of the organization

Internal disputes involving physical or legal persons other than officials may arise in those cases where the organization has been granted extended jurisdiction over individuals (and companies) other than officials. Such jurisdiction may have been granted in the form of territorial jurisdiction, such as that of certain international river commissions; or of personal jurisdiction, such as that of the Mixed Commission for the Exchange of Greek and Turkish Populations or that of the European Nuclear Energy Agency under the Convention on the Establishment of a Security Control in the Field of Nuclear Energy of 20 December 1957 [127]); or of comprehensive jurisdiction, such as that of the so-called "supra-national" organizations. In such cases there may be a practical need for judicial settlement of disputes arising out of the exercise by the organization of its legislative and / or administrative powers over these parties.

The constitutions of the European Communities provide that their Court of Justice shall be competent in actions brought against the Community by natural or legal persons under their extended jurisdiction [128]).

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[127]) Entered into force on 22 July 1959. Text in the International Atomic Energy Agency's Legal Series No. 1, entitled "Multilateral Agreements" (Vienna 1959), p. 187.

[128]) See, for example, art. 175 of the CEE constitution.

But there can be no doubt that other organizations, too, are entitled to establish courts for the adjudication of such disputes, which are internal *largo sensu*. The individuals and companies concerned may be given the right to sue the organization before such internal courts [129]). And if they consent, they may themselves be sued by the organization or by third parties.

The question of whether the organization may confer upon its internal courts compulsory jurisdiction over the individuals and companies concerned, *i. e.* jurisdiction in actions brought against them without their consent, cannot be answered in general terms. It depends upon an interpretation of the act conferring the extended jurisdiction upon the organization. – In the case of organizations exercising complete territorial jurisdiction, such as indirect *coimperia*, it goes without saying that the compulsory judicial power of the organization extends as far as its legislative and administrative powers. Reference may also be made to the Western European Union, which had been empowered by the German-French agreement on the Status of the Saar of 23 October 1954 to supervise the implementation of its provisions. Judicial powers were not specifically mentioned, but in 1955–56 an internationally composed tribunal was established to adjudicate upon any complaints by Saarlanders of political persecution in connection with the referendum provided for in the agreement [130]). – The compulsory judicial power of International River Commissions, on the other hand, usually extends only to cases expressly provided for. The power conferred upon the UN in respect of its headquarters district in New York by § 8 of its headquarters agreement with the United States, is expressly confined to a legislative power, the judicial power remaining with the United States, *cf.* § 7 (c) and (d) of the headquarters agreement [131]).

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[129]) The semi-judicial Eligibility Review Board of the International Refugee Organization was to hear and determine appeals from individual refugees against administrative decisions by the Organization denying them status as refugees eligible for assistance. See resolutions nos. 53 and 70 of the Preparatory Commission for the International Refugee Organization (Prep./154/Rev. 1/pp. 10 and 25, and Prep./195/Rev. 1/pp. 18–19 and 36). This Board, however, was never established. Moreover, it was not to be concerned with disputes arising out of genuine jurisdiction over private individuals, since the Organization did not have the power to impose duties upon the refugees other than as a condition for receiving aid from the Organization.

[130]) See Deruel, Le Tribunal international de la Sarre in: Annuaire français de droit international vol. 2 (1956), pp. 509–16, and below, note 226.

[131]) It was in the context of a discussion of these provisions that the delegate of Syria made the statement quoted above, note 52. It is unfounded even in this context, since the UN does exercise legislative powers over private individuals, and could have exercised

The Court of the European Communities has not directly been given compulsory jurisdiction over enterprises subject to its legislative and administrative authority or over other private parties, except insofar as this might be provided by the state under whose general jurisdiction they belong. The latter is expressly provided in art. 43 of the constitution of the Coal and Steel Community, but it goes without saying that the other Communities, too, like any other intergovernmental organization, have the power to confer such compulsory jurisdiction upon their courts if the competent state so provides [132]). Otherwise the Court may exercise compulsory jurisdiction over private individuals only indirectly. Thus, in the first place, if the individual is sued in a national court in a matter which raises, as a preliminary issue, the question of the validity of a decision of the organization, the Court of the Community has exclusive jurisdiction in respect of this question [133]). In the second place, art. 104 of the constitution of EURATOM provides that, on a petition by the Commission of the Community, the Court of Justice shall rule as to the compatibility with the constitution of

> any agreement or convention concluded by any person or enterprise with a third country, an international organization or a national of a third country, where such agreement or convention has been concluded after the date of the entry into force of this Treaty.

Thirdly, since most or all disputes involving the Community may be brought before national courts only if they do not arise under the internal law of the Community (*stricto* and *largo sensu*) [134]), the individuals themselves are forced to sue the organization before its Court of Justice if they want to contest the validity of a decision of the organization. The constitutions contain a number of provisions authorizing them to do so [135]).

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judicial powers as well if the headquarters agreement had so provided, despite the absence of any provision in the Charter to that effect.

[132]) Private parties may, furthermore, be sued before the Court if they have consented thereto by a clause in a contract, *cf.* the constitutions of CECA, art. 42; of CEE, art. 181; and of EURATOM, art. 153.

[133]) See the constitutions of CECA, art. 41; EURATOM, art. 150; and CEE, art. 177. The Court has already rendered three decisions on prejudicial questions submitted to it by private firms pursuant to the latter provision, see Cour de justice des Communautés européennes, Recueil de la jurisprudence de la Cour vol. 8 (1962), p. 89 and vol. 9 (1963), pp. 1 and 59. See below, Chapter VIII A (1).

[134]) This is fully provided only in art. 40, third paragraph, of the constitution of the CECA. But the effect of art. 183 of the CEE constitution and art. 155 of the EURATOM constitution may to a large extent be the same.

[135]) See for example CECA constitution, arts. 33–36, 63 (2) and 66 (5)–(6) (see also art. 40), CEE constitution arts. 175–8, and EURATOM constitution, arts. 148–51.

The incentive to bring such action is particularly manifest in respect of decisions of the High Authority imposing monetary obligations upon the individual, since these decisions have been given direct executory force in the member states [136]).

The European Convention on the Establishment of a Security Control in the Field of Nuclear Energy provides, in art. 13, that "any Government party to the present Convention or any undertaking concerned may bring before the Tribunal set up under Article 12 appeals" against certain decisions made by the European Nuclear Energy Agency (an autonomous organ of the Organization for Economic Co-operation and Development) in connection with the security control. The tribunal may declare that the decision appealed against is contrary to the convention or to the security regulations enacted or agreements concluded pursuant thereto, and it may oblige the Agency to pay reparation for any damage suffered by the undertaking. The Convention then goes on to provide, in art. 14:

> The Tribunal shall be competent to decide on any other question relating to the joint action of the Member countries of the Organization in the field of nuclear energy submitted to it by agreement between the parties to the present Convention concerned.

Such competence has indeed been granted to the Tribunal by three conventions. Art. 16 of the Convention of 20 December 1957 on the Constitution of the European Company for the Chemical Processing of Irradiated Fuels (Eurochemic) [137]) provides that "any dispute arising between Governments party to the present Convention concerning the interpretation or application thereof" may be submitted to the Tribunal "by agreement between the Governments concerned". On the other hand, art. 17 of the [European] Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy and art. 17 of the Supplementary Convention thereto of 31 January 1963 provide that "any dispute arising between two or more Contracting Parties concerning the interpretation or application of this Convention... shall, upon the request of a Contracting Party concerned", be submitted to the European Nuclear Energy Tribunal.

It is submitted that, even in the absence of arts. 13 and 14, the organization could have established a tribunal with the competence stated in these provisions (although its competence could then not be made ex-

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[136]) CECA constitution, arts. 44 and 92 (see also arts. 63 (2) and 66 (5)–(6)); CEE constitution, arts. 187 and 192; EURATOM constitution, arts. 159 and 164.

[137]) International Atomic Energy Agency, Legal Series No. 1 (Vienna 1959), p. 218.

clusive), since they do not impose compulsory jurisdiction upon the contracting parties or the undertakings, but only upon the organization. Furthermore, if there had been no such provisions, any member of the organization could accept the jurisdiction of the Tribunal as compulsory upon them or upon individuals under their jurisdiction, as members have done under two of the conventions quoted above. The legal significance of art. 14 is not that it authorizes the organization and the Tribunal to accept extension of its competence, but that it gives the contracting states a legal right to require the Tribunal to adjudicate in circumstances covered by the provision, and, possibly, that it prevents the Tribunal from accepting jurisdiction in circumstances not covered by the provision [138]).

At any rate, it is quite clear that art. 14 does not authorize the organization to confer upon the Tribunal compulsory jurisdiction over enterprises or other private persons without the agreement of their governments.

(2) Enforcement

The means of enforcing judgments rendered by the internal court of the organization against a private individual similarly depend upon an interpretation of the act conferring the extended jurisdiction upon the organization. In the case of complete territorial jurisdiction, the organization may enforce its judgments by the same means as a state. In other cases the organization may enforce its judgments only by withholding payment of sums due to the losing party or by withholding other benefits or rights accruing to him within the organization [139]). In such cases it may be necessary that the states concerned undertake to enforce the judgments, as they have done in the case of the European Communities [140]). Even in the absence of such provisions, municipal courts should, it is submitted, attribute the same force to judgments of an IGO (intergovernmental organization) court of competent jurisdiction as they do to judgments of a foreign municipal court of competent jurisdiction [141]).

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[138]) On the latter problem, see below, under F (2).

[139]) The constitution of the European Coal and Steel Community provides that even decisions of administrative organs of the Community may be enforced by these and other means, see arts. 63 (2), 66 (5)–(6) and 91. On fines and other sanctions in the European Coal and Steel Community, see also Krawielicki, Das Monopolverbot im Schuman-Plan (Tübingen 1952), pp. 36–42 and 86–98.

[140]) See the citations in note 136.

[141]) *Cf.* above, under A (5)–(6).

(3) Individuals not under the extended jurisdiction of the organization

Intergovernmental organizations may also establish courts for the adjudication of disputes between the organization and individuals who are not subject to its organic or extended jurisdiction, or between the organization and individuals concerning matters which fall outside the legislative and administrative jurisdiction of the organization. This has been done in certain cases by constitutional provision [142]). But it may also be done without such provision, as has been done by the International Labour Organization and the Council of Europe. Art. II (4) of the Statute of the Administrative Tribunal of the International Labour Organization provides:

> The Tribunal shall be competent to hear disputes arising out of contracts to which the International Labour Organisation is a party and which provide for the competence of the Tribunal in any case of dispute with regard to their execution.

And the «Cahier des clauses et conditions générales applicables aux marchés passés par le Conseil de l'Europe», which is included by reference in contracts concluded by that organization, provides, in art. XIX, *inter alia:*

> Tout litige entre le Conseil et l'entrepreneur ou le fournisseur au sujet des travaux, fournitures ou clauses d'application du marché est soumis arbitrage administratif dont les modalités sont déterminées par arrêté du Secrétaire Général approuvé par le Comité des Ministres du Conseil de l'Europe.
>
> ...
>
> Les vices cachés et les infractions à la legislation générale pourront donner lieu à un recours par toutes voies de droit.

This provision conforms to art. 21 of the General Agreement on Privileges and Immunities of the Council of Europe, which reads:

> Any dispute between the Council and private persons regarding supplies furnished, services rendered or immovable property purchased on behalf of the Council shall be submitted to arbitration, as provided in an administrative order issued by the Secretary-General with the approval of the Committee of Ministers.

However, this agreement is not part of the constitution of the organization and has not been ratified by the host country, where a number

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[142]) See notably the constitutions of the following organizations: CECA, arts. 40 and 42; CEE, arts. 178 and 181; EURATOM, arts. 151 and 153; UNIDROIT, art. 7 *bis, cf.* the interpretative resolution adopted by the General Assembly at its second session (1953) in order to bring the provision into conformity with Italian legislation.

of the contracts in connection with the construction of the building of the Organization were made.

It should be noted, however, that such disputes are not internal, but external, and are governed, not by the internal law of the organization, but by municipal law, although the internal law of the organization must be applied where the applicable rules of conflict of laws refer to its "personal" law.

The organization cannot assume compulsory jurisdiction over the individuals concerned without the authorization of the state under whose jurisdiction they belong. But if they sue, or consent to being sued, before the courts of the organization, the judgment given must, it is submitted, be considered by municipal courts as a judgment given by a court of competent jurisdiction or, at least, by an arbitration court[143]).

C. Disputes With or Between Member States or Other States under the Jurisdiction of the Organization

(1) Internal disputes stricto sensu

Certain constitutions expressly authorize the organization to establish tribunals for the settlement of disputes concerning the interpretation and application of the constitution itself[144]), or the reference of such disputes

[143]) Indeed, most of the cases dealt with under (3) might be covered by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (UNTS, vol. 330, p. 38, *cf.* art. II thereof), except that the Convention is only open for accession by "States".

[144]) FAO's constitution, art. XVI (1) and (3), prescribes settlement by the International Court of Justice or "such other body as the Conference may determine". At its first session the Conference adopted a resolution, according to which such disputes, pending the entry into force of the Statute of the International Court of Justice, "shall be referred to such arbitral tribunal as the Conference shall appoint" (FAO, Report of the First Session of the Conference, p. 55–56).

UNESCO's constitution, art. XIV (2), similarly provides for "determination" by the International Court of Justice or "an arbitral tribunal, as the General Conference may determine under its rules of procedure". Rule 33 (4) of the latter provides that disputes to which the Organization is a party may "be submitted for final decision to an Arbitral Tribunal, arrangements for which shall be made *(institué)* by the Executive Board". An arbitral tribunal was set up in 1949 (under rule 33 [2] as then worded) to adjudicate upon a dispute which had arisen within the General Conference (between member states). It was composed of a President designated by the President of the International Court of Justice and two other judges *(assesseurs)* designated by the Executive Board itself, and was serviced by the Legal Division of the Secretariat of UNESCO. Member states were allowed to "file with the secretariat of the tribunal such observations as they may think fit to proffer on the matter". (UNESCO doc. 4 C/PRO/4; the judgment is also reported in Annual Digest of International Law Cases, 1949, Case No. 113.) This must be considered as an internal, not an international court, *cf.* below, Chapter IV.

to administrative organs of the organization for binding decision [145]). Some of these provisions are limited to disputes between member states, but in most cases they are general and thus also comprise disputes between the organization and member states.

It is not known that organizations which have no such constitutional provision have established tribunals for the adjudication of disputes concerning internal matters *stricto sensu* (organizational matters) which arise between member states or between the organization and a member state [146]). However, they cannot be denied the power to do so, as long as the constitution does not preclude it, for example by providing for another exclusive mode of settlement [147]). The organization may confer upon such tribunals compulsory jurisdiction *vis-à-vis* the organization itself, *i. e.* in actions brought against it by a member state. The member

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The constitution of the European Coal and Steel Community, arts. 31 *seq.*, establishes an internal Court of Justice, which is competent to hear disputes relating to any aspect of the internal law of the Organization. It has compulsory and exclusive jurisdiction in disputes between member states regarding the "application" of the constitution (art. 89, first paragraph, *cf.* art. 87) and in actions *(en annulation)* brought by member states against the organization (arts. 33–38). It is competent to adjudicate upon disputes between member states *en connexité* with the object of the constitution if both parties submit to its jurisdiction (art. 89, second paragraph, *cf.* arts. 41–42 of the Protocol on the Statute of the Court). There is no general provision for compulsory or voluntary jurisdiction in actions brought by the Community against member states. The constitutions of the European Economic Community and EURATOM contain provisions conferring upon the Court jurisdiction in actions brought by the organization against member states and *vice versa*, as well as between member states *inter se*, see for example CEE's constitution, arts. 169, 170, 173, 175, 180 and 182. As for EURATOM, see also the special provision in art. 103.

The disputes dealt with in art. 37 (2) of ILO's constitution may be viewed as falling outside the scope of the internal law of the organization. The provision has, moreover, not been carried into effect.

[145]) See especially the constitutions of the Bank, art. IX (a)–(b); the Fund, art. VIII (a)–(b); and ICAO, arts. 84–86. In some other cases it is not clear whether the settlement by the administrative organ is intended to be binding and final. See for example the constitution of FAO, art. XVI (1) *in fine*. *Cf.* above, Chapter II C.

[146]) § 29 of the General Convention on the Privileges and Immunities of the United Nations and the corresponding provisions of other general conventions on privileges and immunities relate to what is more properly considered as external disputes.

Rule 33 (1)–(2) of the rules of procedure of the General Conference of UNESCO provides that "the Legal Committee may be consulted on any question concerning the interpretation of the Constitution and of the Regulations", and that "its decision shall be taken by a two-thirds majority" (in the original wording unanimity was required). However, such "decisions" are probably not binding, *cf.* paras. 3–4 and the constitution, art. XIV (2).

[147]) An example of the latter is art. 37 (1) of the ILO constitution, *cf.* Jenks in BYIL, vol. 22 (1945), p. 64, note, and International Labour Conference, 27th Session, Paris 1945, Report IV (1), Matters Arising out of the Work of the Constitutional Committee, Part. I, p. 107, relating to a proposed addition to art. 37 of a second, more flexible, paragraph.

state is then free to decide for itself whether it wants to institute judicial proceedings or whether it prefers to accept the administrative decision of the organization. However, an intergovernmental organization can hardly without constitutional authorization confer upon its tribunals compulsory jurisdiction *vis-à-vis* member states, *i.e.* in actions brought against these by the organization or by another member state[148]). The members are sovereign states and as such are subject to the jurisdiction of other authorities only when they have expressly or tacitly accepted such jurisdiction. Even if they are considered, by becoming members of the organization, to have tacitly accepted its legislative and administrative jurisdiction in many organizational matters[149]), it does not necessarily follow that they have also accepted its judicial power in the same matters[150]). At any rate, there is no practice to support any inherent power for intergovernmental organizations to assume compulsory judicial authority over their member states. Accordingly, it is submitted that intergovernmental organizations cannot assume compulsory judicial powers over member states in disputes arising out of internal matters *stricto sensu* – *i.e.* of (organizational) matters falling under the inherent organic or membership jurisdiction of the organization – without authorization in the constitution.

(2) Internal disputes largo sensu

Intergovernmental organizations may also establish internal courts to adjudicate upon disputes arising out of internal matters *largo sensu* – *i.e.* matters falling under an extended jurisdiction of the organization[151]). Unless otherwise provided in the constitution of the organi-

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[148]) The constitutions of the European Communities authorize the latter, and, in the case of the CEE and EURATOM, also the former, see note 144.

[149]) See BYIL, 1961, p. 459.

[150]) As far as disputes relating to the interpretation of the constitution are concerned, see Kopelmanas, L'Organisation des Nations Unies vol. 1 (Paris 1947), p. 263, who states that the absence in the Covenant of the League of Nations of any provision concerning its interpretation «témoigne nettement l'intention de ses auteurs de revenir à la solution du droit commun qui laisse aux Etats membres la compétence pour interpréter, en dernier ressort, chacun en ce qui le concerne, les termes du document fondamental de l'institution créée».

The report of Committee IV/2 of the San Francisco Conference – after rejecting the idea of including in the Charter an express provision referring disputes between two organs to an international tribunal – merely states that if two member states "are at variance concerning the correct interpretation of the Charter, they are of course free to submit the dispute to the International Court of Justice as in the case of any other treaty" (UNCIO vol. 13, p. 709).

[151]) *Cf.* above, Introduction.

zation or in the treaty conferring upon it the extended jurisdiction, it may confer upon such internal courts compulsory jurisdiction in actions brought against the organization or its officials as such. But the question of its power to confer upon such courts compulsory jurisdiction over the states concerned depends upon an interpretation of the act conferring the extended jurisdiction upon the organization. This need not be a provision of the constitution of the organization, but may be another treaty [152]) or a unilateral act. And this act need not specify the judicial power. Several examples of this may be cited.

Thus the General Assembly of the UN has twice established tribunals for the compulsory adjudication of disputes arising out of the extended jurisdiction conferred upon it by Annex XI to the Treaty of Peace with Italy [153]). This authorized the General Assembly to make a binding recommendation concerning the "disposal" of the former Italian colonies. This the General Assembly did by its resolution 289 (IV), which "recommended" that Libya should be constituted a sovereign state, and by resolution 390 A (V), which "recommended" that Eritrea be constituted an autonomous unit federated with Ethiopia. The General Assembly, furthermore, by resolutions 388 (V) and 530 (VI), "approved" detailed economic and financial provisions relating to the two territories. But the General Assembly did not confine itself to these legislative and administrative steps. Although the Peace Treaty made no mention of judicial powers, the General Assembly by the two latter resolutions also established UN Tribunals for Libya and Eritrea, respectively, to decide, on the basis of "law", all disputes arising between Italy, the Administering Powers and the government of the territory concerned relating to the interpretation and application of the said economic and financial provisions. The resolutions provided expressly that the Tribunal should be seized of any such disputes upon the unilateral request of one of the parties. Thus, in these cases the legislative and administrative powers clearly conferred upon the organization were held to be accompanied by judicial powers, although it probably did not occur to the parties when concluding the Peace Treaty that in so doing they also accepted the compulsory judicial power of the UN in disputes arising out of the legislation enacted by the UN pursuant to the Treaty.

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[152]) An example of this would be the (European) Convention on the Establishment of a Security Control in the Field of Nuclear Energy, except that the jurisdiction established by this Convention is compulsory only in respect of the organization, see above, under B (1).

[153]) UNTS vol. 49, p. 215.

(3) It should be noted that internal courts do not provide the only possible *fora* for judicial settlement of internal disputes (*stricto* or *largo sensu*) involving member states. Indeed, it is more common to envisage settlement of such disputes by external, international courts[154]), either pre-existing international courts or *ad hoc* arbitral tribunals, the composition, competence and procedure of which is determined, not by the organization, but by the parties to the dispute or by an external treaty or authority[155]). This mode of settlement shall be discussed below, in Chapter IX.

D. Disputes Between Organs

Disputes between an organ of an intergovernmental organization on one side, and officials, private individuals or member states on the other, constitute disputes between the organization as a whole and the official, individual or state concerned. The settlement of such disputes has been discussed under A–C. They all involve parties which also have a legal existence outside the organization.

The position is different in respect of disputes between two organs of the same organization. There is usually no practical need for judicial settlement of such disputes. They can be settled satisfactorily by administrative decision of the superior organ, or by the plenary organ of the organization, in the same manner as disputes between two organs of a state.

The need for judicial settlement may arise, however, if an organ has been granted in the constitution an independent position, in certain respects, *vis-à-vis* the plenary organ, in the sense that the latter is not entitled to interfere in all aspects of the exercise by the "subordinate" organ of the powers conferred upon it.

This is the position in the European Communities. The constitutions of these organizations consequently confer upon their internal Court of justice the power to adjudicate upon certain actions brought by one organ against another relating to the lawfulness of its acts or its failure to act[156]). In the case of the European Coal and Steel Community the con-

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[154]) On this distinction, see below, Chapter IV.

[155]) FAO's constitution, art. XVI (1), and UNESCO's constitution, art. XIV (2), appear to leave a choice between internal or external courts. In fact these organizations appear to have preferred internal courts, *cf.* above, note 144.

[156]) See notably CEE constitution, arts. 173 and 175, and EURATOM constitution, arts. 146 and 148.

stitution authorizes the Council of Ministers to sue the High Authority [157]) and the High Authority to sue the Council or the Assembly [158]).

The position is similar in the United Nations, as far as the relationship between the General Assembly and the Security Council is concerned. However, both the General Assembly and the Security Council have the power to request advisory opinions from the International Court of Justice, and there is then probably no need for settlement by contentious proceedings before an internal court or before the International Court of Justice, acting as an internal court of the Organization [159]); settlement of internal disputes between two organs of the same international person could not appropriately be settled by contentious proceedings before an international court [160]). Questions of delimitation of the powers of the General Assembly as against those of the Security Council have in fact been the subject of advisory opinions of the Court [161]). Questions of the delimitation of the powers of deliberative organs *vis-à-vis* those of administrative tribunals, and *vice versa*, have also been the subject of advisory opinions [162]).

Similarly, the International Atomic Energy Agency has been authorized to request advisory opinions of the International Court of Justice, and may thus solve in this manner any dispute arising from the

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[157]) CECA constitution, arts. 33 and 35.

[158]) CECA constitution, art. 38.

[159]) Committee IV/2 of the San Francisco Conference, in its report to the Conference, confined itself to stating that "the nature of the Organization and of its operation would not seem to be such as to invite the inclusion in the Charter of any provision" for judicial settlement of "a difference of opinion among the organs of the Organization concerning the correct interpretation of a provision of the Charter" (UNCIO vol. 13, pp. 709–10).

[160]) The American Branch sub-committee of the International Law Association Committee on the Charter of the UN nevertheless proposed (in 1955) the inclusion in the Charter of provisions for the settlement of disputes between two organs of the same organization by contentious proceedings before the International Court of Justice, but later confined its proposal to provisions for advisory opinion (par. 26 of the Report, final version in: International Law Association, Second Report on the Review of the Charter of the United Nations, London 1956, p. 112). The resolution subsequently adopted by the International Law Association, recommending admission of intergovernmental organizations to the International Court of Justice in contentious cases, appropriately speaks only of organizations, not of organs (International Law Association, Report of the Forty-Seventh Conference Held at Dubrovnik 1956, pp. 104–5). *Cf.* below, Chapter IX C (1).

[161]) Competence of the General Assembly for the Admission of a State to the UN, ICJ Reports, 1950, p. 4, and, partly, Certain Expenses of the United Nations, *ibid.*, 1962, at pp. 170–2 and 175–7.

[162]) Effect of Awards of Compensation Made by the UN Administrative Tribunal (ICJ Reports, 1954, p. 47). See also Judgments of the ILO Administrative Tribunal upon Complaints Made against UNESCO *(ibid.*, 1956, p. 77).

fact that in this organization, an organ of restricted membership, the Board of Governors has major powers in the exercise of which the plenary organ cannot interfere otherwise than by recommendations[163]). However, the need has not arisen so far.

Those organizations which do not have the power to request advisory opinions from the International Court of Justice[164]) may instead submit the legal questions involved in a dispute to an *ad hoc* legal committee for advice. Such advisory procedure, followed by an administrative decision, will in most cases appear more adequate than contentious proceedings between two organs of the same organization before an internal court, not to mention the International Court of Justice or another international court.

Should the need arise, nevertheless, for genuine judicial settlement of disputes between two organs of the same organization, there can be no doubt that the organization has the power, even in the absence of constitutional provision, to establish internal courts for the compulsory adjudication of such disputes, unless the constitution precludes this by providing for other exclusive modes of settlement. Organs have no legal existence outside the organization and are in all respects subject to the jurisdiction of the organization. The organization may also confer compulsory jurisdiction in such disputes upon an already existing internal court, unless this court has been established by the constitution and its jurisdiction has been defined exhaustively therein.

It is a matter of interpretation of the constitution whether the decision to confer jurisdiction upon a new or a pre-existing court may be made by the plenary organ acting alone, or whether it is necessary to obtain the consent of the other organ concerned. In the case of the UN, the General Assembly would probably be entitled unilaterally to establish courts for the adjudication of disputes with or between organs[165]), other than the Security Council and the International Court of Justice, which have been given an independent position under the Charter.

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[163]) Compare art. V D-F to art. VI F of the Statute of the Agency.

[164]) Above, Chapter II B.

[165]) *Cf.* GA resolution 957 (X), whereby the General Assembly unilaterally established a procedure for review of the judgments of the UN Administrative Tribunal by way of (non-binding) advisory opinions from the International Court of Justice.

E. Conclusion: Power to Establish Internal Courts not Envisaged in the Constitution

(1) Establishment of courts

There can be no doubt that intergovernmental organizations have the power to settle legal disputes concerning internal matters, not merely by decision of their administrative organs, but also by binding judgments of internal courts. It is not necessary that the constitution contains any provision authorizing the organization to establish such courts, as long as it does not provide to the contrary, e. g. by providing exclusively for other modes of settlement. The organization can establish internal tribunals by simple regulation; a convention between the member states is not necessary for this purpose[166]). The inherent power to establish internal courts is clearly confirmed in practice with regard to the case which arises most frequently, viz. disputes between the organization and its officials as such. But the power must extend to other internal disputes as well, including disputes between organs and between member states acting as such, as well as disputes between the organization and member states as such and disputes involving private individuals who have been placed under the legislative and/or administrative jurisdiction of the organization. Organizations may confer upon their internal tribunals jurisdiction even in external disputes, with regard to actions brought against the organization, or against its officials in respect of their official acts (or in respect of private acts with regard to which they have been granted immunity)[167]).

(2) Compulsory jurisdiction

More doubt may arise as to whether an organization may confer upon its internal courts compulsory jurisdiction in internal disputes. It is quite clear that it may do so with respect to actions brought against the organization itself. This is amply confirmed in practice. The same must apply

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[166]) In a resolution entitled «Recours judiciaire à instituer contre les décisions d'organes internationaux» the Institut de droit international states (par. I) that «la réglementation de ce contrôle, des voies de recours qu'il implique, et des effets qu'il comporte, ne paraît, dans l'état actuel des choses, réalisable que par la voie de dispositions conventionnelles ou autres instruments, particuliers à chaque organe ou organisation» (Annuaire de l'Institut de droit international vol. 47 [1957 II], p. 477). Conventions are not necessary to establish internal courts with compulsory jurisdiction over the organization and its organs in disputes with internal or external parties, but conventions m a y be necessary if one wants the judgments pronounced by such courts to be binding upon courts of another jurisdiction, *cf.* above, under A (5), and par. IV (h) of the resolution of the Institut.

[167]) Above, under A (3). There is no practice to confirm the latter.

with regard to actions brought against particular organs, which have no legal existence outside the organization. Doubt arises only with regard to actions brought against parties which, in other legal systems, have a legal personality distinct from that of the organization, viz. officials, member states and private individuals subject to its extended jurisdiction. It has been submitted above that the organization may confer compulsory jurisdiction upon its internal courts in actions brought against its officials as such. Indeed, organizations have in a few cases done so, without constitutional authorization. But there is no practice to indicate that an intergovernmental organization may compel its members, which are sovereign states, to accept the jurisdiction of its internal courts, if this does not follow, directly or by implication, from provisions in the constitution or in another treaty to which the member states are parties. Otherwise it must be assumed that the organization does not have this power, not even in disputes arising out of matters in respect of which the member states are subject to the (organizational or functional) legislative and/or administrative jurisdiction of the organization. With respect to private individuals, which are subject to the jurisdiction of the organization only when this is specifically provided, it is quite clear that the organization cannot assume compulsory jurisdiction unless it has been granted the power to do so by the state or states having territorial, personal, or organic jurisdiction over the individuals concerned. This power has been granted, by implication, in respect of members of the UN Forces in the Middle East and the Congo, by the states placing contingents under the authority of the United Nations with the effect that the members of such contingents are in many important respects assimilated to international officials.

(3) External effects of judgments

There is little practice to demonstrate the external effects of the judgments rendered by internal courts of intergovernmental organizations. It is submitted, however, that national and international courts, as well as internal courts of other organizations, must consider such judgments as binding to the same extent and on the same conditions as they consider judgments of foreign national courts of competent jurisdiction to be binding, unless there is a basis in an applicable treaty or in the law of the state concerned for treating them differently. It is submitted, furthermore, in accordance with principles of procedural international law applied by national courts, that IGO courts are courts of competent jurisdiction in the cases described above.

(4) Practical need for courts

The practical need for judicial settlement has so far arisen mostly with regard to disputes between the organization and its officials arising out of the relationship of employment. The practical need for judicial settlement of disputes involving other parties arises primarily in really powerful organizations having extended jurisdiction over individuals and member states, such as the European Communities. In the latter case the constitution contains express provisions for an internal court. The position of the UN, immediately before the establishment of the first of these Communities, was well described by Lissitzyn in the following terms:

> It is to be doubted whether much would be gained in the formative stage of world organization by placing the action of an already weak Security Council under the control of an even weaker Court. A clash between the Council and the Court might be fatal to both. Yet an organization whose various organs and members all have the power to interpret the basic constitutional instrument without definite legal effect on the other organs and members can hardly be viable. At present, the weakness of the organization largely protects its members from abuse of power. If the organization is to gain strength, the authority to give binding interpretations of the Charter, at least in matters directly affecting the rights and duties of states, must be lodged somewhere, preferably in a judicial organ. The long-range purposes and policies laid down in the Charter must be given some protection against the possible short-range aberrations of the political organs. Power without law is despotism[168]).

F. Power to Extend the Competence of a Court Whose Competence Has Been Defined in the Constitution A contrario Interpretation?

(1) The Court of the European Communities

The constitution of the European Coal and Steel Community expressly provides for an (internal) Court of Justice which shall have compulsory jurisdiction in certain disputes between particular organs of the Community[169]) or between member states[170]), and in certain actions brought against

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[168]) The International Court of Justice (New York 1951), pp. 96–97.

[169]) CECA constitution, arts. 33, 35 and 38.

[170]) CECA constitution, art. 10, penultimate paragraph, and art. 89. The constitution contains no provision for competence in disputes between private enterprises subject to the jurisdiction of the Community, except for certain preliminary issues in such disputes, see art. 41, and below, Chapter VIII A (1).

the Community or its organs by its member states, by enterprises subject to its jurisdiction or by certain other private parties[171]), as well as in certain actions brought against officials by third parties[172]). Similar provisions are contained in the constitutions of the other European Communities. There is an inherent danger in such constitutional provisions in that they may be interpreted *a contrario,* to the effect that the organization may not confer upon its internal court jurisdiction in disputes other than those which have been specified in the constitution. The result will be the paradox that in some respects the internal courts of these (stronger) organizations have a more limited jurisdiction than the internal courts of organizations which have no constitutional provisions establishing or authorizing the establishment of such courts.

Thus, the elaborate provisions in the constitution of the European Coal and Steel Community on the competence of its Court of Justice make no mention of disputes between the Organization and its regular officials[173]). Nevertheless, the Community has – by art. 58 of its Staff Regulations – referred any dispute between itself and its officials to the Court of Justice. In so doing, the Community did not rely upon any of the constitutional provisions conferring jurisdiction upon the Court[174]). Nevertheless, in the first judgments involving officials, the Court, following a suggestion of the *avocat général,* rested its competence upon two articles of the constitution which confer jurisdiction upon the Court in more general terms. The Court considered the relevant provision in the Staff Regulations, corresponding to the present art. 89, as a *clause compromissoire* in accordance with art. 42 of the constitution[175]). The Court, however, also accepted the view that the Community is responsible under art. 40, first paragraph, of its constitution for injury suffered by its officials as a result of wrongful

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[171]) CECA constitution, arts. 33–38; 63.2; 66.5–6; 88; and art. 40. The constitution contains no provisions for competence in actions brought by the Community, *cf.* above, under B.

[172]) CECA constitution, art. 40.

[173]) There is a special provision in art. 12 for competence in respect of certain actions brought against the members of the High Authority. The constitutions of the other European Communities, however, contain general provisions (CEE art. 179 and EURATOM art. 152).

[174]) The Staff Regulations were adopted on 28 January 1956 by the Commission of Presidents, on the basis of § 7 (3) of the Convention Relating to the Transitional Provisions. This merely provides (or rather presupposes) that the Commission shall establish the *statut* (German text: *Stellung)* of the officials. § 7, 3 reads: «En attendant que la Commission prévue à l'article 78 du Traité ait fixé l'effectif des agents et établi leur statut, le personnel nécessaire est recruté sur contrat».

[175]) In this sense also Antoine, La Cour de justice de la Communauté européenne du charbon et de l'acier et la Cour internationale de justice (Paris 1953), p. 42.

termination of their contracts of employment[176/7]). The *avocat général* even submitted that it was necessary that the competence of the Court should follow from the constitution[178]).

Later a similar problem arose in respect of the European Economic Community, whose constitution provides, in art. 179, that:

> La Cour de Justice est compétente pour statuer sur tout litige entre la Communauté et ses agents dans les limites et conditions déterminées au statut ou résultant du régime applicable à ces derniers.

In two cases brought before the Court, the Commission initially argued that the Court lacked competence because the Community had not yet enacted the *statut* and had not expressly defined the rules which were to be applied provisionally until the *statut* would be enacted. The Court rejected this objection. It stated that, until the *statut* was promulgated, the officials were governed by a special and provisional *régime* which resulted from the «conditions expresses ou tacites ayant présidé nécessairement aux contrats d'engagement de ces agents envers la Communauté». The Court also referred to art. 173 of the constitution, which provides that «la Cour de Justice contrôle la légalité des actes du Conseil et de la Commission»[179]).

The validity of the submission of the *avocat général* in the CECA-case, that the competence of the Court must necessarily be deduced from the constitution, cannot be admitted. If based upon the conception that the competence of an internal court of any intergovernmental organization must be laid down in the constitution of the organization concerned, the contention is contradicted by the practice reported under A and B above, and also by the general practice of intergovernmental organization[180]). If based upon the fact that the competence of this particular Court is defined in the constitution of the organization, the submission is an example of such *a contrario* interpretation of constitutional provisions as may lead to the paradoxical result that organizations which have elaborate constitutions have less powers than organizations whose constitutions contain only essential provisions. Such interpretation can hardly be accepted unless

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176/7) *Kergall v. Assemblée commune*, Cour de justice de la Communauté européenne du charbon et de l'acier, Recueil de la jurisprudence de la Cour vol. 2 (Luxembourg 1957), pp. 20–21 and 25, *cf.* pp. 37–38, see also pp. 383 and 435.

178) «Cette compétence doit résulter du Traité lui-même», *ibid.*, p. 35.

179) *Von Lachmüller* v. *Commission CEE, Fiddelaar* v. *Commission CEE*, Cour de justice des Communautés européennes, Recueil de la jurisprudence de la Cour vol. 6, at pp. 952 and 1092, respectively.

180) See BYIL, 1961, pp. 448 *seq.*, and Nordisk Tidsskrift, 1964, pp. 18 and 21 *seq.*

the provisions can be assumed to have been intended as a limitation, because they contain specific and relevant limitations or because they prescribe a specific procedure[181]), as art. 179 of the CEE constitution might be read to do.

A different matter is that the constitution (or other applicable treaties) may contain provisions which confer exclusive competence upon other courts in regard to certain types of disputes and thereby preclude the organization from extending the jurisdiction of its own courts to such types of disputes. An example of this is art. 40, third paragraph, of the CECA constitution, which reads:

> Tous autres litiges nés entre la Communauté et les tiers, en dehors de l'application des clauses du présent Traité et des règlements d'application, sont portés devant les tribunaux nationaux.

However, this provision is apparently only concerned with disputes which do not arise out of the internal law of the organization, and its practical importance is therefore rather limited, considering the express provision in art. 42 for competence in disputes of municipal law on the basis of a *clause compromissoire* in a contract. – The corresponding provisions in the constitutions of the CEE and EURATOM read:

> Sous réserve des compétences attribuées à la Cour de Justice par le présent Traité, les litiges auxquels la Communauté est partie ne sont pas, de ce chef, soustraits à la compétence des juridictions nationales[182]).

This provision does not preclude all disputes arising out of the internal law of the organization from being brought before national courts. On the other hand, the terms of the provision do not indicate that the jurisdiction of the national courts shall be exclusive, and the provision thus does not appear in itself to preclude a concurrent jurisdiction of national and internal courts in such disputes of internal law as are not covered by special provisions in the constitution. Indeed, the article may be read merely as a waiver of the immunity which intergovernmental organizations, like states, enjoy under general international law[183]). Nevertheless it is maintained by a leading authority that insofar as the constitution does not confer jurisdiction upon the Court of Justice of the

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[181]) See BYIL, 1961, pp. 458–9, and Nordisk Tidsskrift, 1964, pp. 109–110.

[182]) CEE constitution, art. 183; EURATOM constitution, art. 155.

[183]) *Cf.* BYIL, 1961, p. 454. Such waiver follows also by interpretation *a contrario* from art. 1 of the Protocols on the Privileges and Immunities of the Communities.

European Economic Community, it cannot be given jurisdiction, except in the cases listed in arts. 181 and 182 of the constitution [184]).

In the absence of, or outside the scope of, provisions which confer exclusive competence upon other courts or which otherwise preclude the organization from conferring jurisdiction upon its internal courts, it is submitted that, when the constitution of an intergovernmental organization contains express provisions conferring upon its internal court jurisdiction in certain respects, the organization cannot, merely because of these provisions, be considered as debarred from extending the jurisdiction of the court to include at least such other disputes as fall within the internal jurisdiction of all intergovernmental organizations. The effect of such provisions is not to confer upon the organization a judicial power which other organizations have an inherent power to confer upon their constitutions by simple regulation, but to confer upon the parties concerned a right, of which they cannot be deprived by simple regulation, to appeal to the court. Normally, the provisions can be interpreted *a contrario* only in the latter respect. Thus, it was not necessary to rely on arts. 42 and 40, first paragraph, in order to justify the competence of the Court of the European Coal and Steel Community in disputes involving its officials [185]).

Indeed, there would probably be nothing to prevent the European Coal and Steel Community from further extending the jurisdiction of its Court of Justice, by unilateral decision, to comprise for example disputes between private enterprises relating to the application of the constitution or other internal law of the organization, in cases where the enterprises submit voluntarily to the jurisdiction of the Court [186]). National courts might have to give the same effect to judgments rendered in such cases as they give

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[184]) Wohlfarth and others, Die Europäische Wirtschaftsgemeinschaft (Berlin 1960), p. 504. The observation is made in a commentary to art. 183, but it is not stated whether it is based upon an interpretation of that article (it should be noted that the German text of art. 183, which the writer quotes, is somewhat different from the Dutch, French and Italian texts, all of which are equally authentic) or upon the general view expressed by the *avocat général*, to which exception has been taken in the text above.

[185]) The contention of the *avocat général* is justified, however, to the extent that the specific (extended) obligation of the member states under art. 44 of the constitution to execute the judgments of the Court does not apply if its competence does not follow from the constitution, see next page.

[186]) Art. 42 of the constitution, on the *clause compromissoire*, relates only to disputes involving the Community itself. – On the limitation of the competence conferred upon the Court (as compared with e.g. that of the French Conseil d'Etat) to actions brought against the Organization, and on the failure to include other disputes arising under the law of the Community, see Jeantet in: Revue du droit public et de la science politique vol. 70 (1954), p. 688.

to judgments of foreign national courts[187]) or, in this particular case, to decisions of foreign courts of arbitration. But the judgments would not *ipso facto* be executory in the territory of the member states as provided in art. 44 of the CECA constitution. This provision is binding upon member states only in respect of such disputes as have been specified in the constitution.

On the other hand, the Community could not unilaterally impose compulsory jurisdiction upon private enterprises. This would require legislation by the states having territorial (or personal) jurisdiction over them. That these states may do so is expressly provided in art. 43 of the constitution. But even without any such provision, an intergovernmental organization could confer compulsory jurisdiction upon its internal courts if authorized to do so by national legislation, except that a constitutional provision on the executory force of judgments, would not, *ipso facto*, apply to judgments rendered in disputes not envisaged in the constitution.

(2) The European Nuclear Energy Tribunal

Similar problems may arise in respect of courts which have been established within the framework of an intergovernmental organization by conventions other than the constitution of the organization concerned, such as the Tribunal established by the (European) Convention on the Establishment of a Security Control in the Field of Nuclear Energy, arts. 13 and 14 of which have been quoted above, under B. It is possible that art. 14 must be interpreted *a contrario* in the sense that both the organization and the contracting parties are precluded from conferring jurisdiction upon the Tribunal in circumstances other than those specified in that article. Under its terms the contracting states, or some of them, may agree to confer upon the Tribunal competence in respect of actions relating to a nuclear ship operated under the flag of the organization in circumstances where jurisdiction would lie with the courts of the flag state[188]). But the organization may not be entitled (without the consent of all the contracting parties) to utilize the Tribunal as an administrative tribunal or to confer upon it competence in suits brought against the organization or its officials in respect of private law acts not covered by (art. 13 of the Convention or by) agreements concluded pursuant to, and within

[187]) *Cf.* above, under A (5), B (2) and E (3).

[188]) *Cf.* art. 7 of the Convention on the High Seas of 29 April 1958 and document CN-6/SC/1 (9 May 1963) of the (Brussels) Diplomatic Conference on Maritime Law, Standing Committee. – For other examples, see above, under B (1), on the three conventions which have already conferred competence upon the Tribunal.

the scope of, art. 14. The case for such *a contrario* interpretation is stronger in respect of a Tribunal established by a special convention than it would have been in respect of a tribunal established by the constitution of the organization concerned, which is a genuine internal court (organ) of the organization [189]). And, of course, no such *a contrario* interpretation could be applied if the Tribunal had been established by regulations enacted by the organization without basis in any constitutional or other treaty provision, as the organization would have had the power to do [190]).

Chapter IV: ARE INTERNAL COURTS GOVERNED BY THE LAW OF INTERNATIONAL COURTS?

A. General

Administrative tribunals and other internal courts of intergovernmental organizations are frequently referred to as international tribunals [191]). This terminology has been accepted even by the International Court of Justice [192]).

However, administrative tribunals and other internal courts of intergovernmental organizations are very different from international courts. They are established, not by special agreement between states and/or independent intergovernmental organizations, but by one intergovernmental organization or by its constitution as an organ of that organization. Furthermore, they do not administer general international law, but the internal law of the organization concerned which, for purposes of conflict of laws and for certain other purposes, is comparable to municipal law rather than to international law. Finally, parties before internal courts may include not only member states and the organization as a whole,

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[189]) *Cf.* below, Chapter IV.

[190]) Above, under B (1) and C (2).

[191]) See, for example, Langrod, Le tribunal administratif des Nations Unies in: Revue du droit public et de la science politique vol. 67 (1951), p. 75, quoted and supported by the Director-General of UNESCO in: ICJ Pleadings, Judgments of the Administrative Tribunal of the ILO (1956), p. 79. See also Chiesa in: Revue internationale des sciences administratives vol. 20 (1954), p. 74, and Internationaler Richterkongress, Rome 1958, vol. 2: »Die internationalen und übernationalen Gerichte, ihre Charakteristiken und grundlegenden Ziele«, Milano 1958, §§ 2–3 and 5. See, on the other hand, art. 5 of Wengler's draft articles on Recours judiciaire à instituer contre les décisions d'organes internationaux in: Annuaire de l'Institut de droit international vol. 45 (1954 I), p. 268, which, however, was not adopted by the Institut de droit international, *ibid.*, vol. 47 (1957 II), p. 478, par. III.

[192]) ICJ Reports, 1956, p. 97, quoted below, p. 67.

but also officials and particular organs of the organization, as well as private individuals (and enterprises) subject to its extended jurisdiction. Of these, only the former two may normally [193]) be parties before regular international courts, and then in their capacity as subjects of international law. Indeed, member states and intergovernmental organizations are subjects both of international law and of the internal law of the organization concerned (and of municipal law). The fact that states and intergovernmental organizations are among those who may be parties before internal courts in disputes arising out of internal law does not necessarily render these courts international, any more than national courts are considered as international courts because they may adjudicate upon municipal law disputes involving states and intergovernmental organizations, or any more than international courts are considered as national courts because individuals are occasionally admitted to plead before them in cases arising out of international law [194]).

Indeed, internal courts of intergovernmental organizations are in most cases comparable to national courts, rather than to international courts. Only when internal courts adjudicate upon disputes between the organization and a member state as such or between two member states as such, can they be compared to international courts, inasmuch as part of the law the apply in these cases is international, as well as internal law. But even in this case there are certain differences between the legal position of the two types of courts [195]), if they have been set up by the constitution of the organization or by the organization through regulations as organs of the organization, rather than by a separate convention as independent

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[193]) On exceptions, see note 194. Individuals have also been granted access to certain international courts which have been set up for the adjudication of disputes of municipal law, such as the Mixed Commission established under art. 31 and Annex IV, art. 16, of the Agreement on German External Debts of 27 February 1953 (UNTS vol. 333, pp. 50 and 214).

[194]) The three examples usually cited, all now a matter of the past, are the Central American Court of Justice, established under a Convention of 20 December 1907 (Martens: Nouveau Recueil Général, 3e série, vol. 3, p. 105, and Hudson, International Legislation vol. 2, p. 908; see especially art. II), the Mixed Arbitral Tribunals established under the Peace Treaties concluding World War I (e. g. Treaty of Versailles, arts. 304–5, *cf.* for example art. 297 [e]) and the Upper Silesian Court of Arbitration, established under the Geneva Convention of 15 May 1922 between Germany and Poland for Establishing a Conventional Regime in Upper Silesia (British and Foreign State Papers vol. 118, p. 365, *cf.* arts. 55 *seq.* and 147 *seq.*; *cf.* Annual Digest, 1927–28, Cases Nos. 188 and 287). However, it is not clear that all these courts applied international rather than municipal law.

[195]) See below, under C. Some of the differences follow from the fact that the courts are set up as organs of the organization, rather than from the nature of the law they apply.

intergovernmental organizations. It may therefore be convenient to consider them as internal courts (*largo sensu*) even in such cases.

There is, however, no clear distinction between the two types of courts[196]). The distinction may be drawn in many different ways, depending upon which criterion is regarded as crucial. Thus the Tribunal of the European Convention on the Establishment of a Security Control in the Field of Nuclear Energy and the European Court of Human Rights have both been established by separate conventions concluded between the majority of the members of the European Nuclear Energy Agency and the Council of Europe, respectively, to decide disputes arising out of these and other conventions outside the constitution, but they are elected and maintained by these organizations. The International Court of Justice, too, unites elements of both international and internal courts[197]). It is submitted that all these courts are autonomous organs of the respective organizations rather than distinct subjects of international law[198]). However, the European Court of Human Rights and, partly, the International Court of Justice adjudicate upon disputes which arise under general or particular international law, rather than under the internal law of the organization, although the distinction between internal and international law, and internal and external disputes[199]), may also be drawn in many different ways. When the present study is primarily confined to internal disputes, it precludes disputes with other subjects of international or municipal law acting as such, *i. e.* not acting as members or organs of the organization or otherwise as entities subject to its legislative or administrative authority. The reservation of international courts for external disputes, on the basis of either the criterion of internal or external parties or of that of application of internal or external law, is brought out in the constitutions and other acts of the International Monetary Fund, the International Bank

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[196]) Moreover, some of the provisions cited above, note 144, may give rise to the setting up of international as well as internal courts to adjudicate upon the same type of disputes, *cf.* note 155.

[197]) *Cf.* below, under D, and Chapter V (3).

[198]) As for the European Court of Human Rights, see also Robertson in: The International and Comparative Law Quarterly vol. 8 (1959), p. 399, who states: "It was therefore decided to set up the Court of Human Rights as an organ of the Council of Europe as a whole, with the participation of all Member States, whether or not they are Parties to the Convention". The OECD Tribunal consists of " ... seven independent judges appointed for five years by decision of the Council or, in default, by lot from a list comprising one judge proposed by each Government party to the present Convention" (art. 12 of the Security Control Convention). Under the latter alternative, the Tribunal could hardly be considered an organ of the OECD-ENEA.

[199]) *Cf.* above, Introduction.

for Reconstruction and Development and the International Finance Corporation. On the one hand, the constitutions of these organizations distinguish as to whether or not the other party to the dispute forms part of the organization, by providing for a binding settlement by an internal (administrative) organ of disputes involving member states, but for submission to an external arbitral tribunal of disputes involving states which are no longer members[200]). On the other hand, the annexes adopted by these organizations to the Convention on the Privileges and Immunities of the Specialized Agencies provide that the reference of disputes to the International Court of Justice provided for in § 32 of that convention shall apply only to differences arising out of the interpretation or application of privileges and immunities which are derived by the organization solely from that convention and which are not included in those which it can claim under its constitution or otherwise[201]). A separate convention to which not all members of the organization are parties, and which, on the other hand, has been incorporated in bilateral host agreements or agreements on technical assistance concluded with non-member states, and which does not confer upon the organization legislative or administrative powers over the contracting parties, is not part of the internal law of the organization[202]), as this term is used in the present paper.

The terminology in itself is, of course, of little importance, if it does not lead to false analogies. However, analogies are sometimes drawn, both by writers, governments and intergovernmental organizations, who do not content themselves with referring to internal courts as "international" tribunals, but who also in fact apply to such courts the legal principles which govern international courts. A similar danger is involved in the proposals which have been made to entrust to international courts jurisdiction in strictly internal disputes involving officials or particular organs of the organization[203]).

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[200]) Fund constitution, art. XVIII; Bank constitution, art. IX; International Finance Corporation constitution, art. 8.

[201]) UNTS vol. 33, pp. 298 (Fund) and 300 (Bank), UN doc. E/L. 796, 29 May 1958 (International Finance Corporation).

[202]) As for term "or otherwise" appearing in the annex, it is submitted that disputes arising out of privileges and immunities granted by bilateral treaties or other distinct acts outside the scope of the constitution are not *ipso facto* subject to the binding administrative decision of the organization under the terms of the constitution. These, too, must be settled by external (international) courts, and could therefore not be bracketed with disputes arising out of the constitution.

[203]) See below, Chapter IX C (1).

B. Internal Courts stricto sensu

In the case of Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, it was pleaded that awards made by this tribunal, "being an institution of international law, would necessarily be subject to the established rule and practice that an award of a tribunal which is *ultra vires* is null and void" [204]). However, the International Court of Justice, in its advisory opinion, rejected any such analogy. It stated:

> This problem would not, as has been suggested, raise the question of the nullity of arbitral awards made in the ordinary course of arbitration between States. The present Advisory Opinion deals with a different legal situation. It concerns judgments pronounced by a permanent judicial tribunal established by the General Assembly, functioning under a special statute and within the organized legal system of the United Nations, and dealing exclusively with internal disputes between the members of the staff and the United Nations represented by the Secretary-General. In order that the judgments pronounced by such a judicial tribunal could be subjected to review by any body other than the tribunal itself, it would be necessary, in the opinion of the Court, that the statute of that tribunal or some other legal instrument governing it should contain an express provision to that effect. The General Assembly has the power to amend the Statute of the Administrative Tribunal by virtue of Article II of that Statute and to provide for means of redress by another organ. But as no such provisions are inserted in the present Statute, there is no legal ground upon which the General Assembly could proceed to review judgments already pronounced by that Tribunal [205]).

In another context the Court drew an analogy from national courts instead. It stated:

> ... the contention that the General Assembly is inherently incapable of creating a tribunal competent to make decisions binding on itself cannot be accepted. It cannot be justified by analogy to national laws, for it is common practice in national legislatures to create courts with the capacity to render decisions legally binding on the legislatures which brought them into being [206]).

Even the other (winning) side, attempted to rely upon an analogy from international courts, in support of its (correct) proposition that decisions

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[204]) U.S. written and oral statement (ICJ Pleadings, UN Administrative Tribunal [1954], pp. 174 and 329–30). Also the Legal Office of the UN Secretariat in its oral statement referred to the rules governing international arbitration (*ibid.*, pp. 304–5). *Cf.* the excellent counter-arguments in the French and Netherlands oral statements (*ibid.*, pp. 343–4 and 374–6).

[205]) ICJ Reports, 1954, pp. 55–56.

[206]) *Ibid.*, p. 61

of the Administrative Tribunal create a legal liability for the organization as a whole (and not merely for the Secretary-General). Reference was made to the arbitral tribunals established under § 21 of the headquarters agreement between the UN and the United States and under certain other treaties concluded by the UN for the settlement of disputes between the contracting parties concerning the interpretation of the agreement concerned [207]). However, these arbitral tribunals were clearly international tribunals, set up to adjudicate upon certain disputes of international law arising between two subjects of international law as such. It follows from general rules of international law that the decisions of these tribunals must be binding, and binding upon the organization as a whole, which alone is a subject of international law and party to international disputes. But this does not prove that decisions of internal courts, which may adjudicate upon disputes involving particular organs of the organization, must be binding upon the organization as a whole. It is in itself conceivable that an internal judgment is binding only upon the parties to the dispute, and not upon a common superior organ [208]). The Court therefore, rightly, did not rely upon the false analogy to § 21 of the headquarters agreement and similar provisions in order to establish the legal liability of the organization as a whole, but arrived at this correct conclusion on other grounds. Judge Hackworth, in his dissenting opinion, expressly repudiated the validity of the analogy [209]), although he had to do so in an unnecessarily complicated manner, because he did not make a terminological distinction between internal and international courts.

The refusal of the Court to accept any such false analogies suggested by the current terminology did not prevent the Director-General of UNESCO from advancing similar views in the case of Judgments of the Administrative Tribunal of the ILO upon Com-

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[207]) Swedish written statement (ICJ Pleadings, UN Administrative Tribunal [1954], p. 92) and Netherlands oral statement *(ibid.*, p. 382). A similar reference was made in the United Kingdom oral statement, but this did not specifically refer to "international tribunals" *(ibid.*, pp. 362–5). Indeed, it referred to the position of the UN in municipal courts as well, *i. e.* it drew the analogy from external courts in general. But even so there is no basis for an analogy in this sense.

[208]) An organ of an intergovernmental organization can plead before international courts too, but then as a representative of the organization as a whole, which is the real party to international disputes. Only if the organ pleads before an internal court of the organization (in an internal dispute), may it be acting in its own name. This appears to be the position in the European Coal and Steel Community, see arts. 33, 35 and 38 of its constitution and Moser, Die überstaatliche Gerichtsbarkeit der Montanunion (Vienna 1955), p. 27.

[209]) ICJ Reports, 1954, pp. 87–89.

plaints Made against the UNESCO. As a point of departure for his arguments in support of a restrictive interpretation of the terms of reference of the ILO Administrative Tribunal he submitted that such restrictive interpretation would conform with the rules of international law applicable to international courts. He went on to state:

> ... both by reason of the circumstances in which it was created and of the type of law which it has to apply, there would seem to be no doubt that this Tribunal, whose duty it is to decide disputes involving international organizations, is an international judicial body and is therefore subject to the general rules governing the exercise of the judicial function in international law[210]).

However, none of the reasons submitted by the Director-General leads to the conclusion he derives from them. On the contrary, the Tribunal was established as an organ of the organization, it applies purely internal law of the organization, and it adjudicates upon disputes between individual officials and the organization. In none of these respects is it comparable to an international court, but rather to a national court. The International Court of Justice, therefore, although (wrongly) accepting the terminology "international tribunal", again refused to draw any legal consequences from this terminology. It stated:

> The Court has not lost sight of the fact that both before the Administrative Tribunal and in the statements submitted to the Court it has been contended, on the one hand, that the Administrative Tribunal was an international tribunal and, on the other hand, that it was a Tribunal of limited jurisdiction (*«juridiction d'attribution»*) and not of general jurisdiction (*«juridiction de droit commun»*). That contention has been put forward with a view to achieving a restrictive interpretation of the provisions governing the jurisdiction of the Tribunal. The Court does not deny that the Administrative Tribunal is an international tribunal. However, the question submitted to the Tribunal was not a dispute between States. It was a controversy between Unesco and one of its officials. The arguments, deduced from the sovereignty of States, which might have been invoked in favour of a restrictive interpretation of provisions governing the jurisdiction of a tribunal adjudicating between States are not relevant to a situation in which a tribunal is called upon to adjudicate upon a complaint of an official against an international organization[211]).

In accordance with these pronouncements by the International Court of Justice it is submitted, as a conclusion, that in most respects internal courts *stricto sensu* are not governed by such legal rules and principles as

[210]) ICJ Pleadings, Judgments of the Administrative Tribunal of the ILO (1956), pp. 76 and 78–80, official translation.

[211]) ICJ Reports, 1956, p. 97.

are special to international courts and do not apply similarly to national courts. The current terminology – which refers to internal courts of intergovernmental organizations as "international courts" therefore does not reflect the true legal position. Indeed there are three distinct types of courts: International courts, national courts, and internal courts of intergovernmental organizations [212]). If analogies are to be drawn, internal courts *stricto sensu* can more frequently be compared to national than to international courts.

C. *Internal Courts largo sensu*

Only when internal courts adjudicate upon internal disputes between entities which are at the same time subjects of international law (member states and the organization as a whole) [213]) may it be appropriate in many or most respects to apply, by analogy, rules of international law governing international courts.

However, even in these cases the courts are not in every respect in the same legal position as independent international courts. A court which is established by or within the framework of an intergovernmental organization remains an organ of the organization concerned even if it adjudicates upon disputes between entities which are at the same time subjects of international law and even if the organization itself is one of the parties. This implies, in the first place, that the organization, rather than the parties to the dispute, may exercise such rights in respect of the composition, competence and procedure of the tribunal as are not left to the court itself [214]). In the second place, if there is a conflict between the constitution of the organization – which is the supreme internal law of the organization – and other treaties or general rules of international law, the internal tribunal, as an organ of the organization, must give precedence to the provisions of the constitution. In both these respects, the proper analogy is to national rather than to international courts [215]).

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[212]) For an elaboration of this classification, see below, Chapter V.

[213]) See e. g. the CECA constitution, art. 89, *cf.* art. 87, and the other provisions cited above, Chapter III C.

[214]) In the case of courts which have been set up by a separate convention, these powers of the organization may be strictly confined to those conferred upon it by that convention, *cf.* above, Chapter III F (2).

[215]) Most national courts give precedence to the constitution of their state over international law. Exceptions are the Netherlands, whose constitution contains an express provision on the subject (art. 63), and, possibly, Indonesia. In the former country, however, the exception applies only if the treaty has been expressly approved by a 2/3 majority by the Staten Generaal (Netherlands constitution, art. 63, as amended on 23 August 1956). In

The supremacy of the constitution is quite clear in the case of an internal court adjudicating upon internal disputes. In this case, not merely is the court an organ of the organization, but it applies the internal law of the organization, of which the constitution is the supreme source. Moreover, the parties to internal disputes are either member states, which are parties to the constitution, or organs (or the organization itself) established under it, and are thus in either case bound by the constitution.

D. The International Court of Justice

The position of the constitution in relation to general international law may appear more doubtful if a court which is an organ of an intergovernmental organization, adjudicates upon disputes arising under general international law or under treaties other than the constitution of the organization concerned, and involving parties which are not bound by the constitution. The most important examples of this are the Permanent Court of International Justice and the International Court of Justice. These are international courts from a functional point of view, especially in so far as their contentious proceedings are concerned, but internal courts from an organizational point of view (although their position *vis-à-vis* the League of Nations and the United Nations, respectively, is more autonomous than that of other organs).

The question will arise if the International Court of Justice is called upon to determine the validity of action taken *vis-à-vis* non-member states under art. 2 (6) (*cf.* Chapter VII) of the UN Charter, which provides: "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security". Or the Court may have to pronounce upon the effects of a treaty which has been concluded between a member and a non-member state and which conflicts with the obligations of the former under the UN Charter, *cf.* art. 103 which provides that in such cases the Charter shall prevail. The question would also arise if the Permanent Court of International Justice were called upon to decide the validity of a treaty which had been concluded between a member of the League of Nations and a non-member, but

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Indonesia all treaties must be approved by statute unless otherwise provided by statute (Provisional Constitution of 15 August 1950, art. 120); statutes are adopted by a simple majority, but so are amendments to the constitution (arts. 75 and 140).

which had not been registered with the Secretariat of the League in accordance with art. 18 of the Covenant, which provided:

> Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered.

Under traditional international law, none of these constitutional provisions are binding upon non-member states[216]). And a court which is independent of the organization whose constitution is involved, might feel compelled to hold this to be so[217]). But a court of the organization concerned would be in a different position. A court is bound, not merely by its own constitution, or statute[218]), but also by the constitution of the state or organization of which it is an organ. Indeed, it is usually this constitution which constitutes the supreme law of an internal or a national court.

A comparison between the position in this respect of the Permanent Court of International Justice and an independent arbitral tribunal or commission was made in a thorough *obiter dictum* by the French-Mexican Claims Commission in *Pablo Nájera (France)* v. *Mexico* (1928)[218a]). The Commission held that, although art. 18 of the League of Nations Covenant applied even to a treaty concluded between a member and a non-member state, it created rights and duties only as between the member state and the League. A non-member state was entitled to invoke the non-registered treaty despite its non-registration, and, on the other hand, was not entitled to invoke its invalidity because of non-registration. This would have to be held by any arbitral tribunal or mixed commission which, like the French-Mexican Claims Commission, was independent of the League[219]). But if the dispute arose before an organ of the League, this organ must

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[216]) *Cf.* BYIL, 1961, pp. 471–3, and Nordisk Tidsskrift, 1964, pp. 12–14.

[217]) In this sense, see Kelsen, The Law of the United Nations, p. 723.

[218]) The International Military Tribunal at Nüremberg, in its judgment of 1 October 1946, states expressly that the Charter establishing it was "decisive and binding upon the Tribunal" and that it was therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the Charter (AJIL vol. 41 [1947], pp. 216–7). The Tribunal was essentially an independent intergovernmental organization although in certain respects it might be regarded as an organ of another intergovernmental organization, the Allied Control Council.

[218a]) UN, Reports of International Arbitral Awards vol. 5, pp. 468–73.

[219]) In a dispute between two member states or between a member state and the League, even an independent court would of course have to consider a non-registered treaty invalid, since both parties to the dispute are bound by the Covenant.

ex proprio motu (ex officio) consider the treaty invalid [220]). The Commission stated that

> il va de soi qu'un tribunal international indépendant n'a pas, comme les organes de la Société des Nations, la mission de coopérer *ex officio* à l'accomplissement, par les membres de ladite Société, de leurs obligations vis-à-vis de celle-ci, et d'en frapper l'inobservation par des sanctions, qui ne découlent pas également des principes généraux du droit.

The Commission specified that this would not apply to the Assembly, the Council, or any commission or organization of the League, and added that one could perhaps say the same of the Permanent Court of International Justice

> bien que celle-ci ne soit pas, dans le même sens que le Conseil, un organe de la Société des Nations, et qu'elle soit investie du pouvoir souverain d'apprécier la situation juridique en parfaite indépendance.

This is probably the correct view [221]). But it applies to a tribunal established by a separate convention [222]) only if it has been established as an organ of the organization and probably only if the contracting parties to that convention are all members of the organization, as they are in the cases of the European Court of Human Rights and the Tribunal established under the European Nuclear Energy Agency by the Convention on the Establishment of a Security Control in the Field of Nuclear Energy [223]).

Chapter V: SETTLEMENT BY EXTERNAL COURTS. GENERAL

Although all intergovernmental organizations have the power to establish internal courts for the judicial settlement of internal disputes, only some organizations have done so. And most of these have confined the jurisdiction of their courts to disputes between the organization and its

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[220]) This is believed to be the correct interpretation of the statements of the Commission, although one of them (p. 471 *in fine)* might be interpreted in a different sense from the other statements.

[221]) In this sense also Oppenheim vol. 1, § 522 a, who states that "it cannot be admitted that the International Court of Justice or any other organ of the United Nations established under the Charter would be at liberty to hold that action taken in pursuance of Article 2 [art. 2 (6) of the UN Charter] is contrary to International Law." See also Kelsen, *op. cit.* above note 217, p. 723. Kunz in: AJIL vol. 41 (1947), p. 126, takes a contrary view, basing his opinion upon art. 38 of the Statute of the Court.

[222]) The Statute of the International Court of Justice forms an integral part of the UN Charter, see art. 92 of the Charter.

[223]) *Cf.* above, Chapter III B (1).

officials arising out of the relationship of employment[224]). This is in most cases due to the fact that the practical need for judicial settlement does not arise so frequently as to justify the establishment of standing judicial institutions within the organization for other types of disputes, if at all.

When the need arises, nevertheless, the organization may find it simpler to resort to an external court than to establish a court of its own. Or one of the parties to the dispute may attempt to bring an action in an external court, without the consent of the organization. Indeed the latter has been attempted even in cases where the organization had an internal court with competence in the matter[225]). In either case the question arises as to whether the external courts concerned are competent to adjudicate upon internal disputes of an intergovernmental organization.

There are three types of external courts which must be considered in this connection:

(1) Internal courts of other intergovernmental organizations. These include courts established as organs of another organization to adjudicate upon internal disputes of that organization[226]) and / or upon external disputes of municipal law involving the organization[227]) or its officials[228]).

(2) National courts. These include courts established as organs of a state to adjudicate upon disputes of municipal law.

(3) International courts. These may be standing tribunals or *ad hoc* arbitral commissions. Typical international courts are established by treaty between two or more states and / or intergovernmental organizations or other subjects of international law to adjudicate upon genuinely international disputes, *i. e.*, disputes of international law between subjects of international law. Such international courts are independent intergovernmental

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[224]) The most important exception – insofar as standing courts are concerned – is the Court of Justice of the European Communities.

[225]) *Díaz Díaz* v. *UN Economic Commission for Latin America* and *Schuster* v. *UN Information Centre*, see below, Chapter VII A.

[226]) Above, Chapter III. – Courts maintained by an intergovernmental organization for regular jurisdiction in a territory under its (extended) jurisdiction (above, Introduction) resemble national courts. The law they administer is formally internal law *(largo sensu)* of the organization, but in substance it is usually municipal law, at least in the case of indirect *condominia* and *coimperia*. – Another type of border-line case between an IGO court and a national court was the internationally composed Tribunal of the Saar, which was established in 1955–56 by the Council of the Western European Union, with the co-operation of the Government of the Saar, for the adjudication of complaints by Saarlanders of political persecution in connection with the referendum which led to the re-incorporation of the Saar into Germany, *cf.* Deruel, Le Tribunal international de la Sarre in: Annuaire français de droit international vol. 2 (1956), pp. 509–16.

[227]) Above, Chapter III B (3).

[228]) Above, Chapter III A (3).

organizations – in contradistinction to internal courts, which are merely organs of a wider intergovernmental organization[229]).

Under the heading of international courts may also be considered certain mixed types, which belong to one category from an organizational point of view and to another category from a functional point of view. Thus courts for the adjudication of genuinely international disputes may be established as organs of an intergovernmental organization set up for other purposes[230]). This is the position of the International Court of Justice[231]), which is an (autonomous) organ of the UN. In its contentious proceedings it adjudicates upon genuinely international disputes (and upon internal disputes between states)[232]).

(4) A fourth means of external settlement of internal disputes, in addition to contentious proceedings before any of the aforementioned courts, is to seek a binding advisory opinion from the International Court of Justice (or from some other legal body). In its advisory proceedings the Court may be seized of "any legal question" – which includes the internal law of the UN and other intergovernmental organizations, as well as municipal law and genuine international law.

Chapter VI: INTERNAL COURTS OF OTHER ORGANIZATIONS

The competence of the internal courts of intergovernmental organizations is set forth in their statutes. These usually provide for competence only in certain internal (and sometimes even external)[233]) disputes of the particular organization concerned. The courts then lack competence, under their own internal law, to adjudicate upon internal disputes of other orga-

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[229]) The distinction between international and internal courts is more fully discussed above, Chapter IV.

[230]) See the examples and discussion above, Chapter IV A.

[231]) Above, Chapter IV D. The European Court of Human Rights may also in certain respects be considered as an autonomous organ – of the Council of Europe, *cf.* the European Convention on Human Rights of 4 November 1950, arts. 39 and 42. A third example of a tribunal established by an intergovernmental organization to adjudicate upon disputes of international law may be the tribunal envisaged in art. 37,1 of the ILO constitution for the adjudication of disputes relating to the interpretation of International Labour Conventions.

[232]) Conversely, courts may also be established by inter-state agreement as separate intergovernmental organizations, to adjudicate upon disputes either of municipal law (see above, note 193, and the proposals referred to in Hudson, International Tribunals (Washington 1944), p. 214) or of internal law. Only the latter type is relevant to the present study. Such courts may be established *ad hoc*, *cf.* below, Chapter IX C (3).

[233]) Above, Chapter III A (3) and B (3).

nizations, and will have to decline jurisdiction if another organization or its officials should attempt to bring any such dispute before them.

However, there is nothing to prevent an intergovernmental organization from extending the jurisdiction of its courts to comprise internal disputes of other organizations, if these other organizations consent. This has in fact been done by some organizations, without any authorization in their constitutions [234]). Thus, the competence of the League of Nations Administrative Tribunal was extended to include disputes involving officials of three autonomous international institutions [235]), in addition to those of the League of Nations and the ILO. The statute of the successor tribunal, the ILO Administrative Tribunal, provides in art. II, 5:

> 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 intergovernmental international organisation approved by the Governing Body which has addressed to the Director-General a declaration recognising, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules of Procedure.

Such declarations recognizing the jurisdiction of the ILO Administrative Tribunal (and the inherent appellate jurisdiction of the International Court of Justice) [236]) have been made by most specialized agencies whose headquarters are located in Europe [237]) and by three (four) other intergovernmental organizations [238]). They have done so without regard to whether their constitutions authorize the establishment of administrative tribunals [239]) and/or the concluding of agreements with other international

[234]) An example of a constitutional provision was art. 38 of the constitution of the International Danube Commission, which provided that states might appeal against the decisions of the Commission "to the special jurisdiction set up for that purpose by the League of Nations" (LNTS vol. 26, p. 193).

[235]) Institute of Intellectual Co-operation, International Educational Cinematographic Institute, Nansen International Office for Refugees. On the nature of this jurisdiction, see Siraud, Le tribunal administratif de la Société des Nations (Paris 1942, pp. 56–63), cited by Langrod in: Revue du droit public et de la science politique vol. 57 (1951), pp. 82–83. See also Wolf in: Revue générale de droit international public vol. 58 (1954), p. 287.

[236]) Statute art. XII (1) with annex. *Cf.* below, Chapter X B (1).

[237]) FAO, UNESCO, ITU, WHO, WMO, IAEA, but not UPU and IMCO. See e.g. the letters of 15 June 1953 and 20 December 1954 from UNESCO to the ILO (UNESCO docs. ODG/SJ/367970 and 456098). A complete list of documents relating to the recognition by UNESCO of the competence of the ILO Administrative Tribunal may be found in: ICJ Pleadings, Judgments of the ILO Administrative Tribunal (1956), pp. 17–18.

[238]) The European Organization for Nuclear Research (CERN), GATT and the United International Bureaux for Intellectual Property (the Paris and Bern Unions).

[239]) Only the FAO constitution authorizes this, in its art. XV,3.

bodies for the maintenance of common services and arrangements for personnel [240]). The International Labour Conference, too, has clearly assumed that organizations may be entitled to do this without constitutional provision, inasmuch as it has provided, in art. II (5) of the Statute of the ILO Administrative Tribunal, that the organization should recognize the jurisdiction of the Tribunal "in accordance with its Constitution or internal administrative rules". – The ILO Administrative Tribunal has in fact in several instances adjudicated upon internal disputes of the other organizations, including both organizations whose constitutions do not provide for adjudication of such disputes (e. g. UNESCO) and organizations whose constitutions do not even provide for common services with other organizations (e. g. WHO, IAEA).

The Statute of the UN Administrative Tribunal contains a corresponding provision in art. 14. This reads:

> The competence of the Tribunal may be extended to any specialized agency brought into relationship with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter upon the terms established by a special agreement to be made with each such agency by the Secretary-General of the United Nations. Each such special agreement shall provide that the agency concerned shall be bound by the judgments of the Tribunal and be responsible for the payment of any compensation awarded by the Tribunal in respect of a staff member of that agency and shall include, *inter alia*, provisions concerning the agency's participation in the administrative arrangements for the functioning of the Tribunal and concerning its sharing the expenses of the Tribunal [241]).

It had been envisaged that those specialized agencies whose headquarters are located in America would conclude such agreements conferring jurisdiction upon the UN Administrative Tribunal in disputes between the organization and its officials. However, only two agencies (ICAO and IMCO) have done so [242]).

On the other hand, most specialized agencies which are members of the UN Joint Staff Pension Fund (even those located in Europe), have conferred jurisdiction upon the UN Administrative Tribunal in dis-

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[240]) This is authorized in the constitutions of FAO (art. XIII,2) and UNESCO (art. VI,6, only "within the UN Organization"). The constitutions of WHO, ITU, WMO and CERN merely provide generally that the organization shall, or may, co-operate with other organizations. The constitutions of the Paris and Bern Union do not even provide that.

[241]) GA resolution 351 (IV) (the article was originally approved as art. 12 of the Statute).

[242]) UNTS vol. 219, p. 396 (ICAO); IMCO only did so in 1964.

putes between their officials and the Fund in matters involving applications alleging non-observance of the Regulations of the Fund. This has been done by formal agreements concluded between the UN and each specialized agency [243]), pursuant to a recommendation of the General Assembly of the UN [244]).

These agreements, however, comprise only disputes concerning the Regulations of the UN Joint Staff Pension Fund [245]), which must be regarded as an autonomous organ of the UN. There is no question of conferring upon the UN Administrative Tribunal jurisdiction in internal disputes of the several agencies participating in the UN Joint Staff Pension Fund [246]). On the contrary, the preamble of the agreements conferring jurisdiction upon the UN Administrative Tribunal refers to an understanding, recorded at the fourth session of the UN Joint Staff Pension Board, that "full faith, credit and respect should be given to the proceedings, decisions and jurisprudence of the Administrative Tribunal, if any, of the agency concerned relating to the staff regulations of that agency, as well as to the established procedures for the interpretation of such staff regulations" [247]). The latter part of the "understanding" may mean that even if the question of the interpretation of the staff regulations of a particular specialized agency arises as a preliminary question (*question préjudicielle)* in a dispute which otherwise concerns the Regulations of the Fund, this preliminary question must be referred to the administrative tribunal of the specialized agency concerned if the parties disagree on the correct interpretation of its staff regulations [248]).

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[243]) See for example UNTS vol. 214, p. 388 (ILO); vol. 219, pp. 388 (FAO), 392 (UNESCO) and 396 (ICAO); and vol. 394, p. 333 (WHO). Agreements were also signed with WMO on 17 October/22 November 1956 (WMO doc. 12. 744/56/S/UN/JSPE and resolution 2 [EC-VIII] of the Executive Committee of the WMO) and with IAEA on 18 October 1963. See in general UN doc. A/2970, with appended model agreement. The agreements are supplemental to the agreements by which the agencies joined the Fund (text of these agreements in UNTS vol. 139, pp. 395 *seq.).*

[244]) GA resolution 678 (VII). See also art. XLI of the Regulations of the Fund, added by GA resolution 955 (X).

[245]) Adopted by GA resolution 248 (III) and amended by the following resolutions: 680 (VII), 772 (VIII), 874 (IX), 955 (X), 1073 (XI), 1309 (XIII), 1561 (XV), 1614 (XV) and 1799 (XVII).

[246]) The question of pensions for the staff falls, in principle, within the scope of the organic jurisdiction of each agency. However, these have delegated their legislative and administrative power in this respect to the UN General Assembly and the UN Joint Staff Pension Board. The law enacted by these bodies must then be regarded as internal law of the UN or the Joint Staff Pension Fund.

[247]) UN, OR GA, IX, Suppl. No. 8, p. 2, and UNTS vol. 394, p. 334.

[248]) See below, Chapter VIII B (1).

In the cases cited above both organizations concerned had expressly provided that the internal court of one organization was to be competent in certain internal disputes of the other. In such cases the court will have compulsory jurisdiction, even if the organization sued or the other party to the dispute contests its jurisdiction [249]).

In accordance with the practice reported above, it is submitted that an intergovernmental organization can delegate its inherent judicial powers to another organization, by conferring upon the courts of the latter jurisdiction in respect of its internal disputes *stricto sensu,* even if there is no relevant provision in its constitution. Its power to delegate its judicial powers in respect of extended jurisdiction depends upon an interpretation of the act conferring such jurisdiction upon the organization. The other organization can accept such jurisdiction for its courts even if there is no relevant provision in its constitution, as long as no provision precludes such extension of the competence of its courts.

No example is known of internal courts of one organization having assumed jurisdiction in internal disputes of another organization if one of the organizations had failed to make a provision to this effect. Indeed, it is submitted that no internal court of an organization could consider itself competent in organic disputes of another organization unless the court's statutes empowered it to adjudicate such disputes and the other organization concerned – or its constitution – had accepted its competence, in general or for any particular dispute. In the absence of such delegation of judicial power, by mutual consent or by constitutional provisions, the organic jurisdiction of an intergovernmental organization must be exclusive *vis-à-vis* other organizations, in its judicial as well as in its legislative and administrative aspect [250]). In this respect the same principles must apply between intergovernmental organizations as between states [251]) and as between a state and an intergovernmental organization [252]).

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[249]) In 1955 the Director-General of UNESCO contested, for certain given reasons, the competence of the ILO Administrative Tribunal to adjudicate upon certain disputes between UNESCO and four of its officials. His objections were, however, rejected by the Tribunal (International Law Reports, 1955, p. 777) and, on appeal, by the International Court of Justice in its advisory opinion on Judgments of the Administrative Tribunal of the ILO upon Complaints Made against the UNESCO (ICJ Reports, 1956, p. 77).

[250]) On the question of whether the court of one organization is entitled to decide questions of the internal law of another organization as preliminary issues, see below, Chapter VIII B.

[251]) BYIL, 1961, p. 448, *cf.* Hackworth, Digest of International Law vol. 4, pp. 732–4.

[252]) Below, Chapter VII A–C.

Chapter VII: NATIONAL COURTS

National courts are theoretically in the same position *vis-à-vis* internal disputes of intergovernmental organizations as are internal courts of other intergovernmental organizations, but in practice their position is different.

A. Disputes Arising under Organic Jurisdiction

No examples are known of an intergovernmental organization having conferred competence upon national courts in respect of its internal, organic disputes. Nor are states known to have conferred upon their national courts competence in such disputes. Agreements delegating certain internal legislative and/or administrative powers of the organization to the appropriate organs of the host state – notably in respect of social insurance – may imply that the national courts of the host state will be competent in disputes relating to the delegated powers, in the same manner as the UN Administrative Tribunal has been given competence in disputes relating to the legislative and administrative powers delegated to the UN and the UN Joint Staff Pension Fund by the specialized agencies [253]). But these disputes will usually be of an external, rather than of an internal nature. Thus, if the organization submits to the social security system of the host state in respect of its officials, as some organizations have done, it will usually be implied that the national courts of the host state shall be competent in disputes arising between the officials and the social security agencies of the host state. These disputes are not internal disputes arising out of the internal law of the organization, but external disputes arising out of the municipal law of the host state and involving parties, one of which is not subject to the organic jurisdiction of the organization.

The question of the competence of national courts when the organization has not conferred jurisdiction upon them, has been dealt with in several decisions by such courts in disputes concerning the relationship of employment. In most of these cases officials sued the organization before a national court for indemnities for termination of their employment with the organization. Except for certain cases involving the UN [254]), the courts

[253]) Above, Chapter V.

[254]) National courts have assumed jurisdiction in three such cases involving the UN. In at least one of these *(Schuster* v. *UN Information Centre)*, the UN had failed to invoke its exclusive jurisdiction in internal matters. Although such failure does not in itself necessarily confer jurisdiction upon national courts, it cannot be expected that these shall be aware of rights of the organization if its representatives have not drawn them to their attention. In the two other cases (Annual Report of the Secretary-General, 1953–54, pp. 106–7), the courts appear to have ignored completely obtaining rules of international law,

declined jurisdiction, even though the organization had its headquarters, and the official had been hired and performed his duties, in the territory of the state to which the court belonged, and despite the fact that the official concerned was a national of that state[255]). Not even the risk of denial of justice could induce the national courts concerned to assume jurisdiction, inasmuch as they declined jurisdiction, even in those cases where the organization itself had no internal tribunal which could settle the dispute judicially[256]). In one case, where the organization actually did have an administrative tribunal which was competent in the matter, no reference was made in the judgment to this fact[257]). The refusals of the national courts were not based upon the immunity of intergovernmental organizations from suit in municipal courts *ratione personae* – but on the fact that the suits concerned matters which were within the exclusive jurisdiction of the organization (incompetence *ratione materiae).* By implication, if not expressly, these decisions recognize both the power of the organization to decide disputes in such matters – by administrative or judicial procedures – and the exclusiveness of this power[258]).

The reasoning in some of the decisions referred to seems to indicate that the courts concerned would *ex proprio motu (ex officio)* have considered themselves incompetent *ratione materiae* even if the Organization had accepted their jurisdiction[259]). But in one case the national court assumed jurisdiction on the basis that the organization was considered by the court to have accepted its jurisdiction by not raising any objection on that ground[260]). This judgment may not conform with the general

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inasmuch as they disregarded also treaty provisions on the immunity *ratione personae* of the UN. In all known similar disputes of other organizations national courts have declined jurisdiction.

[255]) See the judgments cited in the following notes and in Nordisk Tidsskrift, 1964, p. 53, note 123.

[256]) *Profili* v. *International Institute of Agriculture,* Rivista di diritto internazionale vol. 23 (1931), p. 386, and *Chemidlin* v. *International Bureau of Weights and Measures,* excerpts in Nordisk Tidsskrift, 1964, p. 20, and in Annual Digest of International Law Cases, 1943–45, p. 231. Indeed, municipal courts are less hesitant to infringe upon the privileges and immunities provided for in the constitution, invoking the absence of any other competent court (denial of justice), than they are to infringe upon the internal autonomy not provided for in the constitution, *cf. Avenol* v. *Avenol,* Annual Digest of International Law Cases, 1935–37, Case No. 185.

[257]) *Díaz Díaz* v. *United Nations, cf.* art. 2 (4) of the Statute of the UN Administrative Tribunal.

[258]) See notably *Profili* v. *International Institute of Agriculture.*

[259]) *Chemidlin* v. *International Bureau of Weights and Measures.* But see *Profili* v. *International Institute of Agriculture.*

[260]) *Schuster* v. *UN Information Centre, cf.* note 254. – Belgian and American courts have accepted jurisdiction in actions brought by the UN against former officials

principles of the procedural international law of other states. But as a matter of public international law the Court was of course entitled to assume jurisdiction, if the UN had really consented.

If national courts decline jurisdiction in cases involving officials, then there is all the more reason why they should decline jurisdiction in the even more typically internal disputes between and within organs which have no distinct legal existence outside the organization. In disputes involving members of the organization – *i. e.* sovereign states acting as such – municipal courts obviously have no jurisdiction.

The decisions referred to above conform with the many cases in which national courts have declined jurisdiction in disputes between foreign governments and their officials serving in the country of the court and possessing the nationality of that country [261]). Neither the judgments relating to officials of foreign states, nor those relating to officials of intergovernmental organizations, state whether the incompetence is merely a matter of the municipal (procedural international) law of the state concerned, or whether it derives also from public international law, in the sense that national courts are barred under public international law from adjudicating upon organic disputes of another state or of an intergovernmental organization. It is submitted that the latter is the case. It would be entirely improper for an organ of one state in this manner to intervene in the internal functioning of the administration of another sovereign state or of an organization of sovereign states. It is thus submitted as a general rule, applicable to intergovernmental organizations as well as to states, that the organic jurisdiction is exclusive even in its judicial aspect. National courts may not, under international law, assume jurisdiction in internal disputes relating to matters falling under the organic jurisdiction of an intergovernmental organization [262]) or of another state, unless the organization or the other state concerned has recognized their competence. Such recognition can not be inferred from art. 183 of the constitution of the European Economic Community or art. 155 of the

for reimbursement of overpayment of salary (below, note 272). These disputes, however, must properly be considered as external, involving questions of the internal law of the organization only as a preliminary issue, *cf.* below, Chapter VIII A. *Cf.* also above, Chapter IV A, on disputes with former member states of the Bank and the Fund.

[261]) See the cases reported in Hackworth, Digest of International Law vol. 4, pp. 732–34.

[262]) Münch appears to assume the contrary, in respect of the "contracts of employment" of the officials of the European Coal and Steel Community (Gegenwartsprobleme des internationalen Rechts und der Rechtsphilosophie, Festschrift für Rudolf Laun, Hamburg 1953, p. 138). The validity of this assumption cannot be admitted, not even if meant as a special rule of the European Coal and Steel Community, *cf.* above, Chapter III F (1).

constitution of EURATOM, which provide: «Sous réserve des compétences attribuées à la Cour de Justice par le présent Traité, les litiges auxquels la Communauté est partie ne sont pas, de ce chef, soustraits à la compétence des juridictions nationales»[263]). Nor can it be inferred from any constitutional or other provision which waives the procedural immunity of the organization concerned, such as that contained in art. 1 of the Protocols on the Privileges and Immunities of the European Communities and in art. VII 3 of the constitution of the International Bank for Reconstruction and Development. Even if the organization should have admitted the competence of national courts in certain organic fields, the national court may be debarred, as a matter of its own municipal law, from assuming jurisdiction in internal disputes of other sovereign entities, unless the state under which it belongs has expressly extended its jurisdiction.

B. Disputes Arising under Extended Jurisdiction

The position is different with regard to disputes arising under the extended internal law of the organization (*i. e.* law enacted by virtue of territorial or personal jurisdiction conferred upon it, in its constitution or elsewhere), even if the dispute is one between parties both of which are subject to its jurisdiction.

If a dispute between two nationals or residents of a state arises under its territorial or personal law, the dispute will usually be submitted to the courts of that state. But if they bring the dispute before the courts of another state, then these are not debarred from assuming jurisdiction by the mere fact that the dispute arises out of matters which are subject to the non-organic jurisdiction of the former state. If competent under its own law of venue, and if this law is not excessively liberal, the court can assume jurisdiction and can apply, in accordance with its own law of conflicts, the substantive law of the former state. The court can interpret this law, and probably may even review the validity of non-organic acts of the foreign state itself, if the municipal law of the court permits this, since the so-called act of state doctrine is not recognized as a rule of public international law[264]).

[263]) Emphasis added. The German text is not so clear, but must mean the same. *Cf.* also art. 40, third paragraph of the CECA constitution.

[264]) The International Law Association, at its Fiftieth Conference, adopted, on the basis of a report listing cases going one way in some countries and another way in other countries, a resolution stating that "the so-called Act of State Doctrine is not a rule of International Law. A state whose courts refuse to apply that Doctrine does not violate International Law". (Report of the Fiftieth Conference, Brussels 1962. *Cf.* Oppenheim, International Law vol. 1, § 115 aa. See, however, below, p. 94.

As for disputes arising out of the non-organic law of an intergovernmental organization, it is similarly submitted that the internal courts of the organization, or its administrative organs, do not have exclusive competence unless this follows from the treaty or other act which confers extended jurisdiction upon the organization and unless such treaty or other act is binding upon the state under which the national court concerned belongs. The constitutions of the European Communities contain certain provisions conferring exclusive competence upon the High Authority, the Commissions and the Court of Justice of the Communities [265]), and national courts have been faced with the problem of the application and interpretation of these provisions [266]). In so far as no such exclusive competence can be derived from an act which is binding upon the national courts concerned, these are probably not in principle prevented from adjudicating upon disputes arising under the extended internal law of the organization between parties subject to its jurisdiction. And such disputes may well come within the competence of national courts as laid down in the procedural international law of the state concerned [267]). Thus the Court of

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[265]) Express provisions to this effect are contained, for example, in arts. 40, third paragraph (the implications of this provision are not clear), 41 and 65 (4) of the CECA constitution. See also art. 44 and Cahiers de la Fondation nationale des sciences politiques vol. 41 (Paris 1953), pp. 234–5. The Court of Justice of the European Communities has stated that the fact, that arts. 169 and 170 of the constitution of the European Economic Community permit the Commission and member states to sue before the Court a member state which has failed to fulfil its obligations under the constitution, does not deprive private parties of the right to invoke the same obligations in national courts (Cour de Justice des Communautés européennes, Recueil de la Jurisprudence de la Cour, vol. 9, p. 25).

[266]) Landgericht Stuttgart, 10 August 1953 *(Stadt Stuttgart u. a.* v. *Oberrheinische Kohlen Union)*, Recueil Sirey, Jurisprudence, Année 1954, Quatrième partie, pp. 1–9.

[267]) In one very special case the constitution even provides expressly for appeal to national courts. However, this concerns disputes of municipal law which have been referred for decision to the organization, rather than disputes arising purely out of the internal law of the organization. The relevant provisions are § 7 of the Agreement between the United States and the Federal Republic of Germany Regarding the Validation of Dollar Bonds of German Issue of 27 February 1953 (UNTS vol. 223, p. 167), art. III of a companion agreement of 1 April 1953 (UNTS vol. 224, p. 3 and arts. 9 (5), 31 and 33 of the German Validation Law of 25 August 1952. Under these provisions owners of bonds which have been denied validation by the Board for the Validation of German Bonds in the United States, may appeal *inter alia* to national courts, and have indeed done so *(Abrey* v. *Reusch*, 153 F. Suppl. 337, summarized in AJIL vol. 52 [1958], p. 347). The Board is a joint United States-German agency, established under § 2 of the Agreement, for the sole purpose of deciding upon the validation of bonds which have not been validated by the German member of the Board. Under § 2 of the Agreement the United States Government expressly "consents to the said Board's conducting its operations within the territorial jurisdiction of the United States" and accords to the German representative on the Board "such privileges and immunities normally accorded by it to diplomatic representatives of foreign governments as may be necessary to enable him properly to carry out his responsibilities".

Justice of the European Communities has no competence in disputes between private enterprises, unless this has been provided in the municipal law of a member state[268]). Should therefore a dispute arise, e. g. between two German enterprises, concerning the interpretation of the constitution of the European Coal and Steel Community or of the decisions of its organs, German courts would be competent, although it follows from the express provision in art. 41 of the constitution that they would have to ask the Court of Justice of the Community for a preliminary decision on any question as to the validity of the decisions of the High Authority or of the Council[269]). In the other European Communities the situation is different, since their constitutions provide more broadly that the Court shall

statuer, à titre préjudiciel,
a) sur l'interprétation du présent Traité,
b) sur la validité et l'interprétation des actes pris par les institutions de la Communauté[270]).

C. Conclusion. Delegation

The conclusion is thus that – while the competence of internal courts of intergovernmental organizations (as well as that of national courts of states) is exclusive, *vis-à-vis* a (foreign) national court, with regard to internal disputes arising out of matters falling under the organic jurisdiction of the organization or the state concerned – the competence of these courts is not exclusive under public international law with respect to "internal" disputes arising out of matters falling under the territorial or personal jurisdiction of the organization or state concerned, unless this follows from specific provisions. With the latter reservation, national courts are therefore, in principle, not barred under international law from assuming jurisdiction, even without delegation, in respect of the second type of internal disputes of an intergovernmental organization, and may even review the validity of the acts of the organization[271]).

In respect of internal disputes arising out of matters falling under the organic jurisdiction of the organization, however, national courts are not entitled under international law to assume jurisdiction unless the

[268]) CECA constitution, art. 43. The corresponding provision in the constitutions of the CEE, art. 183, and EURATOM, art. 154, is confined to disputes between member states.
[269]) Below, Chapter VIII A.
[270]) CEE, art. 177; EURATOM, art. 154, *cf.* the three cases cited below, p. 87.
[271]) The latter is also pointed out by Wengler in: Annuaire de l'Institut de droit international vol. 45 (1954 I), p. 282, in general terms, without making an exception for acts made in the exercise of organic jurisdiction.

organization has delegated its powers. However, such delegation to national courts would in most cases be inappropriate, since it would prejudice the independence of the organization and the equality of its member states. But this does not necessarily mean that an intergovernmental organization would be legally barred from conferring jurisdiction upon national courts in certain special types of internal disputes, and to render such jurisdiction compulsory in cases where it is entitled to confer compulsory jurisdiction upon its internal courts.

Chapter VIII: PRELIMINARY QUESTIONS (*QUESTIONS PRÉJUDICIELLES*) OF ANOTHER LEGAL SYSTEM

Disputes which are properly brought before the courts of one jurisdiction, in accordance with the applicable rules of international competence (procedural international law), may be governed in some of their aspects by the law of another jurisdiction, in accordance with the relevant rules of conflict of laws. Whenever the conflict rules refer to another legal system, the court before which the dispute is brought will have to decide, as a *question préjudicielle* (since no equivalent term is known to be used in English legal terminology, "preliminary" issue will be used in the following, although, normally, this term is used in a different sense), what is the law of that system on the question concerned. If this is in dispute between the parties, the questions arise, (1) whether the court is entitled itself to interpret the foreign law concerned, and (2) whether it is bound by a relevant judgment of a court of the foreign jurisdiction concerned (pronounced in a dispute between the same parties on the same question – *res judicata*).

These questions must be considered separately with regard to: (A) Preliminary questions of the internal law of an intergovernmental organization arising before a national court, (B) preliminary questions of the internal law of one organization arising before the courts of another organization, (C) preliminary questions of municipal law arising before an IGO court, (D) preliminary questions of international law arising before an IGO court, and (E) preliminary questions of the internal law of an intergovernmental organization arising before an international court.

A. Questions of the Internal Law of an Organization Arising before National Courts

Questions of IGO law may easily arise as preliminary issues before national courts. Thus, the question of who is entitled to act on behalf

of the organization *vis-à-vis* third parties, e. g. for the purpose of concluding contracts, must be determined according to the internal administrative law of the organization, not according to the company law or the administrative law of the state whose law governs the other aspects of the dispute. Similarly, if the organization brings a claim in a national court against a former official for reimbursment of overpayment of salary, the national court may have to determine, as a preliminary issue, what amount of salary the official was entitled to, in order to decide whether overpayment has in fact taken place. This question too must be determined on the basis of the internal law of the organization [272]).

(1) Can the national court interpret the organization's law?

It is submitted that national courts may themselves interpret the internal law of the organization, unless prevented by a treaty provision [273]) or by an application by analogy of the act of (foreign) state doctrine if this doctrine is applied in their municipal law [274]). However, as already pointed out, the act of state doctrine is not recognized as a limitation of public international law [275]), although it probably constitutes such a limitation in respect of acts performed in the exercise of organic jurisdiction.

The constitution of the organization concerned may preclude the national courts of member states from reviewing the validity of acts of the organization, by providing for another exclusive mode of settlement of disputes in this respect [276]). An example of such limitation upon the

[272]) The UN and UNRRA have brought some actions of this kind, but the available reports of the judgments (Annual Report of the Secretary-General, 1952–53, p. 149; Annual Digest of International Law Cases, 1949, Case No. 114) do not specify which law was applied.

[273]) *Cf.* par. IV (h) of the resolution on Recours judiciaire à instituer contre les décisions d'organes internationaux, adopted by the Institut de droit international (Annuaire, vol. 47 [1957 II], p. 479), and Wengler's draft articles, art. 1 *(ibid.*, vol. 45 [1954 I], p. 269).

[274]) *Cf.* Oppenheim, vol. 1, § 115 aa. See also *Hewitt* v. *Speyer et al.* (250 Fed. 367, 371 [C. C. A. 2 d, 1918]), where a United States federal court took the principle to be incontrovertible in both countries concerned (United States and Ecuador) that the national courts "will not adjudicate upon the validity of the acts of a foreign nation performed in its sovereign capacity" (Hackworth, *op. cit.* vol. 2, p. 18). On the limitation of this doctrine, in accordance with the public policy doctrine, insofar as extraterritorial effects are concerned, see e. g. *Bánská a Hutni Spolecnost, národni podnik* v. *Hahn et al.*, decided by a Danish court in 1952 (Text in Ross and Foighel, Studiebog i Folkeret [Copenhagen 1954], pp. 270–1).

[275]) Above, note 264.

[276]) Wengler, in a report to the Institut de droit international on Recours judiciaire à instituer contre les décisions d'organes internationaux, may not intend to go any further when he states that, unless a special procedure for judicial review of decisions by international organs has been established,

competence of the national courts of member states is provided by art. 41 of the constitution of the European Coal and Steel Community, which (by analogy to the act of state doctrine) provides, that the Court of Justice of that organization has exclusive competence

> pour statuer, à titre préjudiciel, sur la validité des délibérations de la Haute Autorité et du Conseil, dans le cas où un litige porté devant un tribunal national mettrait en cause cette validité[277]).

Another limitation may be found in art. 40, third paragraph, which provides that disputes between the Community and third parties *en dehors de l'application des clauses du présent Traité et des règlements d'application* shall be brought before national courts. This provision clearly implies that national courts of member states may not consider disputes arising under the (organic or extended) law of the European Coal and Steel Community, if the organization itself is a party to the dispute. It does not follow so clearly from article 40 that national courts are prevented from considering questions of the law of the European Coal and Steel Community (other than the validity of its acts) if these arise merely as preliminary issues in regular disputes of municipal law, but writers on the subject seem to interpret the provision in this sense[278]). The position in

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the validity of such decisions may be contested at any time and before any institution *(instance)* in accordance with the general rules of international law (Annuaire de l'Institut de droit international vol. 45 [1954 I], p. 266). He appears, however, to have been thinking only of disputes involving states and thus of the right of interference of international rather than national courts *(ibid.*, pp. 266 and 283).

[277]) *Cf.* art. 65 (4) and *Stadt Stuttgart u. a.* v. *Oberrheinische Kohlen Union*, cited above, note 266.

For a discussion of art. 41, see Valentine, The Court of Justice of the European Coal and Steel Community (The Hague 1955), pp. 122–4.

See generally on the complicated question of conflicts of jurisdiction between the Court of Justice of the European Coal and Steel Community and national courts, art. 90 of the CECA constitution and Cahiers de la Fondation nationale des sciences politiques vol. 41 (Paris 1953), pp. 234–5.

Wengler, in his report to the Institut de droit international on Recours judiciaire à instituer contre les décisions d'organes internationaux, proposed to extend the rule expressed in art. 41 to other organizations which establish judicial procedures for the settlement of disputes on the validity of their decisions (Annuaire de l'Institut de droit international vol. 45 [1954 I], p. 269, art. 1), but the Institut did not adopt a clear rule on the subject *(ibid.*, vol. 47 [1957 II], p. 479, par. IV (h) of the resolution).

[278]) Reuter, La Communauté Européenne du Charbon et de l'Acier (Paris 1953), p. 79, states that the provision is obscure, but that it «semble indiquer que s'il y avait matière à application du Traité, il y aurait au moins question préjudicielle devant les tribunaux nationaux». Valentine, The Court of Justice of the European Coal and Steel Community (The Hague 1955), p. 120, understands this to mean that the preliminary issue must be submitted to the Court of the European Coal and Steel Community, but suggests, as an alternative interpretation of art. 40, that "national tribunals are not com-

this and other respects has been made much more clear in art. 177 [279]) of the constitution of the European Economic Community and art. 150 of the EURATOM constitution. These provisions are identical and read:

> La Cour de Justice est compétente pour statuer, à titre préjudiciel,
> a) sur l'interprétation du présent Traité,
> b) sur la validité et l'interprétation des actes pris par les institutions de la Communauté,
> c) sur l'interprétation des statuts des organismes créés par un acte du Conseil, sauf dispositions contraires de ces statuts.
>
> Lorsqu'une telle question est soulevée devant une juridiction d'un des États membres, cette juridiction peut, si elle estime qu'une décision sur ce point est nécessaire pour rendre son jugement, demander à la Cour de Justice de statuer sur cette question.
>
> Lorsqu'une telle question est soulevée dans une affaire pendante devant une juridiction nationale dont les décisions ne sont pas susceptibles d'un recours juridictionnel de droit interne, cette juridiction est tenue de saisir la Cour de Justice.

While the scope of the relevant provisions of the Coal and Steel Community has not been clarified by the Court, the provision of the Economic Community has, at the time of writing, been applied in three decisions which, *inter alia,* defined its scope [280]). In particular, it has been held that if the Court has already rendered a *décision à titre préjudiciel* on a substantially identical question in an analogous case, national courts are under no obligation to submit the question anew if it arises in another case, but they may do so if they find it desirable [281]).

(2) Is a national court bound by a judgment rendered by an IGO court?

This question has already been considered in another context [282]). As explained there, the answer depends on the procedural international law

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petent to consider cases concerned with the application of the Treaty, even if there has been an authoritative ruling upon that issue as a preliminary question". This probably goes too far, unless Valentine is thinking only of cases concerned exclusively with the law of the Community.

[279]) *Cf.* also arts. 164, 173, 183 and 184.

[280]) *Société kledingverkoopbedrijf de Geus en Uitdenbogerd contre* (1) *Société de droit allemand Robert Bosch GmbH,* et (2) *Société Anonyme Maatschappij tot voortzetting van de Zaken der firma Willem van Rijn* (Cour de justice des Communautés européennes, Recueil de la jurisprudence de la Cour vol. 8, p. 89); *N.V. Algemeene Transport- en expeditie onderneming van Gend & Loos* contre *Administration fiscale Néerlandaise (ibid.,* vol. 9, p. 1) and *Da Costa en Schaake N.V. Jacob Meijer N.V. Hoechst-Holland N.V.* contre *Administration fiscale Néerlandaise (ibid.,* p. 59).

[281]) See the last of the three cases cited in the preceding note.

[282]) Above, pp. 33–39, 44 and 54.

of the state to which the court belongs. This law, which has been framed with a view to judgments of foreign national courts, should, as far as possible, be applied by analogy to judgments pronounced by the internal courts of intergovernmental organizations[283]).

B. Questions of the Internal Law of one Organization Arising before Courts of Another Organization

(1) Express provisions: UN Joint Staff Pension Fund

The problem of a question of the internal law of one organization arising as a preliminary issue before a court of another organization, has been raised with regard to judgments rendered by the UN Administrative Tribunal upon applications alleging non-observance of the regulations of the UN Joint Staff Pension Fund[284]). The UN Joint Staff Pension Board, at its fourth session in April 1953, recorded its understanding that

> full faith, credit and respect should be given to the proceedings, decisions and jurisprudence of the Administrative Tribunal, if any, of the agency concerned relating to the staff regulations of that agency as well as to the established procedures for the interpretation of such staff regulations[285]).

The UN Administrative Tribunal has thus to recognize as binding (*res judicata*) any relevant judgment of the administrative tribunal of the specialized agency concerned. The latter part of the "understanding" appears to imply, furthermore, that the UN Administrative Tribunal shall not itself decide preliminary questions of the internal law of employment of a specialized agency, if the agency has established an administrative tribunal or other procedures for the binding settlement of such questions. If this is the correct interpretation, the "understanding" apparently implies that the preliminary question shall be referred to the appropriate organs of the agency concerned for binding decision, before the UN Administrative Tribunal decides the main issue. This would then apply for example

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[283]) Wengler, in his draft articles on Recours judiciaire à instituer contre les décisions d'organes internationaux, proposed, in art. 3, that «le jugement du tribunal international aura force de chose jugée envers tous les membres de l'organisation ayant qualité pour prendre part à la procédure, envers l'organisation elle-même et l'organe qui a rendu la décision attaquée» (Annuaire de l'Institut de droit international vol. 45 [1954 I], p. 269). It is not clear whether this proposal, which was not included in the resolution adopted by the Institut, also related to decisions of internal courts of the organization, and whether the decisions were to be binding upon national courts and not merely upon international courts.

[284]) See above, Chapter VI.

[285]) UN, OR GA, IX, Suppl. No. 8, p. 2; text also in UNTS vol. 394, pp. 335–6.

if there is disagreement as to whether the contract of the official with his organization is of such duration as would make him eligible, under art. II or art. II *bis* of the Regulations of the Pension Fund[286]), for full or associate participation in the Fund. – The "understanding" has been quoted in the preamble of the agreements which have been concluded between the UN and each specialized agency concerned and which confer jurisdiction upon the UN Administrative Tribunal in disputes arising out of the regulations of the Pension Fund[287]). This reference probably implies that the "understanding" shall be binding upon the Tribunal in the exercise of this jurisdiction, if this does not follow already from the recording of the understanding by the UN Joint Staff Pension Board.

(2) When no provision has been made

The question arose in 1957 before the ILO Administrative Tribunal adjudicating in a dispute relating to a dismissed official of the International Telecommunication Union. The plaintiff based her case, *inter alia*, upon an allegation that the attitude taken by the organization's Medical Adviser towards her was one of hostility, traceable to an earlier dispute having arisen out of a diagnosis established by him in connection with a sickness contracted by her when she was employed by the United Nations in Libya, and that he had formulated reservations at the time of her engagement by the International Telecommunication Union, on the basis of medical records established when she was employed by the United Nations. The organization replied that the earlier dispute, submitted to the Administrative Tribunal of the United Nations, was *res judicata* and might not therefore be brought before the ILO Tribunal. The Tribunal stated:

> Considering that the facts previous to the engagement of the complainant by the defendant organization have already been the subject of a decision by the United Nations Administrative Tribunal and may therefore not be considered, in keeping with the principle of *res judicata pro veritate habetur*[288]); ...

Prejudicial issues of the law of one organization may arise before the courts of another organization also in cases where a special relationship has been established between the two organizations, by agreement between

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[286]) Above, note 245.

[287]) See, for example, UNTS, *loc. cit.*, note 285.

[288]) ILO Administrative Tribunal, Judgment No. 27, *In re Mauch*, 13 July 1957, *cf.* Suzanne Bastid in: Recueil des Cours vol. 92 (1957 II), p. 508.

them, by one organization becoming a member of the other [289]), or by one organization acceding to conventions concluded under the auspices of the other [290]). If in such cases the relevant documents contain no other indication, it is submitted that IGO courts, like national courts, are under no general obligation of international law to refrain from considering, as preliminary issues, questions of the internal law of another intergovernmental organization. But they ought, as a matter of their own internal law, to adopt the principle laid down by the UN Joint Staff Pension Board, if the other organization has a court to which the question can be submitted. In particular they should do so if the preliminary question arises under the organic jurisdiction of the other organization concerned, or if it is one of the validity of an act of that organization.

In the same vein, IGO courts, like national courts, are under no general obligation of international law to recognize as binding judgments of internal courts of other organizations [291]), unless this has been specifically provided or unless the dispute concerns matters which are under the exclusive organic jurisdiction of the other organization [292]). Nevertheless, even in other cases the court should not inquire into the merits of a case which has already been decided by a competent court of another organization. It ought, as a matter of its own internal law, to recognize the judgment of the other court as binding.

C. Questions of Municipal Law Arising before Courts of the Organization

The problem of a question of municipal law arising as a preliminary issue before an IGO court has been raised by German writers with regard to the Court of Justice of the European Coal and Steel Community. The majority of these writers appear to take the view that the Court is free to decide any preliminary questions of municipal law, and that it is

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[289]) Nordisk Tidsskrift, 1964, pp. 25–26, *cf.* pp. 64–66; see for example the agreement of 29 January 1963 for the Establishment in Cairo of a Middle Eastern Regional Radioisotope Centre for the Arab Countries, under which officials of the Agency will work at the Centre, which is a separate intergovernmental organization.

[290]) See for example the agreement cited *ibid.*, p. 65.

[291]) Suzanne Bastid, *loc. cit.* above note 288, states broadly: «Les décisions des tribunaux administratifs internationaux ont l'autorité de la chose jugée en ce sens que les points tranchés ne peuvent être remis en question devant une autre instance». It is submitted that if this statement is intended to express a rule of international law, it applies only to internal, organic disputes (between the organization and its officials, *cf.* below, under F), not to judgments rendered pursuant to those provisions (cited above, Chapter III B [3]), which confer upon them jurisdiction in external disputes.

[292]) Below, under F.

not bound by any relevant judgment of a national court[293]). Jerusalem takes the extreme contrary view, that the Court of the European Coal and Steel Community cannot decide anly legal questions within the competence of a member state, even if this arises as a preliminary issue in a dispute within the competence of the Court[294]).

It is submitted that there is no general rule of international law which would compel the Court of the European Communities or other IGO courts to take the position suggested by Jerusalem[295]). Nevertheless, as a matter of its own internal law, it would be reasonable for an IGO court to recognize the binding force of relevant judgments of municipal courts. This would, incidentally, be necessary in order to secure recognition of its judgments by courts of such non-member states as recognize foreign judgments as binding only on condition of reciprocity[296]). The court might even do well to refer certain or all preliminary issues of municipal law in dispute between the parties to the national courts concerned, as proposed by Jerusalem.

However, these are questions which must be solved in the light of the special nature, purposes and powers of the organization concerned. Any policy adopted by or in respect of the Court of Justice of the European Communities therefore is not necessarily suitable for other organizations. Indeed, the majority view of the German writers appears to be based upon a concept of the European Coal and Steel Community as an entity on the lines of a federal state, in which federal courts are considered superior to the courts of the several states, while Jerusalem's dissenting view is based upon the view that the Community is a common organization of the member states and on the same hierarchical level as these. As a matter of fact, the European Communities are a combination of both, since in certain respects they have supra-national powers within the member states, while in other respects they are merely intergovernmental organizations of the consultative or operational type, acting within their own legal sphere which is distinct from that of the member states. However, questions of the municipal law of the member states are more likely to arise before the Court of the Communities in the former fields.

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[293]) Ophüls in: Neue Juristische Wochenschrift vol. 4 (1951), p. 696 *in finc;* Schlochauer in: Archiv des Völkerrechts vol. 3 (1951/52), p. 396, citing also Ule in: Deutsches Verwaltungsblatt vol. 67 (1952), p. 71.

[294]) Jerusalem, Das Recht der Montanunion (Berlin 1954), p. 61, *cf.* p. 60 *in fine.*

[295]) But see below, under F, on the binding force of judgments in disputes arising out of matters of organic jurisdiction.

[296]) *Cf.* above, note 113. In member states the judgments of the Court of Justice of the European Communities are binding by virtue of art. 44 of the CECA constitution, art. 187 of the CEE constitution and art. 159 of the EURATOM constitution.

D. Questions of International Law Arising before Internal Courts

Internal courts of intergovernmental organizations must – like national courts – decide any preliminary questions of international law which may arise out of an internal dispute duly submitted to them. They will, however, obviously consider themselves bound by a relevant judgment rendered by an international court in a dispute between the same parties, unless this conflicts with the constitution of the organization to which the internal court belongs[297]). Art. 37 (2) of the ILO constitution expressly provides that an (internal) tribunal for the determination of disputes relating to the interpretation of an International Labour Convention shall be bound by "any applicable judgment or advisory opinion of the International Court of Justice". However, the International Labour Conventions do not fall within the internal law proper of the organization.

E. Questions of Internal Law Arising before International Courts

For the sake of completeness, it may also be mentioned that international courts (whose competence in internal disputes of intergovernmental organizations shall be discussed in Chapter IX) must decide any preliminary questions arising out of a dispute duly submitted to them, even if these fall under municipal[298]) or internal law[299]). But, unless the terms of reference of the Court provide otherwise, it must accept as binding a relevant decision rendered in a dispute between the same parties by a

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[297]) *Cf.* above, Chapter IV C-D.

[298]) *Cf.* below, Chapter IX C (2), on the seemingly divergent statements of the Permanent Court of International Justice in the cases concerning the Serbian and Brazilian Loans in France and Certain German Interests in Upper Silesia. Even in the former cases, where the parties had agreed to submit to the Court a dispute of municipal law, the Court emphasized that it must apply the municipal law as it is applied in the state concerned. Thus, it stated, in the Serbian case: «Il ne serait pas conforme à la tâche pour laquelle elle [the Court] a été établie, et il ne correspondrait pas non plus aux principes gouvernant sa composition, qu'elle dût se livrer elle-même à une interprétation personnelle d'un droit national, sans tenir compte de la jurisprudence, en courant ainsi le risque de se mettre en contradiction avec l'interprétation que la plus haute juridiction nationale aurait sanctionnée et qui, dans ses résultats, lui paraîtrait raisonnable». (PCIJ, Ser. A, Nos. 20/21, p. 46). And in the Brazilian case it stated: «La Cour étant arrivée à la conclusion qu'il y a lieu d'appliquer le droit interne d'un pays déterminé, il ne semble guère douteux qu'elle doit s'efforcer de l'appliquer comme on l'appliquerait dans ledit pays. Ce ne serait pas appliquer un droit interne que de l'appliquer d'une manière différente de celle dont il serait appliqué dans le pays où il est en vigueur» *(ibid.*, p. 124).

[299]) Wengler, discussing the special problem of the validity of decisions by intergovernmental organizations, points out two limitations upon the right of judicial recourse against such decisions (Annuaire de l'Institut de droit international vol. 44 [1952 I], pp. 267–70).

competent national or internal court, if this does not conflict with international law [300]). Indeed, it cannot apply any rule of municipal or internal law which conflicts with international law unless its terms of reference so permit [301]).

F. Binding Force of Judgments Rendered in Organic Disputes

As already suggested [302]), even the courts of those states which do not normally recognize the binding force of foreign judgments, probably must recognize the binding force of foreign judgments rendered in disputes arising out of such matters as fall under the exclusive organic jurisdiction of the foreign state concerned, including disputes between the state and its officials arising out of the relationship of employment. Whatever attitude courts adopt in this respect *vis-à-vis* organic disputes of foreign states, it is submitted that they must adopt the same attitude towards judgments of courts of intergovernmental organizations in disputes arising out of such matters as fall under the exclusive organic jurisdiction of the organization, unless provision has been made to the contrary. On the assumption made above, this means that the judgments pronounced by the numerically most important IGO courts, the administrative tribunals, must be recognized as binding by the courts of all states and of all other intergovernmental organizations, in so far as these judgments concern disputes between the organization and its officials arising out of the relationship of employment.

Inversely, IGO courts must, on similar conditions, recognize as binding *(res judicata)* judgments pronounced by national courts in disputes falling under the exclusive organic jurisdiction of the state concerned, or by courts of another organization in disputes falling under its organic jurisdiction. An example of the latter is the judgment of the ILO Administrative Tribunal reported above, under B, although this judgment could also be seen merely as a confirmation of the general submission made under B that internal courts ought, as a matter of their own internal law, to recognize as binding judgments rendered by courts of other organizations (and states).

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[300]) *Cf.* art. 38 of the Statute of the International Court of Justice, which, since 1945, provides: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it..." (emphasis added), *cf.* below, Chapter IX C (2).

[301]) On the position of the International Court of Justice and other courts which are organs of an intergovernmental organization, *vis-à-vis* the constitution of that organization, see above, Chapter IV C-D.

[302]) Above, Chapter III A (5).

Similarly it is submitted that the courts of one jurisdiction, whether this be national, internal or international, cannot, even as a preliminary issue, try the validity of an act of a foreign state or intergovernmental organization, if the act is performed in the exercise of organic jurisdiction. To this extent the Act of State Doctrine is submitted to be a valid principle of public international law (*cf.* above, p. 81).

Chapter IX: INTERNATIONAL COURTS [303])

A. Constitutional Provisions

A great number of IGO constitutions provide that disputes concerning the interpretation or application of their provisions shall be submitted to the International Court of Justice [304]) or to an arbitral tribunal [305]). [306]).

Other constitutions exceptionally provide for a right for member states or for individuals under the extended jurisdiction of the organization to appeal to an external court against the decisions made by the organization [307]). Several proposals have been made for similar provisions in respect of other organizations [308]).

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[303]) On the distinction between internal courts of intergovernmental organizations and international courts, see above, Chapter IV.

[304]) E.g. the constitutions of WHO, art. 75; FAO, art. XVI,1; ILO, art. 37,1; IRO, art. 17,2; UNESCO, art. XIV,2; ICAO, arts. 84–86; the Bern Union, art. 27 *bis*. See also the abortive proposal for a new art. 13 *bis* in the constitution of the Paris Union (*travaux préparatoires* in: Union internationale pour la protection de la propriété industrielle, Conférence de Lisbonne, Documents préliminaires, [Bern] 1956, pp. 85–91, *cf.* pp. 127–8). For a complete list of provisions, see ICJ Yearbook, chap. X, first and third parts.

[305]) E.g. the constitutions of the Interallied Reparation Agency, part II, art. 7; UPU, art. 31; and ITU, art. 25. However, the arbitrators provided for in the two former constitutions are not external to the organization. They are either its secretariat, or member governments, or their delegates to the organization. – See also the constitutions of the Fund, art. XVIII (c), and the Bank, art. IX (c), although it may be questioned whether the disputes with which these provisions are concerned are internal or external. Nor is it clear whether these provisions are confined to disputes concerning the interpretation of the constitution.

[306]) Both alternatives are provided for in the constitutions of UNESCO, art. XIV, 2; ICAO, arts. 84–86; and FAO, art. XVI, 1.

[307]) Art. 38 of the constitution of the International Danube Commission (LNTS vol. 26, p. 193), provided for appeal against the decisions of the Commission to a "special jurisdiction set up for that purpose by the League of Nations". This "jurisdiction" might have been the Permanent Court of International Justice, as subsequently envisaged in art. 37 of the Statute of that Court, except that this Court was not competent in contentious disputes involving intergovernmental organizations as parties. Similar appeals in other international river commissions may be made to the International Court of Justice, if the dispute is one between states, according to art. 10,5, *cf.* art. 22, of the Statute on the

The provisions referred to above usually confer compulsory jurisdiction upon the tribunal concerned[309]). But it is not always clear whether they envisage the establishment of an international or of an internal tribunal. Nor is it always clear whether the provisions relate only to disputes between member states or also to disputes between these and the organization (or, exceptionally, even to disputes involving other parties)[310]). Similar doubts may arise as to whether the reference to the International Court of Justice is to the advisory or to the contentious procedure[311]). In the latter case the provisions can apply only to disputes between member states, unless the term "state" in art. 34 (1) of the Statute of the Court is given a broad interpretation[312]).

B. Competence in the Absence of Constitutional Provisions. General

None of the provisions referred to above cover all internal disputes of the organization. Moreover, a great number of intergovernmental orga-

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Regime of Navigable Waterways of International Concern, annexed to the Barcelona Convention of 20 April 1921 (LNTS vol. 7, p. 57).

Under arts. 29–32 of the ILO constitution, members of the ILO may appeal to the International Court of Justice (under the contentious procedure) against the recommendations of the Commission of Inquiry appointed under arts. 26–28 to consider complaints of non-observance of International Labour Conventions (*cf.* also the recourse provided for in art. 37,2). However, these conventions should rather not be considered part of the internal law proper of the ILO.

Most of the examples cited in this note, and in certain others, are cited by André Gros, Le problème du recours juridictionnel contre les décisions d'organismes internationaux in: La technique et les principes du droit public, Etudes en l'honneur de Georges Scelle vol. 1 (Paris 1950), pp. 268–9.

[308]) See, *inter alia*, Wengler's report on Recours judiciaire à instituer contre les décisions d'organes internationaux to the Institut de droit international (Annuaire de l'Institut de droit international vol. 44 [1952 I], pp. 224–360, and vol. 45 [1954 I], pp. 265–309) and the concluding, rather different, resolution of the Institut (*ibid.*, vol. 47 [1957 II], p. 478; English translation in AJIL vol. 52 [1958], p. 105). See also the reports of the national branch committees of the International Law Association Committee on the UN Charter, reproduced in: Second Report on the Review of the Charter of the UN (London 1956).

[309]) The compulsory jurisdiction of the International Court of Justice does not become effective *vis-à-vis* non-member states which are not parties to the Statute of the Court, unless these make the declarations prescribed by the resolution of the Security Council of 18 October 1946. None of the constitutions cited above expressly requires them to do so, as did the abortive proposal in: Union internationale pour la protection de la propriété industrielle, Conférence de Lisbonne, Documents préliminaires, [Bern] 1956, p. 91.

[310]) *Cf.* above, Chapter I, and below, under C (1).

[311]) The constitution of IMCO expressly refers to advisory opinions only. The constitution of ILO, arts. 37,1 and 29,2 (*cf.* art. 31), refers to the contentious procedure ("decision", in this sense also Sörensen, Grundtræk af international organisation, Copenhagen 1952, pp. 128–9).

[312]) See below, under C (1).

nizations have no provisions at all for judicial settlement of internal disputes [313]).

In one case as in the other, the question arises as to whether internal disputes of the organization, despite the absence of relevant constitutional provisions, may be referred to standing international courts or to *ad hoc* arbitral tribunals, either by the parties to the dispute or by the organization.

The main question which arises in this connection is whether international courts are competent under their own constitution (statute) to assume jurisdiction in internal disputes of an intergovernmental organization. Difficulties may arise here because the competence of standing international courts is limited with regard to parties (*ratione personae*, see under C [1] below) and with regard to subject matter (*ratione materiae*, see under C [2] below). *Ad hoc* arbitral tribunals are in a different position (see under C [3]).

Secondly it must be ascertained in what circumstances internal disputes may, under the law of intergovernmental organizations, be brought before an international tribunal – by the parties to the dispute (D [1]) or by the organization itself (D [2]).

C. Limitations Deriving from the Constitution of the Court

(1) Standing courts: Competence ratione personae

International tribunals are in principle concerned with disputes between subjects of international law. However, it is for the constitution (statute) of each court to determine who may be parties before that particular court.

The constitutions of most standing international courts limit the competence of the court still further – to disputes between states [314]). If these provisions are interpreted literally, as precluding other subjects of international law, this means that the court is able to deal only with such internal disputes of intergovernmental organizations as arise between member states and/or (other) states subject to the extended jurisdiction of the organization. The court cannot accept jurisdiction in disputes between the organization itself and one or more such states. Still less can it accept jurisdiction in disputes involving particular organs of the organization, its officials or individuals subject to its extended jurisdiction.

[313]) See above, Chapter I.

[314]) Examples of individuals having been admitted as parties before independent international courts are listed above, notes 193 and 194. These courts, however, are now a matter of the past, except for those dealing with disputes of municipal law.

This is the position of the Permanent Court of International Justice and the International Court of Justice. Art. 34 (1) of the Statute of the International Court of Justice provides that "only states may be parties in cases before the Court" [315]).

It has been suggested by some writers [316]) and by the President of the former Permanent Court of International Justice, that this provision does not preclude intergovernmental organizations possessing international personality from being parties to cases before the Court. And it is true that the provision was only intended to preclude private parties. However, the records show that the question of intergovernmental organizations being parties to cases before the Court was not absent from the minds of the drafters of the Statute, neither of the former Court, nor of the present, but that they refrained from taking any action in this sense [317]). In these circumstances, the term "state" can hardly be read as comprising subjects of international law generally, as this and many other provisions [318]) ought to have read.

Provisions in IGO constitutions which refer disputes to these courts must therefore be interpreted restrictively, as meaning either settlement of disputes between member states (by contentious proceedings), or settlement (of any type of dispute) by advisory opinion, or both [319]).

However, it is not possible to interpret the constitution of the International Labour Organization in this sense. It provides for reference to the International Court of Justice under the contentious procedure even of disputes between a member state and the organization [320]).

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[315]) The Statute of the Permanent Court of International Justice, art. 34, provided that "only States and Members of the League of Nations can be parties in cases before the Court".

[316]) See for example Eagleton in: Recueil des Cours vol. 76 (1950 I), p. 418, and Weissberg, The International Status of the United Nations (London 1961), p. 200, and the writers cited by him in note 136. See also ICJ Reports, 1952, p. 133, and ICJ Pleadings, Reparation for Injuries Suffered in the Service of the UN, p. 99.

[317]) Hudson, The Permanent Court of International Justice 1920–1942 (New York 1943), p. 187, *cf.* p. 186. As for the capacity of the League of Nations to "plead before the Court" [in disputes between states], see League of Nations, Official Journal, No. 8, *Procès-Verbal* of the Tenth Session of the Council, 20–28 October 1920, II, p. 16; *cf.* also, for the advisory procedure, art. 73 of the Rules of Procedure of the Permanent Court of International Justice and art. 66 (2) and (4) of the Statute of the International Court of Justice.

[318]) *Cf.* the example discussed in Nordisk Tidsskrift, 1964, pp. 82–86.

[319]) The latter is probably the correct interpretation of the WHO constitution, art. 75, and possibly even of the constitution of the International Refugee Organization, art. 17 (2) (despite the reference to art. 96 of the UN Charter).

[320]) Art. 29 (2), *cf.* arts. 26 (4) and 31 (these disputes might more appropriately be considered external, but that does not affect the question of principle involved in the

It has been contended that this conflict between the two treaties must be settled according to which treaty is of the higher hierarchical order [321]), or simply that the International Court of Justice may have to deviate from its Statute in order to avoid a conflict, which the drafters of the Statute did not intend to create, with the earlier Treaty of Versailles [322]). However, it is submitted that the constitution of one intergovernmental organization (the ILO) cannot supersede the constitution of another intergovernmental organization (the UN with the International Court of Justice) as the internal law of the latter. To the International Court of Justice, as to any other international body, its own constitution is the supreme law unless the constitution itself provides otherwise [323]). If this constitution contains an unequivocal provision – as indeed the Statute does – the Court cannot set this provision aside by applying a contrary provision of the constitution of another intergovernmental organization of which it is not itself an organ [324]). This leads to the conclusion that the contentious jurisdiction of the International Court of Justice – like that of most other standing international courts – does not extend to disputes between an intergovernmental organization and its member states, whatever the constitution of the organization may say.

Various proposals have been made to extend the jurisdiction of the International Court of Justice to embrace disputes involving parties other than states. These proposals have been made to a great extent with a view to bringing before the Court what in the present article are described as

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present context). Art. 37 (1) also speaks of "decision" and thus clearly refers to the contentious procedure – but it does not necessarily embrace disputes between the organization and a member state, although many writers conceive of it in this way (Georges Fischer, Les rapports entre l'Organisation internationale du travail et la Cour permanente de justice internationale (Paris 1946), pp. 30–40, and Max Sörensen, *op. cit.* above note 311, p. 129).

[321]) Fischer, *op. cit.*, pp. 40–46, who on this basis arrives at the conclusion that art. 37 (1) of the constitution of the ILO, as part of the Peace Treaties concluding World War I, must prevail over the Statute of the Permanent Court of International Justice, but not over the Statute of the International Court of Justice.

[322]) Sörensen, *op. cit.*, p. 129, in respect of both art. 29 (2) and art. 37 (1).

[323]) This supremacy has been confirmed in practice *vis-à-vis* general international law, see above, Chapter IV C – D, where the parallel problem in respect of state constitutions is also discussed (note 215).

[324]) The ILO was more closely associated with the League of Nations (and thus indirectly with the Permanent Court of International Justice) than it is with the UN (and the International Court of Justice). If therefore the ILO and the Permanent Court of International Justice are both regarded as autonomous organs of one and the same organization (the League of Nations), this fact might offer a basis for the contrary solution suggested by Fischer, *loc. cit.* above note 320, in the case of the Permanent Court of International Justice.

internal disputes of intergovernmental organizations[325]). The proposals merit full support insofar as they strive to give effect to the international procedural capacity of intergovernmental organizations and other subjects of international law that are not states[326]). Indeed, this capacity should not be denied to any intergovernmental organization by the constitution of any standing international court, neither for the purpose of external disputes[327]), nor for the purpose of internal disputes – *i.e.* neither for disputes of genuine international law, nor for disputes arising under the internal law of the organization[328]). However, certain of the proposals which have been made tend to extend the jurisdiction of the Court in contentious proceedings even to internal disputes, *stricto sensu,* involving officials[329]) or particular organs of the organization[330]). This would involve an extension of the tasks of the Court to

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[325]) See the different proposals made by the International Law Association Committee on the UN Charter (International Law Association, Report of the Forty-seventh Conference, Dubrovnik 1956, pp. 128–132; the proposal, attributed to the present writer on p. 129, that disputes between organs be decided by advisory opinion, was merely an attempt to improve the original U.S. Branch sub-committee proposal referred to above, note 160, to resort in such cases to contentious judgments of the International Court of Justice; usually disputes between organs can be settled by internal, non-judicial procedures). The Austrian, Yugoslav and United States Branch sub-committees even proposed a modified compulsory jurisdiction for the International Court of Justice in internal disputes between the organization and a member state (Second Report on the Review of the Charter of the United Nations, London 1956, pp. 43, 77 and 112).

[326]) *Cf.* Nordisk Tidsskrift, 1964, pp. 89–93.

[327]) *Ibid.*, pp. 26–27.

[328]) This is indeed the implication of the resolution which the International Law Association adopted at its Dubrovnik Conference, in conclusion of its discussion of the report cited in note 325 (International Law Association, Report of the Forty-seventh Conference, held at Dubrovnik, 1956, pp. 104–05).

[329]) See e.g. Gonsiorowski, Société des Nations et problème de la paix (Paris 1927) vol. 1, p. 288, on an ILO proposal that jurisdiction be conferred upon the Permanent Court of International Justice in disputes between the League of Nations and its officials.

According to the second report of the International Law Association Committee on the UN Charter, two national branch committees similarly proposed that art. 101 of the UN Charter and art. 34 (1) of the Statute of the International Court of Justice be amended to enable officials to sue their organization before the Court (International Law Association, Report of the Forty-seventh Conference held at Dubrovnik 1956, pp. 130 and 132).

Certain proposals to institute a right of appeal to the International Court of Justice against decisions by administrative tribunals appear to envisage the contentious procedure, rather than the procedure of advisory opinions which is resorted to in the existing regulations of the ILO and the UN. Concerning such appeals, see below, note 334.

[330]) See above, note 160, on the original proposal of an American Branch sub-committee of the International Law Association to extend the jurisdiction of the International Court of Justice to disputes between two organs of an international organization concerning their respective spheres of jurisdiction.

a field which is different from that for which it was created[331]). And such an extension, which certainly would require an amendment of the Statute, is not necessary, from a practical point of view, since, as has been pointed out above, in Chapter III, any intergovernmental organization is free to establish internal tribunals for this purpose, or to confer jurisdiction upon the internal tribunals of other organizations. This may be done by simple regulation[332]) (and/or by agreement with the other organization concerned)[333]) without resorting to any constitutional amendment or other treaty revision. There may, of course, be a need for a court of appeal. This too may be satisfied by internal courts. At present, the International Court of Justice is acting as a court of appeal through the artificial procedure of (binding) advisory opinions, a procedure which does not require Charter or Statute revision[334]).

The constitution of the Permanent Court of Arbitration was also clearly drafted with a view to disputes between states only. However, it does not expressly provide that only states may be parties before the Court[335]). On the other hand, it contains a provision, in art. 47, second paragraph, to the effect that its jurisdiction may be extended to disputes between non-contracting *Puissances* or between contracting and non-contracting *Puissances*[336]). By the term *Puissances* the contracting states presumably had only states in mind, not intergovernmental organizations, since these had not by 1899 and 1907 attained a sufficiently prominent position in international law to be taken into account. Nevertheless, the term *Puissance* does not in itself exclude subjects of international law other than states. And it would hardly be reasonable to-day to interpret the term restrictively, merely because intergovernmental organizations had not at the time of the establishment of the Court attained such importance that it was natural for the drafters to take them into account. Accordingly it is submitted that it is possible to constitute an arbitral tribunal under

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331) On the inconveniences of this, see above, pp. 64 *et seq.*

332) Above, Chapter III E (1).

333) Above, Chapter VI.

334) Below, Chapter X B (1) and resolution 957 (X) of the General Assembly of the United Nations.

335) Art. 37 of the Hague Convention for the Pacific Settlement of International Disputes provides: «L'arbitrage international a pour objet le règlement de litiges entre les Etats». However, this article does not appear in the chapter dealing with the Permanent Court of Arbitration, but in the immediately preceding chapter on «la justice arbitrale».

336) «La juridiction de la Cour permanente peut être étendue, dans les conditions prescrites par les règlements, aux litiges existant entre des Puissances non contractantes ou entre des Puissances contractantes et des Puissances non contractantes, si les Parties sont convenues de recourir à cette juridiction».

the Hague Convention on Pacific Settlement of Disputes to adjudicate upon a dispute between an intergovernmental organization and a state, provided that the regulations adopted by the Administrative Council so permit[337]).

(2) Standing courts: Competence ratione materiae

International courts are established to adjudicate upon disputes of international law. And what in this study is referred to as the internal law of intergovernmental organizations, is widely assumed to constitute international law.

However, the latter is only partly true. In principle, the internal law of each organization constitutes a legal system of its own. These legal systems differ from international law in sources, subjects, contents and / or legal effects. Important parts of the internal law of intergovernmental organizations differ from international law in all these respects, and are, on the whole, comparable to municipal law. Other parts differ from international law only in certain respects, and are otherwise comparable to, or even part of, international law.

It is therefore necessary to ascertain whether the competence of standing international courts is really confined *ratione materiae* to disputes of international law. This question has so far arisen only *vis-à-vis* municipal law, and the answer must therefore be based, in the first place, upon an examination of practice in that respect.

Although international courts are established, in principle, to adjudicate upon disputes of international law, they need not decline jurisdiction in disputes arising under another legal system if their constitutions do not

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[337]) Such regulations should be adopted by the Council on the basis of art. 49, *cf.* art. 47, second paragraph, of the Hague Convention on the Pacific Settlement of International Disputes of 18 October 1907. The Council has adopted no such regulations so far. In February, 1962, the Bureau of the Court elaborated a «Règlement d'arbitrage et de conciliation pour les conflits internationaux entre deux parties dont l'une seulement est un Etat», the text of which was published *inter alia* in Nederlands Tijdschrift voor Internationaal Recht vol. 9 (1962), pp. 339–50. However, these rules were based upon the first paragraph of art. 47, which reads: «Le bureau est autorisé à mettre ses locaux et son organisation à la disposition des Puissances contractantes pour le fonctionnement de toute juridiction spéciale d'arbitrage». Already before that time, the Court had in fact placed its premises and its organization at the disposal of commissions appointed to arbitrate in disputes between member states and private commercial companies. See on this François in: Recueil des Cours, vol. 87 (1955 I), pp. 541–6. However, the courts of arbitration envisaged in the first paragraph of art. 47 are not courts of the Permanent Court of Arbitration, but independent *ad hoc* tribunals, whose jurisdiction, as explained below, under (3), is not limited by the provisions contained in the constitution of the Court.

expressly confine their jurisdiction to disputes of international law – at least not if the parties agree to the submission of the particular dispute to the court.

This may be the position of the Permanent Court of Arbitration. The term *différends internationaux* used in art. 41 of its constitution may have in view the parties to the dispute rather than its subject matter, and, at any rate, is not so specific that it must be interpreted as barring two contracting powers from submitting to a court of arbitration under the convention a dispute between them arising out of municipal law or the internal law of an intergovernmental organization.

The Statute of the Permanent Court of International Justice provided on the one hand, in art. 36, first paragraph, that "the jurisdiction of the Court comprises all cases which the parties refer to it". This was interpreted by the Court as meaning that "there is no dispute which states entitled to appear before the Court cannot refer to it" [338]). On the other hand, art. 38, which enumerated the sources of law to be applied by the Court, did not mention such sources of municipal law and of internal law of intergovernmental organizations as do not at the same time constitute sources of international law. Nevertheless, the Court accepted jurisdiction in the cases of the Serbian and Brazilian Loans in France, although it considered the dispute to be one of municipal law [339]). In so doing, the Court relied upon the provision in art. 36, first paragraph, of its Statute, quoted above, and upon the fact that the parties had agreed to submit the dispute to its jurisdiction. As for art. 38, the Court merely stated that

> Article 38 of the Statute cannot be regarded as excluding the possibility of the Court's dealing with disputes which do not require the application of international law, seeing that the Statute itself expressly provides for this possibility.

By the latter the Court was referring to art. 36 (2) (c) of the Statute, which provided that states may accept the compulsory jurisdiction of the Court, *inter alia* in legal disputes concerning "the existence of any fact which, if established, would constitute a breach of an international obligation". Such a fact, the Court pointed out, might be a question of municipal law [340]). And it might not be necessary for the Court to pass upon the

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[338]) Rights of Minorities in Upper Silesia (Minority Schools), PCIJ, Ser. A, No. 15, p. 22.

[339]) PCIJ, Ser. A, Nos. 20/21, pp. 16–20 and 101.

[340]) *Cf.*, however, the Case Concerning Certain German Interests in Polish Upper Silesia (PCIJ, Ser. A, No. 7, p. 19). Here the Court stated that it was "certainly not called upon to interpret the Polish law as such". (Emphasis added).

international law aspect of the dispute, since the parties "may agree that the fact to be established would constitute a breach of an international obligation" [341]).

The International Court of Justice is essentially in the same position as the Permanent Court of International Justice, since its Statute [342]) restates word for word the relevant provisions of the Statute of its predecessor. However, one addition has been made. Art. 38, before enumerating the sources of law which the Court is to apply, now states that the function of the Court is "to decide in accordance with international law such disputes as are submitted to it" [343]). The report of Committee IV/1 of the San Francisco Conference comments upon this addition as follows:

> The First Committee has adopted an addition to be inserted in the introductory phrase of this article referring to the function of the Court to decide disputes submitted to it in accordance with international law. The lacuna in the old Statute with reference to this point did not prevent the Permanent Court of International Justice from regarding itself as an organ of international law; but the addition will accentuate that character of the new Court [344]).

The judgments in the Serbian and Brazilian Loans Cases have not met with unanimous approval. And the view has been advanced that, whatever view one takes of the soundness of these judgments, the new Court could not make a similar decision after the addition of the words "in accordance with international law" in art. 38 of the Statute [344a]).

However this may be, neither the Permanent Court of International Justice, nor the International Court of Justice could assume compulsory jurisdiction under Article 36 (2) of the Statute in a dispute of municipal law between States. The compulsory jurisdiction is based, not upon the unlimited provision in Article 36 (1), but upon the specific provision in Article 36 (2). This provision enumerates four specific cases in which states may accept the compulsory jurisdiction of the Court, and all of these fall within the province of (public) international law [345]).

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[341]) PCIJ, Ser. A, Nos. 20/21, pp. 19–20. The example does not appear altogether conclusive.

[342]) Arts. 36 (1); 38 (1); and 36 (2), respectively.

[343]) Emphasis added.

[344]) United Nations Conference on International Organization, San Francisco 1945, vol. 13, p. 392.

[344a]) ICJ Pleadings, Case of Certain Norwegian Loans vol. 1, pp. 122–3, and vol. 2, p. 111.

[345]) The seemingly contradictory statement, referred to above, of the Permanent Court of International Justice in the Serbian Loans case, in respect of Article 36 (2) (c), refers

The question of the compulsory jurisdiction of the Court in a dispute of municipal law arose in the Case of Certain Norwegian Loans. The Norwegian Government maintained that the dispute, which was rather similar in nature to the Serbian and Brazilian Loans cases, was one of municipal law, and that the Court was therefore incompetent. This applied whatever view one took of the soundness of the judgments in the Serbian and Brazilian Loans Cases, because in the Norwegian Loans Case the dispute had been brought before the Court, not by agreement between the parties under Article 36 (1), but by unilateral application of France under Article 36 (2) [346]). The majority of the Court did not pass upon the question of whether or not it was competent under its Statute in disputes of municipal law, since they held that the Court was in any case barred from assuming jurisdiction in the case before it because of a reservation in the same sense which had been attached to the French acceptance of the optional clause and which Norway was entitled to invoke as a matter of reciprocity [347]), although it had done so merely as a subsidiary basis for its objection [348]). However, two of the judges who voted with the majority against the competence of the Court, stated that they did so because they considered that the dispute came within the domain of municipal law [349/50]).

If the competence of an international court is not confined to disputes of international law, so that in certain circumstances it is able to accept jurisdiction in disputes of municipal law, it must clearly also be able to accept jurisdiction in disputes arising out of the internal law of an intergovernmental organization, provided that the other conditions for the exercise of jurisdiction are satisfied. Thus, if the interpretations indicated above in respect of municipal law disputes are accepted, the Permanent Court of Arbitration will not be incompetent *ratione materiae* in respect of disputes arising out of the internal law of an intergovernmental organization. The same may be said of the Permanent Court of International Justice and, possibly, of the International Court of Justice, if the parties agree to submit the dispute to the Court.

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to the situation where "two States have agreed to have recourse to the Court" or where "the States concerned may agree that the fact to be established would constitute a breach of an international obligation".

[346]) International Court of Justice, Pleadings, Case of Certain Norwegian Loans vol. 1, pp. 121–7 and 462–6, and vol. 2, pp. 110–6.

[347]) ICJ Reports, 1957, pp. 22–27.

[348]) ICJ Pleadings, Case of Certain Norwegian Loans vol. 1, pp. 129–31. *Cf.* Carsten Smith, The Relation between Proceedings and Premises, Nordisk Tidsskrift for international Ret og Jus Gentium vol. 32 (1962), pp. 60 and 78.

[349/350]) Judges Moreno Quintana and Badawi, ICJ Reports, *loc. cit.*, pp. 28 and 29–33.

On the other hand, if the constitution of the court restricts its jurisdiction so that it is barred from adjudicating upon disputes of municipal law, the question arises whether it is similarly barred from adjudicating upon disputes arising under the internal law of an intergovernmental organization. This question arises particularly in respect of the compulsory jurisdiction of the International Court of Justice.

It was probably not the intention of those who drafted the constitutions of most standing international courts to exclude such disputes, since the internal law of intergovernmental organizations was (and still is to a great extent) considered as part of international law. Moreover, in most non-organic cases there are no other courts which would be competent to adjudicate upon disputes arising out of the internal law of intergovernmental organizations and with whose jurisdiction the international court could interfere by assuming jurisdiction. Finally, as for the International Court of Justice, it should be noted that this Court is itself an organ of an intergovernmental organization. For these and other reasons, there is no complete analogy to municipal law in this respect, and it would not seem necessary to preclude internal disputes of intergovernmental organizations from the competence of an international court merely because it has no competence in respect of disputes of municipal law, even if this fact may be an important factor in the interpretation of the constitution of the international court concerned.

At any rate, there can be no doubt that the competence of international courts comprises disputes arising out of law which – although it constitutes part of the internal law of an intergovernmental organization – at the same time forms part of international law. Thus international courts must assume even compulsory jurisdiction in disputes arising out of the constitution and of related customary law or principles of law. This applies also to the International Court of Justice in respect of the four categories of disputes enumerated in the optional clause (art. 36 [2]) – since these are all covered by the sources enumerated in art. 38 of its Statute. The competence of this Court to interpret the UN Charter has been contested on several occasions even in connection with advisory opinions, but without success [351]).

International courts may probably also assume jurisdiction in other internal disputes between states (or between states and the organization if their constitutions permit) – *i. e.* in disputes which arise out of binding regulations enacted by the organization in pursuance of its inherent organic

[351]) Above, note 35. It should be noted, however, that in this context the Statute speaks of "any legal question" (art. 65).

or membership jurisdiction [352]) or its extended jurisdiction over member and non-member states or out of internal customary law if these create rights and obligations as between member states *inter se* or between these and the organization. These parts of the internal law of the organization differ from international law with regard to sources, hierarchical order and in certain other respects. But they also differ, in certain respects relating to their effects, from the internal law *stricto sensu* – *i.e.* from the law which governs relations with and between subjects of internal law which are not concurrently subjects of international law (organs, officials, individuals subject to the extended jurisdiction [353]) of the organization). In particular, it should be noted that states act a s s u c h even under the internal law of an intergovernmental organization, while under municipal law they act like any private party. It is true that the enumeration of sources in art. 38 (1) of the Statute of the International Court of Justice does not include all sources of the internal law of intergovernmental organizations, and particularly not regulations enacted by the organization. But the International Court of Justice, in its judgments in the Serbian and Brazilian Loans cases, did not attach decisive importance to this article, which does not include all sources of municipal law either.

Internal law *stricto sensu* (as defined above) is in nearly all respects comparable to municipal, rather than to international law. Disputes arising under such internal law could not be brought before the International Court of Justice, or any regular international court, because of its incompetence *ratione personae* in disputes involving parties which are not subjects of international law. Questions of internal law *stricto sensu* could only arise as *questions préjudicielles* (preliminary questions). It has already been submitted that an international court must deal with *questions préjudicielles* even if they belong to another legal system, whether this be municipal or internal law [354]).

As far as the International Court of Justice is concerned, it is submitted, in conclusion, that it may assume voluntary as well as compulsory jurisdiction (under art. 36 of its Statute) in disputes between states a s s u c h, not only when they act as independent subjects of international law, but also when they act as members of an intergovernmental organization, even

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[352]) See BYIL, 1961, p. 459.

[353]) In the present context it is convenient to include in the term internal l a w *stricto sensu* even the law governing relations of and with individuals under the extended jurisdiction of the organization, although d i s p u t e s arising out of that law are more conveniently considered internal *largo sensu*, *cf.* above, Introduction and Chapter V.

[354]) Above, Chapter VIII E.

if the Court would have been barred under its own constitution or practice from assuming jurisdiction in disputes of municipal law between the same states. This applies, however, only if there is no other (internal) court or other body having exclusive jurisdiction [355]), and of course only if the other conditions for the jurisdiction of the Court are satisfied.

(3) Ad hoc tribunals

Ad hoc tribunals are established by the parties for the purpose of settling a particular dispute which has arisen between them. Such courts accordingly can and must adjudicate upon the dispute submitted to them, whatever its nature and whoever the parties. The arbitrators cannot decline jurisdiction because one or both parties are not states, or because the subject matter of the dispute is not one of international law – merely on the basis that the arbitrators consider themselves as constituting an "international" tribunal.

The question of what types of disputes are comprised in a treaty of compulsory arbitration depends upon an interpretation of the particular treaty concerned. It may well be that this is confined to disputes arising between states under international law [356]). However, international law must then usually be understood in the same wide sense as indicated above, under (2).

D. Limitations Deriving from the Law of the Organizations

(1) Power of the parties to refer internal disputes to an international court

States are entitled to refer disputes between them to a standing or *ad hoc* international tribunal, if they agree upon such reference or are bound to accept it under the terms of an earlier, general or special, bilateral or multilateral, treaty [357]). This right extends to any type of dispute which the tribunal is competent to adjudicate upon. It has been exercised in respect of disputes of municipal law [358]) and of interpretation of the consti-

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[355]) Below, under D (1), note 360.

[356]) The compulsory judicial settlement procedure laid down in the Revised General Act of 28 April 1949 (UNTS vol. 71, p. 101) does not appear to be strictly confined to disputes of international law, despite the fact that reference is made to art. 38 of the Statute of the International Court of Justice (see arts. 17–18, *cf.* arts. 21 and 28 of the General Act).

[357]) E.g. the Revised General Act of 28 April 1949 (UNTS vol. 71, p. 101) or constitutional provisions such as art. 37 of the ILO constitution.

[358]) The cases of the Serbian and Brazilian Loans in France, PCIJ, Ser. A, Nos. 20/21.

tution of an intergovernmental organization[359]). It is submitted that it applies also to disputes concerning other parts of the internal law of an intergovernmental organization, unless its constitution provides otherwise, e. g. by providing for other exclusive modes of settlement[360]). It has already been pointed out that states do not, by the mere fact of joining an intergovernmental organization as members, submit to the compulsory jurisdiction of its internal courts in regard to disputes arising out of its internal law[361]). Conversely, it must be assumed that they retain their freedom to submit even disputes of this type to international courts of their own choosing, unless exclusive competence has been specially conferred upon the organization or upon any other body.

The same must apply to disputes between a member state and the organization as such.

It has been pointed out above, under C (1), that parties who are not subjects of international law are not usually entitled to be parties before an international court. Moreover, officials and particular organs acting in that capacity are under the compulsory jurisdiction of the organization in respect of organic disputes[362]). It has been demonstrated – on the basis

[359]) The Permanent Court of International Justice in 1929 rendered a judgment on the Territorial Jurisdiction of the International Commission of the River Oder (PCIJ, Ser. A, No. 23). The Commission had been unable to reach agreement upon the interpretation of certain provisions of the Treaty of Versailles which defined the term of reference of the Commission and which thus formed its constitution, besides forming part of a general international convention. The seven members then agreed, by a special agreement, to submit the dispute to the Permanent Court of International Justice as a dispute between Poland on the one hand and the six other members on the other.

[360]) Very explicit examples of constitutional provisions to this effect are the constitutions of the abortive International Trade Organization, art. 92; CEE, art. 219; EURATOM, art. 193, and CECA, art. 87. The latter provides: «Les Hautes Parties Contractantes s'engagent à ne pas se prévaloir des traités, conventions ou déclarations existant entre Elles en vue de soumettre un différend relatif à l'interprétation ou à l'application du présent Traité à un mode de règlement autre que ceux prévus par celui-ci». In accordance with art. 89, such disputes shall be decided by the Court of Justice of the Community. Wengler, in his report on Recours judiciaire à instituer contre les décisions d'organes internationaux, points out two particular limitations upon the right of international courts to declare invalid decisions made by an intergovernmental organization (Annuaire de l'Institut de droit international vol. 44 [1952 I], pp. 267–270). One of these derives from the constitutions of the particular organizations concerned, and the other from a general principle of law (estoppel).

In its judgment on Rights of Minorities in Upper Silesia (Minority Schools) the Permanent Court of International Justice stated that the principle laid down in art. 36 (1) of the Statute (that "the jurisdiction of the Court comprises all cases which the Parties refer to it") "only becomes inoperative in those exceptional cases in which the dispute which States might desire to refer to the Court would fall within the exclusive jurisdiction reserved to some other authority" (PCIJ, Ser. A, No. 15, p. 23).

[361]) Above, Chapter III C.

[362]) Above, Chapter III A and D.

of practice – that this organic jurisdiction is exclusive *vis-à-vis* national courts [363]).

It is submitted that it is also exclusive *vis-à-vis* other external courts, in the sense that the organization has the right to oppose the submission of such disputes to any external court, even if the parties agree to such submission and even if the organization has not itself established courts to adjudicate upon such disputes [364]). The same is true of other disputes, if exclusive competence has been specially conferred upon the organization or any other body. However, this does not apply to disputes which involve other (external) parties, too, *i. e.* parties which are not bound by the act conferring exclusive competence upon the organization.

Irrespective of whether the dispute involves states or other parties, an intergovernmental organization is not legally bound by a judgment rendered by an international (or any other external) court if the organization has not itself been a party to the dispute [365]). An organ of an intergovernmental organization, appearing as a party before an international court, must, however, usually be presumed to represent the organization as a whole.

(2) Power of the organization to confer compulsory jurisdiction upon an international court

It has already been pointed out that an intergovernmental organization does not have compulsory jurisdiction over member states for the settlement of internal disputes, unless this follows from particular provisions of the constitution [366]). It is even clearer that the organization does not have the power to confer compulsory jurisdiction upon an international (or any other external) court insofar as member states are concerned, if the constitution does not so provide. But the organization may of course – by simple regulation, without constitutional provision – confer jurisdiction upon an international court in disputes between itself and a member state which sues it or which consents to being sued, if the constitution of that court permits the hearing of disputes involving intergovernmental organizations [367]).

[363]) Above, Chapter VII A.

[364]) In *Profili* v. *International Institute of Agriculture* the Italian Court of Cassation expressly stated that the absence of a competent tribunal of the organization was not a condition for the incompetence of the Italian courts. The same was held, by implication, in *Chemidlin* c. *Bureau International des Poids et Mesures.*

[365]) This was expressly provided in the abortive Charter of the International Trade Organization, art. 93,2.

[366]) Above, p. 48.

[367]) Above, under C (1).

In regard to organic disputes involving parties which are under the compulsory judicial power of the organization, such as officials and particular organs, the organization must have the right to delegate its judicial powers to external tribunals [368]). However, a standing international court would normally not be an appropriate forum for such disputes, and would in most cases also be incompetent under its own constitution. It is therefore more expedient to delegate such powers to the internal courts of another intergovernmental organization, as indeed many organizations have done [369]), or to establish an *ad hoc* court, which would then usually be considered as an internal court of the organization itself, rather than as an international court. However, delegation has taken place to the International Court of Justice as a court of appeal in respect of the judgments of the administrative tribunals of the International Labour Organization and the United Nations, and in certain other cases, although this has to be done in the form of advisory opinions, because the organizations and their officials cannot appear as parties before the Court [370]).

In respect of disputes which involve external parties, too, or which arise out of matters not under the organic jurisdiction of the organization, the latter does not have the power to confer compulsory jurisdiction upon external tribunals, unless such power follows from a special act, e. g. an act conferring extended jurisdiction upon the organization.

E. Conclusions

In principle, s t a n d i n g international courts are, under their constitution, competent only in regard to disputes between subjects of international law. In many cases, notably the International Court of Justice, their competence is even confined to disputes between states. On the other hand, if a dispute arises between these parties, the court is usually not incompetent merely because the dispute arises out of the internal law of the organization rather than out of general international law.

Ad hoc tribunals can and must adjudicate upon the dispute which gave rise to their establishment, whatever its nature and whoever the parties.

Internal disputes between states or between the organization and a state may be submitted to a standing or *ad hoc* international court by

[368]) Due to the inherent incompetence in such disputes of standing international courts under their own constitutions, no cases can be cited to support this submission. However, an indirect support may be found in the examples of binding advisory opinions quoted below, Chapter X B, under (1) and (2).

[369]) Above, Chapter VI.

[370]) See below, Chapter X B, and art. 11 of the Statute of the UN Administrative Tribunal, as amended by GA resolution 957 (X), *cf.* also OR GA. X, Annexes A. i. 49.

agreement between the parties, or by unilateral application if this follows from a treaty on compulsory jurisdiction. The approval of the organization is not necessary, but it is a condition that its constitution does not provide for other exclusive modes of settlement.

Internal disputes arising out of matters falling under the organization's organic jurisdiction and involving only parties subject to that jurisdiction may be submitted to *ad hoc* (or other) courts by the organization, or by the parties if the organization does not object. Other disputes may be submitted to *ad hoc* (or other) courts by the parties without the consent of the organization, unless an exclusive power of settlement has been conferred upon the organization or upon any other body. But such *ad hoc* courts may well be more appropriately considered as internal courts of the organization than as international courts.

Chapter X: BINDING "ADVISORY" OPINIONS OF THE INTERNATIONAL COURT OF JUSTICE

In order to be able to have recourse to the International Court of Justice for the purpose of settling internal disputes of intergovernmental organizations and external disputes to which intergovernmental organizations are parties, despite the limitation of the competence of that Court in contentious proceedings to disputes between states, a new method has been devised to circumvent the antiquated provision in art. 34 (1) of the Statute of the Court. Under this method, the organization requests an advisory opinion from the Court, and the organization, or both parties to the dispute, declare in advance that it, or they, shall be bound by the opinion.

A. Truly Advisory Opinions

The advisory opinions of the International Court of Justice have been discussed in another context[371]). As was pointed out, the International Court of Justice (like the Permanent Court of International Justice) has the power to give such opinions, but only upon the request of an intergovernmental organization, indeed, the power to request such opinions is confined to the United Nations and the specialized agencies by art. 96 of the UN Charter. Nevertheless, the opinion may relate to a dispute involving other parties. Thus the International Court of Justice and the Permanent Court of International Justice have rendered advisory opin-

[371]) Above, Chapter II B.

ions relating to internal and external disputes involving the organization as a whole, as well as member (and non-member) states[372]) and particular organs[373]) and officials[374]) of the organization. This it has done even if one of the parties did not agree to the submission of the question to the Court[375]). Indeed, it is submitted that in internal disputes of an intergovernmental organization the organization must have the right to

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[372]) The advisory opinion on the International Status of South-West Africa (ICJ Reports, 1950, p. 128) related to a dispute between the United Nations and the Union of South Africa concerning the interpretation of, *inter alia*, arts. 75 *seq.* of the UN Charter. The advisory opinion of the Permanent Court of International Justice of 12 August 1922 on the Competence of the International Labour Organization in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture (PCIJ, Ser. B, No. 2) concerned a case where the French Government challenged the constitutionality of a decision made by the Organization. The advisory opinion of the Permanent Court of International Justice of 23 July 1926 on the Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer (PCIJ, Ser. B, No. 13) concerned a challenge by a minority of the representatives on a deliberative organ of the Organization of the constitutionality of a majority decision. The (first) advisory opinion of the International Court of Justice on the Conditions of Membership in the United Nations of 12 December 1947 (ICJ Reports, 1947–48, p. 9) concerned a dispute between the members of a deliberative organ of the UN. The advisory opinion of the International Court of Justice of 20 July 1962 on Certain Expenses of the United Nations (ICJ Reports, 1962, p. 149) concerned a dispute between the UN and some of its member states. The advisory opinion of the Permanent Court of International Justice of 31 July 1922 on the Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference (PCIJ, Ser. B, No. 1) even concerned a dispute w i t h i n a member state, relating to its participation in the organization and the composition of the latter's organs.

[373]) The (second) advisory opinion on Competence of the General Assembly for the Admission of a State to the United Nations of 3 March 1950 (ICJ Reports, 1950, p. 4) concerned the delimitation of the powers of the General Assembly and the Security Council *vis-à-vis* one another (under art. 4 [2] of the UN Charter). And so did, in two respects, the advisory opinion on Certain Expenses of the United Nations of 20 July 1962 (ICJ Reports, 1962, at pp. 162 *seq.* and 170 *seq.*). See also note 374.

[374]) The advisory opinion on Effect of Awards for Compensation Made by the UN Administrative Tribunal (ICJ Reports, 1954, p. 47) was in the first place concerned with the delimitation of the competence of two particular organs of the UN (the General Assembly and the Administrative Tribunal) *vis-à-vis* one another. At the same time it was the final legal act in the settlement of a dispute between the United Nations and one of its member states on the one hand and certain UN officials, nationals of that member state, on the other. The advisory opinion on Judgments of the Administrative Tribunal of the International Labour Organization upon Complaints Made against the UNESCO (ICJ Reports, 1956, p. 77) involved the final decision of a dispute between UNESCO and four of its officials concerning the relationship of employment. See also above, note 64.

[375]) Thus the Soviet Union opposed the submission to the Court of the two membership cases (OR GA II, Plenary Meetings, pp. 1047–53, and OR GA IV, Plenary Meetings, pp. 325–6, *cf.* ICJ Pleadings, Conditions of Admission of a State to Membership in the United Nations, 1948, p. 28, and ICJ Pleadings, Competence of the General Assembly for the Admission of a State to the United Nations, 1950, pp. 100–1).

obtain the advice of the Court even if the parties object, even if this is not always true in respect of disputes of purely international law [376]).

However, regular advisory opinions are not legally binding. The final decision in matters falling within the jurisdiction of intergovernmental organizations, is made by administrative decision of the organization itself [377]). Recourse to truly advisory opinions therefore does not constitute genuine judicial settlement of the dispute which has given rise to the request for advisory opinion.

In certain external disputes between intergovernmental organizations and states it has been provided that the advisory opinion shall form a basis of a binding decision of an *ad hoc* arbitral tribunal [378]). Such procedure is not known to have been prescribed for internal disputes, properly speaking.

B. Binding "Advisory" Opinions. Examples

In certain cases it has been provided that the advisory opinion shall be directly binding upon the organization, or upon both parties. The following examples may be cited:

(1) The Statute of the ILO Administrative Tribunal, adopted by the General Conference, provides in art. XII:

> 1. In 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 [379]).

[376]) In its advisory opinion on the Status of Eastern Carelia, the Permanent Court of International Justice declined to give an advisory opinion on the question put to it by the League of Nations because it found that the question was directly related to the main point of a dispute actually pending between two states, one of which objected to the request for an advisory opinion (PCIJ, Ser. B, No. 5, pp. 27–29). On the other hand, the Permanent Court of International Justice and the International Court of Justice have consented to give advisory opinions, despite the objection of the states concerned, when the questions put to the Court relate to the procedure for the settlement of a dispute and not to its merits, and when the organization requesting the opinion needed the advice of the Court for its own guidance (Turkish-Iraqui Frontier [Mosul], PCIJ, Ser. B, No. 12, pp. 8–9 and 17–18; Interpretation of the Greco-Turkish Agreement of 1 December 1926, *ibid.*, No. 16; Interpretation of Peace Treaties, ICJ Reports, 1950, pp. 71–72). In these cases it was not considered necessary to apply the procedure prescribed for contentious cases.

[377]) Above, Chapter II C.

[378]) See e.g. the headquarters agreement between the United Nations and the United States, § 21, and the ILO constitution, art. 37,2.

[379]) In the Annex to the Statute a similar provision is made for other organizations which recognize the jurisdiction of the Tribunal.

2. The opinion given by the Court shall be binding.

(2) The FAO Conference adopted at its first session the following recommendation by its General Committee on the Terms of Appointment of the Director-General:

...

3. If any question of interpretation or dispute arises on the terms of his contract an advisory opinion of the International Court of Justice shall be obtained by the usual procedure and adopted, or, alternatively, the matter shall be submitted for determination to such arbitral tribunal as the Conference shall appoint [380]).

(3) Art. 96 of the Charter of the International Trade Organization, which never came into being, provided:

1. The Organization may, in accordance with arrangements made pursuant to paragraph 2 of Article 96 of the Charter of the United Nations, request from the International Court of Justice advisory opinions on legal questions arising within the scope of the activities of the Organization.

2. Any decision of the Conference under this Charter shall, at the instance of any Member whose interests are prejudiced by the decision, be subject to review by the International Court of Justice by means of a request, in appropriate form, for an advisory opinion pursuant to the Statute of the Court.

...

5. The Organization shall consider itself bound by the opinion of the Court on any question referred by it to the Court. In so far as it does not accord with the opinion of the Court, the decision in question shall be modified.

According to a resolution adopted at the Havanna Conference (1947–48) the drafters of the ITO Charter wanted such opinions "to have the nature of a judgment with respect to the organization" [381]).

(4) Reference may also be made to the provisions for settlement of disputes in the general conventions on the privileges and immunities of the United Nations and the specialized agencies (§§ 30 and 32, respectively) and in certain other agreements on privileges and immunities [382]). However, these concern disputes of an external nature.

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[380]) FAO, Report of the First Session of the Conference, 1945, p. 67. Emphasis supplied. See also the abortive resolution *ibid.*, p. 55.

[381]) United Nations Conference on Trade and Employment, Final Act and related documents, UN Sales No. 1948. II. D. 4, p. 73.

[382]) E. g. the agreement of 26 May 1954 between the United Nations and Thailand relating to the headquarters of the Economic Commission for Asia and the Far East (ECAFE) in Thailand (UNTS vol. 260, p. 35 and ICJ Yearbook, 1956–57, p. 241) and the Agreement on the Privileges and Immunities of the International Atomic Energy Agency, § 34 (UNTS, vol. 374, p. 166). A clearly external example, not specially concerned

(5) Binding advisory opinions have also been requested of other legal bodies. Thus the Council of the League of Nations, by a resolution adopted on 8 June 1925, prior to the establishment of its Administrative Tribunal, referred to a *collège* of three legal members a dispute between the League and a former official who claimed compensation for unjustified dismissal. The Council declared in advance that it would accept the conclusions of the *collège* as its own decision in the matter. After an oral procedure "without judicial formalities" – in the course of which the parties, their Swiss lawyers and one witness were heard – the *collège* submitted its report to the Council with the conclusion that the ex-official was to be paid a compensation in the amount of £ 750 [383]).

It will be noted that in some of these cases [384]) the advisory opinion is to be binding upon both parties to the dispute. It is then in fact a judicial decision and requires, in principle, that the procedure prescribed for such decisions be followed. In particular, both parties must be given an opportunity of presenting their views to the Court or the other legal body concerned.

In other cases [385]) only the organization has undertaken to be bound by the opinion. The organization will then make an administrative decision in accordance with the opinion. This will be binding upon the other party only as an administrative decision, by virtue of the organic or extended jurisdiction of the organization, as the case may be. In other words, from a formal point of view it is no more binding upon the other party than it would have been if no opinion had been obtained. However, in fact it will be much more difficult for the other party to challenge the validity of the decision of the organization. In these cases too, it will therefore be reasonable to follow as far as possible the procedure required for judicial proceedings. But it is doubtful whether the parties may claim this as a matter of right.

C. Competence of the Court under Its Statute to Render Binding "Advisory" Opinions

Although the Statute of the Court does not authorize binding advisory opinions, it does not preclude them either. Indeed, the Court has, although not unanimously, accepted jurisdiction in the one case of this type which

with privileges and immunities, is art. XVI of the Agreement for the Establishment in Cairo of a Middle Eastern Regional Radioisotope Centre for the Arab Countries of 18 October 1962.

[383]) Journal Officiel, 1925, pp. 858 and 1441–7 (Monod case).

[384]) Nos. (1) and (4).

[385]) Nos. (2), (3) and (5).

so far has been submitted to it. This is the advisory opinion on Judgments of the Administrative Tribunal of the International Labour Organization upon Complaints Made against the UNESCO, rendered on 23 October 1956[386]).

Four Judges considered that the Court could not render a binding advisory opinion in the circumstances because both parties to the dispute could not appear before the Court and did not enjoy an equal status before it. However, no doubt was voiced as to the competence of the Court *ratione materiae*. Indeed, art. 96 authorizes the organizations to request advisory opinions "on any legal question", adding, in the case of the specialized agencies, the qualification "arising within the scope of their activities". This clearly includes any aspect of the internal law of the organization, whether or not it at the same time forms part of international law, and whether or not there is a dispute between states. It is submitted that, in principle, this does not apply if the "advisory" opinion is to be binding, since the Court then is faced in substance with the task of rendering a judgment in a contentious case. In such a case the competence must be determined by analogy with the rules applicable to contentious proceedings. However, none of the judges questioned the competence of the Court on this basis. Indeed, even if it had been a genuine contentious case, the Court might not have had to consider itself incompetent *ratione materiae* when the dispute had been submitted to it by the organization itself, *cf.* above, pp. 105–110.

The parties to the dispute – other than the organization – have no right to request advisory opinions, since this right, under art. 96 of the UN Charter, may be conferred only upon the organization, or, more particularly, only upon the United Nations and the specialized agencies.

D. Power of the Organization under Its Own Law to Request Binding "Advisory" Opinions

In those cases listed under B which concern internal disputes *stricto sensu*[387]), *i. e.* cases arising out of matters falling under the organic jurisdiction of the organization, the decision to seek a binding advisory opinion was made by unilateral regulation and/or decision of the organization, without requiring specific consent[388]), or consent at all, of the other party

[386]) ICJ Reports, 1956, p. 77.

[387]) Nos. (1), (2) and (5).

[388]) In the case of ILO the officials may be said to have accepted this unilateral power of the organization by accepting the terms of appointment. In the case of FAO, the Director-General accepted the reciprocal right as a direct part of his terms of appointment.

to the dispute. In none of these cases did the constitution of the organization authorize the organization to request such binding opinions. The constitutions did not even authorize the organization to request a truly advisory opinion on the type of disputes concerned[389]).

It has already been demonstrated that the organization has exclusive jurisdiction in such matters, and that this comprises not only legislative and administrative powers, but also the judicial power. Thus the organization may not only refer such disputes for binding decision to internal courts of the organization[390]), but it may also delegate its compulsory jurisdiction to external tribunals[391]). Whether it does so by asking for regular judgments in contentious proceedings or for binding advisory opinions is immaterial, if the procedure adopted by the court in both cases is a judicial one, affording the regular judicial guarantees to both parties to the dispute. This was precisely the point of discussion in the advisory opinion on Judgments of the Administrative Tribunal of the International Labour Organization upon Complaints Made against the UNESCO. The majority held that the procedure which the Court was able to adopt did afford the required judicial guarantees to both parties. And this must then suffice also from the point of view of the constitutional powers of the organization.

The organizations listed under B (1), (2) and (5) therefore had the right to adopt unilateral regulations referring the disputes in question to the International Court of Justice for decision by binding advisory opinion, without providing for the consent, generally or in each case, of the other party to the dispute. Indeed, it is submitted that in all those cases where the organization has organic or extended jurisdiction which includes compulsory judicial power, it may ask the International Court of Justice to render a binding advisory opinion, if this is able to do so under a procedure which offers the necessary judicial safeguards, and if the constitution of the organization or the treaty conferring extended jurisdiction upon it does not provide otherwise.

However, in disputes which do not fall under the jurisdiction of the organization, it can ask for a binding advisory opinion only if the other party to the dispute agrees or if the opinion becomes binding only upon the organization itself.

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[389]) The relevant provision of the FAO constitution (art. XVII) was more restrictively worded at that time than it is in its present form.

[390]) Above, Chapter III A (1)–(2).

[391]) Above, Chapters VI and IX D (2).

Chapter XI: CONCLUSIONS[392])

The need for judicial settlement of internal disputes of intergovernmental organizations has so far arisen primarily in three respects. First, in disputes between the organization and its officials arising out of the relationship of employment. Indeed a few hundred judgments have already been rendered in such disputes by administrative tribunals and equivalent judicial bodies set up for this purpose by a number of organizations. In the second place the practical need has arisen within the supra-national European Communities in connection with the direct legislative and administrative powers conferred upon these organizations *vis-à-vis* private undertakings in the member states. The Court of Justice of the European Communities has already rendered a number of judgments in cases relating to these activities, in addition to those relating to officials. In the third place the practical need has arisen within the United Nations and the International Labour Organization in connection with various types of internal disputes, most of which have arisen between the organization and certain of its member states, or between member states *inter se*. These disputes, most of which do not relate to genuine legislative or administrative powers conferred upon the organization, have, however, not been solved by genuine judicial decisions, but by advisory opinions of the Permanent Court of International Justice or the International Court of Justice. Although not legally binding, these opinions have been complied with by the organization, but in several cases not by the other parties to the dispute[393]).

On the basis of the concrete examination in the preceding chapters of the judicial powers of the organization, it is submitted that intergovernmental organizations have an inherent power to establish courts of their own to adjudicate upon internal disputes and even upon external disputes involving the organization or its officials or organs. The organization can confer upon such courts compulsory jurisdiction *vis-à-vis* itself and its organs, as well as *vis-à-vis* its officials in those respects where these act in that capacity (or in a personal capacity if they, because of their status with the organization, enjoy immunity even in respect of private acts). However, the organization cannot confer upon its courts compulsory jurisdiction over member states or external parties unless it has been given this power by the states concerned.

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[392]) See also above, Chapter III A (6) and E. The problems dealt with in Chapters I-II, III f, IV and VIII have not been included in these conclusions.

[393]) See, for example, the advisory opinions on the International Status of South-West Africa (ICJ Reports, 1950, p. 128) and Certain Expenses of the United Nations (ICJ Reports, 1962, p. 149).

Otherwise the courts can assume jurisdiction over such external parties only if they themselves bring an action before the court or accept an action brought against them. However, even this jurisdiction is in fact exclusive in so far as the organization and its officials enjoy immunity from suit in national courts.

Intergovernmental organizations which have no territorial jurisdiction do not have the means of genuine enforcement of the judgments rendered by their courts, except that in most cases which have so far arisen in practice, such enforcement was not necessary because the judgment called for action only by the organization itself or because the judgments were enforceable by the authorities of the member states pursuant to express constitutional provisions to that effect. In the absence of such provisions, states have no obligation under international law to enforce judgments rendered by the courts of the organization, any more than they have such obligation in respect of judgments rendered by the courts of foreign states. However, it is submitted that judgments rendered by courts of intergovernmental organizations in internal disputes, and probably also judgments rendered in external disputes involving the organization or its officials as such (or relating to acts in respect of which they enjoy immunity) must be considered by national courts as courts of competent jurisdiction. Accordingly, in the absence of special provisions on the international or municipal plane, national courts must give the same effect to judgments of courts of intergovernmental organizations as they give to judgments rendered by courts of foreign states in respect of which no special provisions have been made by treaty or statute. This means that the courts of many states will recognize judgments rendered by courts of intergovernmental organizations as binding, even if they do not consider them enforceable without a new judgment of a court in the state where enforcement is sought, or that they will refrain from enquiring into the merits of a case decided by the court of an intergovernmental organization.

Intergovernmental organizations, like states, have exclusive jurisdiction over their organs and officials as such, both with regard to legislative and administrative, as well as judicial powers. This means that no external court can, without the consent of the organization, assume jurisdiction in disputes between the organs, the officials and the organization acting as such.

In disputes falling outside this organic jurisdiction, because they involve other parties (or the organization and its officials acting as subjects of municipal law), external courts are not prevented under international law from assuming jurisdiction even in respect of internal matters of the organi-

zation, if they are competent under their own law and this law is not excessively liberal. This applies to national courts, to courts of other intergovernmental organizations and to international courts. Thus, if no contrary provision has been made, national courts can assume jurisdiction in disputes arising out of the extended jurisdiction conferred upon certain organizations, such as disputes relating to navigation on rivers under the partial territorial jurisdiction of international river commissions, or relating to private enterprises under the partial jurisdiction of one of the European Communities, even if the dispute arises out of law enacted by the organization (its internal law *largo sensu).*

A distinction must be made between international courts and internal courts of the organization. These are in several respects governed by different rules.

For the settlement of disputes between the organization and its officials internal courts of the organization or of other organizations offer the best means. Only in respect of appeals from the decisions of these courts would it seem necessary to resort to international courts, if the organization, alone or together with other organizations, does not wish to establish its own appeals court or procedures. Appeals to international courts must, however, be made in the form of requests for binding or non-binding advisory opinions, as long as contentious proceedings before such courts are open only to states, and even after they may have been opened also to intergovernmental organizations. Indeed, regular international courts are not very appropriate for the settlement of disputes involving officials. And a general reference by the organization of such disputes to national courts would also be inappropriate.

Disputes between organs of an organization can usually be settled by administrative decision of the plenary organ of the organization or of another superior organ. Only in cases where, as in the United Nations and the International Atomic Energy Agency, there is no organ having supreme powers in all respects, may the need arise for a decision by an external body. In such cases the proper procedure will be an advisory opinion by the International Court of Justice. Two organs of the same organization, *i. e.* of the same subject of international law, cannot be opposing parties to contentious proceedings before a regular international court. If a legally binding decision is required, it must be obtained by means of a binding advisory opinion. However, for practical purposes, a regular advisory opinion will usually suffice.

Disputes between the organization and its member states, or between

member states *inter se*, can be settled either by courts established by the organization or by international courts. However, as long as the Statute of the International Court of Justice precludes intergovernmental organizations from being parties to contentious cases before the Court, disputes between the organization and its member states can only be submitted to that Court by way of a request from the organization for an advisory opinion. If the need is felt for a binding judicial decision, this can only be obtained by the parties agreeing in advance to regard the "advisory" opinion as binding.

Disputes between the organization and private parties subject to its extended (territorial, personal or comprehensive) jurisdiction can be settled either by internal courts of the organization or by national courts.

The need for judicial settlement of internal disputes, except for disputes involving officials, is pressing only in respect of those organizations which have significant legal or political powers [394]). Only in such cases will the member states and / or the private parties subject to the extended jurisdiction of the organization feel the need for judicial protection against abuse of the organization's powers.

By virtue of their inherent powers, intergovernmental organizations can establish courts to afford judicial protection to member states, officials and private parties against abuse by the organization or its officials of their powers, even if there is no provision in the constitution of the organization authorizing it, expressly or by implication, to establish such courts or to provide modes of settlement of such disputes, and even if no other treaty so provides. The need to include such provisions in constitutions or other treaties arises only if the states concerned wish to have a right to judicial recourse of which they cannot be deprived.

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[394]) *Cf.* Lissitzyn as quoted above, p. 55.