

Summary

Procedural Aspects of the Legal Review of Actions by Organs of the International Community

by Prof. Mag. iur. et phil. Dr. August Reinisch, LL.M. (NYU), Wien

In a very wide sense, organs of the international community comprise not only international organizations, but also other institutions created by states to serve their interests on a looser basis, such as treaty-based supervisory or judicial bodies.

The monitoring of their actions usually depends upon the constitutional framework setting up such institutions. This contribution investigates whether and, if so, what kind of judicial or quasi-judicial mechanisms are available in order to monitor the legality of the activities of international institutions.

On the international level, it is quite obvious that a proper judicial review of the acts of international institutions is generally not provided for. The exception to the rule is the internal judicial oversight exercised by the Court of First Instance as well as the European Court of Justice over the legality of acts of Community organs. Almost no other organization offers comparable internal legality checks. However, there is an evolving debate, in particular within the framework of the UN, on whether judicial review might be part of the implied powers of the judicial organ of an organization. While the ICJ has been rather careful in avoiding a direct confrontation with the UN Security Council, it has implicitly ruled on the legality of various resolutions and not refrained from deciding such cases brought before it, sometimes in the form of requests for advisory opinions, sometimes in contentious proceedings.

Also a number of other international judicial and quasi-judicial institutions have in fact asserted various degrees of jurisdiction to review the legality of actions by organs of the international community. For instance, administrative tribunals, set up in order to provide an alternative remedy in staff disputes which cannot be brought before national courts as a result of the immunity regularly enjoyed by international organizations, have not refrained from assessing the legality of general acts of international organizations that may have a negative effect on staff members. Some of the UN human rights bodies provide a particularly interesting example of quasi-judicial institutions broadly interpreting their jurisdictional mandate and thereby passing judgment upon the legality or perceived illegality of UN actions. Both economic sanctions imposed by the UN Security Council as well as UN-organised peacekeeping operations have been severely criticised from a human rights and humanitarian law point of view. A similar development may be observed in the context of the European Court of Human Rights and its gradually extending, though still subsidiary, jurisdiction over acts of the EC/EU. Although the Strasbourg Court has refrained from exercising jurisdiction over the EC/EU itself – an option that is anticipated in the Draft Treaty on a European Constitution – it has entertained proceedings against the Community's member states for failing to secure an adequate comparable level of human rights protection in such landmark cases as *Matthews*. Human rights tribunals have been increasingly willing to extend their power of review over acts of international organizations, and this tendency may be viewed as a result of increased calls for accountability. Demands for accountability have also prompted inspection panels, such as those created by a number of international financial institutions de-

signed to check compliance with their internal operational policies and procedures, and ombudsman institutions, such as the Ombudsperson Institution in Kosovo which has been highly critical of the human rights performance of UN personnel in Kosovo.

Finally, one should not underestimate the importance of political control mechanisms that may equally pronounce on the legality of actions of international organizations. The reports of various inquiry commissions, frequently chaired by eminent persons, often do contain critical findings on the legality of acts of international organizations. Examples include the Independent Inquiry into the Actions during the Genocide in Rwanda or the so-called *Volcker Commission*, set up to investigate mismanagement in the course of the UN's Oil-for-Food programme. Such commissions have in fact had a far-reaching impact on the review of legality of the activity of international organizations.

What is maybe even more surprising than the increased activities of international bodies which review the legality of acts of organs of the international community is the fact that also national institutions no longer automatically refrain from scrutiny of such acts. National courts, though generally impeded from entertaining lawsuits against international organizations as a result of their immunity from legal process, are increasingly using opportunities to rule, at least implicitly, on the legality of acts of international organs. One should not overlook the fact that these are still exceptions to the rule of judicial abstention resulting from immunity or related doctrines. Nevertheless, there are highly interesting examples of "jurisdictional activism": national courts have sometimes questioned the legality of acts of international organizations, though they have not yet developed a routine procedure for review of legality like the one exercised by national courts over certain types of international arbitral awards. However, even in the highly integrated European Community, national courts have not hesitated to question *ultra vires* Community acts or acts not providing sufficient fundamental rights protection. The German *Solange* jurisprudence, partly followed in other jurisdictions, is a classical example.

On the national level, more political instruments of control are particularly important. National inquiries as well as public opinion, often mobilized by the media, may influence political decision-makers who in turn will exercise membership rights in an international organization in a way that puts pressure on the latter in order to act in a law-abiding fashion.

The reasons for the increased tendency of international and national institutions to review the legality of acts of organs of the international community are manifold. One of them is certainly the fact that international organizations perform more and more functions and exercise powers that have been conferred upon them by their member states. This leads to an increased likelihood that their actions may violate rights of members or third parties. The factual need for more control is reinforced by an ever increasing legal awareness of the fact that "with power comes responsibility" – a principle that is not limited to the exercise of state power but also applies to power exercised by organs of the international community. In addition, the debates on good governance as well as accountability have contributed to this awareness which is further reinforced by human rights demands for access to justice and the right to a remedy.