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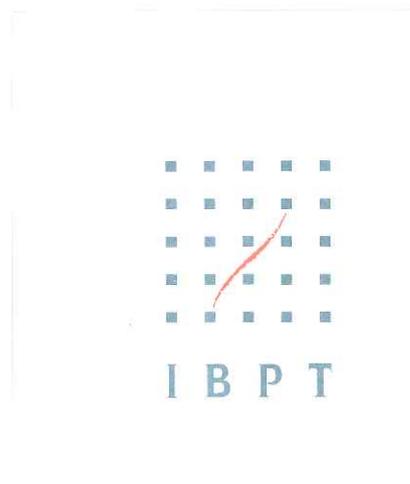
Faculty of Law and Criminology
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Study

Legal Aspects of the Universal Postal Union's Status as a United Nations Specialized Agency and its Extrabudgetary Activities

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The Universal Postal Union's Extrabudgetary Activities

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INTRODUCTION

The present study has been prepared by the Belgian Institute for Postal Services and Telecommunications in collaboration with the Centre for International Law of the *Vrije Universiteit Brussel* (Brussels). The objective of this study is to identify and analyse international law aspects of certain UPU extrabudgetary activities, namely the Telematics and EMS Cooperatives.

THE UNIVERSAL POSTAL UNION'S EXTRABUDGETARY ACTIVITIES

i. Concept

Definition. Organs are indispensable tools through which international organizations act in order to carry out their objectives. As a general principle, the conduct of such organs is attributable to the international organization on whose behalf they act. Organs are highly diverse, making it possible to draw up classifications according to functions, powers, composition etc. One such classification is the distinction between principal and subsidiary organs.

Principal bodies are founded upon the constitutive document and stand at the top of the internal structure of the organization. The constitution regulates aspects of their relationship *inter se*.¹ Subsidiary bodies² are lower down in the hierarchy. This is because they either (i) owe their existence to the will of a principal organ or (ii) despite being established pursuant to the constitution of the international organization are dependent upon a parent body for their function and powers^{3,4}. They can also be jointly set up by two or more principal organs.⁵

¹ Schmalenbach, *o.c.*, § 81.

² These can be referred to under different names, such as “subordinate bodies”, “commissions”, “committees”, “special organs”. C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed., Cambridge, Cambridge University Press, 2005, p. 139.

³ E.g. the Military Staff Committee, which is provided for in the UN Charter, but remains a subsidiary body of the UN Security Council. See Arts. 45-47 UN Charter.

⁴ Schmalenbach, *o.c.*, § 82.

Although it would not be feasible to give an all-encompassing definition of the term subsidiary organ, it should be noted that issues of form are not of great importance.⁶

Pros and cons. The proper and efficient functioning of international institutions is unthinkable without the presence of subsidiary organs. In the practice of the UN specialized agencies they play a major role in decision-making.⁷⁸ Such bodies also manage to “take the politics out of politics”, consequently providing a forum for experts to seek sound, non-biased solutions.⁹ Furthermore, subsidiary bodies can be a dynamic force, thereby enabling international organizations to adapt to ever-changing circumstances and trends in international relations.

Nonetheless, concerns have been voiced. One can legitimately raise the question whether the excessive creation of subsidiary organs does not stray too far from the vision of the founding fathers of the organization or encroach upon the sovereignty of member states.¹⁰ Overzealous resort to subordinate bodies can be detrimental to effectiveness and efficiency.¹¹ Committees have also been criticized for their lack of democracy and transparency with respect to their decision-making process and the composition of the groups (and the interests their members represent). Whatever the merit of these concerns may be, the daily practice of intergovernmental institutions indicate that the number of subsidiary bodies continue to come into being in relative disregard of constitutional provisions.¹² It would therefore be useful to elucidate the legal principles that govern such sub-organs.

ii. Applicable legal framework

⁵ Amerasinghe, *o.c.*, p. 140.

⁶ D. Sarooshi, “The Legal Framework Governing United Nations Subsidiary Organs”, *British Year Book of International Law*, vol. 67, p. 414.

⁷ Klein, *o.c.*, § 46.

⁸ Interestingly, the UN Industrial Development Organisation (UNIDO) was initially a UN General Assembly subsidiary body (established by UNGA Res. 2152 (XXI), 17 November 1966) yet later became a specialized agency upon adoption of its constitution (Constitution of the United Nations Industrial Development Organization, 8 April 1979, 1401 *U.N.T.S.* 3).

⁹ J. Klabbers, *An Introduction to International Institutional Law*, Cambridge, Cambridge University Press, 2002, p. 179.

¹⁰ Klabbers, pp. 178-179.

¹¹ See e.g. UNGA Res. 45/264, 13 May 1991 on the restructuring and revitalization of the United Nations in the economic, social and related fields.

¹² Klabbers, pp. 179-180.

a) QUALIFICATION OF THE ACT CREATING A SUBSIDIARY ORGAN

The decision that forms the legal ground for the creation of the subsidiary organ can be classified as an **institutional or organizational act**.¹³ These decisions are accorded binding effect as a result of a reasonable interpretation of the constitutive documents.¹⁴ The latter can be distinguished from operational acts which are aimed at reaching the objectives of the organization. The addressees also differ: whereas the addressees of institutional acts are usually entities within the international organization, the vast majority of operational acts are directed to states or other international organizations.¹⁵

The legal force of organizational acts can derive from explicit provision in the constitution, of which the *Certain Expenses* case provides a good example. As regards the decision-making power of the UN General Assembly, the World Court opined:

“[T]he functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory. Article 18 deals with ‘decisions’ of the General Assembly ‘on important questions’. These ‘decisions’ do indeed include certain recommendations, but others have dispositive force and effect. Among these latter decisions, Article 18 includes suspension of rights and privileges of membership, expulsion of Members, ‘and budgetary questions’.”¹⁶

Several years later in the *Namibia* case, the very same Court seemed also to acknowledge that the binding effect of institutional acts could find an implicit basis in the constitution:

“(…) [I]t would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design.”¹⁷

A note of caution is in order. In several instances, the ICJ has refrained from qualifying institutional acts as fully binding.¹⁸ Accordingly, the legal effect of these acts must

¹³ Amerasinghe, *o.c.*, p. 165.

¹⁴ Amerasinghe, *o.c.*, p. 163.

¹⁵ Amerasinghe, *o.c.*, p. 164.

¹⁶ International Court of Justice, *Certain Expenses of the United Nations, Advisory Opinion*, *I.C.J. Reports* 1962, 151, p. 163.

¹⁷ International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion*, *I.C.J. Reports* 1971, 16, p. 50.

¹⁸ International Court of Justice, *Competence of Assembly regarding Admission to the United Nations, Advisory Opinion*, *I.C.J. Reports* 1950, 4 (concerning the decision of the UN Security Council in connection with the admission of new member states); International Court of Justice, *South-West Africa – Voting Procedure, Advisory Opinion*, *I.C.J. Reports* 1955, 67 (concerning UN General Assembly supervisory functions with regard

be nuanced: the adoption of an institutional act is *prima facie* presumed to have binding effect unless (i) an explicit or implicit basis in the constitutive documents cannot be found or (ii) the organ issuing the act had no intention of imbuing it with binding force.¹⁹

b) LEGAL BASIS FOR CREATING SUBSIDIARY ORGANS

Principle. Some constitutive documents explicitly grant organs the power to set up subsidiary bodies. Here, few concerns arise. This is *inter alia* the case for the UN Charter, which contains multiple articles to that effect. In other instances, sub-organs are created without their being an express constitutional provision. There are two categories in this respect.

In the first case, the parent organ decides to delegate certain of its own attributed powers and functions to the sub-organ. It is widely accepted that principal organs do indeed have the power to do so.²⁰

In the second instance, the parent body bestows a subsidiary organ with the competence to perform functions that it does not perform itself. A number of precedents provide some legal justification for doing so.

Case law. In the *Effect of awards* case²¹, the ICJ was requested to deliver an advisory opinion on the creation of the UN Administrative Tribunal (UNAT). The Tribunal was set up by the UN General Assembly in 1949 as a means for determining employment and pension disputes.²² After UNAT has started rendering awards of compensation, prompting the Secretary-General to set money aside to that end, certain member states expressed their consternation. Faced with this debacle, the UN General Assembly decided to seek the advice of the World Court.²³ The judges found a legal basis in the doctrine of implied powers in stating that the capacity to establish UNAT arises “by necessary intendment out” of the

to the territory of South-West Africa); International Court of Justice, *Certain Expenses of the United Nations, Advisory Opinion*, I.C.J. Reports 1962, 151 (decisions by specialized agencies and UN organs other than the General Assembly or Security Council to request an advisory opinion of the International Court of Justice).

¹⁹ Amerasinghe, *o.c.*, p. 168.

²⁰ See J. Makarczyk, “La création des organes subsidiaires et les statuts des organisations internationales”, *Polish Yearbook of International Law*, vol. 6, 1972-1973, pp. 183-298.

²¹ International Court of Justice, *Effect of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion*, I.C.J. Reports 1954, 47.

²² See UNGA Res. 51 A (IV), 24 November 1949.

²³ Klabbers, *o.c.*, p. 181.

Charter which “promotes freedom and justice for individuals.”²⁴ The Court also refuted the argument that compensation due for victorious claimants would erode the UN General Assembly’s competence in budgetary matters. After all, international organizations have no alternative but to honour the many obligations they incur.²⁵ It seems that some scholarly opinion is more nuanced on this point. As argued by Schermers & Blokker:

“We may take it to be a general rule that an organ may create subsidiary organs to which it may delegate part of its functions, provided that such new organs do not increase the obligations of the organization or of its members. There is no harm in creating a drafting committee in order to facilitate the work of the organ, but there would be financial consequences if an organ is created which is to meet outside the session of its parent organ.”²⁶

In subsequent cases such as *Application for review of Judgement No. 158*, the ICJ confirmed its position with respect to the power to create subsidiary organs.²⁷ Further support can be found in the *Tadic* case brought before the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY).²⁸ Here, the defendant, Mr. Tadic, challenged the constitutionality of the ICTY, claiming that the UN Security Council had acted *ultra vires* in establishing a criminal tribunal.²⁹ The Appeals Chamber refuted this argument, relying on the ample discretionary powers of the latter under Art. 39 *juncto* 41 to take measures not involving the use of force to maintain international peace and security.

c) LIMITS TO THE CREATION OF SUBSIDIARY ORGANS

The precise contours of the power to establish subsidiary organs are difficult to delineate. In practice, the parent body setting up the new sub-organ will determine whether it has acted in conformity with the rules of the international organization. This creates a

²⁴ International Court of Justice, *Effect of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion*, I.C.J. Reports 1954, 47, p. 57.

²⁵ International Court of Justice, *Effect of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion*, I.C.J. Reports 1954, 47, p. 59.

²⁶ Schermers & Blokker, *o.c.*, § 224.

²⁷ E.g. International Court of Justice, *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion*, I.C.J. Reports 1973, 166.

²⁸ International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, *Prosecutor v. Tadic*, Decision, Case No. IT-94-1-AR72, 2 October 1995, 35 *International Legal Materials* 32.

²⁹ UNSC Res. 827, 25 May 1993.

presumption of legality, which can be challenged by member states.³⁰ Nonetheless, it is possible to suggest guiding principles for assessment.

(i) In the case of a delegation of powers, the parent body cannot confer more powers that it already has.³¹

(ii) Equally in instances of delegation, principal organs may not “delegate away” their responsibilities to the subsidiary organ.³²

(iii) In the case of a resort to implied powers doctrine, the sub-organ must be necessary, essential or indispensable for performing the functions of the organization. Meeting this threshold will depend on how specific these functions are worded in the constitutive instruments.³³

(iv) When applying the theory of implied powers, the explicit powers should not be bypassed.³⁴

(v) Fundamental principles and rules of international law may not be breached.³⁵

(vi) Creating new sub-entities may not effectuate a change in the distribution of competencies among the organs. This flows from the principle that principal organs may not impinge on each other’s constitutionally mandated powers.³⁶

(vi) Practice has arguably crystallized into the rule that the general competence to set up new organs does not extend to subsidiary bodies themselves. There are ample instances demonstrating this point. For instance, the Military Staff Committee, a subsidiary organ of the UN Security Council, may only establish regional sub-committees “with the authorization of the Security Council (...).”³⁷ Another example is the UN General Assembly Resolution 3351, in which the latter *decided* that:

³⁰ Klabbers, *o.c.*, p. 185.

³¹ Schermers & Blokker, *o.c.*, § 225.

³² Schermers & Blokker, *o.c.*, § 277C.

³³ N.M. Blokker, “International Organizations or Institutions, Implied Powers”, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008, online edition, www.mpepil.com, § 17.

³⁴ Blokker, *o.c.*, § 18.

³⁵ Blokker, *o.c.*, § 19.

³⁶ Sarooshi, *o.c.*, p. 458.

³⁷ Art. 47.4 UN Charter.

“subsidiary bodies of the General Assembly should not under ordinary circumstances create new standing bodies or *ad hoc* sessional or intersessional bodies which acquire additional resources without the approval of the Assembly and requests the other principle organs of the United Nations to take a similar decision with regard to their respective subsidiary bodies”.³⁸

The UN General Assembly subsequently went on to give certain subsidiary organs the power to set up their own subsidiary organs. ECOSOC took a similar decision.³⁹ A final example is a legal opinion of the UN Secretariat’s Office of Legal Affairs which stated the following regarding the UN Development Program:

“[t]he power to establish United Nations subsidiary organs, which under the Charter of the United Nations is conferred upon three of the principal organs of the United Nations, is clearly not conferred upon UNDP, which is itself a subsidiary organ of the United Nations. However, UNDP may be empowered in a specific case, and under an appropriate legislative authority of the General Assembly, or of its Governing Council, to establish its own subsidiary organs.”⁴⁰

Based on such precedents one can thus argue that subsidiary bodies do not have powers for the purpose of creating sub-organs (unless otherwise stipulated in the constitution) and must therefore receive authorization from their principal organ if they wish to do so.⁴¹

d) CONTROL OVER SUBSIDIARY ORGANS

Principle. The parent body has control over its subsidiary body.⁴² This quality results from the subordinate nature of the sub-organ vis-à-vis the principal organ.⁴³ Illuminating are the words of Judge Hackworth in the *Effect of awards* case:

“The term ‘subsidiary organ’ has a special and well recognized meaning. It means an auxiliary or inferior organ; an organ to furnish aid and assistance in a subordinate or secondary capacity. This is the common acceptance of the meaning of the term.”⁴⁴

³⁸ UNGA Res. 3351 (XXIX), 18 December 1974, § 5.

³⁹ UN ECOSOC, “Decision – Report of the Working Group on Rationalization”, 18 May 1973, UN Doc. E/5367, 34: “(...) [T]he Council decides that its subsidiary bodies, with the exception of the regional economic commission, may not create either standing or *ad hoc* inter-sessional subsidiary bodies without prior approval by the Council (...).”

⁴⁰ United Nations Secretariat – Office of Legal Affairs, “Legal capacity of international intergovernmental organizations to establish other international organizations—Legal capacity of the United Nations Development Programme to participate in the establishment of other international organizations or to establish its own subsidiary organs”, 1 November 1991, *United Nations Juridical Yearbook*, p. 299.

⁴¹ K. Schmalenbach, “International Organizations or Institutions, General Aspects”, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008, online edition, www.mpepil.com, § 84.

⁴² See *Repertory of Practice of United Nations Organs*, vol. 1, p. 228, <http://www.un.org/law/repertory/>.

⁴³ Sarooshi, *o.c.*, p. 447.

The organ that creates the subsidiary body has the power, within limits, to determine the latter's tasks.⁴⁵ Subsidiary organs also generally report back to a superior organ.⁴⁶ Moreover, the parent body has the power to terminate or discontinue the sub-body by means of an appropriate decision or resolution. The same rule applies with respect to the revision or modification of the membership, structure and mandate of the subsidiary body.⁴⁷ As for the power of the subsidiary entity to bind its parent body, this depends on whether it was the intent of the latter to confer such power.⁴⁸

Having a degree of control can be seen as a corollary to the important legal implication resulting from the creation of a new sub-entity, i.e. the organization is responsible for its conduct. Article 5(1) of the International Law Commission's Draft Articles on the Responsibility of International Organisations specifies that:

“The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.”⁴⁹

In light of the wording, namely the term “organ” without further adjectives or embellishments, one can conclude that this rule equally applies to subsidiary organs.

Limits. There are limits to the aforementioned principle. Firstly, a subsidiary organ must possess a certain degree of independence. This makes it possible to distinguish it from other bodies which are not distinct from the principal organ, such as working groups and committees.⁵⁰ The crucial element for determining this is whether the entity in question

⁴⁴ International Court of Justice, *Dissenting Opinion of Judge Hackworth, Effect of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, 76, p. 79.

⁴⁵ Schermers & Blokker, *o.c.*, § 1201(2).

⁴⁶ Schermers & Blokker, *o.c.*, § 366.

⁴⁷ Sarooshi, *o.c.*, pp. 448-449.

⁴⁸ International Court of Justice, *Effect of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, 47, p. 61.

⁴⁹ International Law Commission, Draft Articles on Responsibility of International Organizations (as adopted by the Commission on first reading), *Report of the International Law Commission*, UN Doc. A/64/10, p.21.

⁵⁰ Sarooshi, *o.c.*, pp. 416-417; S. Torres Bernardez, “Subsidiary Organs”, in R.J. Dupuy (ed.), *Manuel sur les organisations internationales*, Dordrecht, Nijhoff, 1988, p. 130.

exercises its powers and functions in a fashion that is distinct from the inner workings of the parent body.⁵¹

Secondly, as a general rule, decisions of subsidiary organs duly adopted do not require the endorsement or approval of the parent body, unless the decision in question calls for its action.⁵²

⁵¹ Sarooshi, *o.c.*, p. 417.

⁵² Schermers & Blokker, *o.c.*, § 891. It is for this reason, that it is disputed whether an administrative tribunal is a subsidiary organ, given that its judgments are binding. See Amerasinghe, *o.c.*, p. 141, footnote 37.

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