Laws Governing International Organizations: An Overview

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Abstract

International organizations have played an ever more active role in international affairs, with implications at the international and national levels. This development or active role of international organizations has been arising from a response which is evident in international intercourse rather than to the philosophical or ideological appeal of the notion of global government. This intercourse advances in the mechanism of transport and communications with the desire for trade and commerce which ultimately called for laws and regulations by international means. Each organization of course has its own governing law deriving from its constituent instrument as well as its established practices and found themselves with an increase in the breadth and nature of their activities. These laws and practices create a legal framework of the organizations to conduct their own intercourse for fruitful outcome of their undertakings. This study encompasses the common law of international organizations and also oversees the influence of customary international law on the mechanism of international organizations.

Keywords: Constituent Instrument, Established Practices, General International Law, National Law.

Introduction

International organizations are legal persons, whose activities are governed by law, including obligations under general rules of international law, under their constitutions, and under international agreements. Their powers are derived directly from their constituent instruments as reflecting the intention of their founders, and are subject to the limits of law. In general terms the sources of legal obligations establishing the parameters within

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which such activities may be lawfully carried out may be divided into two broad categories. The first category comprises the "rules of the organization," sometimes referred to as the "internal law" of the organization. The second category - sometimes referred to as the "external law"-compiles those rules arising outside the organization itself, of which there are two types: the rules of international law (in particular treaties and custom) and the rules on nation.

The Constituent Instrument

The constituent instrument of an international organization is almost always a treaty, although in some exceptional cases an international organization may be created by an act of one or more existing international organization e.g. Global Environment Facility.[3] The constituent instrument will provide for the functions and objects of the organization, and indicate how they are to be achieved. It will also provide for the framework against which secondary acts of the organization may be adopted and its other practice developed, even if such practice sometimes departs from the original objects of a particular provision of the constituent instrument.

As a treaty the constituent instrument will be governed by the rules reflected in the 1969 Vienna Convention on the Law of Treaties (as well as those of the 1986 Vienna Convention), which are expressly stated to apply 'to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice any relevant rules of the organization' (Art.5(3)).

The constituent instrument of an organization is the subject of elaboration and adoption mush like any other treaty. Once two or more states have agreed on the need to create an international organization, they will establish a negotiating process (which could be *adhoc* or established under the auspices of an existing international organization) which could be open ended in time or established for a limited period.

Once the draft text has been adopted, which may sometimes occur at a Diplomatic Conference of the representatives of the negotiating states, the constituent instrument will enter into force in accordance with its provisions on enter into force. Some constituent instruments require certain named states to have ratified to bring it into force: the UN Charter,

[3] The Global Environment Facility (GEF) was established in1990 as a three-year 'experiment' to provide grants to developing countries for investment projects, technical assistance and research to protect global environment and transfer environmentally benign technologies jointly by WB, UNEP and UNDP.

for example, came into force within four months of its signature, after ratification by the five permanent members and by a majority of the other signatory states (Art.110(2)). Other constituent instrument come into force upon a particular event: the Articles of Agreement of the IBRD came into force once instruments of ratification had been deposited by governments whose minimum subscriptions to the Bank comprised not less than 65 per cent of the required total subscriptions (Art.XI(1)). And yet others come into force once a certain number of states have become parties: the OAS Charter came into force once two-thirds of the majority states had deposited their instruments of ratification (Art.145).

Practice is mixed on the subject of reservation to the constituent instruments of international organizations. Some instruments expressly prohibit reservations, for example those establishing the International Sea-Bed Authority and the World Trade Organization.[4] Other instruments, such as the UN Charter, are silent. None appear to expressly permit reservation. In the absence of an express rule it will be the rules on reservation reflected in Arts 19 to 23 of the Vienna Convention which will determine the permissibility of a reservation, including, in particular, whether it is compatible with the objects and purposes of the treaty (Art.19(c)). The permissibility of reservations will generally only be an issue when the instrument is silent on the subject, although an express prohibition (or even authorisation under certain conditions)[5] does not exclude the possibility of issue arising, since state may enter reservations raising questions about their compatibility with such conditions.

Related to the questions of reservation is that of declarations (or interpretative declarations): where a state introduces a declaration but does not describe it as a reservation, how will it be characterised? In practise the depository of the constituent instrument will usually communicate the "declaration" to other parties or, in the case of international institution, to the relevant organ.[6] In many cases the declaration will have an overly political character, for example in relation to the refusal to recognise the state of Israel[7] or the sovereignty claimed by the United Kingdom over the Malvinas/Falkland Islands.[8]

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4 1982 UNCLOS, Art.309: 1994 Agreement establishing the World Trade Organisation. Art. XVI (5).

5 E.g. Asian Development Bank, Art. 56 (2).

6 This is the practice, for example, of the UN Secretary- General: Report of the UN Secretary General on the practice followed by depositaries on the subject of reservations, YILC, 1965, II, p.79.

7 Iraq's declaration to the IDA.

8 Argentina's declaration under 1982 UNCLOS.

Where a reservation has been entered the question arises as to who is to determine its effect: is it the state parties or the institution? Prior to the 1969 Vienna Convention this remained an open and sometimes controversial question, and practise was mixed.

Practise was largely been superseded by Art.20 (3) of the 1969 Vienna Convention, which provides that:

> 'When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.'

This provision makes clear that, subject to an express provision otherwise; it is the organization and not the individual states which decide on the admissibility of a reservation. The main question which will arise then becomes: which organ is competent to determine the admissibility of a reservation? Most constituent instruments do not address this question. It will therefore be the organ which is charged with deciding on the candidacy of a state wishing to join the organisation which will adjudge the reservation. Ultimately this may go to a plenary organ or, one has been provided for, a judicial or other body charged with authoritative interpretation.[9]

Apart from reservation there are mainly two other principal questions arise: which body is authorized to interpret definitively the constituent instrument, and what techniques of interpretation are to be applied?

As to the first question, the matter is sometimes addressed expressly by the constituent instrument, but more often is not. Where it is so address, the constituent instrument can provide for authoritative interpretation by non-judicial means (by the political or technical organs of an organisation) or by judicial means, or a combination of the two. In practise the vast majority of disputes concerning interpretation are settled by the political or technical organs, and authoritative interpretation by judicial organs remains the exceptions rather than the rule.[10]

With regards to the different approaches set forth in constituent instruments, an example of the mixed approach is provided by the Article of Agreement of the IMF. Article XXIX(a) of which provides that "any question of interpretation of this Agreement arising between any member and the Fund or between any members of the Fund shall be submitted to

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[9] Imbert, *Les reserves aux traitesmultilateraux*, Paris, 1979, p. 173.

[10] Sohn. ''The UN System as Authoritative Interpreter of its Law'', in Schachter and Joyner (eds), *United Nations Legal Order* (1995), pp. 169-229.

the Executive Board for its decision." Where the Executive Board has given its decision, within three months any member may require that the question be referred to the Board of Governors "whose decision shall be final" (Art.XXIX(b)).

The UN Charter contains no specific compromissory clause providing for the judicial settlement of disputes with regard to the interpretation of the Charter, having noted the absence from the Charter of any procedure enabling the I.C.J. has itself concluded that each organ must, in the first place at least, determine its own jurisdiction and the presumption of validity would apply to such determination.[11]

Most of the specialised agencies contemplate the settlement of disputes on interpretation by negotiation within the political organs of the organisation, although often subject to a right of appeal to an outside body. In some cases such as the IAEA (Art.17A) or the WHO (Art.75), reference is made to settlement by negotiation without specifying any particular organ. In other cases, the organ is specified, as in the case of the Conference of the FAO (Art.XVII). It is the Council, the organ of 27 states, with its own Rules for the settlement of Differences, which plays an important role to disputes settlement in the case of ICAO (Art.84).[12]

Other institutions do not specifically mention the powers of their own organs to interpret the convention in the event of a dispute, but provided that such disputes shall be referred directly to arbitration, as in the case of the UPU (Art.32) and WMO (Art.29), or to the I.C.J. or a tribunal specially appointed, as in the ILO (Art.37) or UNESCO (Art.XIV).[13] It cannot seriously be contended that this excludes the organs of the organization from attempting to settle points of interpretation; indeed, if, through an organ, the question can be settled there will be no dispute remaining to be submitted to the outside body. Moreover, in general it will often be better for such disputes to be settled internally.

It must finally be observed that all the specialised agencies bar the UPU have been authorised by the UN General Assembly to request advisory opinions from the I.C.J. This is the only way in which the organization as such can appeal to the court for an interpretation of its constitution. The

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11 *Certain Expenses of the UN*, Advisory Opinion [1962] I.C.J. Reps. p. 168.

12 Appeal relating to the Jurisdiction of the ICAO Council (*India v. Pakistan*) (1972) I.C.J. Reps. p. 46. And note that the ICAO Council may also hear complaints under the numerous bilateral Air Transport Agreements.

13 Hence the reference, under Art.14 (2), to an *ad hoc* tribunal of the question whether member of the Executive Board who cease to be members of the delegation of their states are eligible for re-election: the *UNESCO (Constitution*) Case, (1949) A.D. case p. 113.

disadvantages is that the advisory opinion is not, *per se*, binding; to get a binding decision the organization would have to have power to submit the dispute to some other arbitral body.

Beyond the UN and the specialised agencies the practise is varied. At the AU the Charter is to be interpreted by the African Court of Justice (Art.29), but until that body is established, "such matters shall be submitted to the Assembly of the Union, which shall decide by a two-third majority."[14] At the E.C. it is the ECJ which is charged with resolving disputes between member states (Art.27), between the Commission and member states (Art.226), and between certain community institutions and member states or third persons having a sufficient legal interest (Arts 230 and 232). Within the Law of the Sea Convention institutions, interpretative differences relating to the International Sea Bed Authority may go to the Sea- Bed Disputes Chamber of ITLOS (1982 UNCLOS, Art.187(a)). Additionally, the ITLOS Rules provided for advisory opinions to be given "on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion."[15]

In contrast to these agreements, the constituent instruments of yet other institutions- such as the OECD, NATO, the Council of Europe and the league of Arab States- make no provision for a special rule or procedure expressed to deal with the interpretation of the constituent instrument, whether by judicial or non- judicial means.

With regard to the techniques of interpretation, the I.C.J. has confirmed, when it has been called upon to interpret the UN Charter, that 'it has followed the principles and rules applicable in general to an interpretation of treaties, since it has recognised that the Charter is a multi- lateral treaty, albeit a treaty having certain special characteristics.'[16] This approach has been confirmed by the 1969 Vienna Convention, the provisions of which apply without prejudice to any relevant rules of the organisation, including in relation to interpretation (Art.5). There is some authority for the proposition that a treaty of a constitutional character should be subject to different rules of interpretation to allow for the "intrinsically evolutionary

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[14] Art.29 AU Charter. Note that in 2004 it was decided that the African Court of Justice would be merged with the African Court of Human and Peoples' Right due to concerns over the growing number of AU institutions, and in an attempt to create a single effective court. Under Article of the Protocol of the Court of Justice, adopted at the 11th AU Summit, held in Sharm El Sheikh, Egypt in June/July 2008, the court is to have jurisdiction in relation to the interpretation of the AU Charter 19.

[15] Rules, Art. 138 (1).

[16] *Certain Expenses Case*, [1962] I.C.J. Reps. p. 157.

nature of a constitution."[17] Subject to this perspective, and the comments set out below which address the practise of various international courts in relation to the interpretation of constituent instruments, the matter is generally governed by Article 31 and 32 of the 1969Vienna Convention. Article 31 establishes the primary rule that a treaty is to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." A person seeking to rely on a special meaning for the terms of the treaty, as opposed to the ordinary meaning, will have to prove that special meaning.[18]

Nevertheless by way of summary, it is clear that the case law of some of these international courts and tribunals, in particular the I.C.J. and the ECJ, indicates a tendency towards seeking to ensure that the approach to interpretation which is relied upon will assure the effectiveness of the organization. This requires careful consideration of the objects and purposes of the organization, by reference to what has been referred to as a "technological approach."[19] It is reflected, for example, in the approach of the I.C.J. in the *Reparation* case, giving effect to a principle of implied powers deeming the UN to have powers conferred upon it 'by necessary implication as being essential to the performance of its duties.'[20]

The essentially dynamic character of a constitutional text, as opposed to the normal multilateral treaty, has led to a general organization of the need for a specific clause envisaging revision or amendment of the text.[21] The procedures for revision are by no means uniform but may be appropriately discussed at this juncture. Before proceeding to a discussion of the three main types of amendment clause, two general observations may be made. First, whilst amendments are usually carried out by the established organs of the organization, it is sometimes envisaged that a special "review conference" may be conveyed to deal with any comprehensive proposals for amendment: this is precisely what is envisaged in Art. 109 of the Charter, in Art.18 (B) of the IAEA Statute, and in Art.48 of the EU Treaty.

The second general observation is that normally the amendment procedure involves two stages: the first is the vote of adoption within the organ or conference, the second is the depositing of ratifications by members. In

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17 Jennings and Watts (eds), *Oppenheim's International law*, 9th edn, 1992, p. 1268 (citing Rights of US Nationals in Morocco, [1952] I.C.J. Reps.176, p. 211.

18 Legal Status of Eastern Greenland Case, P.C.I.J. (1933) Ser. A/B No.53, 49.

19 Amerasinghe, Principles of the Institutional Law of International Organisations (2005), pp. 42-44.

20 [1949] I.C.J. Reps. p. 174.

21 Phillips, "Constitutional Revision in the specialised agencies" (1968) p. 62.

some cases it will be observed that though unanimity is not required for the first, it is for the second in that ratification by all members is required for the entry into force of the amendment; hence one is dealing with a "consent" principle and not a "legislative" principle.

As might be expected, the principle that amendments to the constitution require the consent of all the members is the older and more established principle. It was to be found in the League of Nations (Art.26)[22] and still found in Art.94 (a) of ICAO which specifies that an amendment adopted by a two-thirds vote of the Assembly (first stage) comes into force only when ratified by not less than two-thirds of the members (second stage) and then only 'in respect of states which ratified such amendment.'

The contrasting principle is that which allows a majority of members to adopt an amendment to a constituent instrument which becomes binding on the dissenting minority. This is the principle adopted in the UN that, under Art.108, after adoption by two-thirds of the assembly and ratification by two-thirds of the members including all the permanent members of the Security Council, amendments of specific provisions enter into force for all members.[23]

Beyond the provisions set forth in an organisation's constituent instrument, as may be subject to amendment from time to time, it is now well established that the rules of an organisation including relevant institutional acts. As described earlier, the constituent instrument of an organization will very often provide for one or more of its organs to adopt acts to give effect to the objects and purposes of the organization. These acts can be normative or procedural, and range from formally binding acts (for example, Security Council resolutions, or regulations, directives and decisions of European Communities) to those which are explicitly non-binding such as (for example, resolutions of the UN General Assembly). In addition, there will be other acts which are often not expressly provided for, for example, the Bulletin adopted by Security- General of the United Nations, whose normative status will not always be clear.

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[22] A revision of Art. 26, allowing the Assembly to adopt amendments by a three quarters majority vote, including the votes of all members of the Council, never came into force when ratified by a majority of the Assembly, including all the Council, never came into effect: it failed to do so because of stringency of the old amendment clause.

[23] To date there have been three amendments of the UN Charter under this provision: 1965 (Arts 23, 27 and 61); 1968 (Art. 109); 1973 (Art.61).

Established Practice of the Organization

The established practice of the organization also forms a part of the rules of the organization. In the *Namibia* case, the I.C.J. took the view that an established body of practice forms an integral part of the rules of the organization.[24] The ECJ has reached similar conclusions in relation to the practice of the Council, the Commission and the Parliament with the strict limit that such a practice 'cannot derogate from the rules laid down in the treaty.'[25] The practice must be established but which is uncertain or disputed will usually not be treated as 'established'.

General International Law (Including Secondary Legislation of Other International Organizations)

As an international person an international organization is subject to the rules of international law, including in particular conventional and customary rules. As the I.C.J. put it in an advisory opinion:

> 'International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.'[26]

The I.C.J. had little difficulty in concluding that the United States, as a party to the 1947 Headquarters Agreement between it and the UN was under an obligation, in accordance with s.21 of that Agreement, to enter into arbitration for the settlement of the dispute between itself and the UN.[27] And the ECJ has frequently referred to the obligations of the community arising under international agreement to which it is a party to give rise either to substantive causes of action (where the convention is intended to create rights and obligations directly enforceable in community law) or to construe provisions of the constituent treaties or secondary legislation.

With regard to rules of international law other than treaties, the I.C.J. has similarly recognised that international organizations are subjects to the

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24 [1971] I.C.J. Reps, p. 22.

25 Case 68/86 United Kingdom v Council [1988] E.C.R. 855; Case 131/86 United Kingdom v Council [1988] 905.

26 *Advisory Opinion on the interpretation of the Agreement of March 25, 1951 between the WHO and Egypt*, [1980] I.C.J. Reps. p. 73.

27 [1988] I.C.J. Reps. P.12, Advisory Opinion on the Interpretation of the agreement of March 25, 1951 between the WHO and Egypt, [1980] I.C.J (a contractual legal regime was created between Egypt and the Organisation which remains the basis of their legal relations today).

rules and principles of general international law. This is implicit in the approach taken in the *Reparation for injuries* case, finding that an international organization is "a subject of international law and capable of possessing international rights and duties,"[28] and also from more recent decisions of the Court.[29] What this means in practice is that the organization should, in the conduct of its activities, be assumed to be subject to rules of customary international law, including any rules of *jus cogens*, which may be relevant to the conduct of its activities. In our view this would include, for example, rules of customary law relating to matters such as the protection of fundamental human right, the protection of the environment, and the conduct of activities in maritime areas and in outer space. In relation to human rights one commentator has stated the position as follows:

> 'The Universal Declaration and the International Covenants represent minimal standards for all people and all nations. Intergovernmental organizations are inter-state institutions and they too are bound by the generally accepted standards of the world community.'[30]

This view appears unimpeachable. We also consider that international organizations, as subjects of international law, are bound by general principles of law recognised by civilized nations, that is to say principles common to national legal systems. These could include procedural rules and requirements, as well as principles such as proportionality, legitimate expectation, and equity.

Indeed, in the *Rwamakuba* case[31], the Trail Chamber of the ICTR, in considering the applicability of general human rights norms, held that "the United Nations, as an international subject, is bound to respect rules of customary international law, including those rules which relate to the protection of fundamental human rights."[32] Thus, notwithstanding the fact that an international organization is not a party to, say, a human right treaty or an agreement for the protection of the environment, if the rule contained in an agreement is reflected in general international law then it can, as such, bind an international organization.

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28 [1949] I.C.J. Reps. p. 174.

29 *Advisory Opinion on the Interpretation of the Agreement of March 25, 1951 between the WHO and Egypt*, [1980] I.C.J. Reps. p. 73.

30 M. Cogen, "Human rights, prohibition of political activities and the lending policies of the World Bank and the International Monetary Fund", in S.R. Chowdury et al. (eds), The right to Development in International Law (1993), p. 387; but cf. E. Denters, IMF Conditionality in De Waartet al. (eds), International Law and Development (1988) pp. 240-244.

31 *The Prosecutor* v. *Rwamakuba* (Decision on Appropriate Remedy) [2007] ICTR- p. 98.

32 *Ibid*, at para. 48.

Similar considerations apply in relation to other areas of international law, including the principle of state responsibility. By way of recent example, the UN Secretary General promulgated a Bulletin stating that the fundamental principles and rules of international humanitarian law set out in the bulletin are applicable to UN forces conducting operations under UN Command and Control.[33]

In the European Community context the ECJ has frequently referred to provisions of the European Convention on Human Rights, to which the Community is not a party, to assist it in reaching its conclusions, it has also made reference to international law more generally, so far as it represents a codification of general customary international law.[34]

A related issue concerns the question of whether one international organization might in some way be bound by the acts of one or more others and whether there is, in the words of one commentator, an emerging "common law" of international organizations, which appears to refer to the fact that rules exist that are common to all international organizations (regarding, for example, personality, membership, withdrawal, etc.)?[35]

In addressing this issue it appropriate to distinguish between the situations where the relevant organizations are linked by some special institutional relationship and where they are not.

In first case, for example, when the EC became a member of the FAO like any other member it became bound by the obligations flowing from the FAO's constituent instrument and mandatory institutional acts of the organizations. Short of membership, organizations will often agree to enter into co-operative agreements, which establish certain links between the organizations. These generally do not establish detailed obligations, but they do sometimes specify the effect of acts of one organization on the other.[36]

Similarly, specialized agencies will frequently undertake to co-operative with ECOSOC. In general, however the particular relations between the UN and different bodies will need to be considered separately.

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33 UN Secretary- General's Bulletin on the observance by UN Forces of International Humanitarian Law, August 6, 1999, 38 ILM 1656 (1999).

34 *Intertanko & Other v Sec of State for Transport* (c-308/06), at para.51.

35 Lauterpacht, "The development of the Law of International Organisations by the decisions of International Tribunals". (1976-IV) *R.C.A.D.I.* p. 396.

36 Report of the UN Secretary-General, Doc. A/6825, September 15, 1967, pp. 98-103.

National Law

Beyond their international law and obligations under international law, international organizations are also by necessary in connection with the national law of one or more states. This will be because they are located within the territory of a state, whether a member or not, or because the conduct of some of their activities which seek to give effect to their object and purposes- examples might including making loans and grants, purchasing commodities, or engaging in peacekeeping operations- will necessary have a close connection with national legal systems. Other activities of international organizations relate to everyday operations, for example, purchasing materials needed to run office. Each of these activities brings them into contract with third persons and can subject them to one or more regimes of national law.

A. Contractual Relations

The principle that contractual relations of an international organization can be governed by the national law applicable to the contract is largely accepted.[37] In some international organizations this is set out in implicit or express terms. For example, Art.288 (*ex Art.215(1))* of the EC Treaty provide that "the contractual liability of the Community shall be governed by the law applicable to the contract in question." The provision recognizes that the community is not to be entitled to any special privileges or immunities, and that it is not envisaged that there will develop a community law of contract to which the community institutions will be subject.[38] Community contracts governed by national law will therefore be subject to rules of private international law, including possibly the harmonized rules for choice of law in contracts for cases before national courts.[39]

Indeed, for reasons of expediency most of the contracts of international organizations are partly or all of their contracts are subject to one or more systems of national laws, and this practice has generally not created difficulties. The practice applies equally to organizations of universal membership (and certain UN specialized agencies) as to regional organizations. By way of example, most contract of the UPU and some of

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37 See for example Monaco, "Observations sur les contracts conclus par les organisations internationals", in Melanges Modins, 1968, 93-94; Lysen, ''*The non- contractual and contractual liability of the European Communities",* 1976.

38 Hartley, *The Foundations of European Community Law*, 4th edn. 1998, at p. 442.

39 1980 Rome Convention on the Law Applicable to contractual Obligations, [1980] O.J., C266.

those of the WHO are governed by Swiss law, whereas those of the ICAO are governed by the law of the province of Quebec.[40]

In some instances national law governs contracts of employment concluded with local persons[41] and contracts of insurance.[42] Without Controversy national law is also applied to real estate transactions in application of the *les reisitae* principle. For these types of contracts local law is appropriate because it is able to address the various issues which are likely to arise in relation to the performance of contractual obligations, and the local juridical system is the one which is most closely related to the conduct of these activities.

For other types of contract national law may be justified by the technical character of the subject matter of the contract. This is the case for loan agreements of the IBRD and the IMF, which are governed either by the law of the place of the loan, or by the law of the state on whose territory the private contracting banks are incorporated,[43]or by the law of the state of New York.[44]

Another example may be found in the *Westland* case where a contract between the Arab Organization for Industrialization (AOI) and a private company named Westland Helicopters United was governed by Swiss law.[45]

The identification of the national law which is applicable to a contract of an international organization may be established by operation of an express contractual clause (clauses reflecting the will of the parties will tend to predominate over other factors),[46] alternatively (if the contract is silent) by operation of ordinary conflicts of laws rules. Additionally, the application of a national law may result from normative instrument of more general application, such as a headquarters agreement.

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40 Klein, La responsabilite des organizations internationals (2011), p. 173.

41 E.g. C. Dominice, 1984-4 Hague Academy, Vol.187, p. 191.

42 Wilfred Jenks, The Proper Law of International Organisations, 1962, pp. 171-172.

43 Delaume, "The Jurisdiction of Courts and International Loans," 1957 *A.J.C.L.* 208.

44 E.g. Art.11(a) of the loan agreement between the IMF and the monetary Agency of Saudi Arabia, Decision No.6843(81/75), May 6, 1981, Annex B in "Selected Decisions of the IMF", Annex to 14th issue, Washington DC, April 30,1989.

45 *Westland Helicopters ltd and AOI,* I.C.C. Court of Arbitration, Case 3879/AS, March 25,1985, 80 ILR 596 et seq.

46 The Decision of Advocate General Slynn in European Commission *v*. CO.DE.MI, making reference to the 1980 Rome convention to confirm the principle of the pre-eminence of the will of the parties in determining the law of the contract (case 318/81, 1985 E.C.R. 3697).

The Choice of national law to govern contracts of an international organization in not entirely without its inconvenient aspects, of which the most notable is the potential for subjecting an organization to the legislative, will of the state whose law is applicable. This should not, however, be over-stated since it has not much arisen in practice. The problem is less significant than for contracts between two states, where one party to a contract may have a direct interest in unilaterally modified its terms by way of a unilateral act. States are less likely to engage in such acts of benefit the private persons who are normally the parties to private contracts with organisations.

B. Non-Contractual Obligations

Outside the realm of contract, the activities of international organizations in the territory of states (and indeed beyond) can have the effect of causing damage or harm to third persons, including private persons. Classical examples include road traffic accidents involving an official car of the organisation. In cases such as this, the applicable national law will be determined not by the clauses of a contract but rather by principles of general law governing the non-contractual liability of the international organizations. It is therefore necessary to determine what law will apply to such situations.

The general principle that an international organization will be responsible for damage resulting from its activities in the territory of a state is not controversial and is by now well-established.

In some cases non-contractual liability is provided for in the treaty establishing the organization. Such in the case of Art.22 of Annex III of UNCLOS which states that the ISBA "shall have responsibility or liability for any damage arising out of wrongful acts in the exercise of its power and functions". It is also the case for the non-contractual liability of the EC: Art.288(2) (formerly 215(2)) provides that "the Community shall, in accordance with the general principles common to the laws of the member states, make good damage caused by its institutions or by its servants in the performance of their duties".[47] In practice, the European Court of Justice has been slow to recognize such liability, having early on adopted a high threshold which a claimant would need to reach to bring a successful claim against a community institution.

Non-contractual liability also finds expression in a number of agreements between organizations and states. Examples include Art.8(1) of the

[47] Euratom Treaty (Art. 188(2)).

Agreement between the Netherlands and the "ESRO" on the creation and functioning of the European Centre of Space Technology.[48] But the principle of responsibility has been accepted even absent an express treaty provision. To take just one example, the UN accepted a priori the principle that it should repair damage caused to property by the UNEF arising from acts of negligence and where military necessity could not be invoked.[49]

The application of national laws to the case of non-contractual liability of the international organisations is reflected in the practice of organisations. Thus, the internal law of the state on whose territory UN peacekeeping operations take place will play an important role in disputes relating to such operations.[50] In the *stairways* case, the arbitral *compromis* charged the arbitrators with the task of determining the non-contractual liability of the UN for damage to third persons in the course of UN operations in the Congo, by a plane rented by the organization to a third company. The text of the rental agreement envisaged that the law applicable to this question would be that of the former Belgian Congo, which remained in force in the newly established Democratic Republic of Congo.

The application of the *lex loci delicticommisi* to establish non-contractual liability is also recognized by many commentators.[51] The principle constitutes a logical consequence of the obligation of all international organizations to respect the law in force in the territory of the states in which they carry out their activities, in so far as these do not go against the privileges and immunities which are recognized in respect of it. On occasion they may be a genuine conflict between what the organization is required to do by its internal law, and the requirements of the national law of the state in which it carries out that activity. For example, national legislation may prohibit the publication of information which the organisation is, as a result of its statutory obligations, entitled or required to publish.

In some circumstances the *lex loci* may not be appropriate, for example, where national law is invoked to determine the responsibility of an international organisation it may be that general principles of law are more

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48 Agreement between the Netherlands and the ESRO on the creation and functioning of the European Centre of Space Technology, U.N.T.S Vol.808, p. 145.

49 The study arising from the establishment and operation of UNEF, Report of the Secretary General, UN Doc A/3943, October 9, 1958, p. 122.

50 The UN legal service has referred to local law in an opinion relating to the responsibility of the UNDP for a road accident caused by one of its drivers. See UNJY 1991.p. 309.

51 Jenks op. cit, 212 et seq; P.M. Dupuy, loc. Cit., 1386; Amerasinghe, Principles of the Institutional Law of International organisations, 1996, 228. See Also Freidman, ''International public corporations," 1943 MLR 205; Mann, ''International Corporations and National Law," 1967, B.Y.I.L. 164.

appropriate. In respect of the liability of UNEF, for example, Professor Bowett was circumspect in observing that "not least of the problem faced by a claims commission attempting to deal with civil claims against the United Nations is the absence of an agreed 'proper law', for it is by no means clear that the *lex loci* will be applied or will it even be suitable."[52] In this context, organizations will develop their own system of material norms and maintain an emerging relationship between national law of one or more states and that of international organizations.

Conclusion

This Article has sought to demonstrate that in determining the content of customary international law with the actual practice of states in addressing that subject. It has shown, first, that customary international law has not in the past been frozen by treaties dealing with a particular subject. It has also shown that practice can even modify or destroy treaty obligations themselves, which of course suggests that practice can be at least as important in its effects on customary rules that are derived from treaty obligations. This Article has also demonstrated that one must take care in considering particular treaties as representing state practice in-formed by 'opinio-juris' because these treaties may show that, far from believing the treaty to represent a rule of custom, the parties to them believe that but for the treaty, they would have no obligation to adhere to a particular rule. This belief, moreover, may be reflected in the express language of the treaty or implied by the parties' treating the obligations as not carrying the constraints that would apply if the obligations were legally binding.

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[52] See Bowett, *United Nations Forces – A Legal Study of the United Nations Practice*, 1964, pp.150 and 244, respectively. See also Simmonds, *Legal Problems Arising from the UN Military Operations in the Congo*, 1968, p. 235.

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