THE LEGAL VALIDITY OF ULTRA VIRES DECISIONS OF INTERNATIONAL ORGANIZATIONS

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I. INTRODUCTION

The question of the legal validity of the acts and decisions adopted by international organizations in excess of their authority has attracted the attention of international lawyers,[1] as well as international courts and tribunals,[2] in recent years. However, no general principles or criteria for determining such validity have as yet been formulated by the international community. In the meantime, the question has continued to give rise to controversy within and outside international organizations and to gain in importance, because of persistent procedural irregularities and the increasing tendency of some of the organizations to take measures that are not expressly provided for in their constitutive instruments but that they consider necessary or essential for the effective discharge of their mandates.

The present article will examine the legal status of these acts and decisions on the basis of the writings of international lawyers, the opinions of international courts and tribunals, and the law and practice of certain international organizations, with a view to determining whether any general principles have now emerged. However, an inquiry of this sort will necessarily involve consideration of two other issues on which there are still some differences of opinion among legal commentators, namely, the right of member states to

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[1] Osieke, *'Ultra-Vires' Acts in International Organizations—The Experience of the International Labour Organization*, 48 BRIT. Y.B. INT'L L. 259 (1976–77); Osieke, *Unconstitutional Acts in International Organisations: The Law and Practice of the International Civil Aviation Organisation (ICAO)*, 28 INT'L & COMP. L.Q. 1 (1979); Osieke, *Admission to Membership in International Organizations: The Case of Namibia*, 51 BRIT. Y.B. INT'L L. 189, 220–22 (1980); Morgenstern, *Legality in International Organizations*, 48 *id.* at 24 (1976–77); Jennings, *Nullity and Effectiveness in International Law*, in CAMBRIDGE ESSAYS IN INTERNATIONAL LAW 64 (1965); Lauterpacht, *The Legal Effect of Illegal Acts of International Organizations*, in *id.* at 88; Cahier, *La Nullité en droit international*, 76 REV. GÉNÉRALE DROIT INT'L PUBLIC 645 (1972); D. CIOBANU, PRELIMINARY OBJECTIONS: RELATED TO THE JURISDICTION OF THE UNITED NATIONS POLITICAL ORGANS (1975); and C. LEBEN, LES SANCTIONS PRIVATIVES DE DROITS OU DE QUALITÉ DANS LES ORGANISATIONS INTERNATIONALES SPÉCIALISÉES (1979).

[2] *See, e.g.*, the Advisory Opinions of the International Court of Justice on Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, 1960 ICJ REP. 150 (June 8); Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter), 1962 ICJ REP. 151 (July 20); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 ICJ REP. 16 (June 21); and the Judgment on the Appeal Relating to the Jurisdiction of the ICAO Council, 1972 ICJ REP. 46 (Oct. 18).

challenge the legal validity of the acts and decisions of international organizations and the competence of these bodies to rule on such challenges. It would therefore seem appropriate to deal with these two questions before examining the legal validity of the acts and decisions adopted in excess of authority.

The Right of Member States to Challenge the Decisions

The constitutions of most international organizations generally do not contain express provisions authorizing challenges of their acts and decisions by the member states, on grounds of excess of authority or procedural irregularity. In practice, however, member states have consistently made such challenges, and their right to do so has mostly been accepted within and outside the international organizations.[3]

The right of member states in these cases appears to derive from the consensual nature of the constitutions concerned. Because they are international treaties, each party possesses an inherent right to supervise their implementation to ensure that the organizations do not adopt decisions that would be incompatible with their objects and purposes, or that would be detrimental to the interests of the member states in excess of what they had accepted as the basis for membership.

In practice, member states have often been reluctant, for political or other reasons, to challenge the legal validity of the acts and decisions of international organizations.[4] However, the availability of the right has helped put the organizations on their guard, and its exercise by some member states has in many cases resulted in the defeat of proposals that would have constituted

[3] This right was emphasized by Judge Bustamante in his dissenting opinion in the *Certain Expenses* case:

> [W]hen, in the opinion of one of the Member States, a mistake of interpretation has been made or there has even been an infringement of the Charter, there is a right to challenge the resolution in which the error has been noted for the purpose of determining whether or not it departed from the Charter.

1962 ICJ REP. at 304.

[4] The cases of reluctance to raise objections for political reasons may be illustrated by the various resolutions concerning the apartheid policy of the Government of South Africa. Some member states from the industrialized countries refrain from raising objections on the ground of illegality because they do not wish to be seen as supporting the Government of South Africa on apartheid. One good example in recent years is the admission of nonindependent Namibia to full membership in international organizations. Many members considered that the admission might not be compatible with the law and practice of the organizations concerned, but some of them refrained from raising any formal objections and some even voted for it. *See* Osieke, *Admission to Membership, supra* note 1, at 213–16.

It has also been pointed out that member states are restricted from contesting the decisions of international organizations because these bodies do not always indicate the sources of their authority and, consequently, members do not often have the criteria they need to evaluate the "improper" decisions. *See* Wright, *The Strengthening of International Law,* 98 RECUEIL DES COURS 1, 121 (1959 III); and D. CIOBANU, *supra* note 1, at 73–74.

flagrant departures from the functions and powers of the organizations as laid down in their constitutions and other fundamental laws.[5]

The Competence of the Organizations to Decide the Challenges

The constitutions of most international organizations do not contain any provisions on their competence to determine claims concerning the legal validity of their acts and decisions. This silence has led some writers to conclude that these bodies have no competence to make such determinations, and that for them to do so would be to act as "judges in their own cases," contrary to the general legal principle *nemo debet esse judex in propria causa.* In his dissenting opinion in the *Namibia* case (1971), Judge Sir Gerald Fitzmaurice put the issue thus:

> In the institutional field, the justification for the act of some organ or body may turn upon considerations of a political or technical character, or of professional conduct or discipline, and if so, the political, technical or professional organ or body concerned will, in principle, be competent to make the necessary determinations. But where the matter turns, and turns exclusively, on considerations of a legal character, a political organ, even if it is competent to take any resulting action, is not itself competent to make the necessary legal determinations on which the justification for such action must rest. This can only be done by a legal organ competent to make such determinations.[6]

This position has not been generally accepted by writers. Indeed, the more general view, supported by pronouncements of the International Court of Justice and the consistent practice of the organs of international organizations, is that these bodies are competent to deal with claims against their competence and jurisdiction.[7] The attitude of the Court on this issue is discernible from its Advisory Opinion in the *Certain Expenses* case (1962), where it stated:

> 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 interpret the Charter in the International Court of Justice were not accepted;[8] the opinion which the Court is in course

[5] *See, e.g.*, the defeat at the International Labour Conference in 1973 of the resolution concerning "the policy of discrimination, racism and violation of trade union freedoms practised by the Israeli authorities in Palestine and the occupied territories," discussed by the present writer in *Ultra-Vires Acts, supra* note 1, at 269–70; *see also* Osieke, *Unconstitutional Acts, supra* note 1, at 24–25.

[6] 1971 ICJ REP. at 299.

[7] *See* I. DETTER, LAW MAKING BY INTERNATIONAL ORGANIZATIONS 23 (1965); and D. CIOBANU, *supra* note 1, at 163–73.

[8] For the proposals made in this respect by the Belgian delegation, see Doc. 2, G/7(k)(1), 3 UNCIO Docs. 335, 336 (1945).

> of rendering is an *advisory* opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction.[9]

According to some commentators, the competence of international organizations to determine claims against their jurisdiction is derived from their inherent power to interpret their constitutions in order to ascertain the nature and extent of their functions and powers.[10] It is difficult, however, to reconcile this assertion with reality. The interpretation of their constitutive instruments by international organizations in order to ascertain the extent of their functions and powers is not the exercise of a judicial function because there is no question or dispute involved. On the other hand, the determination of jurisdictional claims raised by member states could be characterized as the exercise of a judicial function because it involves a question or dispute necessitating considerations of a legal character. It follows, therefore, that the inherent powers of international organizations to exercise a nonjudicial function cannot be the proper basis for the performance of functions of a judicial character.

The main justification for the attribution of competence to international organizations to determine claims against their jurisdiction, or the legal validity of their acts and decisions, is the absence of review bodies with original or appellate jurisdiction to deal with these cases. To deny international organizations competence in these circumstances would create a lacuna; and it could seriously impede the effective attainment of their objects and purposes because all that a member state would have to do to create an impasse or prevent the adoption of a decision is to challenge the competence of the organ or the organization, or indeed the legal validity of the decision.

[9] 1962 ICJ REP. at 168. Again, when it considered the objection raised in the *Namibia* case that General Assembly Resolution 2145 (XXI) made pronouncements that the Assembly, not being a judicial organ and not having previously referred the matter to any such organ, was not competent to make, the Court stated:

> To deny to a political organ of the United Nations which is a successor of the League in this respect the right to act, on the argument that it lacks competence to render what is described as a judicial decision, would not only be inconsistent but would amount to a complete denial of the remedies available against fundamental breaches of an international undertaking.

The Court concluded, therefore, that it was "unable to appreciate the view that the General Assembly acted unilaterally as party and judge in its own cause." 1971 ICJ REP. at 49. Although the Court was dealing in this case with Resolution 2145, in which the General Assembly derived competence from the mandate for South West Africa, the foregoing statements constitute some indication of its approach on the question of "*compétence de la compétence*" of international organizations.

[10] This approach is normally supported by the following statement in the Report of Committee IV/2 of the San Francisco Conference:

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

Doc. 933, IV/2/42(2), 13 UNCIO Docs. 703, 709 (1945). *See also* I. DETTER, *supra* note 7, at 23.

It appears, therefore, that the determination of jurisdictional claims by international organizations, though perhaps not as satisfactory as a judicial determination, is necessary at the present time. Furthermore, the apparent legal defects of the present practice seem to be mitigated by the fact that in the proceedings of many international organizations, claims as to jurisdiction, or the legal validity of acts and decisions, are not often seen in their purely legal contexts by member states, but rather as political devices or manipulations by opponents to defeat a proposal. For instance, a claim that an international organization has no competence to adopt a resolution condemning the apartheid policies of the Government of South Africa will be seen by many member states as a political ploy by the opposing members to defeat the resolution. Hence, the supporters of the resolution will see its adoption as a political victory, rather than a legal triumph—and its opponents will take the opposite view.

II. The Legal Status of Reviewable Acts and Decisions

The legal status of an act or decision adopted by an international organization in excess of its authority will depend to a large extent on whether there is the possibility for review. Thus, the present section will examine the legal status of reviewable acts and decisions, while the nonreviewable cases will be dealt with in the next section.

Although there is no general review machinery in international organizations, in some of them certain acts and decisions may be reviewed if an objection or appeal has been made.[11] Such a review could be by a judicial organ, as with certain decisions of the Council of the International Civil Aviation Organization (ICAO) which are appealable to the International Court of Justice,[12] or by a political organ, normally the main or plenary body of the organization.[13]

As a general rule, all review bodies possess the power to invalidate an impugned act or decision that they find to be in excess of authority or illegal; but in determining the question of legal effects, they seem to make a distinction between substantive and procedural acts. These two categories of cases will therefore be considered separately.

Substantive Ultra Vires *Acts*

The word "substantive" is a generic term normally employed to designate certain acts and decisions that are not procedural. Stated simply, a substantive act or decision is one that is not procedural. But this definition does not get one very far in the context of international organizations because questions

[11] *Cf.* the separate opinion of Judge Sir Percy Spender in the Certain Expenses case, 1962 ICJ REP. at 196. *See also* 3 G. SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 53–54 (1976).

[12] *See* Art. 84 of the Chicago Convention, 61 Stat. 1180, TIAS No. 1591, 15 UNTS 295.

[13] *Cf.* Art. 7(3) of the Constitution of the International Labour Organisation, which authorizes ILO members to appeal to the International Labour Conference a decision of the Governing Body as to which are the members of the Organisation that are of chief industrial importance.

of substance are very often intertwined with those of procedure. The best approach would be to categorize as substantive all the decisions that affect the policies of an organization, such as those relating to budget, allocation of functions and powers, appointment of the executive head, amendments to the constitution, conclusion of treaties, admission to and termination of membership, and many others. The list is not exhaustive. A possible guide to what constitutes substantive acts and decisions would be the requirement of a voting majority of two-thirds and above, but this is not always determinative because some substantive decisions may be adopted by simple majorities.

With respect to the legal effects of substantive *ultra vires* acts, opinion is divided among legal commentators on whether they are *void ab initio* or voidable.[14] However, it appears from the jurisprudence of the International Court of Justice and the law and practice of international organizations that, unless there are express provisions to the contrary, substantive *ultra vires* acts and decisions of international organizations are not void ab initio, but only cease to give rise to binding legal obligations with effect from the date of their invalidation. For instance, after the International Court of Justice concluded in its Advisory Opinion on the *Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization (IMCO)* that the committee, which was elected on January 15, 1959, was not constituted in accordance with the Constitution of the Organization,[15] the second Assembly of IMCO, which met in 1961, decided to dissolve the committee and to constitute a new one in accordance with Article 28 of the Convention as interpreted by the Court.[16] At the same time, the Assembly confirmed and adopted the measures that had been taken by the improperly constituted committee during the period 1959 to 1961, *i.e.*, before its dissolution.[17]

The confirmation of these measures by the IMCO Assembly shows that it did not regard them as without legal validity from their inception. In other words, the Assembly did not consider them as void ab initio.

Further light may be thrown on the approach of international organizations to this question by Article 7(3) of the Constitution of the International Labour Organisation (ILO), which stipulates that an appeal to the Conference against the declaration of the Governing Body as to which members of the Organisation are of chief industrial importance "shall not suspend the application of the declaration until such time as the Conference decides the appeal." Thus, even if the declaration of the Governing Body is eventually invalidated, legal effect will be attributed to actions or measures taken on the basis of the declaration before the determination of the appeal by the Conference. The

[14] *See* D. CIOBANU, *supra* note 1, at 75; Lauterpacht, *supra* note 1, at 111; Osieke, *Ultra-Vires Acts, supra* note 1, at 276–77; Osieke, *Unconstitutional Acts, supra* note 1, at 21–22. *See also* H. Lauterpacht, *The Legal Remedy in Case of Excess of Jurisdiction*, 9 BRIT. Y.B. INT'L L. 117 (1928); Castberg, *L'Excés du pouvoir dans la justice internationale*, 35 RECUEIL DES COURS 353, 361 (1931 I); Guggenheim, *La Validité et la nullité des actes juridiques internationaux*, 74 *id.* at 195 (1949 I); and Jennings, *supra* note 1, at 83–84.

[15] 1960 ICJ REP. at 171.

[16] IMCO Res. A.21 (II) (Apr. 6, 1961); *see also* IMCO Doc. A.11/S.R.3, at 6–11 (1961).

[17] IMCO Res. A.21 (II), *supra* note 16.

justification for this interpretation is that if the invalidated declaration were regarded as void ab initio, all the decisions adopted by the improperly constituted Governing Body before the appeal is determined would be null and void, and without legal effects. Since a period of up to 10 or 11 months could elapse before the appeal is decided by the Conference, this could give rise to serious consequences in the Organisation.

Similar considerations would seem to apply to the provisions of Article 86 of the Chicago Convention that unless the Council of ICAO decides otherwise, any of its decisions on whether an international airline is operating in conformity with the provisions of the Convention "shall remain in effect unless reversed on appeal."

The nonattribution of absolute nullity to the substantive *ultra vires* acts of international organizations—although different from the position in many municipal systems—would appear to be justified by the special character of the decisions of these organizations. Many of their decisions, such as those relating to the admission of new members or the creation of committees or subsidiary organs, very often become effective immediately after adoption,[18] and it would be unrealistic to maintain that all the actions taken by the organization and its organs, as well as third parties, should be considered as absolute nullities on the basis of the subsequent invalidation of the substantive decision by a review body. The fact that these acts are only voidable may not be entirely satisfactory, but the alternative would lead to uncertainties and chaos, which would weaken the effectiveness of international organizations. A possible solution may be to suspend the implementation of decisions against which objections or appeals have been made until the matter is decided by the review body.[19]

Procedural Ultra Vires *Acts*

Where the constitution or other instrument of an international organization authorizes a certain function or power to be exercised in accordance with a specified procedure, failure to observe the procedure could constitute a ground for a review body to invalidate the resulting act or decision. It is not possible—nor indeed necessary—to draw up a list of all the procedural defects that may occur in an international organization, but these would include adoption of decisions by a method of voting other than that prescribed in the rules, *e.g.*, voting by show of hands instead of by record vote or secret ballot; failure to appoint a committee whose recommendation is required for a decision by a superior organ; adoption of a decision on a matter that was not placed on the agenda of an organ in accordance with the prescribed procedure; adoption of a decision by the wrong organ or by a smaller majority than that laid down in the rules. The list is not exhaustive.

[18] On the self-executing nature of certain decisions of international organizations, see Osieke, *Admission to Membership*, *supra* note 1, at 220–21.

[19] *See, e.g.*, Article 86 of the Chicago Convention, *supra* note 12, which stipulates that certain decisions of the ICAO Council, if appealed, shall be suspended until the appeal is decided.

The attitude of review bodies to procedural irregularities appears to be somewhat cautious. The International Court of Justice has been reluctant to admit that such irregularities could constitute the basis for invalidating a decision of an international organization. In its Advisory Opinion in the *Certain Expenses* case, the Court stated:

> 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 the 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.[20]

Again, during the proceedings before the International Court of Justice in 1971 concerning the *Appeal Relating to the Jurisdiction of the ICAO Council,* the Government of India contended, *inter alia,* that the impugned decisions of the Council were vitiated by procedural irregularities. The Court made the following statement on the matter:

> The Court however does not deem it necessary or even appropriate to go into this matter, particularly as the alleged irregularities do not prejudice in any fundamental way the requirements of a just procedure. The Court's task in the present proceedings is to give a ruling as to whether the Council has jurisdiction in the case. This is an objective question of law, the answer to which cannot depend on what occurred before the Council. Since the Court holds that the Council did and does have jurisdiction, then, if there were in fact procedural irregularities, the position would be that the Council would have reached the right conclusion in the wrong way. Nevertheless it would have reached the right conclusion. If, on the other hand, the Court had held that there was and is no jurisdiction, then, even in the absence of any irregularities, the Council's decision to assume it would have stood reversed.[21]

It would appear, therefore, that procedural irregularities would not normally constitute a ground for invalidating the acts or decisions of an international organization by a review body, unless such irregularities result in the adoption of a wrong decision or in a miscarriage of justice. Judge Dillard emphasized this latter point in his separate opinion in the *ICAO* case: "It is, of course, not impossible to contemplate a situation of gross abuse of procedural requirements leading to a miscarriage of justice. In such a situation the validity of the decision adopted by a subordinate adjudicating body may be legitimately challenged on appeal."[22]

What amounts to a wrong decision or miscarriage of justice in this respect will depend upon the special circumstances of each case, but one clear example is where the rules stipulate that a particular decision should be adopted by a

[20] 1962 ICJ REP. at 168.

[21] 1972 ICJ REP. at 69–70.

[22] *Id.* at 100; *see also* the separate opinion of Judge Jiménez de Aréchaga, *id.* at 153.

two-thirds majority and the organ concerned adopts it by a simple majority, which derogates from the constitutional rights of some members.

As in the case of substantive *ultra vires,* the acts and decisions that are invalidated by review organs on the basis of procedural irregularities would not be void ab initio, but would merely cease to give rise to binding legal obligations after their invalidation.

Limitations to Review

The power of review bodies to invalidate the acts and decisions of international organizations would appear to be limited, as in municipal systems of law, by the operation of a number of rules, such as acquiescence, estoppel, severability, and lapse of time *ex tempore.*[23] In addition, review bodies appear to be unwilling to interfere with the exercise of discretionary power by an international organization, or to substitute their discretion for that of an organ, unless there has been a miscarriage of justice.[24] It is also doubtful whether a review body would interfere with rules, regulations, or procedures adopted by the organs of international organizations in the exercise of their constitutional powers.

The recent Draft Convention on the Law of the Sea (Informal Text) contains some provisions that may reveal the attitude of the international community on this question. Article 187 grants jurisdiction to the Sea-Bed Disputes Chamber to determine disputes between a state party and the Sea-Bed Authority concerning acts or omissions of the Authority alleged to be in violation of part XI of the Convention or its Annexes, or of rules, regulations, or procedures promulgated in accordance therewith; "or acts of the Authority alleged to be in excess of jurisdiction or a misuse of power."

At the same time, Article 190 of the Convention, which deals with limitations on the jurisdiction of the Sea-Bed Disputes Chamber with regard to decisions of the Authority, stipulates that the Chamber "shall have no jurisdiction with regard to the exercise by the Authority of its discretionary powers in accordance with this Part; in no case shall it substitute its discretion for that of the Authority"; and that "in exercising its jurisdiction pursuant to Article 187, the Sea-Bed Disputes Chamber shall not pronounce itself on the question whether the application of any rules, regulations or procedures adopted by

[23] *Cf.* J. GARNER, ADMINISTRATIVE LAW 175–92 (5th ed. 1979); S. DE SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW 550–59 (3d ed. 1977); S. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 314 (3d ed. 1973); and E. WADE & G. PHILLIPS, CONSTITUTIONAL AND ADMINISTRATIVE LAW 587–97 (9th ed. 1977). *See also* the interesting discussion on these limitations with respect to the acts and decisions of international organizations by Lauterpacht, *supra* note 1, at 116–21.

[24] C. W. JENKS, THE PROPER LAW OF INTERNATIONAL ORGANISATIONS 85–101 (1962); also 3 G. SCHWARZENBERGER, *supra* note 11; and the Judgments of the Administrative Tribunal of the ILO in Meyer v. International Atomic Energy Agency, Judgment No. 245 (Oct. 21, 1974); Djoehana v. Food and Agriculture Organization of the United Nations, Judgment No. 359 (Nov. 13, 1978); and Sita Ram v. World Health Organization, Judgment No. 367 (Nov. 13, 1978). *See also* the recent Judgment of the United Nations Administrative Tribunal in Adler v. United Nations, Judgment No. 267, UN Doc. AT/DEC/267, at 38 (Nov. 21, 1980).

the Authority are in conformity with the provisions of this Convention, nor declare any such rule, regulations or procedure invalid."[25]

These provisions clearly limit the review powers of the Sea-Bed Disputes Chamber over the activities of the Sea-Bed Authority when the exercise of its discretionary powers or the application of rules, regulations, and procedures it has adopted are involved.

Another limitation to the review of acts of international organizations is that review bodies do not normally have the jurisdiction to interfere on their own motions, *ex moro motu,* but may exercise their review functions only if the matter has been referred to them by a member state or an organ of the organization. Consequently, a presumption of validity, *omnia praesumuntur rite et solemniter esse acta,* will be made with respect to all the acts and decisions of international organizations to which no objections have been raised.

III. The Legal Status of Nonreviewable Acts and Decisions

One of the complexities of the law and practice of international organizations is that many of their acts and decisions, particularly those of the plenary bodies, are not subject to appeal or review by any other organ, judicial or political, within or outside the organization. Some examples of these "final" acts and decisions are those relating to the admission of a new member or the appointment of the executive head of the organization or a committee and those against which no appeal is permitted under the constitution.

The practice of international organizations shows that objections are sometimes raised against these acts and decisions,[26] but opinion is divided among international lawyers as to their legal validity if the objections are overruled by the organ concerned. Some writers consider that the acts and decisions cannot be regarded as automatically void if it is not possible to appeal them and no machinery exists for determining the objections raised against them.[27] Some other writers maintain, however, that even in the absence of compulsory jurisdiction or review machinery, the final acts and decisions that are manifestly outside the scope of the powers of an international organization, or that are based on irrelevant political considerations, should be regarded as *ultra vires* and without legal effect.[28] Thus, in the opinion of these writers, the attribution of *ultra vires* status to such acts and decisions does not depend on

[25] Draft Convention on the Law of the Sea (Informal Text), UN Doc. A/CONF.62/WP.10/Rev.3, at 78–80 (1980).

[26] Osieke, *Ultra-Vires Acts, supra* note 1, at 264–73.

[27] *Id.* at 278–79.

[28] *See* the separate opinion of Judge Morelli in the Certain Expenses case, 1962 ICJ REP. at 222, and the dissenting opinion of Judge Bustamante in the same case, *id.* at 304. *See also* Duke Pollard, who maintains:

> [T]he status of an act by an international organisation is intrinsically independent of the existence of machinery for authoritatively appreciating it as a prelude to its enforcement or nullification as the case may be. The determinations of competent review machinery in appreciating the quality of an act in municipal systems are not constitutive; they are merely declaratory and are normally expressed to be so.

Pollard, *Conflict Resolution in Producers' Associations,* 31 INT'L & COMP. L.Q. 99, 120 (1982).

a determination or declaration by a review body.[29] This argument raises a number of important points that should be considered further.

Manifestly Ultra Vires *Acts*

The concept of "manifest *ultra vires,*" which appears to have received a measure of acceptance with respect to the improper awards of arbitration tribunals,[30] has not received the same approbation as regards the acts and decisions of international organizations. However, during the oral proceedings in the *Certain Expenses* case, the representative of the Government of the United Kingdom submitted that there was no power to apportion the expenditure arising out of *ultra vires* acts that were "manifestly invalid."[31] And according to the United States representative, *ultra vires* acts could give rise to lawful expenditure unless they were "manifestly invalid."[32]

In its Advisory Opinion in the case, the International Court of Justice also made a statement that suggests that the presumption of validity only attaches to an action pertinent to the stated purposes of an organization: "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."[33]

Obviously, the rather unsettled state of the law and practice of international organizations on questions of nullity and invalidity makes the concept of manifest *ultra vires* very attractive, but its practical application would give rise to considerable difficulties. It might not be easy to establish the category of acts and decisions that could be characterized as manifestly *ultra vires.* Perhaps all the acts and decisions that are contrary to the objects and purposes of an international organization should be considered as manifestly *ultra vires.* But what if no objections have been raised against them? Should they still be presumed to be *ultra vires* and nonexistent? Who decides whether an act or decision is manifestly *ultra vires?* The organ whose acts have been impugned? Or should the matter be left to the unilateral decision of a member state?

Another difficulty stems from the nature of the decision-making process in international organizations. A decision of an international organization is consensual in character and must be approved by a majority of the member states. This means that any such decision constitutes some form of understanding or agreement among the sovereign states that participated in its adoption. Therefore, it would seem difficult to maintain that a decision accepted by a majority of states in the proper exercise of their rights of membership in an international organization should be considered as *ultra vires* and nonexistent *per se*, *i.e.*, in the absence of a declaration to that effect by a competent review body.

[29] *Ibid.*

[30] 3 E. DE VATTEL, THE LAW OF NATIONS, bk. II, ch. XVIII, §329 (Carnegie ed. 1916). *See also* H. Lauterpacht, *supra* note 14; Jennings, *supra* note 1, at 83–84; Castberg, *supra* note 14, at 361; and Guggenheim, *supra* note 14, at 195–263.

[31] 1962 ICJ Pleadings (Certain Expenses of the United Nations) 337 (statement of May 17, 1962).

[32] *Id.* at 416.

[33] 1962 ICJ REP. at 168.

Acts and Decisions Based on Irrelevant Political Considerations

Many of the decisions of plenary organs of international organizations to which objections are often raised relate primarily to political questions, such as the apartheid policies of the Government of South Africa and the policies of the Government of Israel in the occupied territories. Invariably, the decisions on these matters are motivated on the whole by political considerations, and on many occasions, many member states, particularly those belonging to the Group of 77 and the socialist countries of Eastern Europe, vote together—a situation generally characterized as "bloc voting."

These developments have given rise to serious criticisms by the member states from the industrialized market economy countries, as well as by legal commentators. More significantly, doubt has been raised as regards the legal validity of the politically motivated decisions adopted by international organizations with the support of the "automatic" majority. One eminent jurist, Professor Eagleton, considered that if a political action taken by a majority vote were to be regarded as proof that the organ was competent under its constitution to take the action, the result would be anarchy from a constitutional or legal viewpoint.[34]

Writing about events in the United Nations, particularly the role played by the majority relating to the adoption of certain decisions, Professor Leo Gross concluded that the minority members could have prevented the spread of majoritarianism in the Organization:

> One would have been justified in expecting that the United States and other minority members, particularly those which are permanent members of the Security Council, would have been on their toes to prevent the contagion of unbridled majoritarianism from infecting that principal organ of the United Nations. This, regrettably, has not been the case.[35]

In a recent study, Professor Elihu Lauterpacht emphasized the extent to which the adoption of decisions by the majority is controlled by the legal system of international organizations:

> What conclusion is to be drawn from references to situations in which majorities in international organizations have shown their unconcern for the constitutional rights of States which can muster only minority support? It could, of course, be argued that what may appear to be illegal acts are in truth not so; that adoption by sizable majorities demonstrates the general acceptability of the line of conduct in question; and that the very fact of general acceptability excludes the possibility of illegality. But the answer to such an argument is clear. The extent to which acceptability determines legality is controlled by the legal system surrounding the conduct in question. Since it is axiomatic that international organizations operate within some legal system . . . one must look to see whether in the international constitutional system there is any such instant assimi-

[34] Statement by Professor Eagleton during the discussion in the International Law Association on review of the UN Charter. ILA, REPORT OF THE 46TH CONFERENCE 80 (1954).

[35] Gross, *Voting in the Security Council and the PLO*, 70 AJIL 470, 471 (1976).

> lation of acceptability to legality. And the answer is emphatically negative.[36]

The contention that majority decisions motivated by political considerations are *ultra vires* has not been generally accepted by commentators. Speaking on the subject, the Prime Minister of Luxembourg, Gaston Thorn, stated:

> We should not complain about the intrusion of politics into the United Nations—we created the organization for political reasons, in order to apply our strategy there. What has happened recently are the accidents and setbacks of a former majority. So they should play the game! In the United Nations the problem is every bit as much one of the new minority that has not accepted its new position.[37]

According to Amadou-Mahtar M'Bow, the Director-General of the United Nations Educational, Scientific and Cultural Organization (UNESCO):

> [T]he record of the former majority is catastrophic in every field. One must not forget that it was the former majority which prevented the admission of the People's Republic of China into UNESCO for more than twenty years. Was it a technical vote or a political vote in an international institution whose purpose is to deal with science and culture? It can hardly be claimed that the 800 million Chinese had nothing to contribute to the world in the way of education, science and culture! Yet they were kept away. Solely for political reasons![38]

Recently, Ambassador Mohammed Bedjaoui, now judge of the International Court of Justice, wrote:

> [T]he process of elaborating international legal norms is much more complex than the critics of the supposed "automatic majority" would have one believe. It reflects complex power balances. When such diverse countries as Algeria, Chile and India vote together, thereby contributing to the creation of that "automatic majority" in order to try to promote the new international economic order, one loses sight somewhat too conveniently of the fact that the power of decision-making remains the prerogative of a small group of States which are "more equal than others".[39]

According to Ambassador Bedjaoui, the consequence of the emergence of the new majority is that "for the first time, the real political and economic power in the world, still held by the West, no longer finds its juridical expression embodied in the same way as it still was a few years ago, for example, in the resolutions of the United Nations, ILO, UNCTAD, or Unesco."[40]

[36] Lauterpacht, *The Development of the Law of International Organization by the Decisions of International Tribunals*, 152 RECUEIL DES COURS 381, 393–94 (1976 IV).

[37] Statement made during a broadcast debate, in E. LAURENT, UN MONDE À REFAIRE. DÉBATS DE FRANCE CULTURE. TROIS JOURS POUR LA PLANÈTE 120–21 (Paris: Editions Mengès, 1977).

[38] Statement made in the debate, *id.* at 129.

[39] M. BEDJAOUI, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER 147 (UNESCO 1979).

[40] *Id.* at 142.

These statements indicate that many commentators see the question of the "automatic majority" and "politicization" in international organizations as a political, rather than a legal, issue. It is true, of course, from a purely legal standpoint, that national review bodies normally invalidate the decisions of national administrative organs on the ground of improper considerations or motive.[41] But the situation appears to be different with respect to decisions of international organizations.

Apart from the absence of review machinery, and the consensual nature of decisions in international organizations to which reference has already been made, many of the political decisions adopted by the plenary organs of international organizations, particularly on such questions as the apartheid policy of the Government of South Africa, are symbolic in character and are, in most cases, self-executing. Their primary objective is normally to condemn the member state concerned, and that objective is fulfilled once a resolution is adopted and published. This does not mean that the question of the legal validity of the resolution is not relevant, but that question loses its significance because the primary objective of the resolution, namely, condemnation of the member state, has been attained.

Again, the political decisions of many international organizations, which are adopted in the form of resolutions, do not normally give rise to binding legal obligations for the member states. The resolutions often ask the members not to collaborate with the policies of the condemned government or to give it assistance in the implementation of its policies. Thus, any member that strongly opposes adoption of the nonbinding resolution is not under a legal obligation to implement its provisions—a factor that reduces the legal significance of political decisions in international organizations.

Finally, it is evident from the practice of international organizations that the controversy concerning "automatic majorities" normally arises when the decision concerned is of a political nature or when certain member states consider that their interests would be affected or at stake. It is important, therefore, that efforts be made to reconcile the divergent points of view and to ensure that the decisions reflect a sufficiently wide consensus of the general membership.[42] This is all the more important because quite often the decision of an international organization, especially on political issues, is the beginning of a process aimed at the attainment of certain objectives on the basis of prescribed actions and measures to be taken subsequently by the members individually or collectively. Thus, the adoption of decisions of international organizations by consensus constitutes an important element in their effective implementation.

One cannot argue on this basis, however, that majority decisions of inter-

[41] *See, e.g.*, the following British cases: Roberts v. Hopwood, 1925 A.C. 578; Chertsey U.D.C. v. Mixnam's Properties, Ltd., [1964] 2 All E.R. 627; and R. v. Hullingdon London Borough Council, *ex parte* Royco Homes, Ltd., [1974] 2 All E.R. 643. *See also* J. GARNER, *supra* note 23, at 158–59.

[42] *See* Jenks, *Unanimity, the Veto, Weighted Voting, Special and Simple Majorities and Consensus as Modes of Decision in International Organisations*, in CAMBRIDGE ESSAYS, *supra* note 1, at 48, 48.

national organizations are illegal or invalid because they were adopted against the wishes of the minority. From a purely legal point of view, what is necessary is that the decision be adopted in accordance with the prescribed rules and procedure, and once the required conditions have been fulfilled, the legal validity of the decision will not depend on the wishes or the desires of the minority of the members of the organization. To accept otherwise would be to undermine the principle of "majority rule" on which the operations of contemporary international organizations are predicated.

The Right of Member States to Reject Ultra Vires *Acts*

The contention that the acts and decisions of international organizations that are manifestly outside the scope of their functions and powers, or that are based on irrelevant political considerations, are *ultra vires* even in the absence of review machinery has led some international lawyers to assert that member states possess the right to reject them. In his dissenting opinion in the *Certain Expenses* case, Judge Winiarski, the President of the Court, rejected the contention that the nullity of a legal instrument can be relied upon only where there has been a finding of nullity by a competent tribunal. He concluded that, in the international legal system where there is no tribunal competent to make a finding of nullity,

> [i]t is the state which regards itself as the injured party which itself rejects a legal instrument vitiated, in its opinion, by such defects as to render it a nullity. . . .
>
> A refusal to pay, as in the case before the Court, may be regarded by a Member State, loyal and indeed devoted to the Organization, as the only means of protesting against a resolution of the majority which, in its opinion, disregards the true meaning of the Charter and adopts in connection with it a decision which is legally invalid. . . .[43]

Similarly, in his separate opinion in the recent case of the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Judge Gros stated:

> A decision of the WHO which is contrary to international law does not become lawful because a majority of States has voted in favour of it. The WHO and, in particular, its Assembly were created by the member States in order to carry out that which they had decided to do together, and that alone; member States are not bound to implement an unlawful act if that is what they hold it to be, and the practice of international organizations has shown that recourse is had in such circumstances to a refusal to carry out such act. Consequently nothing is settled by a decision taken by a majority of member States in matters in which a specialized agency over-steps its competence. Numbers cannot cure a lack of constitutional competence.[44]

[43] 1962 ICJ REP. at 232.

[44] 1980 ICJ REP. 73, 104 (Advisory Opinion of Dec. 20). *See also* the Report of the Special Committee on Reference to the International Court of Justice of Questions of United Nations Competence, which states that "a Member may now refuse to execute a decision of the Organization, if he feels strongly that the decision is unconstitutional," *quoted by* D. CIOBANU, *supra* note 1, at 174.

According to some writers, the right of member states to reject the actions and decisions of international organizations that they consider to be *ultra vires* is derived from their inherent right to interpret the law if they are not satisfied with the interpretation given by an international organ.[45] This right entitles member states to claim that their interpretation of the constitutions of international organizations is the correct one, and they could therefore refuse to comply with the decisions of the political organs that they claim to be unconstitutional.[46] Professor Gross has endeavored to explain the meaning and scope of the right of auto-interpretation:

> It is generally recognized that the root of the unsatisfactory situation in international law and relations is the absence of an authority generally competent to declare what the law is at any given time, how it applies to a given situation or dispute, and what the appropriate sanction may be. In the absence of such an authority, and failing agreement between the states at variance on these points, each state has a right to interpret the law, the right of autointerpretation, as it might be called. The interpretation, however, is not a "decision" and is neither final nor binding upon the other parties. In consequence of the technical insufficiency prevailing in general international law, we may never know, or, in some cases, we may not know for a time, which autointerpretation was correct. . . . This is, for better or worse, the situation resulting from the organizational insufficiency of international law.[47]

The right of member states to reject decisions they consider unconstitutional in the absence of a legal determination by a review body to that effect has not been generally accepted by international lawyers. In his separate opinion in the *Certain Expenses* case, Judge Morelli stated:

> In my view it is not possible to suppose that the Charter leaves it open to any State Member to claim at any time that an Assembly resolution authorizing a particular expense has never had any legal effect whatever, on the ground that the resolution is based on a wrong interpretation of the Charter or an incorrect ascertainment of situations of fact or of law. It must on the contrary be supposed that the Charter confers finality on the Assembly's resolution irrespective of the reasons, whether they are correct or not, on which the resolution is based; and this must be so even in a field in which the Assembly does not have true discretionary power.[48]

[45] *See* D. CIOBANU, *supra* note 1, at 174; and the discussion in Gross, *States as Organs of International Law and the Problem of Autointerpretation*, in LAW AND POLITICS IN THE WORLD COMMUNITY 59, 77–78 (G. A. Lipsky ed. 1953). *See also* Tammes, *Decisions of International Organs as a Source of International Law*, 94 RECUEIL DES COURS 261, 338 (1958 II); Waldock, *General Course on Public International Law*, 106 *id.* at 1, 108 (1962 II); and Watson, *Autointerpretation, Competence, and the Continuing Validity of Article 2(7) of the Charter*, 71 AJIL 60 (1977).

[46] This right is sometimes referred to as "the right of last resort." Thus, Professor Ciobanu has stated that "the States possess, under the law of the United Nations as it stands at present, the so-called 'right of last resort'," and in exercising such right, "a State itself corrects any defects which it may have found in the application by the relevant organ of the provisions pertaining to its competence or in the substance of the decision." He then justifies some of the refusals of UN members to implement certain contested resolutions of the main organs of the United Nations on the basis of the "right of last resort." D. CIOBANU, *supra* note 1, at 174–79.

[47] Gross, *supra* note 45, at 76–77. [48] 1962 ICJ REP. at 224.

According to Pollux, the "easiest, the most primitive, and the most unsatisfactory solution is to say that each individual Member has the right to decide for itself how to interpret the Charter";[49] and in the opinion of Professor Quincy Wright, "the suggestion, occasionally made, that the States themselves should interpret the Charter, would tend toward nullification and a hopeless incapacity of the United Nations to function."[50] Professor Oscar Schachter has also emphasized that even if the dominant motive of a government was its own advantage, "the essential point is that this motive cannot be the *justification* to others of an interpretation which is claimed to have legal effect."[51]

Because of the divergencies of opinion that still exist on the matter, it is clear that the right of member states to reject decisions of international organizations that they consider to be *ultra vires,* or indeed the right of auto-interpretation, cannot be regarded as a generally accepted principle of international law or of the law and practice of international organizations. There is no doubt that in the course of the proceedings of international organizations, member states are continuously interpreting the constitutions of these bodies to determine the basis of the proposed acts or decisions and the nature and extent of their obligations, and to contest any proposals that appear to them to be incompatible with the express provisions of the constitutions. But to arrogate to the member states a general right to reject a properly adopted decision on the basis of a unilateral determination that it is *ultra vires* would be tantamount to making the members judges in their own cases—a situation that would be similar to the much criticized principle of *compétence de la compétence* of international organizations.[52]

IV. General Conclusions

The present study has shown that some principles have emerged concerning the legal validity of acts and decisions adopted by international organizations in excess of their authority. It has been established that member states have an inherent right to challenge the legal validity of acts and decisions; that the organizations possess the competence to determine the claims that arise; that the possibility exists in certain cases for review; and that, as a general rule, the invalidated acts and decisions are voidable rather than void ab initio.

It is also clear that many acts and decisions of international organizations, particularly those of the plenary organs, are not subject to appeal or review, and that, at present, determining the validity of some of them poses considerable difficulties. The increasing importance of international organizations and the need for effectiveness in the attainment of their objects and purposes through the full cooperation and collaboration of all the member states make it imperative to establish some form of procedure for review.

[49] Pollux, *The Interpretation of the Charter,* 23 BRIT. Y.B. INT'L L. 54, 56 (1946).

[50] Wright, *supra* note 4, at 125.

[51] Schachter, *The Relation of Law, Politics and Action in the United Nations,* 109 RECUEIL DES COURS 165, 198 (1963 II).

[52] *See* note 9 *supra* and accompanying text.

Several suggestions have already been put forward, including the creation of an ad hoc body of jurists,[53] the creation of a body made up of the senior legal officers of the international organizations,[54] and applications by member states to the International Court of Justice for binding advisory opinions. In his report to the International Symposium of the Max Planck Institute in 1974, Professor R. Y. Jennings presented the latter idea as follows:

> The Court should attain a position of greater power and importance if its advisory jurisdiction could more often be used to test the legality of the acts or omissions of international organizations. Such cases will hardly come from international organizations themselves, but a government might be enabled to move for an advisory opinion through some such device as a General Assembly Committee.[55]

An appeal to the International Court of Justice for a binding advisory opinion may constitute the best procedure for determining the legal validity of acts and decisions that are claimed to be illegal or unconstitutional. One major drawback here is that reference to the Court, even in the form of a request for an advisory opinion, is not free from practical problems[56] and could even result in protracted debates and long delays—which could further undermine the activities of the organization concerned.

Another possible approach would be to establish machinery within the international organizations themselves, on the lines of the Sea-Bed Disputes Chamber, to deal with claims relating to the legality of their acts and decisions.

[53] Suggested by Sir Gerald Fitzmaurice in his dissenting opinion in the Namibia case, 1971 ICJ REP. at 300.

[54] Suggestion by Professor Louis Sohn in *Due Process in the United Nations,* 69 AJIL 620, 621 (1975).

[55] Jennings, *Report,* in MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT, JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES: AN INTERNATIONAL SYMPOSIUM 35, 48 (1974). *See also* Farukowa, *La Controle de la Cour internationale de Justice sur les organisations internationales—les actes ultra-vires des organisations internationales,* 78 JAPAN. J. INT'L L. & DIPL. 133 (July 1979). Also the resolution in [47] 2 INSTITUT DE DROIT INTERNATIONAL, ANNUAIRE 274 (1957).

[56] *See* I. BROWNLIE, GENERAL PRINCIPLES OF INTERNATIONAL LAW 730–32 (3d ed. 1979); and Rosenne, *The Non-Use of the Advisory Competence of the International Court of Justice,* 39 BRIT. Y.B. INT'L L. 1 (1963).