SOME ASPECTS OF ILLEGAL ACTS OF INTERNATIONAL ORGANIZATIONS

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I. Introduction

The problem concerning illegal acts of certain juridical entities is a familiar subject in municipal law and has already been extensively studied both under company law and administrative law of some countries. It has presented itself, in particular, as a problem of *ultra vires* acts of a company or that of *excès de pouvoir* of an administrative organ of a State. Even under international law, similar problems have been dealt with in the law of state responsibility. With the recent evolution of international organizations, however, a new problem has come to the fore which is *prima facie* similar to, but in some important respects different from, those existing problems. We may, therefore, discuss the problem of illegal acts of international organizations as a distinct subject of study.

As will be anticipated, the problem we are now facing involves many aspects each of which itself deserves extended discussion. The legal effect of illegal acts of international organizations, *inter alia*, is no doubt one of the problems of particular importance in the practical operations of international organizations. Space permits, however, the examination of only a few aspects of the whole matter. Thus, the scope of this paper is limited to an exposition of the following questions: first, what acts of international organizations can be dis-

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cerned as illegal acts, or, the question concerning, so to speak, possible types of illegal acts; and, second, how the illegality of such acts could be determined or what organ could review such acts, or, the question concerning, so to speak, control of illegal acts. Some consideration on these questions appears to be prerequisite to any further study on the whole problem on the illegal acts of international organizations.

In pursuing the present study, two kinds of materials will be availed of which are in some respects distinct from each other. One is legal instruments, that is to say, the constitutional documents of certain international organizations; *e. g.*, the Treaties constituting three European Communities, the abortive Havana Charter establishing the International Trade Organization, the Statutes of the administrative tribunals of the United Nations or the International Labor Organization, etc. The other is the materials which suggest how to deal with the illegal acts of international organizations whose basic instruments are silent as to the matters in question; *e.g.*, two advisory opinions of the International Court of Justice concerning respectively the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization and Certain Expenses of the United Nations.[1)]

Among the materials mentioned above, only two will be here examined, one from each class: first, the Treaty of the European Coal and Steel Community, and, second, the Advisory Opinion of the International Court of Justice on *Certain Expenses Case.* The reason for taking up the ECSC Treaty is that it has elaborate and in that sense unprecedented provisions with respect to the illegal acts of its institutions and the effective means of controling them together with the fact that fairly abundant cases have been decided by the Court of Justice of the European Communities. In the majority of other international organizations, on the other hand, the more important question will be how to dispose of allegedly illegal acts in the absence of express provisions. This is precisely that which has vexed the United Nations in some way or the other. This is the reason for taking up as a second material the Advisory Opinion of the Court on *Certain Expenses of the United Nations.*

In analyzing these materials, the first question which I have posed, that is, what kinds of acts can be discerned as illegal acts of international organizations,

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1) E. Lauterpacht, "The Legal Effect of Illegal Acts of International Organizations", *Cambridge Essays in International Law—Essays in honour of Lord McNair*, 1965, London, p. 94. In fact this article inspired the present writer to set out the study on the subject with which this paper attempts to deal.

will be examined in the case of the European Coal and Steel Community, and the second question, that is, another aspect of controling them, will be discussed in the case of the United Nations.

Before going further, however, what has to be clarified as a preliminary question is, in my view, the meaning of *illegal acts* of *international organizations*. Thus, in the following section, a brief mention of this will be made for the benefit of later discussion.

II. The meaning of *Illegal Acts* of *International Organizations*

An international entity which is here designated as an international organization will be defined as an association of two or more States, whose individual wills are organized and incorporated by its constitution into one common will distinct from those of its members,[2] which is again distributed into and operated by various organs prescribed by the constitution.[3] It thus possesses a corporate personality in the strict sense of the term. What is to be distinguished from this is a group of States whose will is nothing but the aggregate of the individual wills of participating States. An international organization so defined does not necessarily possess international *legal* personality, that is, the capacity of being the subject of international law. This is due to the fact that there is no positive international law which uniformly attributes legal personality to every international organization.[4] In other words, on the international scene, corporate personality and legal personality may not always coincide.

With regard to an international organization, its international legal personality will come into question only in the case where the organization concerned has the capacity to act on its external plane, for its external acts can only be performed in accordance with the law outside the organization, that is, the rules of general or particular international law, as the principles of its conduct.[5] But international organizations which have been defined include not only the organi-

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2) Paul Reuter, *International Institutions*, 1958, New York, pp. 214-215, 231. See also Hans Kelsen, *The Law of the United Nations*, 1951, p. 329.

3) Niemon Obuchi, "The Theory on the Subjects of International Law", *Kokusai-ho Gaiko Zasshi (The Journal of International Law and Diplomacy)*, Vol. 62, No. 1.

4) D. W. Bowett, *The Law of International Institutions*, 1963, p. 296.

5) Thus, Bowett maintains, "To the extent that the activities are internal activities, relating to the functions of the organs, there will generally be adequately covered by the constitutional texts of the organization. It is when the activities become external in the sense of

zations with the capacity of external action but also those whose activities are confined exclusively on the internal plane of the organization, that is, the relations between the organization and its members. To possess international personality is not, therefore, *sine qua non* for an international body to be an international organization.

From what has been observed will now be clear the meaning of *illegal acts*, or, what the law is, when it is alleged that a certain act of an organization contravenes the *law*. It does not indicate public international law in general which exists outside the orbit of any international organization. Certain international organizations could, of course, act in contravention of the rules of such external international law, but this will be possible only in the case where the organizations concerned possess the capacity to act under such external rules. Careful observation of the existing international organizations will reveal the fact that the capacity of external action or international legal personality is in reality attributed to the very limited number of organizations.[6] Furthermore, the nature of acts against external rules is, in my view, identical in its juridical significance with acts of a State in violation of the rules of international law. It thus appears doubtful whether such acts need any special treatment under the independent title of illegal acts of international organizations.

Consequently, laws which are implied in the words of *illegal acts* merely signify the constitutional law and other rules derived thereof, or, what are called in short, internal laws, of an organization. Each organ of an international organization performs its functions imposed by the constitution by exercising the powers conferred upon it. Principles of its conduct are not the rules of international law but the internal laws of the organization.[7] It is true that the con-

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affecting third parties. . . .that the constitutional texts may afford no guidance to the problems raised." *Ibid.*, p. 296.

6) As for the general discussion of legal personality of international organizations, see D. P. O'Connell, *International Law*, Vol. I, 1965, pp. 89-92. See also Clive Parry, "The Treaty Making Power of the United Nations", *British Yearbook of International Law*, 1949 (Vol. xxvi), pp. 91-92; Bowett, *op. cit.*, p. 275; Yoshio Kawashima, "International Legal Personality of International Organizations", *Handai Hogaku* (*Osaka University Law Review*), No. 58, 1966, and, "The Legal Nature of the United Nations", *Handai Hogaku*, No. 59-60.

7) E. Lauterpacht divides the 'unlawful acts' of international organizations into two categories. In one class fall "those acts which even though committed by international organizations are nevertheless of a kind which could also be committed by states". The other class of act is "that which can arise only in the context of international organization—the type of illegal act which, as an element in its illegality, involves a reference to the special nature of international organizations as artificial legal persons deriving all their powers from a con-

stitution of an organization is enacted by the agreement of participating States often under the title of a treaty. But the designation only indicates a formal phase of the agreement and the substance is different from usual agreements of contractual nature which only create or clarify rights and obligations of the parties under international law. On the contrary, an agreement constituting an international organization does actually create an entity which is independent of its members and leads its own life. This is an organized society *per se* and its internal activities are regulated by the sum of the norms agreed upon both at the time of its establishment and in the process of its subsequent development. Viewed in its entirety, these norms constitute a legal order, or, as some writer calls, the *ordre juridique interne* of the organization.[8] Within such an internal order the great part of the activities of various organs appears to be very similar to, although not identical with, administrative acts of a certain organ of a State.

The acts of the members of the organization committed in violation of the internal law are considered as the conduct contrary to the common interest of the organization, against which the law itself usually prescribes certain measures of sanction as a counteraction. But more usually this is not the case with respect to the acts of the organs contrary to the internal law. It is perhaps due to the consideration that if the effects of the acts of the organs are always likely to be vitiated on account of their illegality the purposes of the organization cannot fully be achieved. However, in an organization with much limited purposes and comparatively strong powers to attain the purposes the possibility will increase that the individual interests of its members are encroached upon by the arbitrary acts of its organs. It is natural, therefore, that its members, in anticipating such a situation, try to ensure that every act of the organs be performed strictly in conformity with the laws of the organization or that powers of the organs be exercised within the prescribed scope of the original engagement they entered into. This is what the six members of the European Communities did in drawing up the respective governing instruments. Control of illegal acts of international organizations is for the first time embodied in their constitutions together with the definite types of illegal acts.

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ventional or statutory souce and bound to act only within the limits and in accordance with the terms of the grant made to them." *Op. cit.*, p. 89.

8) Philippe Cahier, "Le Droit interne des Organisations Internationales", *Revue Général de Droit International Public*, 1963, No. 3, pp. 571-578; See also Lazar Focsaneanu, "Le Droit interne de L'Organisation des Nations Unies", *Annuaire Français de Droit International*, 1957, pp. 315 ff.

III. Types of Illegal Acts — In the Case of the European Coal and Steel Community

In attempting to recognize what acts of international organizations will fall into the category of illegal acts, we now turn to the practice of the European Coal and Steel Community for a guidpost. The reason for limiting our inquiry to that Community is that, in addition to the fact that, as I have mentioned, the greatest part of the precedents of the Court of Justice of the European Communities are occupied by the cases brought against the ECSC, the types of illegal acts enumerated in the three Community Treaties are exactly identical[9] and one can therefore be justified in taking up the ECSC as a model organization.

Before examining the judgements of the Court in which the illegality of individual acts will be illuminated, a few words will be necessary about the position of the Court in the European Communities. The Court is given the function "to ensure the rule of law in the interpretation and application of the present Treaty and of its implimenting regulations"[10], and after the establishment of the EEC and Euratom the Court has become the common institution but its function remains the same.[11] Hence, the determination of illegal acts by the Court is authoritative and with the accumulation of the relevant judgements the scope of illegitimate acts in the Communities has gradually been shaped. In this respect the Court has contributed to the evolution of the law of international institutions.

The types of acts which may be vitiated on account of their illegality are enumerated in Article 33 of the Treaty constituting the European Coal and Steel Community in the following terms:

> The Court shall have jurisdiction over appeals by a member State or by the Council for the annulment of decisions and recommendations of the High Authority on the ground of lack of legal competence, substantial procedural violations, violation of the Treaty or any rule of law relating to its application, or abuse of power. However, the Court may not review the conclusions of the High Authority, drawn from economic facts and circumstances, which formed the basis of such decisions or recommendations, except where the High Authority is alleged to have abused its powers or to have clearly mis-

9) Relevant articles of these Treaties are: Art. 33 of the ECSC Treaty, Art. 173 of the EEC Treaty and Art. 147 of the Euratom Treaty.

10) Art. 31 of the ECSC Treaty.

11) Art. 4 of the Convention relating to certain Institutions common to the European Communities.

interpreted the provisions of the Treaty or of a rule of law relating to its application.

The enterprises, or the associations referred to in Article 48, shall have the right of appeal on the same grounds against individual decisions and recommendations which they deem to involve an abuse of power affecting them.

The appeals provided for in the first two paragraphs of the present article must be taken within one month from the date of the notification or the publication, as the case may be, of the decision or recommendation.

The relevant part to our present discussion is only the first sentence of the first paragraph, although rather lengthy reproduction of the whole article is here made because of its important position in the entire system of the Treaty.

Four grounds of appeal contained in this provision, namely, lack of legal competence, substantial procedural violation, violation of the Treaty or any rule of law relating to its application, and abuse of power, correspond to the well-known *cas d'ouverture* in the administrative tribunals of some of the European countries, particularly in the *Conseil d'Etat* of France.[12] And, as the Court is often referred to as the *Conseil d'Etat* of the European Communities, they are incorporated almost *en bloc* in the laws of the Communities. The following is the elucidation of each type of illegal acts appeared in the cases before the Court.[13]

(1) Lack of Legal Competence

According to the French text of the Treaty the equivalent is *incompetence*. Translated into English terms, the nearest is said to be substantive *ultra vires*.[14] Thus, in two cases in 1960,[15] the Court held that the ECSC Treaty did not grant any power either *expressis verbis*, or by implication, to enforce certain provisions of the Treaty by means of decisions.[16] Article 70, paragraph 3 of the ECSC Treaty provides that "the rate scales, prices, and tariff provisions of all sorts

12) L. Neville Brown and J. F. Garner, *French Administrative Law*, 1967, pp. 118-126.

13) D. G. Valentine, *The Court of Justice of the European Communities*, 1965, Vols. I & II., to which I am much indebted for the following description concerning the types of illegal acts appeared in the actual cases before the Court.

14) Brown and Garner, *op. cit.*, p. 120.

15) *Netherlands Government* v. *The High Authority* (Case 25-59) and *Italian Government* v. *The High Authority* (Case 20-59).

16) Under the provision of Article 14 of the ECSC Treaty, decisions are binding in all their details, while recommendations are binding with respect to the objectives which they specify but must leave to those to whom they are directed the choice of appropriate means for attaining these objectives. As regards the emphasis on the distinction between decisions and recommendations which has been put by the Court, see Valentine, *op. cit.*, Vol. I, p. 118, note 34.

applied to the transport of coal and steel within each member State and among the member States shall be published or brought to the knowledge of the High Authority."

Based on this provision, the High Authority passed a series of decisions specifying certain matters which were to be brought to its knowledge. Both the Netherlands and the Italian Governments challenged the validity of these decisions on the ground that the High Authority has no power under this provision to take a decision.

The Court accepted this contention and in its judgement it declared:

> "Although it is true that, by virtue of a general principle, applied moreover by Article 70 in regard to transport, control of discriminations and punitive action with regard to them devolves upon the High Authority, yet one cannot, however, deduce from this principle that the High Authority has been granted a power of decision relating to an anticipatory control by prescribing the manner of the publication of price lists or prices. Its competence, *ad hoc*, is by way of an exception and is subordinated to a renunciation by Member States, which in this instance the Treaty does not contain, either expressly or by implication.
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> One must, therefore, deny to the High Authority any power to enforce the provisions of Article 70, paragraph 3, by means of Decisions."[17]

As the Court correctly stated, in case that there cannot be descerned any grant of power to a certain organ in a certain provision of the basic law of an international organization on the basis of which an action was taken, it must be considered that the organ has no competence to act at least under the provision concerned and consequently the action taken is nought in the province of law. This is the fundamental principle of any corporate person and the ECSC is no exception. Any act in violation of the principle, therefore, must be regarded as an illegal act in the wider sense of the term.

(2) Substantial Procedural Violation

The distinction between this head of illegality and the head of violation of the Treaty immediately following is in reality not always easy to be made. In fact, the Court found in a case a certain act of the High Authority illegal on the ground that it constituted "violation of the Treaty *or* violation of a substantial procedural requirement."[18] However, there is, at least in theory, a distinction

17) *Netherlands Government* v. *The High Authority* (Case 25-59), cited in Valentine, Vol. I, *op. cit.*, p. 125.

18) *Italian Government* v. *The High Authority* (Case 2-54), cited in Valentine, Vol.I, *op. cit.*, p. 127.

between these two heads of appeal. It is thus suggested that it is possible to conceive of a decision which in its wording and effect is in full compliance with the Treaty, yet during the stages preceding its enactment procedural requirements have not been observed. The decision, on its wording alone, could not therefore be challenged; it is only the manner of its enactment that in such a case is open to attack.[19] The Court accepted such a distinction in some of the cases before it.

For instance, Article 60 of the ECSC Treaty provides concerning prices that unfair competitive practices and discriminatory practices are prohibited and that the High Authority may define the practices covered by such prohibition after consultation with the Consultative Committee and the Council. Thus, the Court declared in the very first case that a failure of the High Authority to consult the Council would have been a violation of the Treaty, but that because that violation would have occurred in one of the preliminary stages prior to the final enactment of the decision concerned that decision itself would not have been void by reason of a violation of the Treaty but by reason of a violation of a substantial procedural requirement.[20] In this case, the plaintiff was the French Government, that is, a Member State, but if the plaintiff was the Council the decision would have been appealed on the ground of a violation of the Treaty.

Another example which amounts, in the opinion of the Court, to a substantial procedural violation is a failure of the High Authority to support its decisions with reasons,[21] for it is provided in Article 15 that the decisions, recommendations and opinions of the High Authority shall state the reasons therefor. Furthermore, the acts which would fall within this category of illegality would be such acts as impose a pecuniary sanction or fix a daily penalty payment without giving the interested enterprise an opportunity to present its views (Art. 36), or a failure to obtain the required concurrence of the Council (Art. 52 (b)).

(3) Violation of the Treaty or any Rule of Law concerning its Application

19) *Ibid.*, p. 127.

20) *Ibid.*, pp. 127-128. *French Government* v. *The High Authority* (Case 1-54).

21) *Netherlands Government* v. *The High Authority* (Case 6-54); *Meroni & Co., S.P.A.* v. *The High Authority* (Case 9-56); *Nold KG* v. *The High Authority* (Case 18-57); *Netherlands Government* v. *The High Authority* (Case 6-54); *Industrie Sidérurgiche Associate* v. *The High Authority* (Case 4-54); *"Geitling" and others* v. *The High Authority* (Case 2-56); *Koninklijke Nederlandsche Hoogovens Staalfabrieken N.V.*v. *The High Authority* (Case 14-61); *German Government* v. *The High Authority* (Case 19-58), cited in Valentine, Vol. I, *op. cit.*, pp. 129-131.

An instance of this head of illegality will be found in a case in which a decision was annulled on the ground of its violation of a certain provision of the Treaty.[22] The decision of the High Authority in question was to the effect that the iron producers were authorized to sell their products 2.5 per cent higher or lower than the price determined in the price lists which were to be published. But, according to Article 60, paragraph 2, the publication of the price lists are obligatory and moreover the prices must not be higher or lower than the price indicated by the price lists. The Court further construed the provision as indicating that the price contained in the price lists must be exact at the time of the sale concerned and declared that the decision of the High Authority constituted a violation of the Treaty.

It is thus understood that this head of violation of the Treaty points to the acts committed explicitly in contravention of the Treaty provisions. However, because of the general and flexible nature of the Treaty which purports to "keep pace with the ever changing and lively development of economic affairs"[23], there exists some margin of discretion on the part of the High Authority. In determining the illegality of a particular act, therefore, the Court has in practice met with the difficulty of delimiting this head of illegality from lack of competence or abuse of power.[24] Thus, with regard to one and the same decision of the High Authority, the Court found it a violation of the Treaty in the above-mentioned case and declared it as abuse of power in two other cases.[25]

With respect to violation of a rule of law, the Court has accepted a very broad scope of its application.[26] Thus, in one case, the decision of the High Authority was appealed which had demanded the payment back from certain steel enterprises of subsidy payments which had been wrongly paid. The Court recognized the existence of a general proposition of law to the effect that the payment back of money could only be demanded when there existed some element of unjustified enrichment on the part of the party being required to pay. Then, the Court found:

"In effect, the subsidy was aimed at reducing the difference in price between im-

22) *Italian Government* v. *The High Authority* (Case 2-54), cited in Valentine, Vol. I, *op. cit.*, p. 135.

23) Gerhard Bebr, *Judicial Control of the European Communities*, 1962, p. 92.

24) Valentine, Vol. I, *op. cit.*, p. 135.

25) *Associazione Industrie Sidérurgiche Italiane* (*ASSIDER*) v. *The High Authority* (Case 3-54), Valentine, Vol. I, *op. cit.*, pp. 135-136.

26) Valentine, Vol. I, *op. cit.*, pp. 136, 138.

ported scrap which is more expensive, and scrap coming from within the Common Market.

This additional cost, according to the very principles upon which the subsidy is based, ought to be borne, not by the plaintiffs, by reason of the supplies of imported scrap received by them, but by all of the consumers of scrap. . . .

The payment of the subsidy did not, therefore, constitute an enrichment for the plaintiffs by reason of a payment which benefited them directly, but was the result of an operation which aligned the price of the scrap delivered, to the price on the domestic market. . . .

The conditions for an unjustified enrichment requiring repayment do not exist in this case.

Under these circumstances, the Decisions [demanding such repayment], by violating the rules of law concerning the application of the Treaty, must be annulled."[27]

In this case, therefore, the Court has interpreted the rule of law as a general principle of law which prescribes the repayment based on an unjustified enrichment.[28] This category of rules of law also includes the rule of correct interpretation which the High Authority gives to the terms of its own decisions,[29] or general acts which the High Authority may issue in accordance with the statutory powers expressly provided for by the Treaty.[30]

(4) Abuse of Power

Although translated in various ways into English, the original terms of *détournement de pouvoir* in the French text is used in the works of some English writers. This reveals the fact that, although the concept of this head of illegality has rather uniform application in the administrative laws of most of the Member States of the European Communities, it appears somewhat different from anything known in Anglo-American law because it no way depends on any principle of *ultra vires*.[31] It is no doubt interesting and useful for a comparative study of administrative laws of various countries to scrutinize the concept of *détournement de pouvoir* where it is one of the grounds for review or to see if similar recourse

27) *Mannesmann AG and others* v. *The High Authority* (Joint Cases 4 to 13-59), *ibid.*, pp. 136-137.

28) However, Bebr says, "It seems doubtful, at least for the moment, that the Court would go so far as to consider violations of general principles of law not incorporated in the Treaty as adequate grounds of illegality". *Op. cit.*, p. 91.

29) For example, *Société Nouvelle des Usines de Pontlieue-Aciéries du Temple* (S.N.U.P.A.T.) v. *The High Authority* (Cases 32-58 and 33-58), Valentine, *op. cit.*, pp. 137-138.

30) Bebr, *op. cit.*, p. 90.

31) Brown and Garner, *op. cit.*, p. 124.

can be found where there is no such ground as this. But the European Communities could form their own concept of *détournement de pouvoir* and this is exactly the function of the Court of Justice of the European Communities. Furthermore, whereas in municipal law it is just one of the grounds of illegality for annulment, it assumes a quite unique position in the European Communities.[32] For, in Article 33, paragraph 2 of the ECSC Treaty which I have quoted, the enterprises or other bodies could appeal only against such general decisions and recommendations of the High Authority that they deem to involve a *détournement de pouvoir* affecting them. What we concern here is not, however, to examine such a role of this concept in the European Treaties, but rather to present a brief account of the attitude of the Court as to what acts of the High Authority fall within this head of illegality.

First of all, as regards the definition of *détournement de pouvoir*, the definition will be cited which was given by the High Authority as its defense in an earlier case. It stated:

> "There is a *détournement de pouvoir* when an administrative act is objectively in accordance with the rule of law but subjectively vitiated by reason of the aim being pursued by the administrative authority."[33]

The Court, in another occasion, made a similar statement in such general terms as:

> "The powers. . . .granted to the High Authority. . . .become divorced (*détourné*) from their legal objectives if it appears that the High Authority in dealing with circumstances with which it is faced has used them with the sole purpose, or at any rate with the dominant purpose, of avoiding a procedure specially provided by the Treaty [*i.e.*, for an improper purpose]."[34]

No act of the High Authority has yet been annulled on the ground of *détournement de pouvoir*, but the Court has in several occasions expressed its views on what acts would constitute this head of illegality. A few examples will here be cited.

Thus, according to Article 59, paragraph 1, on the one hand, if the High Authority finds that the Community is faced with the serious shortage of coal or

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32) Bebr, *op. cit.*, p. 99.

33) *Fédération Charbonnière de Belgique* v. *The High Authority* (Case 8-55), cited in Valentine, Vol. I, *op. cit.*, p. 139.

34) *Groupement des Hauts Fourneaux et Aciéries Belges* v. *The High Authority* (Case 8-57), *ibid.*, p. 139.

steel and that a certain measures do not enable it to cope with the situation, it must bring the situation to the attention of the Council and must propose the necessary measures. But, by Article 53 (b), on the other hand, the High Autority may institute itself any financial mechanism common to several enterprises which are deemed necessary for the accomplishment of its mission.

In a case where these two provisions were at issue, the Court has stated:

> "It must be recognised that a *détournement de pouvoir* would have occurred if the High Authority, finding itself faced with a situation which necessitated the application of the procedure set out in Article 59, had nevertheless, in order to avoid the guarantees of Article 59, proceeded under Article 53 (b) and the financial arrangements which it contains."[35]

Again, according to Article 61 of the Treaty, the High Authority may fix in certain circumstances maximum prices for coal and steel, if it deems necessary to establish the lowest possible prices for such products. In a case where a decision of the High Authority based on the power granted by this Article was alleged to constitute a *détournement de pouvoir*, the Court declared:

> "This ground [of appeal] requires one to judge whether, when fixing maximum prices by virtue of Article 61 of the Treaty, the High Authority sought not so much the objectives which it stated, particularly a lowering of prices, but in reality that it sought to act against agreements and concentrations of enterprises.
>
> It would thus have used the powers which were given to it by Article 61 for a purpose other than the one for which those powers were given."[36]

As has been observed, the determination of this head of illegality confronts a difficulty because it mainly concerns the subjective motives of the organ which performs the act in question. The fact must be noted here, however, that the Treaties of the European Communities, notwithstanding such a difficulty, have taken over this concept of *détournement de pouvoir* into their judicial system as one of the means to check the administrative acts of the institutions of the Communities. It thus appears to offer a clear evidence that an international organization could, as the case may be, adopt such a head of illegality in its constitutional instrument.[37]

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35) *Compagnie des Hauts Fourneaux de Chasse* v. *The High Authority* (Case 2-57), *ibid.*, p. 140.

36) *Netherlands Government* v. *The High Authority* (Case 6-54), *ibid.*, p. 141.

37) The possibility of general application of this concept to the acts of international organizations in general is suggested by J. E. S. Fawcett, "Détournement de Pouvoir by International Organizations", *The British Yearbook of International Law*, 1957 (xxxiii), pp. 311-316.

What we have seen in the law and cases of the European Coal and Steel Community are the typical categories of illegal acts of international organizations. Our purpose has therefore been nothing but to indicate the types of illegal acts which could occur in any international organization. It would of course be possible either to prescribe certain other categories of illegal acts in the basic documents of an organization or to provide for no such recourse.

It can be presumed, however, that those categories of acts as indicated above could be alleged to be illegal and thus be likely to assume illegality in any international organization regardless of the existence or absence of explicit enumeration of illegal acts in the constitution of the organization. In ordinary international organizations, it will suffice for the possible existence of illegal acts to exhibit that the acts concerned fall into the broader concept of illegality which includes the four categories indicated in the European Treaties. In other words, an act is illegal when it is performed in any way in violation of the laws of the organization. An only exception to this at present is the case of the European Communities where an appeal against illegal acts must be made on either one of the four grounds because of the explicit provisions of the categories of illegal acts and of the special significance attached to a *détournement de pouvoir*.

IV. Control of Illegal Acts — In the Case of the United Nations

As one of the cases of international organizations whose basic instruments are silent with regard to control of illegal acts committed by their organs, we now turn our attention to the United Nations.

A specific case through which we are attempting to approach the problem will be found in the Advisory Opinion of the International Court of Justice on the case of *Certain Expenses of the United Nations* given on June 10, 1962. However, the examination here neither touches upon such points as the legality of the basic resolutions authorizing the establishments of respective United Nations forces or that of financial measures nor appraise the conclusion of the Court's Opinion that the expenditures in question constitute "expenses of the Organization". Our purpose is rather to examine some of such aspects of the various opinions, including dissenting and individual ones, as appear useful in formulating the theory of illegal acts of international organizations in general and of the United Nations in particular.

Before going directly to the question as to how the existence of illegal acts is determined, it will be of some help to consider what kind of acts fall within the categories of illegal acts under the United Nations system.

The Opinion of the Court and those of the four judges, of whom one judge expressed individual opinion and three delivered dissenting opinions, expressly took the position that an act must be *intra vires* the Organization in order to be legal. It is not clear, however, whether all the acts within the purposes of the Organization are *intra vires* the Organization. As to this point the Court declares:

> ". . .when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization."[38]

It must be noted here that the Court says that action is presumed to be within the powers of the Organization if it is taken for the fulfilment of the purposes of the United Nations but does not say that such action is legal. The United Nations possesses such powers as necessary for the achievement of its purposes, but they are distributed among the several organs with different functions. The legality of an act, in my opinion, can only adequately be claimed if it is done by a competent organ. However, the Court pronounces:

> "If it is agreed that the action in question is within the scope of the functions of the Organization but it is alleged that it has been initiated or carried out in a manner not in conformity with division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent."[39]

What is said here by the Court is no mistake in itself. As Judge Fitzmaurice pointed out, however, the matter we are now concerned is not external but internal one. According to him, "what is really in question here is the relationship of the Member States *inter se*, and *vis-à-vis* the Organization as such," and "if an instrument such as the Charter of the United Nations attributes given functions in an exclusive manner to one of its organs.....this can only be because, in respect of the performance of the functions concerned, importance was attached to the precise constitution of the organ concerned."[40]

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38) I.C.J. Reports, 1962, p. 168.
39) *Ibid.*
40) *Ibid.*, p. 200.

It appears that the Court is dealing with the matter as an external question, but it does not seem to deny altogether the existence of illegal acts in the internal relations of the Organization. Thus, the Court, when analyzing the functions of UNEF, refers to the resolution of the General Assembly which accepted the description of the functions of UNEF by the Secretary-General by saying:

> "It could not therefore have been patent on the face of the resolution that the establishment of UNEF was in effect 'enforcement action' under Chapter VII which, in accordance with the Charter, could be authorized only by the Security Council."[41]

Such wording of the Court implies that the establishment of UNEF is within the powers of the General Assembly and therefore legal. If the Court, on the contrary, considered that it was *patent* on the face of the resolution that the action was taken *ultra vires* the Assembly, the Court would have declared that it was illegal. It can be presumed, therefore, that in this respect the Court is inclined to regard as illegal an act which is *ultra vires* an organ even in the internal relations of the United Nations.

The problem of illegal acts of the United Nations posed in the arguments of *Ceratin Expenses Case* has been dealt with in the light of the rather coarse concept of *ultra vires*. Hence, even if an act within the purposes of the United Nations can be presumed an *intra vires* act, it does not follow from this that an *intra vires* act is always legal. In order to avoid such simplification we must look for some basic means to ascertain the existence of illegal acts in the United Nations framework.

In this respect Judge Bustamante maintains in his dissenting opinion:

> "The United Nations is an association of States in which the rights and the obligations of the Members are contractually prescribed in its constituent charter. It is the Charter which governs the mutual relations of the associates and their relations with the Organization itself. Only because of their acceptance of the purposes of the Charter and the guarantees therein laid down have the States Members partially limited the scope of their sovereign powers (Article 2). It goes without saying, therefore, that the real reason for the obedience of States Members to the authorities of the Organization is the conformity of the mandates of its competent organs with the text of the Charter. This principle of the conditional link between the duty to accept institutional decisions and the conformity of those decisions with the Charter is enshrined in Article 25, which, although referring explicitly to the Security Council, in my opinion lays down a fundamental basic rule which is generally applicable to the whole system of the Charter. Article 2, paragraph 2, confirms this interpretation."[42]

41) *Ibid.*, p. 171.
42) *Ibid.*, p. 304.

Thus, whatever concrete forms they may take, illegal acts of the United Nations are not different from those of other international organizations in general in the fundamental character that they are performed in violation of the basic norms which were created by the common will of the participating States.

A question then arises, in the case that there is no competent organ to determine the illegality of an act such as in the case of the United Nations, whether an allegedly illegal act can nevertheless retain its legitimacy, or whether there is any conceivable means to determine an allegedly illegal act as illegal. With respect to the determination of illegal acts by the United Nations, the Opinion of the Court states as follows:

> "In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. . . . Proposals made during the drafting of the Charter to place the ultimate authority to interprete the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an *advisory* opinion. As anticipated in 1945, therefore, each organ must in the first place at least, determine its own jurisdiction."[43]

As Judge Fitzmaurice pointed out, it is in a sense a matter of course that each organ must, *in the first place at least*, determine its own jurisdiction. For instance, when a certain provision of law leaves the performance of an act to the discretion of an organ, it is that organ, in the first place, to determine its own jurisdiction. Otherwise, the organ cannot perform its functions prescribed by the law. It goes without saying, of course, that in exercising its discretionary power to do some concrete acts the organ cannot exceed the limit provided for by the law in broad and abstract terms. However, what is in question here is not a primary determination by an organ of its own jurisdiction, but rather whether such a determination is final or whether there is any possibility that the act of the organ is reviewed and controled by whatever means.

While Judge Morelli takes the former position, Judge Bustamante takes the latter. It seems of value for further discussion on this subject to look through the contrary opinions of the two judges in some detail.

In approaching the problem of legality of acts, Judge Morelli chiefly concerns the aspect of their legal effect. He observes that in any legal system the problem of the validity of legal acts faces two different requirements: the requirement of *legality* and the requirement of *certainty*. Particularly as regards administrative

43) *Ibid.*, p. 168.

acts those opposed requirements have been happily reconciled, because in general the invalidity of acts involves not the nullity but rather the voidability of the act. This aspect of invalidity of an administrative act as voidability in municipal law, he maintains, is closely linked with the system of the means of recourse open in such municipal law against the illegitimacy of administrative acts. Then he turns to look at the problem on the international plane. He says:

> "In the case of acts of international organizations, and in particular the acts of the United Nations, there is nothing comparable to the remedies existing in domestic law in connection with administrative acts. The consequence of this is that there is no possibility of applying the concept of voidability to the acts of the United Nations. If an act of an organ of the United Nations had to be considered as an invalid act, such invalidity could constitute only the absolute *nullity* of the act. In other words, there are only two alternatives for the acts of the Organization: either the act is fully valid, or it is an absolute nullity, because absolute nullity is the only form in which invalidity of an act of the Organization can occur."[44]

Based on the observation quoted above, Judge Morelli carefully distinguishes certain acts of the Organization which could be regarded as invalid and hence constitute an absolute nullity. They include, in his view, a resolution which had not obtained the required majority, or a resolution vitiated by a manifest *excès de pouvoir* (such as, in particular, a resolution the object of which had nothing to do with the purposes of the Organization). On the other hand, however, there is other category of acts which involve violation of the rules governing competence. According to him, such acts are not considered null and void under the United Nations system. On the contrary, they are valid, because, while they are voidable in domestic law, there is no such acts as could be regarded voidable in the United Nations for the reasons he has given. Then Judge Morelli concludes:

> "This means that the failure of the act to conform the rules concerning competence has no influence on the validity of the act, which amounts to saying that each organ of the United Nations is the judge of its own competence."[45]

Judge Morelli's opinion which I have just outlined seems to be open to some criticism. First of all, whereas he denies the possibility of the existence of voidable acts in the United Nations, he admits a certain kind of acts which are null and void on the ground that there is no competent organ to determine the illegal-

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44) *Ibid.*, p. 222.
45) *Ibid.*, p. 223-224.

ity of acts. In my opinion, however, it appears rather difficult to distinguish between voidability and nullity of certain acts depending solely on whether there exists a machinery of review, for the determination of nullity of an act is also only possible in the case of the existence of a competent organ to pronounce the legal effect of the act. But the problem of legal effect of illegal acts of international organizations is so complex and important that it deserves a separate treatment. A second question, which we are now concerned, is whether there is no organ to determine the illegality of acts in the United Nations system, in other words, whether, even in spite of the absence of clear provisions in the Charter as to the organ with such a function, there is no such system in the United Nations as provides the means of recourse against the illegitimacy of acts. We now move to the relevant opinion of another judge, Judge Bustamante.

First of all, he admits that since the United Nations is a corporate person there is a legal presumption that each of the organs of the Organization is careful in its actions to comply with the prescription of the Charter. This does not exclude, however, a right on the part of the Member States to challenge the resolution in which the error has been noted for the purpose of determining whether or not it departed from the Charter. The claim that the resolutions of any organ of the United Nations are not subject to review, he asserts, would amount to declaring the pointlessness of the Chafter or its absolute subordination to the judgement — always fallible — of the organs. Judge Bustamante continues:

> "But the case of the United Nations is clearly a special one. Having regard to the fact that it is the highest international institution as being an association of sovereign States, its unfettered autonomy is subject to no higher tribunal capable of reviewing its acts. It is the institution itself which has the power to rectify or to confirm them. That is probably why no provision was made in the Charter for any supervisory organ to determine legality or conformity with the Charter. . . . But that in no way excludes the Organization's function of dealing with complaints by its Members. And I think I find evidence that that was the intention of the Charter in the text of its Article 96, which makes provision for the advice of the International Court of Justice on legal questions. An advisory opinion, taking the place of judicial proceedings, is a method of voluntary recourse which, if only by way of elucidation, precedes the decision which the Organization is called upon to give with regard to legal objections raised by Member States."[46]

He then refers to the attitude of certain States which pointed out the illegality of some resolutions or possible mistakes of interpretation of the Charter and says:

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46) *Ibid.*, p. 304.

"This attitude on the part of certain States derives from an inherent right of all members of associations which have a body of rules to which the acts of the institution have to conform. This principle of conformity with the rules is, one must not forget, the basis for a contractual obligation. The fact that, faced with this number of objections, the General Assembly has asked for the legal opinion of the Court is—in my view —the best proof that this organ of the United Nations intends to decide in accordance with law the objections put forward by several of its Members and—perhaps—to embark upon a review or adaptation of the Charter to the new circumstances."[47]

Judge Bustamante's opinion which I have just quoted is obviously opposed to that of Judge Morelli. The latter envisages only an organ of compulsory character as an organ of reviewing illegal acts of the United Nations. His opinion is drawn from an analogy of administrative law or, in particular, of administrative litigation under municipal legal systems. Referring to the internal legal order of international organizations at the beginning of this paper I suggest that the nature of the acts of an international organization is similar to, or even identical with, that of administrative acts of a State and that therefore it will be possible to borrow to a certain extent the theories of administrative law in dealing with the problem of illegal acts of international organizations. My intention is not, however, to extend such an analogy to administrative litigation whose function is purely judicial. An analogy of municipal law is possible only to the extent that even in international organizations there can be similar types of illegal acts and some means of their control, but it does not extend to the nature of the control. In other words, in the legal system of a State, illegal acts are determined by courts, whose function is exclusively judicial, where the rules of law are clarified and disputes are ultimately solved. On the contrary, the control of illegal acts of international organizations is not always judicial but in most cases political except in the case of the European Communities. It appears, therefore, to be based on a false analogy of municipal law to say that there is no means of controling illegal acts on account of the non-existence of such judicial control as can be found in domestic laws and that therefore illegal acts themselves do not exist at all in international organizations.

It is obvious that there is no such judicial control of illegal acts in the United Nations system. It is true that the International Court of Justice is a judicial organ in international society in the sense that it is vested the function and power to solve disputes between States. But it does not fully perform a judicial function in the internal administrative relations, or the relations between the Member

47) *Ibid.*, p. 305.

States *inter se*, and *vis-à-vis* the United Nations as such. The evidence of the limited function of the International Court of Justice in the internal relations of the United Nations could be found in the fact that the United Nations Administrative Tribunal was specially set up in order to solve disputes between the United Nations and its staffs. What the International Court of Justice could do in the internal relations of the United Nations is at most to give an advisory opinion on certain legal questions and moreover such an opinion is only of the nature of a recommendation. Since any organ of the United Nations cannot be parties in cases before the Court, the latter has no competence to solve disputes between the Member States and the organs of the United Nations or between the organs *inter se*.[48]

Thus, in view of the fact that the International Court of Justice is incompetent to perform a fully judicial function with regard to illegal acts within the United Nations, what is to be considered next is how to control such acts in the actual working of the Organization. It would not be realistic, although conceivable as a paper plan, to give to the International Court of Justice or to the United Nations Administrative Tribunal the competence to review illegal acts. The only practical way conceivable at present is the one which the United Nations actually took in *Certain Expenses Case*. Although it did not here pass judgement on the illegality of a certain act, it appears that the method used here gives direction to the possible control of illegal acts of international organizations whose basic instruments are silent on the matter in question.

The question as to whether a certain act is in conformity with the rules of law is nothing but a purely legal question and the most appropriate organ to answer it is no doubt the International Court of Justice, whose opinions the organs of the United Nations may request.[49] The opinions thus given by the Court, without having any legal authority or binding force, would either be accepted or declined by a resolution of the General Assembly which is composed of all the Member States of the United Nations. Such a resolution of the Assembly has the significance that it is of the nature of the act of reaffirming or extending the scope of the original agreements which all the Member States entered into in the abstract terms when joining in the Charter engagement. Inasmuch as the resolution is of the advisory nature and hence is not binding any Member States opposing to it, it does not by itself assume any judicial function. On the contrary, the advisory opinion of the Court on legal question preceding to the

48) Art. 34 of the Statute of the Court. See Bowett, *op. cit.*, pp. 125-126.
49) Art. 96 of the U.N. Charter.

resolution presents itself as a phase of its judicial functions.

Thus, in the absence of the express provisions in the Charter, what has been done by the United Nations in the control of its illegal acts appears to have the double functions: on the one hand, the function of clarifying what the law is is vested on the International Court of Justice, while, on the other, the actual determination based on the findings of the Court is carried out by the General Assembly. It thus appears that such a means of controling illegal acts as used in this and other occasion[50] by the United Nations is most appropriate and therefore applicable to the other international organizations which have no express provisions concerning the problem which we have considered.

V. Conclusions

We have so far been discussing two aspects of illegal acts of international organizations: first, the main types of illegal acts in the law and cases of the European Coal and Steel Community, and, second, the control of such acts in the case of the United Nations whose constitution has no provision relevant to the points at issue. It seems by no means possible to draw from the observations of such a limited scope and insufficient inquiry as this something like a theory applicable to the problem of illegal acts of international organizations in general. If, however, it is considered advisable for the further study of the problem to draw a certain kind of conclusions from what has been observed, it would not be too bold to give tentative conclusions in the following way.

Firstly, the possible types of illegal acts would be common to all international organizations. This at once concerns the definition of an *international organization*, for, this is due to the fact that, when certain international entities or corporate bodies fall within the category of *international organizations*, some common features can be found in their constitutions or legal structures. Thus, a certain act which infringes the constitution of an organization would be vitiated

50) In January 1959, the first IMCO Assembly requested an advisory opinion of the International Court of Justice on the following question: 'Is the Maritime Safety Committee of IMCO, which was elected on January 15, 1959, constituted in accordance with the Convention for the establishment of the Organization?' In its advisory opinion of June 8, 1960, the Court expressed: 'The Maritime Safety Committee of IMCO which was elected on January 15, 1959, is *not* constituted in accordance with the Convention for the establishment of the Organization' (I.C.J. Reports, 1960, p. 150). On April 6, 1961, the IMCO Assembly accepted the advisory opinion of the Court and dissolved the Maritime Safety Committee elected on January 15, 1959 (Lauterpacht, *op. cit.*, p. 102).

by being an illegal act and therefore would no more be held the act of the organization even in the case of the absence of explicit provisions to that effect. Suffice it to say, in such a case, that there is a strong theoretical presumption in favor of the existence of common types of illegal acts to every international organization. However, it goes without saying that, when the constitution of an organization provides that certain types of acts could be held illegal, such particular acts could differently be laid down depending on the individual character of each organization.

Secondly, as regards the control of illegal acts, the elements which determine the nature of the control appear to depend not upon the nature of international organizations in general but rather upon their individual characters, that is to say, the scope of their purposes and the extent of the powers entrusted to the organs of the organizations. Thus, in an organization with limited purposes and comparatively strong powers which could be directed to its members, such powers are required to be exercised strictly within the framework of its constitution in order to protect the individual interests of the members. Here the means of controling illegal acts are beforehand embodied in the original engagement and tends to be more effectively carried out in the form of judicial control. On the other hand, in an organization with far-reaching purposes and rather minor powers, such powers should scarcely jeopardize the individual interests of its members. The control of illegal acts here is sometimes considered even unnecessary to be predetermined in its constitution for fear that the effective working of the organization should be hindered by an allegation on the part of the individual members of illegal acts at the expense of the common interest of the organization. Thus, as Bowett rightly observed, certain constitutional issues are not thought suitable for independent, judicial settlement.[51] Even when needs arise to regulate illegal acts, its control is apt to be influenced by political expediencies.

Finally, it is to be noted, however, that even in the absence of the express provisions (concerning illegal acts) in the basic instrument, it cannot be necessarily maintained, as we have seen, that there is no means of recourse available to the members or the organs of an organization of reviewing illegal acts. The fact is that at the present stage of development of international organizations the problem we have dealt with is only about to emerge as a practical concern of international life.

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51) Bowett, *op. cit.*, p. 128.