

FOREWORD

By His Excellency Sir Robert Yewdall Jennings, Judge of the International Court of Justice and its President during 1991-1993.

It was the late Judge Sir Hersch Lauterpacht who said: "once we approach at close quarters practically any branch of international law, we are driven, amidst some feeling of incredulity, to the conclusion that although there is as a rule a consensus of opinion on broad principle — even this may be an overestimate in some cases — there is no semblance of agreement in relation to specific rules and problems". That was some forty years ago (see 49 AJIL 17 (1955)), and things have greatly improved since that time, thanks not least to the codification work of the International Law Commission; and Lauterpacht was indeed writing about the contribution that codification could make to the progressive element of the law. Nevertheless there remain areas of international law where there are no doubt 'broad principles' but an inadequacy of generally accepted hard law. One such area is that of the legal position of intergovernmental organizations, their legal status and immunities. It is with some enthusiasm therefore that one can commend Mr. Bekker's able excursion into that difficult area.

It should be said at the outset that a major complication of these problems of legal status and immunities is that they are not merely questions of public international law; in virtually all practical cases they involve questions not only of public international law, but also of private international law and of municipal law. As I had occasion to observe some four years ago, "... the former boundaries between public international law and private international law and municipal law have become less clearly defined, and in their place are grey, often puzzling, boundary zones. New terms such as 'transnational' law have appeared in order to recognize if not to explain one such grey area. It is no longer always obvious whether, at a given moment, one is dealing with public international law, private international law or municipal law." (39 ICLQ 522 (1990)).

But this makes the subject not only one of difficulties and complexities, but also of opportunity. For the very complication of these relationships is the consequence of the expansion of public international law to govern new areas of human activity. This is well illustrated by the question of jurisdictional immunities. Whereas in the older books this was a one of the more straightforward parts of international law, the emergence of the commercial exceptions to the general rule has meant that the law about immunity is now a most important part of any law, international or domestic, concerned with international commerce, trade and indeed banking.

The broad juridical provenance of these problems, as they may appear in the domestic fora, is well illustrated by the spate of cases before the High Court in England and eventually the House of Lords (there was also litigation before the courts in Malaysia, New York and the Court of Justice of the European Communities) and which arose from the announcement, in October 1985, by the International Tin Council that it was unable to meet its commitments, leaving debts estimated at £750 million. The central question was inevitably the legal status of the Tin Council; or to put the same question in more practical terms, whether the debtor plaintiffs could now have recourse against the States members of that international organization. It was these problems raised by the Tin Council cases which evidently inspired Mr. Bekker to undertake this study.

The like problems arise constantly not only in domestic courts but also in international commercial arbitrations and indeed before the International Court of Justice itself. In commercial arbitration there is, for example, the very lengthy matter of Westland Helicopters and the Arab Organization for Industrialization (see 23 ILM 1071 (1984) for an Interim Award; the final award on the merits of this case was handed down in July 1993 but has not yet been published). As to the International Court of Justice, there is the *Mazilu* Advisory Opinion of 15 December 1989 (1989 ICJ REP.177): the only case in which a principal organ of the United Nations, other than the General Assembly and the Security Council, has requested an Opinion from the Court; and more recently still, there have been the *Lockerbie* cases which may yet raise difficult and very important questions about the relationship of the Court and the Security Council.

It is in relation to a branch of law such as this one that the systematization that results from good academic work comes into its own. Rigorous exposition and analysis of the materials can, of itself, be an important contribution to our understanding. But the best work goes further; it discerns principles and patterns, consistencies rather than incompatibilities, and thus is able to make a positive contribution to both the general apprehension of the law, and to its practical usefulness.

This essentially intellectual task of the legal scholar has been well understood by Mr. Bekker. At the outset he tackles one source of confusion: much of the law about the privileges and immunities enjoyed by States and governments, and indeed diplomats, is driven by the notion of sovereignty. But intergovernmental organizations, insofar as they may indeed have a juridical status of their own, by the same token cannot be said to be sovereign. Questions therefore arise how far stock concepts, such as even the well-known distinction between acts *jure imperii* and acts *jure gestionis* can properly be applied, even by analogy, to intergovernmental organizations. Courts have not been consistent in their answers to these sorts of question. Mr. Bekker finds a solution to these problems in the two-fold principle of 'functional necessity', which is an appropriate and practical

criterion for intergovernmental organizations, and which makes recourse even by analogy to the legal position of sovereigns, wholly unnecessary and illogical. This general principle of functional necessity is again usefully qualified by "the principle of the *speciality* of the international organization" concerned. These principles Mr. Bekker works out in a three-stage scheme of first, the identification of the functions and purposes of a particular organization; second, the consequent appropriate selection of immunities and privileges; and third, the scope and extent of those immunities and privileges, having regard to that organization's 'official activity'.

In the course of this survey and analysis, Mr. Bekker deals with the relevant work of the International Law Commission, with the views of commentators (he acknowledges a special debt to the work of the late Professor Virally), and the jurisprudence of case law.

After these chapters setting out his general thesis on this area of law, Mr. Bekker then turns to the exposition and analysis of the decisions of the English Courts in the *International Tin Council* cases, thus using those practical problems to illustrate and confirm his own thesis. Finally there is a chapter of conclusions concerning the functional necessity approach, in which the author identifies some of its disadvantages, as well as its advantages which he concludes to be preponderant.

The essentially practical, as well as theoretical importance of this kind of work needs to be stressed. It is by no means as fully understood as it should be, that the gap in our juridical understanding of international organization is a serious weakness of modern international law. The institutionalisation of curial settlement and decision is already quite well developed, as a glance at the volumes of the *International Law Reports* will demonstrate. What is still in a relatively underdeveloped stage is the machinery for political and administrative decision. To deal with that is an urgent task; for courts of justice cannot stand on their own. And what is lacking is still much of the theoretical basis for such organisations and their relationships with States and with one another. As the author himself says: "the concept of the international organization in its modern form is a relatively new one and the problems posed by the legal status, privileges and immunities of international organizations are, consequently, also of recent date".

The present work of Mr. Bekker is an important contribution to the filling of that gap.

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