

KRZYSZTOF SKUBISZEWSKI

The Significance of the Legislative Resolutions of International Organizations for the Development of International Law¹

In this work, we will attempt to present and assess the place of the legislative resolutions of international organizations in the law of nations today, as well as the role of such resolutions for the future development of that law. Thus, our attention will focus first on the novelty of the phenomenon of laws for states being enacted by international organizations (Subchapter 1). At the same time, it is noted that the subjective and objective scope of the legislative competence that such organizations possess is limited (Subchapter 2). This is particularly evident with global political organizations—the League of Nations and the United Nations—which have not had and still do not have direct lawmaking powers with respect to states (Subchapter 3). Certain difficulties associated with investing organizations with such powers are illustrated by the developments in that respect in the European Communities, examined particularly in the light of the treaties which establish the Communities (Subchapter 4). The judicious, slow, and gradual emergence of the legislative resolutions of international organizations is evinced in the relics of the contractual concept, which remain present in the activities of a number of organizations capable of lawmaking. Simultaneously, the models of internal state legislation have been adopted by only a few

¹ Translated from: K. Skubiszewski, *Uchwały prawotwórcze organizacji międzynarodowych: przegląd zagadnień i analiza wstępna*, Poznań 1965 by Szymon Nowak and proofread by Stephen Dersley. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

of the organizations in question, and by no means to a broad extent (Subchapter 5). Bearing all the resulting reservations in mind, one can speak of the inception of legislative bodies within the international community (Subchapter 6). Finally, we briefly discuss the reasons why in order to regulate certain matters, states opt for the enactment of law by an organization rather than proceed by means of a traditional treaty (Subchapter 7).

Enactment of Law for States by International Organizations as a New Phenomenon in International Life

The information provided in the preceding chapters and the deliberations conducted on their basis, compel one to state that in international life today the enactment of law for states by international organizations is an accomplished fact.

The involvement of international organizations in establishing legal norms addressed to states should be approached as a novel development process in the law of those organizations. The law of international organizations evolves quickly and its growth engenders changes of certain fundamental principles adopted at a time when the first international organizations came into existence. It may be noted for instance that today the principle of unanimous decisions has been overcome in the law of international organizations, and the right to veto for every member has been abolished as well; international bodies have been equipped with competence enabling them to use coercion with respect to states; physical persons have been granted the right to sue states (including their native state) before international instances; the actions and interventions of organizations have been extended to encompass those affairs and areas which until recently had been an inviolable domain of the exclusive competence of the state. The development and progress in the law of international organizations translates into simultaneous develop-

ment and progress in international law.² The fact that certain international organizations have gained the competence to enact law for states not only proves that organizations enhance their role with respect to states—upon consent of the latter in any case—but also shows that the international community is gradually improving its structure and is transitioning to a higher level of development.³ The competence to enact legal rules for states appears increasingly often in the law of international organizations. This competence constitutes one of the major changes introduced by that law in the universal international law.

The competence of international organizations on which we are currently focusing our attention is a novel and contemporary phenomenon. This monograph is concerned exclusively with positive law, but it is only in that law that we find instances of an international organization being empowered to issue legislative acts that are binding on states. Our issue has actually no history of its own, as the phenomenon described here dates back to the end of World War II, while precedents from earlier periods are more than meagre. Among the organizations currently able to enact legal rules for states, only one originates from before 1939: The Central Commission for the Navigation of the Rhine. This organization may enact law only by way of unanimous resolutions (Chapter III, Subchapter 1), and therefore belongs to the least developed category of organizations equipped with legislative powers. Also, a few more organizations that are empowered to revise their own statutes trace their origin to before the last world conflict. Here, one can mention only the International Bureau of Education in Geneva (Chapter VI, Subchap-

² See C.W. Jenks, *The Common Law of Mankind*, London 1958, specifically the study on p. 173 ff. entitled *The Impact of International Organization on International Law*. In his appraisal of legislative activities of international organizations, the author refers to the phenomena we are interested in only when discussing the manuals of the World Health Organization and the technical annexes of the International Civil Aviation Organization, pp. 186–188.

³ Cf. remarks by P. Reuter in *Organisations internationales et evolution du droit*, *L'évolution du droit public*, Études offertes à Achilles Mestre, Paris 1956, p. 453, concerning lawmaking as a “normal form of law in developed communities.”

ter 2, Section 1) and the Revision Commission acting under Berne railway conventions (*ibidem*, Section 9). As regards organizations which no longer exist, two should be mentioned: the European Commission of the Danube, and the International Commission on Air Navigation. The European Commission of the Danube issued regulations concerning riparian navigation and policing.⁴ When this information is compared with the present-day competence of the Central Commission for the Navigation of the Rhine, a body also established in the nineteenth century, one may conclude that the very first legislative acts of an international organization were effected in the area of riparian law in the previous century. However, those were isolated developments in a world in which there were very few international bodies and one could hardly conceive international law being created otherwise than through custom or treaties. The second body we would like to mention is the International Commission on Air Navigation, established under the Paris Convention of 1919. By virtue of majority vote, it was able to amend the annexes to the convention.⁵ The Commission was created much later than the aforementioned organs for riverine affairs, but in the interwar years the legislative competence of international organizations remained largely an unprecedented phenomenon.⁶

4 The Commission is mentioned by M. Merle, *Le pouvoir réglementaire des institutions internationales*, "Annuaire Français de Droit International" 1958, vol. IV, p. 344; A.J.P. Tammes, *Decisions of International Organs as a Source of International Law*, "Académie de Droit International, Recueil des Cours" 1958-II, vol. 94, p. 284.

5 The Commission has been referred to previously, Chapter IV, Subchapter 1. See P.H. Sand, J. de Sousa Freitas, G. Prat, *An Historical Survey of International Air Law before the Second World War*, "McGill Law Journal" 1960, vol. 7, p. 34.

6 See further examples in H. Hart Jones, *Amending the Chicago Convention and Its Technical Standards—Can Consent of All Member States Be Eliminated?*, "Journal of Air Law and Commerce" 1949, vol. 16, pp. 194–197 and H.T. Adam, *Les établissements publics internationaux*, Paris 1957, p. 58 ff. The latter author is cited by M. Merle, *Le pouvoir réglementaire...*, p. 344. See also G. Schulz, *Entwicklungsformen internationaler Gesetzgebung*, Göttingen 1960, *passim* and on p. 55 on unrealized designs to introduce the contracting-*out* system in the International Labour Organization.

The Limited Subjective and Objective Scope of the Legislative Competence Exercised by International Organizations

The overview of the competences and activities of international organizations in Chapters III-IV leads to the conclusion that at present—the legislation of the European Communities notwithstanding—the norms established for states by international organizations have shifted the burden from the treaty as a basic instrument of international legislative technique only to a minimal extent. Formulated more than three decades ago, the words of an expert on the law of treaties, which characterize international agreements as “the only and sadly overworked instrument with which international society is equipped for carrying out its multifarious transactions”⁷ are still relevant today. However, should the role of the treaty begin to diminish in the future, it will come to pass thanks to the development of the competences of international organizations to issue legislative and administrative acts. Even today, when one considers the abundant growth and development of those regulations we have called the internal law of organizations (Chapter I, Subchapter 4), it must be stated that the legislative and administrative activity of international organizations considerably disburdened the treaty in the domain of internal affairs of organizations. Still, this monograph concentrates on those legal norms which represent the actual rival to treaty law, i.e. norms addressed directly to states. When assessing the place and the role of the law enacted by organizations, we may leave internal law out of the equation, as from the outset it was created through legislative process by the organizations themselves, and the matters which it governed were as a rule beyond the scope of treaties. Trying to determine the extent to which the legislative acts of international organizations have replaced treaty law, one must—given the enormous body of the latter—conclude that the role of the law enacted for states by international organizations is still a minor

7 A.D. McNair, *The Function and Differing Legal Character of Treaties*, “British Year Book of International Law” 1930, vol. 11, p. 101.

one. It increases when such legislation is not compared with the entirety of treaty law, but with only with some of its branches. It follows from the overview in Chapter III-IV that in areas such as aerial navigation, public health, certain aspects of economic collaboration or meteorology, the legislative acts of organizations are extensive, at times display the nature of codification, and not infrequently replace many pertinent conventions, for instance in sanitary law.⁸ As one examines the development of international law in those selected areas, one can hardly concur with the view that “the so-called normative competences of international organizations are very narrowly delineated.”⁹ The view is nonetheless correct in relation to the entirety of affairs within the purview of contemporary international law of treaties. Only in the European Communities, the European Economic Community in particular, can one see the beginnings of a process in which, in an area of such magnitude and importance as the economy, six European states have decided to give priority to legislative acts of organizations at the expense of both treaties and even their own legislation. The states in question have adequately equipped the bodies of the Communities with broad legislative competence. And yet, experience shows that the experiment with the legislation of the Communities not only fails to find followers among other groups of states, but also proves incapable of finding it for the time being.¹⁰ After all, investing organiza-

8 M. Merle, *Le pouvoir réglementaire...*, p. 359: “Qu’il s’agisse de leur champ d’application ou de leur force exécutoire, les règlements internationaux ont donc une portée beaucoup plus grande, envers les États, que les traités et les conventions.”

9 R. Ago, *Die internationalen Organisationen und ihre Funktionen im inneren Tätigkeitsgebiet der Staaten. Rechtsfragen der Internationalen Organisation*, Festschrift für Hans Wehberg zu seinem 70. Geburtstag, Frankfurt am Main 1956, p. 25. Earlier D. Anzilotti, *Lehrbuch des Völkerrechts*, Berlin–Leipzig 1929, vol. 1, p. 228 referred to norms established by international organizations as “zufällige und akzessorische Nebenprodukte”, cited by G. Schulz, *Entwicklungsformen...*, p. 5. Anzilotti’s view (in contrast to Ago’s) is justified, having been formulated 35 years ago.

10 M. Sørensen, *Principes de droit international public*, Cours general, “Académie de Droit International, Recueil des Cours” 1960-III, vol. 101, p. 107 observes as follows regarding legislative competence of European Communities: “Sans méconnaître l’importance fondamentale pour l’Europe de cette évolution, il faut admettre qu’elle pousse l’intégration internationale à un tel point qu’elle n’est plus typique des tendances générales qui se manifestent dans la communauté internationale.” See also G. Jaenicke, *Völkerrechtsquellen*, Strupp-Schlochauer,

tions with such a far-reaching legislative competence as has been the case in two economic Communities (due to its tasks, the Atomic Energy Community did not need broad legislative powers), required on the one hand that states be sufficiently determined and decide to engage in very close cooperation, whilst going so far as to surrender the exercise of sovereignty in many economic matters. On the other, the actual political powers, productive forces and relations of production had to be aligned in a manner which objectively enabled such a close and lasting mutual association. In general, France, Western Germany, Italy, Belgium, the Netherlands, and Luxembourg met the posited requirements and thus were able to attempt to establish organizations which have then gone further in the area of international legislation than is politically feasible in other organizations and larger groups of states. It is noted further on that differences in terms of legislative competence exist between the Communities themselves; these differences demonstrate that even in a small group of states which agree on a common economic policy, the extent of legislative powers granted varied depending on the area to which these powers pertained. In all other international organizations the participation of states is possible only because these organizations operate under the premise that one agrees on and coordinates shared and opposing interests, but do not rely on the minority yielding to the majority, or on subordination to supranational bodies. The international community today is composed of sovereign states and it is remote from being a monolith, given that the states differ with regard to fundamental systemic arrangements and display tremendous discrepancies in economic development and national revenue. The resulting contradictions and rivalry do not permit the creation of an international law that is common to all states in any other manner than through treaties, i.e. by means of a method which still most effectively safeguards each state from having any obligations imposed by other states. Therefore, in numerous

Wörterbuch des Völkerrechts, Berlin 1962, vol. 3, p. 772. A different, more optimistic position appears to be assumed by W. de Valk, *La signification de l'intégration européenne pour le développement du droit international moderne*, Leyden 1962, esp. p. 121.

issues, international organizations are competent to enact laws solely by way of unanimous resolutions (Chapter III). For this reason, for further matters—in which the considerations of purpose dictated the adoption of the principle of majority resolutions due to the numerous members of a given organization—the contracting-out system was invented, enabling states which dissented to a legislative act to object or state their reservations (Chapter IV). Lawmaking decisions which are enacted by majority vote and come into mandatory effect are, in practical terms, exclusive to the European Communities (Chapter V). As already observed, such decisions are only possible when the mutual ties are particularly strong and a community of goals exists between states¹¹; even when the aforesaid conditions are met, granting substantial legislative prerogatives to organizations does not have to be the only form of international association in a given group of states.

Hence, what we are witnessing is merely the inception of the practice whereby international organizations enact law for states. In view of the current political structure of the international community, one should not expect prompt changes in the modest scope and reach that legislative acts of international organizations possess among the sources of international law.¹² However, the fact that these are but the beginnings of the legislation of international organizations should not overshadow the momentousness of the very development process discussed here nor—even less so—lead to the process being downplayed.

11 Cf. G. Schulz, *Entwicklungsformen...*, p. 72, who, quoting such authors as Mosler, Max Huber, Wright and Brierly, finds that in order for decisions taken by majority vote to be effective, they must be accompanied by a sense of solidarity and community of interests. Schulz adds: “Ein Mehrheitsbeschluss, dem die überstimmte Minderheit die Anerkennung verweigert, bewirkt keine Festigung der internationalen Organisation, sondern ruft die zentrifugalen Kräfte an die Oberfläche.”

12 P. Reuter, *Organisations internationales...*, pp. 451–452: “Concéder à une organisation internationale les compétences nécessaires pour imposer aux États membres des règles générales et permanentes, c’est procéder à une délégation trop importante pour qu’elle ne reste pas jusqu’à présent exceptionnelle.” Cf. also S. Bastid, *De quelques problèmes juridiques posés par le développement des organisations internationales*, *Grundprobleme des internationalen Rechts*. Festschrift für Jean Spiropoulos, Bonn [1957], p. 37.

At present, states and the international community are far from such a developmental stage in which the legislative acts of organizations will regulate international life to a substantial degree. This is eloquently attested by the fact that organizations whose tasks are political do not possess legislative competence. In particular, I am referring to the League of Nations and the United Nations (Subchapter 3). Also, the direction in which the development of legislative competence proceeded in the integration organizations of Western Europe in the wake of the bold and successful experiment with the European Coal and Steel Community demonstrates that international lawmaking—even in such a small group of states—depends on the political circumstances (Subchapter 4). These issues are discussed below.

World Political Organizations and Legislative Competence

Soon after the founding of the League of Nations, the view was expressed in the scholarly literature that the resolutions of the League are a “particular source of international law.”¹³ The matter was debated in the interwar period, as every now and then the Assembly of the League would pass resolutions which bore on this or that provision of international law. As an example, one could cite the resolution of the Assembly of 11 March 1932 on the adoption of the Stimson Doctrine in connection with the conflict in Manchuria.¹⁴ A number of authors considered such resolutions to represent changes and new norms introduced by the Assembly into international law.¹⁵

13 P. Fauchille, *Traite de droit international public*, vol. I, Part 1, Paris 1922, p. 48.

14 League of Nations, Official Journal, Special Supplement, no. 101, p. 8. The Stimson Doctrine proscribed recognition of anything that happened following breach of the Kellogg-Briand Pact, which prohibited offensive warfare; in particular, the doctrine enjoined that territorial acquisitions made in violation of the Pact were not to be recognized.

15 E.g. H.A. Smith, *The Binding Force of League Resolutions*, “British Year Book of International Law” 1935, vol. 16, pp. 157–158.

A study of the Covenant of the League of Nations leads to the conclusion that the League had no legislative competence with respect to states.¹⁶ The Covenant does not contain any provision which would equip the League with powers to establish legal norms addressed directly to states. Just as any other international organization, the League was able to create its internal law (Chapter I, Subchapter 4). Where authorized, it was capable of passing resolutions under which obligations for the member states arose.¹⁷ However, as already explained, it is not that each binding act is a legislative one (Chapter I, Subchapter 5, Section 3), which is why League resolutions were not a source of international law owing solely to that circumstance. One could perhaps ponder whether the mandates of the League of Nations were in fact international agreements or were rather legislation enacted by the League.¹⁸ However, the International Court of Justice in The Hague ruled recently that the mandate pertaining to South-West Africa is a treaty or convention within the meaning of Article 37 of the Statute of the Court.¹⁹ The opinion of the Court may be extended to apply to the remaining mandates. Even if it is assumed that the League of Nations did possess legislative competence in mandate-related cases (a view we do not share), it would have been

16 Smith, *op. cit.*, p. 159; J.L. Brierly, *The Meaning and Legal Effect of the Resolution of the League Assembly of March 11, 1932*.

17 See views expressed by Pastuhov, Riches, Schindler and Wilcox, quoted by F.B. Sloan, *The Binding Force of a 'Recommendation' of the General Assembly of the United Nations*.

18 See dissenting opinions of justices Sir Percy Spender and Sir Gerald Fitzmaurice regarding South-West Africa cases (preliminary objections): "To all appearances [...], the Mandate was a quasi-legislative act of the League Council, carried out in the exercise of a power given to it by the Covenant to meet a stated contingency – a power which it was bound to exercise if the terms of the Mandate had not been previously agreed upon by the Members of the League." And further: "[...] the Mandate was the act of the League Council and is not and never was a "treaty or convention," (or other form of international agreement), or [...] if it was, it is no longer in force as such [...]."

19 Judgment of 21 December 1962 on South West Africa Cases (preliminary objections), I.C.J. Reports, 1962, pp. 330–332. The wording of the mandates followed the model of resolutions of the League Council, see M.O. Hudson, *International Legislation, 1919–1921*, vol. 1, p. 44 ff.

a competence exercised by way of exception given the absence of law-making powers in any other matters.²⁰

The United Nations today represent a similar problem: the world political organization which functions currently does not have legislative powers with respect to its members either. At the 1945 conference in San Francisco where the Charter of the United Nations was drafted, one of the delegations in Committee II/2 submitted a project according to which the General Assembly was to be empowered to enact international legal norms. The norms would have been binding on the members after ratification by the Security Council. However, the committee rejected the proposal with 26 votes to 1.²¹ The General Assembly and the other main bodies of the UN create the internal law of the organization, and its provisions are already very numerous.²² Still, neither the General Assembly nor other organs of the UN have obtained the competence enabling them to enact law for states in designated domains.²³

20 A power granted exceptionally to the League was the competence of its Council to introduce changes in the clauses on the protection of minorities in peace treaties with Austria, Hungary, and Bulgaria, see A.J.P. Tammes, *Decisions of International Organs...*, pp. 283–284.

21 Documents of the United Nations Conference on International Organization, vol. 9, 1945, p. 70. Discussing the rejection of the project, F.B. Sloan, *The Binding Force...*, p. 7 observes: “But while this rejection indicates that the General Assembly was not intended to have general powers of enacting new law similar to those of a national parliament, it is not a decisive indication of the juridical consequences which were envisaged for a recommendation.” The project is also mentioned by H. Field Haviland Jr., *The Political Role of the General Assembly*, New York 1951, p. 26.

22 See, in particular, the provisions cited as examples in Chapter I, Subchapter 4.

23 See literature cited in Chapter I, notes 33 and 34. See also C. Eagleton, *The Role of International Law*, Commission to Study the Organization of Peace. Charter Review Conference. Ninth Report and Papers presented to the Commission, New York 1955, p. 194. The ability of the General Assembly to resolve on “additional categories of questions to be decided by a two-thirds majority” under Article 18 (3) of the Charter is a legislative competence granted to the Assembly, which appears to be something more than merely a competence to enact internal law of the organization. The competence is referred to by M. Sibert, *Traité de droit international public*, vol. 1, Paris 1951, p. 36; E. Stein, *Constitutional Developments of United Nations Political Organs*, Lectures on International Law and the United Nations Delivered at University of Michigan Law School, June 23–28, 1955. Summer Institute on International and Comparative Law, Ann Arbor 1957, p. 351, quotes the so-called Douglas-Thomas Resolution presented at the US Congress in 1949, which called for a treaty under which the General Assembly would acquire broad competences to take

While articulating that view, we do not intend to conclude in the negative whether the recommendations of the Assembly and other bodies have legal effects for the members and whether they affect their conduct.²⁴ Nonetheless, recommendations are not legislative acts and are therefore marginal to the subject matter of this monograph.

World political organizations, such as the League of Nations formerly and the United Nations today, are entities within which there co-exist states whose interests and aspirations differ or, particularly, diverge. The organizations are expected to create the framework and the mechanism enabling states to cooperate in matters the latter find vital where the life and existence of each is concerned. The most significant task of the United Nations is to contribute to the upholding of world peace and to influence states to resolve their disputes in a peaceful manner. In order to carry out this task, an organization such as the UN does not require legislative competence. Instead, it needs executive powers and the Charter of the United Nations, in particular Chapter VII, contains provisions which set out the legal grounds for the organization to bring

binding decisions in the area of security. It remains unclear whether the proposal also aimed to endow the Assembly with lawmaking powers. L.B. Sohn, *op. cit.*, p. 383, speaking with approval of the competences of the World Health Organization, declared: "I do not see at all any reason why we could not have a supplementary agreement giving the United Nations General Assembly power to make similar regulations in various fields of international law which do not have special political implications." See suggestions advanced by that author with respect to granting legislative competence to the Assembly, G. Clark, L.B. Sohn, *World Peace through World Law*, Second Edition Revised, Cambridge, Mass., 1960, p. 35 ff.

24 The issue goes beyond the scope of this book, although it is related to international lawmaking involving the UN. The author discussed the matter in the dissertation submitted in 1964 at the Columbia University, NYC, entitled *The Power of the U. N. General Assembly to Influence Policies of Members in Political Matters. A Preliminary Study*, typescript, 240 pp. See literature cited in Chapter I, notes 33 and 34. See F.B. Sloan, *The Binding Force...*, pp. 6, 16, 20; M. Sibert, *Traité de droit...*, p. 36; M. Sørensen, *Principes de droit...*, p. 92. In particular, see the often quoted remarks of Justice H. Lauterpacht in the dissenting opinion attached to the advisory opinion of the International Court of Justice in The Hague of 7 June 1955 on the voting procedure on questions relating to reports and petitions concerning the territory of South West Africa. I.C.J. Reports, 1955, pp. 118–119 and 122. An original view was advanced by M. Bartoš, *Medunarodno javno pravo*, vol. I, Belgrade 1954, pp. 112–113, who argued that a unanimously accepted recommendation of the General Assembly acquires the nature of a general legal rule adopted by civilized nations.

coercion to bear against states which threaten or violate peace. The political tasks of organizations such as the UN and the highly complex composition of its members permit it to act using persuasion, diplomatic pressures and demarches rather than by means of generally formulated injunctions and prohibitions. It clearly follows from the overview of legislative activity of international organizations (Chapters III–VI) that in strictly political matters it is still too early for even a limited range of lawmaking competence to be granted to an international organization.²⁵

It is also too early for such competence to be granted to organizations with political tasks which gather a minor number of countries, even though the latter may at times function very harmoniously and pursue a foreign policy which proves identical in certain respects. None of the regional political organizations is equipped with legislative competence.²⁶ It may therefore be worthwhile mentioning the view according to which certain resolutions of the North Atlantic Council were allegedly a source of law for the member states.²⁷ Here, one specifically cites the resolution of the Council of 13 December 1956 on the peaceful settlement of disputes between the members and the resolution to implement Section IV of the Final Act of the London Conference of 3 October 1954. The latter instrument increased the competences of the Supreme Allied Commander in Europe, whereas the resolution concerning the peaceful settlement of disputes creates a new legal rule for the members of the Organization: they are obligated (subject to exceptions stated in the resolution) to submit unsettled disputes to good offices procedures within the Organization before resorting to any other

25 It is aptly observed that in the area discussed here the United Nations do not play and, apparently, will not play any greater role: see P.B. Potter, *An Introduction to the Study of International Organization*, New York 1948, p. 265; C.W. Jenks, *The Impact of International Organizations on Public and Private International Law*, The Grotius Society, Transactions for the Year 1951, vol. 37, p. 36.

26 The powers of the Western European Union and the European Council to amend certain provisions of the treaties, which are in fact very limited, are not taken into account here; see Chapter VI, Subchapter 2, Sections 5 and 6.

27 M. Merle, *Le pouvoir règlementaire...*, pp. 346–348.

international institution. As for the other resolution, the Supreme Allied Command in Europe is to exercise its powers after consultation and agreement with the governments concerned. Here, one may consider the matter further to determine whether the new obligations of a military nature which arise for the states are indeed the result of an act of lawmaking, or whether they are formulated only upon having been agreed between those states and the Organization. No treaty had granted lawmaking powers to the North Atlantic Council and therefore—as previously stated in Chapter I, Subchapter 5, Section 1—it has to be concluded that it does not possess legislative competence. If the resolutions of the council give rise to legal norms, then it has to be assumed that the norms are in force not because they have been enacted by the Council but because the states have consented, doing so through a resolution of an international body. If, on the other hand, one adopts the view to which the author quoted here seems to subscribe, namely that by virtue of its resolutions the Council enacts law for its members (who are subject to it as an act of the Council as opposed to contractual rules), we would be dealing—first—with an international organization enacting law in a domain which is thoroughly political and concerns the most vital interests of state, and second, with an organization obtaining legislative competence through practice rather than under an explicit treaty provision (which is indispensable, in our opinion). It seems, however, that the latter interpretation is untenable; in other words, one cannot but conclude that the North Atlantic Treaty Organization has no legislative competence.

Distinct Lawmaking Arrangements in Particular European Communities

The overview of lawmaking powers granted to the European Communities, presented in Chapter III, Subchapter 2–4, and in Chapter V, Subchapter 1–3, leads to the conclusion that there are differences in this re-

spect between the Communities, coming to light as one examines which organs enact law (subjective differences) and determines the scope of affairs that such competence covers (objective differences).

In our opinion, the differences are indicative of the difficulties involved in assigning legislative powers to an international organization, even in the case of organizations with so few members as the European Communities (six states). It turned out that the competence of the Communities to enact law required a distinct arrangement in each Community and that it proved impossible to adhere to one model whilst doing so. For one thing, the tasks of the Communities differ in terms of their subject matter, but the chief cause behind it was that when six Western European states established the first Community, the political circumstances were quite unlike those which the same states faced when deciding on further integration.

1. The first issue: the division of lawmaking competences between the organs of each Community was resolved in one particular fashion in the case of the European Coal and Steel Community, while a different approach was employed for the European Economic Community. The solution adopted for the European Atomic Energy Community follows the model of the EEC. However, given that pursuant to the treaty the legislative competence of the Atomic Energy Community is a minor one (which is also referred to further on), the difference between the latter and the Coal and Steel Community is less evident than in the case of the Economic Community.

Within the European Coal and Steel Community, the body invested with legislative powers is the High Authority. This is not an exclusive competence for—as we have seen—the treaty does not preclude lawmaking on the part of the Special Council (Chapter III, Subchapter 2, and Chapter V, Subchapter 1, Section 1). Still, the treaty authorizes the Special Council to engage in such an activity only in view of exceptional expedients. Let us recall that the High Authority is an organ composed of persons who are not representatives of the states. Under the treaty,

such persons act “in the general interest of the Community, [being] completely independent in the performance of their duties.” (Article 9 (5)).

Meanwhile, the lawmaking function in the European Economic Community is delegated to a body composed of representatives of the states, namely the Council (Chapter III, Subchapter 3 and Chapter V, Subchapter 2, Section 1). Although the Commission of the Community, an organ equivalent to the High Authority of the Coal and Steel Community, also possesses the competence to enact specifically targeted law for the member states (Chapter V, Subchapter 2, Section 2), its role is indeed very minor compared with the powers of the Council, while the regulations it issues are rare and few. Analogous solutions were adopted in the treaty establishing the European Atomic Energy Community. The organ invested with the competence to enact legal norms is also a Council composed of delegates from respective governments (Chapter III, Subchapter 4 and Chapter V, Subchapter 3, Section 1), while a supranational body—the Commission—exercises lawmaking function only exceptionally (Chapter V, Subchapter 3, Section 2). It needs to be noted, however, that the shift of import in favour of the Council is less palpable in the Atomic Energy Community, since instances in which organs of that Community enact law are few and far between in any case.

Thus one sees a characteristic change compared with the solution adopted for lawmaking within the European Coal and Steel Community, where substantial legislative competence was granted to a body which does not comprise representatives of states. Here, i.e. in the Communities established by the Treaties of Rome of 1957, a more traditional solution was employed: the legislative competence was entrusted to diplomatic organs (composed of governmental delegates); in a range of vital affairs, the bodies were and remain entitled to enact law solely by virtue of unanimous resolutions (Chapter III, Subchapters 3 and 4). One should therefore ask why states decided to follow a different paradigm in the Treaties of Rome? After all, those were the same states which continued as members of the Coal and Steel Community, and had no

intention—regarding that Community—of introducing any changes that would affect the division of functions between its organs.

There are no grounds to claim that the five-year-long practice of the Coal and Steel Community prior to the signing of the Treaties of Rome compelled the signatories to abandon the model adopted previously. Admittedly, certain acts of the High Authority were disputed before the Community's Court of Justice, yet the lawsuits are no indication that the High Authority had abused its lawmaking competence or exercised it in an objectionable manner for any other reason.

The reason behind the change lay elsewhere. The 1957 Treaties of Rome which established the Economic Community and the Atomic Energy Community were drafted and signed after the failure of the project of the European Defence Community. In 1954, the French parliament refused to ratify the treaty based on which the Defence Community was to be established. This decided—at least for the time being—the fate of integration efforts undertaken by six Western European states in terms of military affairs and defence. The fact that integration in that area had to be discontinued made it necessary to put the idea of pursuing the project of a political community of the six European countries on hold for an indefinite period. The new steps towards integration in the economic sphere, which were evident in the Treaties of Rome, required one to fall back on the methods tested in organizations which had functioned before the Coal and Steel Community was created; in other words, the supranational elements in the structure and competences of the new Communities were not to be expanded, but suppressed instead.²⁸ In this regard, it is aptly observed that the way chosen by the authors of the Treaties of Rome is an intermediate solution between the two extremes of the full legislative competence of a supranational organ of the Community and

²⁸ This is noted by R. Efron, A.S. Nanes, *The Common Market and Euratom Treaties: Supranationality and the Integration of Europe*, "International and Comparative Law Quarterly" vol. 6, 1957, p. 674 as well as E. Wohlfahrt, *Europäisches Recht. Von der Befugnis der Organe der Europäischen Wirtschaftsgemeinschaft zur Rechtsetzung*, "Jahrbuch für Internationales Recht" 1959, vol. 9, p. 23.

confining the powers of the Community to issuing recommendations.²⁹ One should also add that granting primarily legislative competence to a body composed of representatives of states—for which the treaty establishing the Economic Community provided—was not justified solely by the political difficulties that integration had to confront in the 1950s with respect to military matters and politics in the strict sense. In the case of the Coal and Steel Community, the basic law was formulated already in the very treaty which established it, but the same does not apply to the Economic Community. Here, one often needs to create even more fundamental provisions, since the Treaty of 1957 does not contain a complete set of those. It seems, therefore, that even if the integration had proceeded more efficiently ten years ago, at least a part of the legislative competence would have fallen to the body composed of delegates of governments, because the system of basic norms set out in the Treaty would still have had to be supplemented and elaborated. This required political decisions to be made concerning the substance of the Community law. In practice, only governments could take such decisions, but a body more or less independent of governments did not have such an ability.

Thus the division of lawmaking functions among the Community organs was made according to different principles for the European Coals and Steel Community on the one hand and the remaining Communities on the other.

2. Let us now discuss the other issue referred to at the beginning of this subchapter: the differences in the scope of the matters covered by legislative competence.

An overview of treaty provisions and the practice relying on those provisions in Chapter III, Subchapters 2–4, and in Chapter V, Subchapters 1–3, leads to the conclusion that among three communities the broadest lawmaking competence—*ratione materiae*—was granted to the European Economic Community.

²⁹ E. Wohlfahrt, *Europäisches Recht...*

It has been observed in Section 1 above that the basic law pertaining to the Coal and Steel Community is contained in the treaty which established that Community. Whenever organs of the Coal and Steel Community, the High Authority in particular, exercise their lawmaking function, they legislate implementing rules with respect to the basic (fundamental) law formulated in the treaty. *Ratione materiae*, the law created by the Coal and Steel Community constitutes executive law to the treaty rules governing production and the common market of coal and steel.

In contrast, the treaty establishing the Economic Community has formulated a fundamental law on customs union and the free movement of persons, services, and capital between member states. Also, a proportion of transport-related affairs was provided for by means of fundamental rules in the treaty. This is a great deal, but it does not exhaust the entirety of affairs which should be uniformly regulated, so that one could indeed say that the members do form one community in terms of economy. The treaty does not supply fundamental rules pertaining to agriculture; the matters subsumed in the treaty under the designation of economic and social policy also need to be governed by fundamental provisions. *Ratione materiae*, the laws of the Economic Community cover not one or another area of production and commerce, however important, but the entirety of the economic life in the member states.

It has been emphasized in the scholarly literature that when compared with the European Coal and Steel Community the lawmaking competence of the Economic Community is broader.³⁰ Let us add that in view of the coordinating-administrative tasks facing the Atomic Energy Community, its lawmaking activity spans the least scope of affairs compared with the other Communities. In turn, enacting law for the member states is considered to be the chief task of the Economic

³⁰ E. Wohlfahrt, *Europäisches Recht...*, p. 24, draws attention to the more extensive lawmaking competence of the Economic Community and concludes that, in consequence, the intervention of the latter into the internal legislation of individual member states goes accordingly further.

Community³¹, while less importance is attached to its administrative or coordinating functions. The Economic Community is supposed to create law on its own, to ensure its existence and development, and the accomplishment of its goals; a law whose fundamental rules are only partially laid down in the treaty of 1957.

One therefore observes quite a considerable fluctuation of directions in which the legislative competence of the European Communities developed. The reason why these fluctuations are a noteworthy phenomenon is that they have occurred over a period of merely several years in a group of only six states. If such substantial differences arise in conditions which otherwise qualify as the most favourable for solutions based on a uniform model, then it is no wonder that in larger groups and in longer periods of time there is even less scope for lasting and regular progress in the domain discussed here.

The changing relations between the members of organizations and the shifting directions of their foreign policies determined which organ would exercise legislative powers in each of the three communities and dictated the extent of that competence. Thus, we see that the complete absence of legislative competence in one organization and the varied nature and degree of such competence in others can only be explained in the light of its dependence on international politics, on the role which individual states play in that politics, and finally the goals these states pursue within that framework. The disparities between organizations with respect to the issue under discussion result from specific circumstances and specific opportunities which exist at a given developmental stage of international relations. Reasoning theoretically and leaving the actual international situation aside, one could have anticipated that the model adopted by the six states for the European Coal and Steel Community—namely legislation exercised by a supranational body—would be applied in later integration undertakings. However, it turned out that in 1957—when further Communities came into exis-

31 *Ibidem*, p. 13.

tence—this would not have been a practicable solution. On the other hand, even though the Treaties of Rome were something of a step back with respect to the Coal and Steel Community, it was offset in a sense by the broad legislative competence granted to the European Community *ratione materiae*. From such a standpoint, the Economic Community is an international organization equipped with the most extensive law-making powers. If the development of the competence to establish legal norms in international organizations could be illustrated by means of a curve, its line would alternately move upwards and downwards. Naturally, since 1939 the curve has displayed an upward trend. The level it has reached thus far seems maximal, both for the present and for a number of years to come.³²

Relics of the Contractual Concept and Inter-State Models in the Legislation Of International Organizations

The presence of contractual elements in the resolution-making activities of organizations is eloquent proof of how cautiously the legislation of international organizations develops. Here, yet again, a dividing line should be drawn between the European Communities and all other organizations.

The review of law in Chapters III–V demonstrates that organizations other than the Communities enact law for states either through unanimous resolutions or as part of the contracting-out system. These methods show the extent to which the authors of treaties which grant legislative powers to international organizations adhere to the principle that a sovereign state enters into an obligation and acquires rights un-

³² Here, we do not wholly share the optimistic view expressed by Krylov, who envisions increase of the role of resolutions of international organizations as a source of international law, see S. Krylov, *Les notions principales du Droit des gens*, “Académie de Droit International, Recueil des Cours” 1947-I, vol. 70, p. 444. Cf. idem, *K obsuzhdeniyu voprosov teorii mezhdunarodnovo prava*, “Sovetskoye Gosudarstvo i Pravo” 1954, no. 7, p. 74 ff.

der its own consent.³³ The European Communities hold a monopoly on lawmaking resolutions which are passed by majority vote and become mandatorily binding on the minority, that is with the exception of the competence exercised at times by certain bodies concerned with fisheries (Chapter V, Subchapter 5). However, given the current state of organized cooperation in the international community, the methods and means adopted in the European Communities have to be considered inapplicable in a broader group of states.³⁴ It is to be surmised that in universal organizations as well as in regional organizations with a more diverse membership, the traces of the contractual concept—unanimous resolutions, the possibility of opting out from the law enacted by an organization, the possibility of raising objections—will persist for a long time yet.

However, let us recall a previous observation, namely that the element of state's consent to a legislative act of organization is not conclusive for the act, in that it does not make it a treaty. The lawmaking acts of international organizations are not treaties (Chapter IX). Consequently, do organizations which exercise their legislative competence act in accordance with the model of internal legislative process adopted by the states as such? In other words, do legislative acts of international organizations contribute to creating certain rules of international law in a manner resembling internal legislation?

In general, authors find that there are analogies between the exercise of lawmaking powers by the legislative body of a state and by an international organization.³⁵ The fact that the legislative competence of the Eu-

33 A.J.P. Tammes, *Decisions of International Organs...*, pp. 344–345: “... a regulation adopted by international organs is rarely capable of becoming binding on a Member without some form of consent or (in order to make acceptance more easily assumed) of absence of rejection.”

34 See M. Sørensen, *Principes de droit...*, p. 107. Cf. also the general remark by G.I. Tunkin, *Voprosy teorii mezhdunarodnovo prava*, Moscow 1962, p. 136.

35 M. Sørensen, *Principes de droit...*, pp. 91–92. R.H. Mankiewicz, *L'adoption des annexes à la convention de Chicago par le Conseil de l'Organisation de l'Aviation Civile Internationale*, *Beiträge zum internationalen Luftrecht*. Festschrift zu Ehren von Prof. Dr iur. Alex Meyer, Düsseldorf 1954, p. 92, underlines those analogies in the lawmaking activity of the Council of the International Civil Aviation Organization. M. Merle, *Le pouvoir règlement-*

European Communities is broader and more developed than the equivalent competence of other international organizations compels one to discern such analogies primarily in the case of the Communities.³⁶ On the other hand, one does encounter assertions³⁷ that the mode in which domestic legislations developed cannot serve as a model for the development of international lawmaking in the strict sense. The analogy is allegedly hindered by the circumstance that in either case the addressees of the norms are all too different.³⁸ However, even opponents of the analogy agree that enacting rules through the resolutions of international organizations presents certain problems which previously occurred in the inter-state legislative process.³⁹

taire..., p. 347, notes a similarity between the legislation of the Coal and Steel Community and the state legislation in the judicial review of normative decisions of the High Authority. J.L. Kunz, *Sanctions in International Law*, "American Journal of International Law" 1960, vol. 54, p. 328, makes a following observation: "[...] there exist today sectors of international law, the rules of which directly obligate individuals and where, therefore, the problem of sanctions takes on an entirely different form [...]. Today a great deal of the internal law of international organizations, particularly the whole law of international officials, as well as a part of the law of the supranational organizations in Europe, belongs here. We have here to deal with international norms, international by their creation, reason of validity and function; but the internal structure of these norms is not different from that of advanced municipal legal orders."

36 E. Wohlfahrt, *Europäisches Recht...*, p. 20, is of the opinion that in matters concerning enactment of rules, the treaties establishing the Communities draw not so much on the models supplied by the international organizations which have functioned so far, as on the constitutions of the federal states. In this regard, the author quotes G. Jaenicke, *Bundesstaat oder Staatenbund. Zur Rechtsform einer europäischen Staatengemeinschaft*, Festgabe für Bilfinger, 1954, p. 71; L. Cartou, *Le Marché Commun et la technique du droit public*, *Revue du Droit Public*, 1958, March-April, p. 203. Elsewhere, Wohlfahrt expresses the view that the European Economic Community is closest to the German Customs and Trade Union of 1867. The Union possessed legislative powers with respect to member states in the following areas: export and import duties, salt, sugar, and tobacco taxes, governance of customs and the aforesaid taxes, criminal, customs, and tax law; *ibidem*, p. 12, note 4a. Concerning analogies between the common market and the Customs Union see G.W. Keeton, *The Zollverein and Common Market*, *Current Legal Problems*, 1963.

37 G. Schulz, *Entwicklungsformen...*, p. 5.

38 Let us add at this point that a major part of the law enacted by the European Communities, the Coal and Steel Community in particular, is not addressed to states but to undertakings; consequently, the difference underscored in the cited view ceases to exist.

39 *Ibidem*, on p. 30, Schulz finds that in internal law of the present-day states the determination of the subject matter of a statute (*Feststellung des Gesetzesinhalts*) coincides in the same act

As regards the European Communities, the predominant view is that the legislation of the Communities and the lawmaking in individual states display considerable similarities. These similarities motivate certain authors to deliberate on a question which has thus far emerged only in the sphere of internal law, namely of whether the normative powers of the Communities constitute a legislative competence or a competence to issue regulations.⁴⁰ In such instances, one draws on the institutions of public law in force within the states to explain the norm-giving process in the Communities. This is particularly conspicuous in the debate of the Belgian and French lawyers concerning the extent to which the High Authority of the European Coal and Steel Community uses its competence to issue regulations (*pouvoir réglementaire*). Let us immediately clarify that it is the rank of the normative act of the Community which is debated rather than its name. We know, after all, that the term regulation (*règlement, Verordnung*) appears in the case of the Economic Community and the Atomic Energy Community, but it is not employed in the Coal and Steel Community. On the one hand, contributors to the aforesaid discussion claim that the High Authority of the latter Community does not have a general competence to issue regulations (*pouvoir réglementaire général, pouvoir proprement réglementaire*), since its issues provisions only where empowered by the treaty.⁴¹ Still, on the other hand there are authors who believe that the High Authority does possess general competence and argue that it may enact generally applicable provisions in all those cases in which it is empowered to take individualized decisions.⁴² It seems that the resolution of that dispute lies in the

with giving legal effect to its text (*Gesetzbeschluss*). Although the author observes that in international law both actions are separate in the temporal sense, it needs to be noted that legislative acts of international organizations are not subject to such a separation in time; see above remark concerning non-ratification of those acts, Chapter VII, Subchapter 2.

40 P. Reuter, *La Communauté Européenne du Charbon et de l'Acier*, Paris 1953, pp. 49–50, 99; E. Wohlfahrt, *Europäisches Recht...*, pp. 28–29.

41 P. de Visscher, *La Communauté Européenne du Charbon et de l'Acier et les Etats membres*, Milan 1957 (Congrès International d'Etudes sur la Communauté Européenne du Charbon et de l'Acier).

42 P. Reuter, *La Communauté...*, p. 49. See also M. Merle, *Le pouvoir réglementaire...*, p. 343.

principle according to which an international organization, including a supranational organization such as a European Community, is competent to enact law for states only when it is explicitly authorized to do so by the treaty which established it, or by another international agreement concluded by all member states. Thus, no Community may enact legal norms if the act of enactment is not founded—beyond any doubt—on the statute of the Community or supplementary treaties. Furthermore, whenever one seeks to account for the phenomena belonging to the sphere of international law through reference to institutions of internal law, they choose a path of the most likely lucid and telling analogies, providing that one does not overlook the separate natures of both legal systems and one remains aware of the fact that an act which functions under the same name may in fact mean something else in either system. The risk of foregoing accuracy for the sake of compelling analogies can be seen in the previously cited views of the Belgian and French lawyers. It cannot be denied that certain institutions and terminology of the French public law had their impact on a number of provisions in the treaties establishing the European Communities, primarily on the treaty creating the Coal and Steel Community (e.g. provisions pertaining to the Court of Justice). Where law is created by virtue of enactment, there must exist an essential similarity between the legislative activities of persons or organs which establish the norms. Nevertheless, the analogies do not go as far as to warrant setting the inter-state competence to issue regulations (on the part of the head of state, the government or the ministers) side by side with the legislative competence of the European Communities. When the legislative acts of the Communities are compared with the ordinances in force within states, one immediately sees that numerous issues covered by the provisions enacted by the Communities are not governed by regulations but by statutory acts.⁴³ Therefore,

⁴³ Thus aptly P. Reuter, *La Communauté...*, p. 99. To provide examples, the author cites efforts to define practices which constitute unfair competition and determine what enterprise audit is.

it seems pointless to engage in a general consideration of whether the treaties establishing the Communities represent a constitution or a plain statutory act with respect to the law enacted by the organs of the Communities, and subsequently whether that law qualifies as a statutory act or a regulation. The question of the rank—statutory act or regulation—has its practical significance in specific member states, where it bears on another issue, namely the place of the law enacted by the Communities in the hierarchy of internal norms of a given state. However, this is not what this paragraph focuses on (see Chapter VIII, Subchapter 2 and 3).

We shall thus conclude that the analogies between the legislation within states and the legislation of the European Communities are confined to shared characteristics observed in both legislative processes, due to the fact that both create law by way of enactment; when the enactment of a norm meets the requirements of validity, the norm becomes binding on the addressee regardless of their will. Another analogy with internal law consists in the fact that a judicial body may review the legality of provisions enacted by the communities.⁴⁴ However, these provisions cannot be identified with the categories of internal legal norms, i.e. with statutory acts, decrees, regulations etc., nor can the Communities' competence to issue such provisions be put on a par with the constitutional competence of particular state bodies to pass statutory acts, decrees or regulations. In the internal sphere of a member state, the law enacted by the Communities may have the rank of a statutory act, regulation or another legislative act. But, as already observed, this is a different matter, unrelated to the question of whether the European Communities follow the models proper to the inter-state legislative process while enacting law. Let us recall that international treaty, a source of law that

⁴⁴ Discussing legislative decisions of the High Authority of the Coal and Steel Community, M. Merle, *Le pouvoir réglementaire...*, p. 347, observes as follows: "L'assimilation à la technique du pouvoir réglementaire en droit interne est ici poussée très loin puisque l'exercice de l'activité réglementaire par la Haute Autorité fait l'objet d'un contrôle juridictionnel en vue d'assurer la conformité des décisions prises à la lettre et à l'esprit du Traité." See *ibidem*, p. 359.

is thoroughly distinct from the one discussed here, has on multiple occasions undergone a transformation procedure in specific states which, in view of the needs of its specific internal law, recognized it as a statutory act, regulation or another legislative act that constitutes a source of law in that country.

International Legislative Bodies

If certain international organizations have acquired the competence to enact law for states, then we are dealing with the presence of legislative organs within the international community. Naturally, there is no one organ in that community with the powers to enact laws for all states and in every domain.⁴⁵ An international legislator modelled on the state legislator is still lacking as well, but there are bodies which may be said—within the limits of their usually minor lawmaking authority—to be international legislative organs.⁴⁶

One reads in the literature that the emergence of an international legislator will affect the position of states, deprive them of sovereignty, and transform international law into the public law of a world state.⁴⁷

45 In this sense, W.W. Bishop, *The International Rule of Law*, "Michigan Law Review" 1961, vol. 59, p. 557 is right to have stated the following: "Our international legislative process is solely that of agreement upon treaties by all the notions bound by them; we have no international legislature empowered to enact by majority votes laws obligatory on those not taking part in the legislative process." G.I. Tunkin, *Voprosy teorii...*, p 136, writes that if universal international organizations were able to enact law for states, we would be dealing with a world government and a world state.

46 Cf. M. Merle, *Le pouvoir réglementaire...*, pp. 350, 360, who, referring to the European Coal and Steel Community and its normative competence, speaks of *autorité gouvernementale* and *l'avènement de la fonction gouvernementale dans la société internationale*.

47 J. de Louter, *Le droit international public positif*, vol. 1, Oxford 1920, p. 59; Louter is quoted by H. Lauterpacht, *The Function of Law in International Community*, Oxford 1933, p. 400, note 4. Lauterpacht himself admits: "The setting up of an international legislature would constitute the most fundamental change in the present organization of international society", the paper entitled *The Absence of an International Legislature and the Compulsory Jurisdiction of International Tribunals*, "British Yearbook of International Law", vol. 11, 1930, p. 142, is cited by G. Schulz, *Entwicklungsformen...*, p. 1. P.I. Lukin, *Istochniki mezh-dunarodnovo prava*, Moscow 1960, p. 110, rejects the claim that international organizations

Numerous authors believe that there arise obstacles which, qualified by these authors as legal ones, allegedly prevent an international legislator from functioning as such. They point to the fact that no world parliament exists; that one cannot reconcile the sovereignty of states with the activity of an international legislator; finally, the activity of the latter would violate the principles of equality and the independence of states, that is the fundamental rules of the contemporary international order.⁴⁸ Also, it is underlined that in order to regulate relationships by means of an enactment, there must occur a multiplicity of actual circumstances which could be subject to normative measures. Meanwhile, there are such substantial differences when it comes to the potential and interests between states that a uniform regulation for all entities resembling a statutory act in a state is hardly conceivable in reality.⁴⁹

It appears that the above reservations and concerns relating to the enactment of international legal norms have one feature in common. These are reservations and concerns which—in theory—could be legitimate, but which are not validated by the practice to date. The above overview of provisions in the statutes of international organizations in terms of the aspect with which we are concerned has demonstrated that the instances when an international organ possesses the competence to enact law for states are not that frequent. In any case, those were the states themselves which granted that power to the organ in the treaty, as they found it expedient to have law created—in the domain they designated and within the extent they have delineated—in a different manner than through custom or treaty. It is not the sovereignty of the states which is subject to limitation here, but its exercise—a daily phenomenon in current international life, which does not take place exclusively when an international organization receives normative competence from its

have legislative competence with respect to states, for states are sovereign. He nevertheless admits that some organizations can establish technological norms (*tekhničeskiye pravila*).

48 See the views of authors cited by G. Schulz, *Entwicklungsformen...*, pp. 1–2.

49 Ibidem, p. 2, where names such as Brierly, Erlar, von der Heydte, Ross, Schwarzenberger and Verdross are mentioned.

members.⁵⁰ Law enacted by an organization does not cease to be international law, nor does it become the “public law of a world state”, a state which after all does not exist and—let us add—has not and will not be established as an automatic product of the discussed legislative technique. International life proves that for international law to be created in a way which is to some degree analogous to the legislative processes within a state, no world parliament has to come into existence beforehand. The equality and independence of states has not been diminished because certain international organizations were invested with lawmaking powers. Finally, it has to be emphasized that such competences appeared precisely where the multiplicity of states of fact that required regulations as well as the identical needs and interests of various states made a uniform normative solution—through enactment—the best solution available.

Let us also add that before legislative competence began to feature as an attribute of certain international organizations, international life had known, while international law had tolerated, fairly numerous cases in which a norm created by some states became binding for others. Specifically, this means treaties which established a legal order considered binding on all states, including those which were not parties to the treaties.⁵¹ The most often cited are e.g. the provisions of the Åland Islands demilitarization convention of 1856⁵², provisions on perpetual

50 A good example of confusing different matters and seeing eradication of sovereignty where it by no means occurs are the views of M. Le Goff, *L'activité des Divisions Techniques au sein de l'O.A.C.I.*, “Revue Générale de l’Air” 1951, vol. 14, pp. 425, 426, expressed with respect to the aforementioned technical annexes enacted by the International Civil Aviation Organization. Noting that the annexes are passed by the Council of the ICAO (in which 27 of 103 members are represented—as of 1 April 1964), Le Goff asks: “Que revient, dans ce cas, la souveraineté des Etats? Demeure-t-elle entière? Elle se restreint et peu à peu disparaît.” And further, speaking of the application of the annexes in particular states: “C’est la règle internationale qui s’applique seule. Les Etats et leur souveraineté sont définitivement morts.”

51 The term which tends to be used in English nomenclature is “treaty of international settlement.”

52 See the opinion on that matter formulated by the International Committee of Jurists, League of Nations, Official Journal, Special Supplement, no. 3, pp. 17–19. Ch. de Visscher, *Théories et réalités en droit international public*, Paris 1953, p. 325.

neutrality⁵³, provisions of the Treaty of Versailles regarding internationalization of the Kiel Canal⁵⁴, provisions of the Charter of the United Nations on the international subjectivity of the UN⁵⁵, provisions pertaining to the legal status of South West Africa⁵⁶, etc. As a rule, treaties are concluded with the participation of superpowers. The latter phenomenon, whereby superpowers impose a legal regime to which uninvolved states become subject in practice, has been witnessed in recent history from the 1815 Congress of Vienna until the present day.⁵⁷ In particular, when one juxtaposes the activity of the “superpower directorate” with the activities of organizations equipped with legislative competence by virtue of consent of states, one cannot fail to conclude that the technique and method of international organizations is both more progressive, more democratic, as well as respectful of the sovereignty of states.

The Choice Between a Treaty and a Legislative Act of an International Organization

In the course of the deliberations to which this monograph is dedicated, the following question is likely to have arisen more than once: what are the reasons why in certain areas states decide to equip an international organization with legislative competence? In other words, why in particular matters do states waive the traditional and tested option of a treaty?

53 Ch. de Visscher, *Belgium's Case*, 1916, p. 17, quoted by Harvard Research in International Law, *Treaties*, American Journal of International Law, Special Supplement, 1935, pp. 922–923 and idem, *Théories...*, p. 325.

54 The example is noted by McNair, quoted by Harvard Research in International Law, p. 923.

55 See advisory opinion of the International Court of Justice in The Hague of 11 April 1949 on compensation for losses incurred in service of the United Nations, I.C.J. Reports, 1949, p. 177 ff. This particular example as well as others are cited by H. Lauterpacht, *Report on the Law of Treaties*, UN document A/CN.4/63, 24 March 1953.

56 See advisory opinion of the International Court of Justice in The Hague of 11 July 1950 on the international position of South-West Africa, I.C.J. Reports, 1950, p. 128 ff.; cf. also the opinion of Sir Arnold D. (now Lord) McNair, *ibidem*, pp. 155–157.

57 See A.D. McNair, *The Law of Treaties. British Opinions and Practice*, Oxford 1938, p. 128; Ch. de Visscher, *Théories...*, pp. 325–326; A.J.P. Tammes, *Decisions of International Organs...*, pp. 282–283.

The reasons which have caused the legislative act to replace the treaty as a means to regulate affairs are complex and vary depending on the case at hand.

At times, prompt action is required, while the treaty method does not always ensure immediate regulation. A treaty as such tends to be negotiated and signed within a reasonable time-frame, but the moment at which it comes into effect is sometimes very considerably delayed, or never actually takes place with respect to some—and often numerous—states. At a meeting of the International Law Commission in 1951, one of its members drew attention to the fact that among the American republics there is a state which had signed 61 treaties, but ratified only nine, which happened “not because of the opposition of the people, but because of the inertia of those in the seat of government.”⁵⁸ In this respect, the legislative acts of an organization, also under the contracting-out system, provide a better instrument than treaties.

In other instances, it is the special nature of the matter to which the new law is to apply that compels states to opt for the regulation contained in a resolution of an international organization. This is the case with all highly detailed and technical provisions, such as norms pertaining to aerial navigation. It is easier for an international organization to procure or sometimes even have the exclusive advantage of a team of experts who are needed to draft the provisions.⁵⁹ Here, a characteristic division of tasks often ensues: the purely technical questions remain within the purview of the lawmaking organizations, whereas those questions which may involve various solutions depending on the political situations, economic or legal systems of states, are regulated by means of treaties.⁶⁰

58 Mr. Alfaro at the 88th meeting of the Commission on 21 May 1951, Yearbook of the International Law Commission, 1951, vol. 1, p. 52, cited by G. Schulz, *Entwicklungsformen...*, p. 48.

59 Cf. R.H. Mankiewicz, *L'adoption des annexes...*, p. 88, on the substantive competence of the International Civil Aviation Organization to enact law in the form of the often-mentioned technical annexes to the Chicago Convention of 1944.

60 E.g. liability of the air carrier is not governed by the annexes enacted by the International Civil Aviation Organization but by international agreements, cf. M. Merle, *Le pouvoir réglementaire...*, p. 346.

The political circumstances, especially the requirements of constitutional law and the power configurations in parliamentary bodies, have not infrequently dictated that a new norm of international law should be created through enactment rather than the conclusion of a treaty.⁶¹

In general, it may be stated that reasons of expediency necessitated the choice of a treaty on some occasions, whereas at other times they induced states to agree that a law should be enacted by an organization.⁶²

It may happen, however, that the reason why preference is given to a legislative act of an organization is more fundamental, i.e. it is associated directly with the accomplishment of the goals that the organization has been entrusted to pursue. As an example in point, one should mention the European Communities to which economic tasks have been delegated. Economic integration of the member states is a process which changes their previous economic life to such an extent that a legislative technique other than a treaty had to be employed—one resembling inter-state legislation—so as to obtain an efficient means of carrying out the tasks that the European Communities are supposed to undertake. The technique makes it possible to achieve uniformity in many⁶³ areas of economic law in the member states, which is one of the foremost tasks of the economic Communities. Lawmaking based on the model adopted in the Communities supplements the internal legislation of the members with greater ease.⁶⁴ The activities and the achievements of the Commu-

61 This was the case with a number of norm-giving decisions of the now defunct Organization for European Economic Cooperation, H.T. Adam, *L'Organisation Européenne de Coopération Economique*, Paris 1949, pp. 184–185; A. Elkin, *The Organization for European Economic Co-operation. Its Structure and Powers*, European Yearbook, vol. IV, The Hague 1958, p. 129.

62 Cf. arguments in favour of the so-called delegated legislation, E.C.S Wade, G. Godfrey Philipps, *Constitutional Law*, Second Edition by E.C.S. Wade, London 1937, pp. 311–313.

63 The word “many” is used deliberately, as there are branches of law in which no uniformity is practicable, e.g. property law (Article 222 of the EEC Treaty) or tax and foreign currency law in the extent stipulated by Article 6 of the EEC Treaty; the fact is noted by E. Wohlfahrt, *Europäisches Recht...*, p. 15.

64 Cf. E. Wohlfahrt, *Europäisches Recht...*, pp. 29–30.

nities to date would have been unthinkable had the communities been unable to issue legislative acts.

References

- Adam H.T., *L'Organisation Européenne de Coopération Economique*, Paris 1949.
- Adam H.T., *Les établissements publics internationaux*, Paris 1957.
- Ago R., *Die internationalen Organisationen und ihre Funktionen im inneren Tätigkeitsgebiet der Staaten. Rechtsfragen der Internationalen Organisation*, Festschrift für Hans Wehberg zu seinem 70. Geburtstag, Frankfurt am Main 1956.
- Anzilotti D., *Lehrbuch des Völkerrechts*, Berlin–Leipzig 1929, vol. 1.
- Bartoš M., *Medunarodno javno pravo*, vol. I, Belgrade 1954.
- Bastid S., *De quelques problèmes juridiques poses par le développement des organisations internationales, Grundprobleme des internationalen Rechts*. Festschrift für Jean Spiropoulos, Bonn [1957].
- Bishop W.W., *The International Rule of Law*, "Michigan Law Review" 1961, vol. 59.
- Brierly J.L., *The Meaning and Legal Effect of the Resolution of the League Assembly of March 11, 1932*.
- Cartou L., *Le Marché Commun et la technique du droit public*, Revue du Droit Public, 1958, March-April.
- Clark G., Sohn L.B., *World Peace through World Law*, Second Edition Revised, Cambridge, Mass., 1960.
- Documents of the United Nations Conference on International Organization, vol. 9, 1945.
- Eagleton C., *The Role of International Law*, Commission to Study the Organization of Peace. Charter Review Conference. Ninth Report and Papers presented to the Commission, New York 1955.

- Efron R., Nanes A.S., *The Common Market and Euratom Treaties: Supranationality and the Integration of Europe*, International and Comparative Law Quarterly” 1957, vol. 6.
- Elkin A., *The Organization for European Economic Co-operation. Its Structure and Powers*, European Yearbook, vol. IV, The Hague 1958.
- Fauchille P., *Traite de droit international public*, vol. I, Paris 1922.
- Field Haviland Jr. H., *The Political Role of the General Assembly*, New York 1951.
- Hart Jones H., *Amending the Chicago Convention and Its Technical Standards—Can Consent of All Member States Be Eliminated?*, “Journal of Air Law and Commerce” 1949, vol. 16.
- Hudson M.O., *International Legislation, 1919–1921*, vol. 1.
- Jaenicke G., *Bundesstaat oder Staatenbund. Zur Rechtsform einer europäischen Staatengemeinschaft*, Festgabe für Bilfinger, 1954.
- Jaenicke G., *Völkerrechtsquellen*, Strupp-Schlochauer, Wörterbuch des Völkerrechts, Berlin 1962, vol. 3.
- Jenks C.W., *The Common Law of Mankind*, London 1958.
- Jenks C.W., *The Impact of International Organizations on Public and Private International Law*, The Grotius Society, Transactions for the Year 1951, vol. 37.
- Judgment of 21 December 1962 on South West Africa Cases (preliminary objections), I.C.J. Reports, 1962.
- Keeton G.W., *The Zollverein and Common Market*, Current Legal Problems, 1963.
- Krylov S., *K obsuzhdeniyu voprosov teorii mezhdunarodnovo prava*, “Sovetskoye Gosudarstvo i Pravo” 1954, no. 7.
- Krylov S., *Les notions principales du Droit des gens*, “Académie de Droit International, Recueil des Cours” 1947-I, vol. 70
- Kunz J.L., *Sanctions in International Law*, “American Journal of International Law” 1960, vol. 54.
- Lauterpacht H., *Report on the Law of Treaties*, UN document A/CN.4/63, 24 March 1953.

- Lauterpacht H., *The Absence of an International Legislature and the Compulsory Jurisdiction of International Tribunals*, British Year Book of International Law, vol. 11, 1930.
- Lauterpacht H., *The Function of Law in International Community*, Oxford 1933.
- Le Goff M., *L'activité des Divisions Techniques au sein de l'O.A.C.I.*, "Revue Générale de l'Air" 1951, vol. 14.
- Louter J. de, *Le droit international public positif*, vol. 1, Oxford 1920.
- Lukin P.I., *Istochniki mezhdunarodnovo prava*, Moscow 1960.
- Mankiewicz R.H., *L'adoption des annexes à la convention de Chicago par le Conseil de l'Organisation de l'Aviation Civile Internationale*, *Beiträge zum internationalen Luftrecht*. Festschrift zu Ehren von Prof. Dr iur. Alex Meyer, Düsseldorf 1954.
- McNair A.D., *The Function and Differing Legal Character of Treaties*, "British Year Book of International Law" 1930, vol. 11.
- McNair A.D., *The Law of Treaties. British Opinions and Practice*, Oxford 1938.
- Merle M., *Le pouvoir réglementaire des institutions internationales*, "Annuaire Français de Droit International" 1958, vol. IV.
- Potter P.B., *An Introduction to the Study of International Organization*, New York 1948.
- Reuter P., *La Communauté Européenne du Charbon et de l'Acier*, Paris 1953.
- Reuter P., *Organisations internationales et evolution du droit*, L'evolution du droit public, Études offertes à Achilles Mestre, Paris 1956.
- S[mith] H.A., *The Binding Force of League Resolutions*, "British Year Book of International Law" 1935, vol. 16.
- Sand P.H., Sousa Freitas J. de, G. Prat, *An Historical Survey of International Air Law before the Second World War*, "McGill Law Journal" 1960, vol. 7.
- Schulz G., *Entwicklungsformen internationaler Gesetzgebung*, Göttingen 1960.

- Sibert M., *Traité de droit international public*, vol. 1, Paris 1951.
- Sloan F.B., *The Binding Force of a 'Recommendation' of the General Assembly of the United Nations*, 1948, vol. 25.
- Sørensen M., *Principes de droit international public*, Cours general, "Académie de Droit International, Recueil des Cours" 1960-III, vol. 101
- Stein E., *Constitutional Developments of United Nations Political Organs*, Lectures on International Law and the United Nations Delivered at University of Michigan Law School, June 23–28, 1955.
- Tammes A.J.P., *Decisions of International Organs as a Source of International Law*, "Académie de Droit International, Recueil des Cours" 1958-II, vol. 94.
- Tunkin G.I., *Voprosy teorii mezhdunarodnovo prava*, Moscow 1962.
- Valk W. de, *La signification de l'intégration européenne pour le développement du droit international moderne*, Leyden 1962.
- Visscher Ch. de, *Belgium's Case*, 1916.
- Visscher Ch. de, *Théories et réalités en droit international public*, Paris 1953.
- Visscher P. de, *La Communauté Européenne du Charbon et de l'Acier et les Etats membres*, Milan 1957.
- Wade E.C.S, Godfrey Philipps G., *Constitutional Law*, Second Edition by E.C.S. Wade, London 1937.
- Wohlfahrt E., *Europäisches Recht. Von der Befugnis der Organe der Europäischen Wirtschaftsgemeinschaft zur Rechtsetzung*, "Jahrbuch für Internationales Recht" 1959, vol. 9.

SUMMARY

The Significance of the Legislative Resolutions of International Organizations for the Development of International Law

The paper is an English translation of *Uchwały prawotwórcze organizacji międzynarodowych: przegląd zagadnień i analiza wstępna* by Krzysztof Skubiszewski, published originally in Polish in “Ruch Prawniczy, Ekonomiczny i Socjologiczny” in 1965. The text is published as a part of a jubilee edition of the “Adam Mickiewicz University Law Review. 100th Anniversary of the Department of Public International Law” devoted to the achievements of the representatives of the Poznań studies on international law.

Keywords: public international law, economic aspects of sovereignty, economic aspects of self-determination.

Prof. Krzysztof Skubiszewski

DOI 10.14746/ppuam.2021.12.05

