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REFLECTIONS ON THE PROBLEM OF ORGANIZATION IN INTEGRATED AND NON INTEGRATED SOCIETIES

MILANO - DOTT. A. GIUFFRÈ - EDITORE - 1961

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between corporations. Any lawyer, however, should be able to see that *in the integrated societies* relations such as these are not "inter-group" relations in a proper sense. The groups corresponding to corporate bodies are penetrated by the legal system of the whole society in such manner that, from the point of view of this order, the group underlying the corporation is dissolved into the individual members. No one denies that corporations are vested with rights and duties: but the rights and duties of corporations become rights and duties of individual members through the corporation's charter, which is but a part of the legal order of the whole society. The legal order of the whole society, therefore, is never confronted, under normal conditions, with groups as sociological units. It penetrates each group, reaching down to individual members. This is due to the fact that in any integrated society, the primary members of the legal community are individuals. Any group pre-existing, or set up after, the setting up of the legal order of the whole society is looked at by the latter as an instrument for the "government" of partial communities of individuals subject to its primary control.

One should not be influenced by organic theories and assume that the legal person can be identified with the underlying group or with the effective organization. I do not deny that such group and organization actually exist. When it comes, however, to the legal relations of the corporation with other entities within the sphere of the legal order of the entire society, it is not the group or the organization effectively existing which enters legal transactions, but only the legal agents of the " juristic person ". The group, or the effective organization, may act eventually in the social sphere as such, but its action as such falls probably outside the domain of the legal order of the whole society (2).

This can be understood by an analogy. The formation of the legal community of all the members of the society (regardless of affiliation to partial groups) creates a kind of continuous legal texture connecting all the individual members. The setting up of new legal "groups" and the legalization of pre-existing " groups" only determines the addition, to the main texture, of secondary textures corresponding to the statutes or charters, the secondary textures being mere articulations of the main one. Therefore, in spite of the existence of

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(2) See our *La persona giuridica come soggetto strumentale*, Milano, 1952, and the references to Kelsen's works contained therein.

corporate bodies, the whole legal community remains a legal community of individuals. This is actually the real meaning of integration. *Integration* in a legal sense means the merging, the dissolution, of any previously existing or subsequently constituted groups into the whole society and the absorption of the corresponding legal systems within a main one.

A *second* feature of integrated societies (communities of individuals as we have just seen) is the *inherence of organization in the legal system*. It is common knowledge that whenever a number of individuals are assembled, their intercourse not only produces mere rules of conduct, but also organization. The members of the group differentiate early between a number of individuals exercising powers and a number of individuals subject to such powers. This is but the tendency of human beings to accept leadership. In the sphere of law, this produces a differentiation between ordinary rules of conduct and organizational rules. This second feature can be described roughly by stating that in integrated communities one always finds, even at an early stage, the differentiation of public law from private law.

The *third* feature of integrated societies is that the creation of organization other than the original organization — for instance, the creation of any organization other than the overall, original organization of the State — is not only subject to the *control* of the law of the whole society, but can only be attained by a certain *participation* of the legal order of the whole society. That public organizations come into being by some constituent, legislative or administrative action is too well known. Think of the "enabling act" of Congress by which a new State is set up within the Union according to Article IV, Sect. 3, n. 1 of the United States Constitution. Think of Article 131 of the Italian Constitution of 1948 setting up the Regions. Think simply of the laws setting up provinces, counties or municipalities within any State community. It could not be more obvious that the organization of public bodies such as these comes from above (3). In spite of appearances, however, organization still comes from above in the case of private organizations. It is true that private companies come into being as a " result " of some transaction between individuals. But it would be superficial to assume that the parties in

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(3) I mean from the legal order expressed by the whole society and situated " above " the partial communities. See *La persona giuridica* quoted in footnote 2.

such a contract operate in a void, or even on the mere basis of a rule setting forth the obligation to abide by contracts. Whatever the extent to which the parties are free to determine the contents of the charter in matters relating to the scope, the end, the denomination, the activities and the structure of the corporation, the setting up of the organization is basically determined by the participation of legal rules belonging to the order of the whole community. Insofar do the parties attain the result of setting up the body, of defining in a legally binding manner the body's activities, and of conferring powers, functions, and responsibilities upon the body's agents with binding effects for all — insofar, in other words, do the parties manage ro set up an organization in a proper sense — as one or more rules of the whole society *provide* that such effect is attainable by the transaction.

The private act is not in itself the legal cause of organization. It is only the condition, however essential, for the organization to come into being by virtue of objective, interindividual law.

2. The significance of these features is that in integrated societies we are confronted with a legal order " of the whole ", embracing the individual members regardless of affiliation to partial groups, " naturally provided " with organization, and able and willing, so to speak, to dispense the " gift of organization " lower down, either by authoritative enactment or by empowering willing individuals to set up companies and associations. The directly human basis of the legal order (the social basis) is qualitatively such as to be an adequate support, so to speak, for a complex, hierarchical system of rules, highly developed in the vertical and not only in the horizontal sense, and continuous from the base to the top and viceversa. The vertical development of the legal order ensures especially to the system the possibility of developing within itself virtually any kind of secondary organization situated at any level between the original organization and the human basis. Another analogy may perhaps make the matter clear. The integrated society is like a great building outfit. It is provided with a large building structure: the legal order; it is provided with a rich building material: the human element it directly controls; it is largely developed in width: the rules of law extending over the whole human basis; it is highly developed in depth: the vertical disposition of rules. Just as a builder can meet any building exigency by inserting new storeys and

rooms between cellar and roof, according to the directions of architect and client, the community can meet any exigency of organization by inserting new bodies between the social basis and the top of the legal system. In addition to all the other elements, the integrated community is provided with two essential pieces of equipment corresponding to the cement and the crane of the builder: I mean the *principle of organization* inherent in the system, and the *legal procedures* necessary to "transmit" organization to lower levels, lifting up new structures.

3. That the situation is different in *non integrated societies* is easier to guess than to say.

The essential peculiarity of a non integrated society is the fact that one does not find here (not to the same extent) that *compenetration between interindividual relations and inter-group relations* which is the main feature of integrated societies. In non integrated societies also, inter-group relations coexist with relations among individuals. This coexistence, however, is conditioned by such a different sociological situation that *at the level of the groups that matter,* inter-group relations are not legally dissolved into interindividual relations. The reason is that the groups face each other not as juristic entities, conditioned by the rules of the same order governing their external relations, but rather as *political* entities. Indeed, this is not a situation to be found only in the "society of States" of our time. It has probably existed in a number of societies in the past: in the primitive legal system of Rome as it is described by some historians of law, in ancient Greece, in many European countries during the middle ages. In these cases, groups are *not penetrated by a legal order of the whole.* One reason is simply that this legal order does not exist or is not developed enough to reach directly the members of the groups and condition the groups from within, by acting upon individuals. The basic reason is precisely the fact that the society is not integrated in a legal community of men. Groups emerge as giants, so to speak, from the mass of common human beings, in the very middle of a human society, but not conditioned by a law binding the men themselves before addressing itself to the groups. The groups coexist in a "space" which, as compared to the interindividual legal system of the whole — the integrated community "to be" — is an "empty space": a "space" where interindividual rules do not operate, or do not operate with adequate intensity.

4. If we consider the universal society of men, we find that it is probably the most typical instance of a non integrated society. The beginnings of modern international law are probably not to be found in the " decentralization " of the feudal State. The process is probably entirely different. Far from presupposing the existence of the "respublica christiana" and its evolution (as a law among men and through the "sources" typical of the law among men) international law originated in the very "gaps" and because of the very "gaps" of the universal law of men falling to pieces. The "primitive" rules of the law of nations (embassies, arbitration, the law of war and truce, immunities) developed in the "spaces" permanently or occasionally exempt from the hierarchical authority of Emperor or Pope. When these powers came to an end, and the idea of the universal community of men became only a remembrance of the past and a more or less utopian aim to be attained in the future, those rules became more and more essential in the relations among sovereigns. It is by this process that the immense gap left over by the crumbling of the "respublica christiana" was occupied, and has now been occupied for centuries, by international law.

5. Sovereign States also, then, do coexist *in the middle of the universal society of men*: *at their level,* however, this society has not developed yet, especially in the field of public law, into a *universal, integrated community*. States, also, operate, in their mutual relations, in a space "empty of rules of interindividual law", stemming from the " *whole* society ". Also sovereign States, therefore, are not conditioned *from within* by a universal law of men. May I refer here to an excellent book, little known among international lawyers: Schiffer's "The Legal Community of Mankind" (4). The lack of such a community determines here too the *split and differentiation between interindividual law and inter-group law.* The split is actually deepened by the fact that the conditions and factors of universal disintegration have been consolidated by the very consequences of their own operation through the centuries that divide us from the downfall of the "respublica christiana", and by the relatively firmer establishment of inter-group law (the law of nations) in the space left over by the " respublica " so long ago.

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(4) Columbia University Press, 1954.

This appears pretty clearly if one considers the position of the *individual members* of State communities, of the *agents* of States, and of *States themselves* in the *universal society*.

a) Even in a *decentralized* integrated society, such as a federal State, the *members* of each partial community are legally (and sociologically) the citizens of the federal State before being the citizens of any member State. Their "allegiance" is due in the first place to the federal State, impersonating the nation as a whole. Their allegiance to their particular State is a secondary one. On the contrary, the allegiance of the citizens of sovereign States (of the States composing the international community) is exclusive and supreme. It is *exclusive* in the sense that it ties the individuals to their State to the exclusion of any other. It is *supreme* in the sense that men owe no higher allegiance to the universal society or the universal community. Of course, it matters little, unfortunately, whether this allegiance is spontaneous or imposed by fear or violence. It is a fact that there is no other. The man who camped a few years ago in front of the seat of the Assembly of the United Nations, and insisted on being considered a " citizen of the United Nations ", was looked on by world public opinion as little better than a lunatic.

b) As for the *agents* of sovereign States (those who make up the governmental machineries of States), they are also in a position which is hardly comparable even to that of the agents of such a decentralized integrated society as a federal State. The powers of the agents of partial communities in the integrated society are subject to a double set, so to speak, of "controls", both connected in the last resort with the whole society. On one hand, they are subject to the control of the rules of the internal legal order of the partial society, which is connected to the legal order of the whole society (5). On the other hand, they are subject to the control of the legal order of the whole society itself. It is the combination of these controls that ends up by placing the agents of partial communities in the position of *trustees* or representatives of the partial group *in the eyes of the whole society*. It is by these controls that the agents of each partial group are bound (for the whole society) to be the good administrators of the interests of the partial community as these are deemed worthy of protection by the whole society itself. In a non integrated society, on the contrary, and particularly in the international society,

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(5) This connection was explained above.

the internal control exists only *as such,* in the sense that it is effected by an internal order (of the State) which is not an articulation of the legal order of the whole. As for the external control, it is simply *not exerted upon the agents individually.* These are not even politically responsible within a larger system, embracing all individuals as such (6).

c) As for the position of *States themselves* (each as a whole), the essential datum is the fact that the form of government and the structure of each group is conditioned not by an interindividual legal order " of the whole ", but only by the order established within each group. Any lawyer can see that this has nothing to do with any measure of similarity that may exist at a given time between the forms of government of a number of groups. There will always remain a difference in the source of legitimation of the government of each group as compared to the sources of legitimation of the governments of other groups. Nor is it essential to identify this source of legitimation in any " basic rule ". I refer to a factual, social legitimation. By whatever word we designate it, this source of legitimation is distinct for each group. Think, for instance, of the different position of the governments of the single States of the American Union in the

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(6) It is most essential not to overlook the fact that the obstacles to integration (or just international understanding) do no come only from national Governments or bureaucracies. National " public opinion " is not any better. The difficulty is pointed out sharply by BOURQUIN, *L'Etat souverain et l'organisation internationale,* New York, 1959, p. 122, when he wonders how conciliation can be achieved in international bodies under conditions of " open diplomacy ": " Comment, dans ces conditions, entrer dans la voie de la conciliation? Comment proposer, ou même suggérer à mots couverts, une possibilité de transaction? Les délégués qui feraient un pas dans cette direction risqueraient d'être considérés chez eux comme ayant presque trahi les intérêts qui leur étaient confiés; et s'ils n'avaient eu cette audace que pour exécuter les instructions de leur gouvernement, c'est ce dernier qui aurait à en répondre ".

There is an excellent example of this in European organization. According to the treaties, the choice of the seat of European institutions should be made by a unanimous decision of the Governments. As everybody knows, the difficulty of reaching a reasonable solution for the greatest number of European citizens " to be " has led the Governments to the temporary establishment of a number of institutions in such a " central " location as Brussels. When I once asked a Belgian federalist—and a fervent one indeed—why couldn't Northern European *federalists* agree that some city in the South-East of France would be a more equitable location and that Brussels could be acceptable as a European capital only if the British people *were* " federated " and the Italian people were *not,* he replied that in practice the matter had been finally *settled* by the temporary choice. It had become, according to him, " une fausse question ", because any Belgian Government that dared accept any other location than the one chosen on a temporary basis would not remain in power for more than three days.

federal order, on one side, and of the goverments of sovereign States in the law of nations, on the other (7).

6. The result of this state of affairs can be tentatively summarized in the fact that *the normative framework of the universal society differs from the normative framework of an integrated society,* both *below* and *above* the level of the vertices of " partial communities ", or what "should be " partial communities. *Below* that level, we find as many systems of interindividual law as there are sovereign States, and *not connected by a continuous texture. Above* that level, we do *not* find a *system of interindividual rules,* but a normative system, the existence, structure and contents of which find their "raison d'être " *in inter-group relations as such.* Both the citizens and the agents (or governments) of States normally feel and act, in foreign relations, under the inspiration of the interests of their group as such, or of the interests of inter-group relations as such. In conclusion, unlike inter-group relations in integrated societies, the inter-group relations in a non integrated society (particularly in the international society) are not governed by a basically interindividual law (8). Inter-State relations are governed by inter-group rules that seem to find their " raison d'être ", their source and their end in the relations among the groups. Here lies one of the causes, if not the main cause, of separation between the *sources* (customary or contractual) of international law and the sources of internal (interindividual) law (9).

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(7) The difficulties of the United Nations with " the Koreas " and " the Chinas " (not to mention those arising in the Congo) are even too obvious evidence of the merely "factual " essence of States and governments from the point of view of the universal society. I do not see on what grounds could it be stated that contemporary international law recognizes the "representative " character of the State: and I do not understand what is exactly ZICCARDI's view on the subject (*Les caractères de l'ordre juridique international,* in *Recueil des cours* of the Hague Academy of International Law, 1958, p. 366 ff. of the separate print), except that it seems to conform to anything but international law as it appears in fact to be when confronted with questions such as those mentioned above or with the German question. I have tried to look into the matter realistically in *Gli enti soggetti dell'ordinamento internazionale,* Milan, 1951, and in *La dinamica della base sociale nel diritto internazionale,* Milan, 1954.

(8) I do not see well in what sense it could be stated that "contemporary international law must be regarded as the common law of mankind in an early stage of its development " (JENKS, *The Common Law of Mankind,* London, 1958, p. XI).

(9) This is not contradicted in the least by the existence of a great number of customary and conventional rules of international law *concerning*

7. It is only natural, then, that international law should not possess (or not possess in the same degree) that second feature of integrated societies to which I referred as the *inherence of organization* in the legal system. Unlike individuals, who differentiate into " rulers " and " ruled ", groups show a tendency to remain " equal". Not that there are no groups " more equal than others ", as certain animals of George Orwell's "Animal Farm". In spite of material and moral differences, however, there remains the tendency of inter-group relations to develop in such manner as to maintain, as amongst groups, egalitarian relations. The norms on the external conduct of States develop essentially as rules indicating the solution of a potential conflict between two parties by making the interest of one party prevail, under given circumstances, over the interest of the other. But they set forth rights and obligations for parties remaining basically "equal ". This is confirmed by, and confirms in its turn, the contemporary features of what we call " general international law " : the lack of a vertical development of the system, the principle of equality, the

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individuals. Whether it be the rules limiting the exercise of violence against civil populations in time of war and against prisoners, or the rules on the status of the citizens of foreign countries, or the rules on diplomatic protection, or the " universal " or " European " rules on human rights, they have all come into being *as inter-State rules through inter-State law-making processes*: and States accepted these rules and apply them as " States in the sense of international law ", namely as *powers*, inspiring their law-making or law-applying behaviour to their interests as powers and *not as partial communities of a universal legal community of men controlling States from within*. It is *this* apparently minor point that makes *all* the difference between international law and federal law.

To overlook this difference — and to assume that the structure of international society and law have altered just because " other interests than those of Governments or ruling classes are now relevant for international law " (see for example KOJANEC, in *Comunicazioni e studi* dell'Istituto di diritto internazionale e straniero dell'Università di Milano, X, 1960, p. 426 s.) is unscientific and naïve. Of course the international person corresponding to a contemporary democracy such as the United States, Great Britain or Italy is not identifiable with a few " rulers " or a class. But whatever the extent to which all the members of the community take part in their government, including the administration of foreign relations, the international relations of such an entity consist of attitudes and behaviours inspired *essentially* by the interest of the community viewed as a *group* by far more *separate* and *distinct* from other groups coexisting at " international law " level than any federated community is separate and distinct from other federated communities within a federal State. And this deep separation (the same one that makes States sovereign and their legal orders discontinuous one from the other) affects even the individual members of the national society when they consider the foreign relations of " their group ". It should also be noted, in any case, that the relevance of " *interests other than those of governments* " (*e. g.* individual interests) is *not new at all*. Even in ancient Greece there were frequent inter-State transactions affecting *individual interests*,

fact that the law of nations still remains, in spite of everything, a " private law writ large " as at the time when Holland so rightly defined it so. It is because of these features that international law is not continuous with interindividual law, whatever the interaction. It is for these reasons that individuals are not subjects of the law of nations: not in a proper sense, at least. International law is therefore intergroup law also from the point of view of organization.

8. At the level of customary (general) international law, there should be what in other societies we describe as "original" organization. Original organization, however, meets two serious obstacles: first, the non-interindividual composition of the "society of States"; second, the natural resistance of sovereign States to supra and sub-ordination. The only constitutional rule of the law of nations, the fundamental rule of organization of the society of States, is apparently the assertion of the equality of the members. The basic functions are not organized. "Decentralization" is not the right word to describe the fact that these remain in the hands of the States. Decentralization presupposes the existence of some centre, at least a potential centre: and a centre is not there. The idea of decentralization is tied with the false concept of the "primitiveness" of the law of nations (10). One can put it simply by stating that there is no public law.

It is easy to see why groups maintain such conditions. The rulers of each group tend to monopolize the external relations, particularly in the fields affecting their power (may I quote here Paul Reuter): and if there is a field where the agents' power would be affected, it is the field where organizational rules should come into operation. If this were not enough, there is also the attitude of the *ordinary members* of the groups. The majority of these tend to avoid the conferring of "ruling" functions upon outsiders, namely upon members of other groups. Group "allegiance" is so preponderant over the "allegiance" to the "society of the whole", that any minority attempting to alter or escape the pattern of inter-group relations would normally have to face resistance not only from the rulers themselves, but also from the other ordinary members of the group.

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(10) See footnote 8.

9. One should not get confused in this respect by the obvious consideration that many non integrated societies of the past have achieved organization.

If a given society is at one moment in such a state of disintegration as to allow the consolidation of inter-group relations and rules at the side of the internal orders of the groups, the fact that the same society appears later under integrated and organized "shape" does not mean that inter-group rules "evolved" into interindividual rules. It is far from certain that the resulting order of the community is just a "more developed" stage of the "old" inter-group system.

The passage from a system of equal sovereign groups to a stage of hierarchical organization is not a matter of supra and sub-ordination of the groups one to the other, or simply of supra-ordinating certain individuals to groups while maintaining the sovereignty of these. It is a matter of supra or sub-ordination of men to other men in the total society. As a distinguished scholar puts it with reference to certain problems of Roman law, the organization of "State justice", for example, is not the result of the evolution of group justice. "So called group-justice" writes the scholar "is revenge, a source of disorder. State justice is real justice and a source of social order". "It is not the justice of the group that evolves into State justice, but man, adopting a critical attitude to a given situation, who mentally overcomes that stage and puts the new system into practice" (11).

I should say more. As long as groups exist as closed sociological units, men "of good will" can overcome the stage of "primitive" justice (self-help, retorsion, reprisals, collective responsibility) only within the single groups. They could not do it, even if their moral attitude so suggested, within the total society, until this society is split into separate political units. The lack of integration, the lack of the continuous texture of the social and legal system, would make their action hardly felt if not utterly impossible at inter-group level. The very idea underlying their action would imply the denial of the group as such and of the exclusive and supreme allegiance that the group demands. The overcoming of the stage of self-help, within the whole society, will take place when the single

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(11) Voci, *Esame delle tesi del Bonfante su la famiglia romana arcaica*, in *Studi in onore di Vincenzo Arangio-Ruiz*, Milan, 1953, vol. I, p. 112.

members of the various groups face each other without the mediation of groups. Until such event, the attainment of the "perfect" or less "imperfect" community will be achieved only group by group. In inter-group relations, the most "just" of men is bound to give way sooner or later to the hard "law" of inter-group justice. The adoption of anything like a real legislative process (not to mention the constituent process) is conditioned to the overcoming of the inter-group system, namely to the integration of the whole society and the submersion of the groups and their legal orders by the community of the members of the whole society and the legal order of this society. The same applies to the destination of the rules of conduct set forth at inter-group level (12).

10. It is now within this framework that one should consider the problem of "voluntary" organization in the universal society. States conclude organizational treaties, this is true. It is also true that States have shown in the last half century a marked tendency — and God bless them for it — to increase the number of organizations and that this tendency seems to have become a permanent feature of international relations (13). One must keep in mind, however, that any organization set up by inter-State compact has in itself — whatever its current merits or shortcomings, and whatever the political, economic, or social causes of success or failure — a basic, original flaw, inherent in the very nature of the transaction from which the institution originates: the inter-State compact. The inter-State treaty is subject to two "constitutional" limitations. First, it originates and operates in a "society of sovereign groups" and, until the groups go on existing as such, it is conditioned by the sovereignty of the groups: and a society of sovereign groups is ignorant of, and to a high degree adverse to, the principle of organization. Second: treaties reach individuals, basically, only to the extent to which States give effect to their provisions within their mutually discontinuous and "sovereign" legal systems: and this implies that international institutions are subject to the goodwill of States as regards both their very existence, which is conditioned by the setting up of offices and bodies manned by individuals belonging to States,

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(12) This is why the problem of the *international* personality of individuals can only be solved in the negative.

(13) See especially Ago, *Considerazioni su alcuni sviluppi dell'organizzazione internazionale*, in *La Comunità internazionale*, 1952, p. 527 ff.

and their operation, which is conditioned by the possibility for the organization's machinery to attain the peoples, also controlled by States.

It is probably because of this that in any international institution we find two distinct normative elements, the *dualism* of which is but the reflection of the dualism we all perceive, more or less clearly, between international law as inter-State law on one side, and internal law as interindividual law on the other. I refer to the distinction between the "inter-State element" and the "interindividual element" in international institutions (14).

11. At inter-State level, the treaties establishing international organizations bring about a number af rules that can be roughly classified in three categories. *a*) Taking for instance the United Nations, one category of rules includes simple substantial rules, not dissimilar in the least from the rules of any non-organizational treaty. Such are the rules of article 2.4, concerning the obligation of member States to abstain from the threat or use of force in international relations (quite similar, in structure, to the basic rule of the Kellogg Treaty); article 2.3, concerning the generical obligation of member States to solve their disputes by peaceful means, insofar as it does not involve recourse to any specific organizational procedure (of those set forth in other articles): a rule not differring in structure from other treaty rules to the same effect; article 73, enouncing the obligation of the parties to ensure the political, economic, social and cultural development of dependent communities, and so on. *b*) In a second category, although still among inter-State rules, fall the various instrumental rules concerning the obligations and rights of the parties relating to the establishment of the organs of the United Nations, such as article 7 (listing the organs), articles 9 and 20 (participation in the Assembly), article 23 (membership in the Security Council on the part of the permanent members and eligibility of the other members), etc. *c*) In a third class, even more closely tied to the "organizational intent" of the Charter, fall finally

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(14) May I refer to my *Rapporti contrattuali fra Stati e organizzazione internazionale*, in *Archivio giuridico F. Serafini*, 1950. A summary and review of this work is in this *Rivista*, 1953, p. 403 ff. (Oddini, *Elementi internazionalistici ed elementi interindividuali nell'organizzazione internazionale*). The distinction is authoritatively stressed by Morelli, *Stati e individui nelle organizzazioni internazionali*, in this *Rivista*, 1957, p. 3 ff. But see also *infra*, footnotes 15 and 16.

the rules which, presupposing the setting up of the organs, enunciate or imply the attitude that each State is to adopt respecting the enactments of the organs themselves (recommendations and decisions), and the right of each State to provoke the making by the organ of any such enactments. In this category, one should include the specific obligation to pay the contributions determined by the General Assembly (article 17), the obligation to abide by the decisions of the Security Council concerning the maintenance of international peace and security (articles 25 and 48), the obligation to report to the Secretary General on dependent territories (article 73 (e)), the obligation to abide by the judgments of the international Court of Justice (article 94), etc.

12. If now one considers the specific nature of all these rules, one wonders whether and to what extent even the rules of the second and third category (*b* and *c*), which obviously imply the setting up and the action of an institutional apparatus, do really determine such an "effect" in the sense in which an institutional apparatus is undoubtedly set up among the members of a public or private organization of municipal (interindividual) law. Do these contractual rules, in other words, bring about the existence of an inter-State institution enjoying not only international personality (which may well be acquired by the entity in fact come into existence in execution of the rules, just as it is acquired by any State, the Holy See, or an insurgent party under general international law by the mere fact of the existence of a factual entity) but a number of "powers" in a legal sense, setting it even slightly above the member States? We are led to doubt it, not only because we do not find, in international law, any general non-contractual rule qualifying the inter-State compact as apt to attain such a *specific* and far-reaching result in the manner in which certain private compacts are qualified as such in municipal law, but also because the marked tendency of international law to maintain egalitarian relations between States makes it very unlikely that any such rule (a general rule) come into being in inter-State relations (15).

Of course, we all feel at first sight that rules such as those listed under *c*) bring about something that might impair the sov-

(15) Our doubts are perhaps reduced, but not dispelled, by the arguments lately set forth by BALLADORE PALLIERI, *La personalità delle organizzazioni internazionali*, in *Diritto internazionale*, 1960, p. 230 ff.

ereignty of member States. I wonder, however, if we do not confuse, in this respect, treaty provisions that merely restrict the *freedom* of the parties, with *limitations of sovereignty* in a proper sense. Real limitations of sovereignty can only be obtained by the dissolution of States as closed groups and the direct conditioning of the corresponding communities *from within* by a larger legal community of men and by the corresponding institution. Such a result does not seem to be in the "ratio" or the spirit of the inter-State system. It is certainly not implied by the rule from which the treaty derives, yes, a generical binding force, but no ability to "organize".

13. All that the *pacta sunt servanda* as an inter-State rule seems able to do among States with a charter setting up an "organization" is to create a situation by which States are *bound to each other* to certain behaviours (positive or negative) by the rules directly enounced in the treaty, and are bound to each other to set up certain organs and to abide by the enactments (recommendations and decisions) of the organs so established in execution of the treaty. States become not *subject* to the organization's pronouncements by virtue of a specific instrumental rule of objective law enabling States to set up by treaty, under certain conditions, a *centre of authority* qualified as such from above. It would seem, in other words, that the effect of the Charter is more to create obligations of the member States *inter se* than to create obligations of the member States towards the institution, or, more precisely, institutional "powers".

The reservation of sovereignty, which would be implied even if it were not expressly stated in article 2 (and particularly in article 2.7) does not seem to warrant any other conclusion. In spite of the organizational transaction, the pattern of international law — as inter-State law — remains unaltered. It seems bound to remain so until it is superseded by that very *civitas maxima,* the fall of which determined its existence. Then, inter-State compacts would become *public compacts of public bodies* setting up public organizations of men within the legal community of men.

14. Of course, one must also consider that second aspect of international organization, which must be placed undoubtedly on an interindividual level. I refer to the organizations of individuals operating as the *instrumentalities of inter-State charters*: Secretariats, Permanent Bureaus and Offices, Assemblies, Conferences and

Councils of all intergovermnental organizations — and to the rules governing their inner functioning. Within these mechanisms, we find organization in a proper sense, we find hierarchy, we find majority rule. We find, to a certain degree, the law-making function (internal regulations of collective bodies and Secretariats), the judicial function (administrative tribunals) and the executive function (disciplinary power, administration) (16). It should also be noted that these functions are not always confined to the members or to the staff of the bodies in question. They extend often down into the body-politic of sovereign States to attain the individual citizens of States or the individual inhabitants of territories whenever the intergovernmental institution performs what are known as "operative" functions (River Commissions, International Refugee Organization, United Nations action in certain emergencies, European institutions, etc.).

All these mechanisms appear as a constellation of interindividual institutions of varying weight and proportions, but still constituting, all together, the "embryo" to the texture that *may* be some day the hierarchical apparatus governing the legal community of mankind (17).

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(16) The peculiarity of these rules as compared to the inter-State rules of treaties establishing international organizations—a peculiarity now most obvious in the European economic communities (EEC, ECSC and Euratom)—is stressed in the quoted work on *Rapporti contrattuali fra Stati e organizzazione internazionale*, p. 97 ff., esp. 123-158. For a more restricted application of the distinction see, however, amongst others, in the Italian doctrine, SCERNI, *Saggio sulla natura giuridica delle norme emanate dagli organi creati con atti internazionali*, Genoa, 1930; MORELLI, *L'Istituto internazionale di agricoltura e la giurisdizione italiana*, in *Foro italiano*, 1931, I, 1427; MONACO, *I regolamenti interni degli enti internazionali*, in *Jus gentium*, 1938. These authors, however, do not stress adequately, in my opinion, the difference between the interindividual rules of *international institutions* and the regulations of *collective bodies of municipal law*. The difference between the two phenomena is precisely the reflection of the difference between the *universal society* and a *legally integrated society*. On QUADRI's view see footnote 17.

On the rules in question see also FOCSANEANU, *Le droit interne de l'organisation des Nations Unies*, in *Annuaire français de droit international*, 1957, p. 315-349. This writer seems wrongly to assume, however, that the problem had not been considered before by the doctrine of international law. I take this as another example of lack of integration.

(17) QUADRI seems now to share this view (*Diritto internazionale pubblico*, Palermo, 1960, p. 187 f. and 356 ff.) put forward by me in *Rapporti contrattuali*, p. 142 ff. and accepted also (with reservations) by AGO, *Considerazioni su alcuni sviluppi dell'organizzazione internazionale*, quoted above; and by ODDINI, quoted paper, p. 408. QUADRI, however, also refers to the internal systems of international organizations as "trasformazioni" of international law: a definition that would be acceptable only within the framework of JENKS' conception of international law as the "common law of mankind at an early stage" (see footnote 8). See also, as regards Quadri's ideas, his review of my *Rapporti contrattuali*, in *La Comunità internazionale*, 1952, p. 180.

They will be looked at by our great-grandchildren, in a way, as the anticipation, the forerunners of world-government, especially when they perform operative activities. It may be that they will be looked upon by the historian in a way not much dissimilar — in spite of the probable lack of chronological continuity and of the much longer period over which the process seems to be bound to extend — from the way in which the "United States in Congress assembled" of the "critical period" of the American Constitution appear to us as the antecedent of what became, fifteen years later, the machinery of the federal Government in direct contact with the peoples of the member States (18).

15. It must be noted, however, that the interindividual systems corresponding to the various international institutions are very far from attaining such a stage. In the first place, they are a variety of *scattered,* only *relatively connected* centres, harldy recognizable as a continuous "system", even among themselves. In the second place — and this is most essential — the degree of legal disintegration of the universal society is so high, and State sovereignty and allegiance are so absorbing, that it would be very hard to find any *continuity of texture between each one of these systems and that ultimate "social basis" of their legitimation and action that should be the universal society of men as a whole.* For the mechanisms of international institutions to become the government of the legal community of mankind, it is not only necessary that they become *one system* among themselves. It would be mainly necessary that the peoples of the world as one people bring their States under them, just as the federalist *élites* of the peoples of the thirteen original States of the American Union brought their peoples and their States under the Congress in Philadelphia. How far we are from such a result is shown by the difficulty of "denationalizing" international officials, and by the even greater difficulty of bringing their action to bear directly upon the peoples regardless of the will of the Governments. Public opinion is rightly referred to as an essential factor to build up the texture that should help in bringing about such an achievement (19). Many scholars wonder, however, whether there is, in our

(18) On the "critical period" of the American federation — a most instructive "precedent" for European federalists and "world-organizers" — see *Rapporti contrattuali* quoted above, pp. 109-118.

(19) See for instance BOURQUIN, *L'Etat souverain et l'organisation internationale* quoted above, p. 218 ff.

time, any such thing as an international public opinion in an institutional, permanent, and not merely occasional and very precarious sense (20). The relatively most trivial national interest is sufficient to cut off a whole national community from the rest of the world as a component of international public opinion: not to mention the cases where a good half of existing national communities is cut off *en bloc* from the other.

First, then, the only immediate basis on which these institutions find their support would appear to be the will of the member States to abide by, and execute, the treaty. In the second place, operating as it does in a discontinuous framework and "reserving" the sovereignty of the member States, the treaty does not create, *per se*, that continuous legal texture, from the vertex of the institution to the interindividual social basis, which comes into being automatically whenever private persons or legislators set up an institution in municipal law. The treaty must be looked at as the protective umbrella, and at the same time a conditioning and limiting factor, of the establishment of the interindividual institution, the real growth of this being perhaps inevitably reserved to a process developing outside the framework of the law of nations in a proper sense (21).

16. To define the relationship between the interstate and the interindividual element of international organization and the relationship between the interindividual element and the legal systems of member States is, in our opinion — and in spite of our own past attempts to do so —, one of the most difficult (and not merely theoretical) problems confronting international lawyers. We are under the impression, however, that, whatever the "truth", international lawyers who proceed on the assumption of a superficial analogy between international "charters" on one hand, and transactions establishing institutions of municipal law on the other, are making matters much simpler than they really are. The idea that international treaties *create* international organization, "supra-national"

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(20) See the same BOURQUIN, *L'Etat souverain* quoted above, pp. 120-132.

(21) This is one of the reasons that lead me to hesitate to qualify the Charter of the United Nations as a "constitution". See my *La questione cinese*, in *Scritti di diritto internazionale in onore di T. Perassi*, Milano, 1957, vol. I, pp. 91-94. I find further reasons of doubt in the considerations set forth by ROSS, *Power Politics and the Ideology of the United Nations*, in *Nordisk Tidsskrift for International Ret* (*Acta Scandinavica Juris Gentium*), 1952, p. 33 ff.

institutions or even federal States and the constitution of mankind, is probably as far from an exact definition as we are all far from merging into a universal community of men. Theories perhaps do not matter, after all. Let us keep in mind however that the international treaty is not an adequate lifting machinery for an achievement so high as world or regional government. First, it is not in the hands of the peoples, who often do not even want it to be in their hands. Second, the very entities which control it—the States—have not placed it, and could perhaps not place it, high enough to reach above their heads. Which does not imply, of course, that international organization is not quite useful. It is actually indispensable in order to help creating the conditions that may bring about, in the long run, the real legal community of mankind.

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