

## The Law of International Organisations: «Internal» or «International»? A Critical Analysis of the Relevant Practice of the United Nations Codification Organs

*El Derecho de las Organizaciones Internacionales: «Interno» o  
«Internacional»? Un Análisis Crítico de la Práctica Relevante  
de los Órganos de Codificación de la Organización de Naciones  
Unidas*

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**RESUMEN** Los principales postulados de este artículo consisten en que el derecho de las organizaciones internacionales es de naturaleza interna y que, en este sentido, el uso de «reglas de la organización» en lugar de «derecho interno de la organización internacional» por los órganos codificadores de las Naciones Unidas no resuelve el problema que esta última expresión aparentemente crea, ni está basado en fundamentos sólidos. La caracterización del derecho de las organizaciones internacionales como «interno» es un corolario de la personalidad jurídica de las organizaciones internacionales conforme al derecho internacional, sin perjuicio de la naturaleza internacional de algunos de los instrumentos que contienen las reglas de

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la organización. El derecho de las organizaciones internacionales es interno, pues se aplica solo a los Estados *qua* miembros, independientemente de la aplicación del derecho internacional, que les es aplicable *qua* partes de un tratado o sujetos a una costumbre o principio general. Finalmente, la caracterización del derecho de una organización internacional, incluyendo sus «reglas», como «derecho interno» tiene consecuencias prácticas, pues, como «derecho interno», ninguna regla de la organización puede ser considerada como una regla especial de derecho internacional derogatoria del derecho de los tratados o el derecho de la responsabilidad internacional.

**PALABRAS CLAVE** Derecho internacional, derecho de las organizaciones internacionales, derecho interno, Naciones Unidas.

**ABSTRACT** The main claims of this paper are that the law of international organisations should be regarded as internal in nature and that, in this regard, the use of «rules of the organisation» instead of «internal law of the international organisation» by United Nations codification organs does not address the problems that the latter apparently raises and is not based on solid grounds. In particular, the characterisation of the law of international organisations as «internal» can be understood as a corollary of international organisations' legal personality under international law, without prejudice to the international nature of some of the instruments which contain «rules of the organisation». Indeed, the law of international organisations should be considered to be «internal law», for it applies only to member states *qua* members, autonomously from the application of «international law», which applies to them *qua* states parties to a treaty or bound by a custom or principle. Lastly, the characterisation of the law of an international organisation, including its «rules», as «internal law» has practical legal consequences, for, as «internal law», no rule of the organisation could be a special rule of international law derogating from the law of treaties or the law of international responsibility.

**KEYWORDS** International law, law of international organisations, internal law, United Nations.

## Introduction

This paper analyses the concept of «internal law of international organisations» in the practice of United Nations codification organs and addresses

some of the issues this concept, particularly as set out in such practice, raises. In particular, it addresses the question of whether and to what extent the law of international organisations is internal or international in nature and considers the legal consequences of each characterisation for the purposes of certain areas of international law as codified by the above organs.

The main claims of this paper are that the law of international organisations is internal in nature and that, in this regard, the use of «rules of the organisation» instead of «internal law of the international organisation» by United Nations codification organs does not address the problems that the latter apparently raises and is not based on solid grounds. In particular, this paper seeks to demonstrate that the characterisation of the law of international organisations as «internal» is a corollary of the proposition that they are entitled to legal personality under international law and that the international nature of some of the instruments which contain «rules of the organisation» is not inconsistent with such characterisation. Indeed, it is submitted that the law of international organisations is «internal law», for it applies only to member states *qua* members,<sup>2</sup> autonomously from the application of «international law», which applies to them *qua* states parties to a treaty or bound by a custom or principle. Lastly, it will be demonstrated that the choice to characterise the law of an international organisation, including its «rules», as «internal law» has practical legal consequences, particularly given the fact that, if regarded as «internal law», no rule of the organisation can be assumed to be a special rule of international law derogating from the law of treaties or the law of international responsibility, as codified by the United Nations codification organs.

The paper is divided into three parts. The significance of the concept of «internal law» is discussed and the issues in relation to which the concept is relevant are identified in Part II. Part III analyses the use of the term «internal law of international organisations» in the practice of United Nations organs which perform the function of codifying international law, namely the Sixth Committee of the United Nations General Assembly and, most prominently, the United Nations International Law Commission. Part IV addresses the is-

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2. This is without prejudice to the fact that membership in some organisations is open to other subjects of law, including other subjects of international law, most prominently international organisations. See generally SCHERMERS and BLOKKER (2003) pp. 54 – 67, referring to categories of members other than states, including territories which are not independent states and international organisations.

sues which the above practice raises.

The concept of «internal law» in international law and the practice of the United Nations codification organs

This part analyses the concept of «internal law» in international law. In particular, it takes into account the practice of United Nations codification organs and considers the significance of the concept and its relevance to a set of areas of international law, all of which have been the object of codification projects with the United Nations.

The concept of «internal law» has not been defined. Nonetheless, it is used interchangeably with domestic or municipal law in relation to states. In this latter regard, it was defined the ILC as including «in particular, the constitution of the State and any other kind of internal legal rules, written or unwritten, including those which effect the incorporation into internal law of international agreements.»<sup>3</sup>

First, it is relevant to the concept of «international law». International law is usually defined by leading authors as the law governing the relations of states.<sup>4</sup>

Emphasis is often placed in relation to the legally binding character of «international law», «[i]n contradiction to mere usages ... morality ... and sometimes to international comity.»<sup>5</sup> Nonetheless, to the extent that states may conclude agreements among themselves which are legally binding under their domestic law, such agreements being «more in the nature of private law contracts than international treaties».<sup>6</sup>

Thus, in this latter connection, the concept of «internal law», as a general category of which legal orders usually referred to as «domestic law» and «municipal law», is of relevance for the definition of international law, to the extent that it allows to negatively define the concept of international law, by excluding from its scope principles and rules which are created through sources

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3. UNITED NATIONS INTERNATIONAL LAW COMMISSION (1981). Available at: <[http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC\\_1981\\_v2\\_p2\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1981_v2_p2_e.pdf)>. [Date of Access: 4 July 2013] p. 44, para. 4.

4. See generally JENNINGS and WATTS (1992) p. 4, para. 1, stating: «International law is the body of rules which are legally binding on states in their intercourse with each other.» (internal footnotes omitted).

5. *Id.*, footnote 1.

6. *Id.*, at p. 1200, para. 582, footnote 7.

of law under «internal law».

Secondly, it is relevant to the concept of «legal personality» under international law. The use of the concept of «legal personality» has acquired practical relevance as a result of the fact that the scope of international law has expanded so as to include subjects of international law other than states.<sup>7</sup>

The subjects of international law enjoy legal personality under international law. Such legal personality is the legal position of such subjects and consists of rights, duties and powers under international law.<sup>8</sup>

Legal personality under international law is predicable not only of states, the principal subjects of international law, but also, most prominently, of international organisations, as pointed out by the International Court of Justice in its 1949 Advisory Opinion in *Reparation for Injuries Suffered in the Service of the United Nations*.<sup>9</sup>

In this connection, the relevance of the concept of «internal law» is two-fold. It allows excluding from the scope of international law subjects of law enjoying legal personality under «internal law». Indeed, legal persons constituted by agreements entered into by states but governed by the internal law of a state are not international organisations.<sup>10</sup> Also, it provides a general category to refer to one of the properties of enjoying legal personality, namely the fact that each legal person under international law has an «internal» legal order. The second aspect of the relevance of the concept in question, which is at the part of the present paper's main claims, is further commented on below.

Thirdly, the concept of «internal law» is relevant to the law of treaties and the law of international responsibility, both of which are areas of high practical importance, as they govern one of the most important sources of obligations and the consequences of their breach under international law, respectively.

The 1969 Vienna Convention on the Law of Treaties (VCLT),<sup>11</sup> which

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7. *Id.*, at p. 4, para 1.

8. *Id.*, at p. 119 - 120, para. 33.

9. ICJ Rep (1949) at p. 178, stating that «the subjects of law in any legal system are not necessarily identical ... and international person need not possess all international rights, duties and powers normally possessed by states.»

10. SCHERMERS and BLOKKER (2003) p. 36, para. 45, citing several instances of constitution of such entities in state practice.

11. UNITED NATIONS, *Treaty Series*, vol. 1155. Available at: <[http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)>. [Date of Access: 4 July

applies as conventional law to states parties to it, and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986 VCLT),<sup>12</sup> which does not apply yet as conventional law,<sup>13</sup> codify the customary law of treaties. References to «internal law» in the VCLT are substituted with references to «rules of the organisation» in 1986 VCLT. The use of the term «rules» raises a set of issues, essentially given the international nature of one element of the «rules» of an organisation, namely when the constituent instrument of an international organisation is a treaty.

The law of international responsibility governs the existence and legal consequences of a breach of an obligation under international law, including those the terms of which are set out by conventional rules, as noted above. This law is of a customary character. The 2001 ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)<sup>14</sup> and the 2011 ILC Draft Articles on Responsibility of International Organizations (DARIO),<sup>15</sup> in addition to the 2006 ILC Articles on Diplomatic Protection,<sup>16</sup> are widely regarded as codifying this branch of customary international law.<sup>17</sup> The use of the term «rules» instead of «internal law» also raises a number of issues, particularly given the fact that the application of DARIO is excluded by its Article 64 in the event of special rules of international law, which can be contained in «rules of the organisation», without specifying if rules in addition to those under the constituent treaty are regarded as international.

The use of the concept of «internal law of international organisations» in

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2013]. p. 331.

12. *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, vol. II*. Available at: <[http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_2\\_1986.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf)>. [Date of Access: 4 July 2013].

13. Without prejudice to the rule of customary law of treaties whereby signatories are under an obligation not to defeat the object and purpose of the treaty upon signature and until it enters into force.

14. «Appended to GA Res 56/83, 12 December 2001». Cf., CRAWFORD (2012) p. 540.

15. A/CN.4/L.778. Cf., *Ibid.*

16. A/61/10. Cf., *Ibid.*

17. *Ibid.*

the practice of United Nations codification organs

The practice analysed in this part includes instances of use of the above concepts, particularly of «internal law», in relation to codification processes in the following areas of international law concerning international organisations: (1) immunities and privileges;<sup>18</sup> (2) representation of states in their relations with international organisations;<sup>19</sup> (3) the law of treaties; (4) reservations to treaties; (5) and the law of international responsibility. This part considers in detail practice in the last three domains.

### **The Law of Treaties**

The positions of members of the ILC, including those serving as Special Rapporteurs, as well as the final position adopted in different reports to UNGA's Sixth Committee vary. These positions are commented on below, in chronological order.

In 1968, Commissioner Tammes posited that the question raised by the internal law of an international organisation concerned «the relationship between the all-embracing system of general international law, on the one hand, and various international systems of different degrees of organization, on the other.»<sup>20</sup> In his view, Article 27 concerned «the key to the problem of the relationship between different international legal systems, since the so-called 'internal law' of an organization ... was at the same time a portion of international law.»<sup>21</sup> In 1974, he asserted that «the capacity of the organization could not be provided for by the internal law of the organization itself.»<sup>22</sup> This

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18. UNITED NATIONS INTERNATIONAL LAW COMMISSION (1968). Available at: <[http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC\\_1968\\_v1\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1968_v1_e.pdf)>. [Date of Access: 4 July 2013]. pp. 32 – 46.

19. UNITED NATIONS INTERNATIONAL LAW COMMISSION (1971). Available at: <[http://untreaty.un.org/ilc/texts/instruments/english/commentaries/5\\_1\\_1971.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/5_1_1971.pdf)>. [Date of Access: 4 July 2013]. pp. 311 – 312, para. 3.

20. UNITED NATIONS INTERNATIONAL LAW COMMISSION (1973). Available at: <[http://untreaty.un.org/ilc/summary\\_records/english/a\\_cn4\\_sr1242.pdf](http://untreaty.un.org/ilc/summary_records/english/a_cn4_sr1242.pdf)>. [Last visited on 4 July 2013] p. 202, para. 3.

21. *Id.*, at p. 203, para. 7.

22. UNITED NATIONS INTERNATIONAL LAW COMMISSION (1974a). Available at: <[http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC\\_1974\\_v1\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1974_v1_e.pdf)>. [Date of Access: 4 July 2013] p. 136, para. 53.

would hold true, in his view, «[i]n any legal system», as «capacity was conferred by an outside source.»<sup>23</sup>

In 1973, Commissioner Yasseen proposed that an article should be included whereby the capacity of an international organisation to concluded treaties,<sup>24</sup> representation<sup>25</sup> and «[t]he question of agreements concluded by subsidiary organs» would be governed by «governed by the internal law of the organization».<sup>26</sup> He used this term as well as that of «relevant rules of the organization». He observed that the articles should «reflect reality and seek the organization's competence where it was to be found: in the organization's own law—that was to say in its relevant rules.»<sup>27</sup> He was of the view that «the expression 'internal law of international organizations' should be avoided, since to some extent the law of international organizations was part of international law, so that it could not be assimilated to internal law.»<sup>28</sup> In his use of «internal law» in relation to states, he expressly drew a distinction between the state as «a legal order» and «as a subject of law», more properly «of international law, not of internal law.»<sup>29</sup>

In the 1974 draft articles of the 1986 VCLT, the ILC used the term «the law peculiar to any international organisation». In its Commentary to Article 2(2), the ILC explained its choice in the following terms: «In the course of its work, the International Law Commission has on occasion used the term 'internal law of an international organization', without this expression having given rise to any objections or even any comments. Admittedly, however, it may lead to a twofold ambiguity. In the first place, the term 'internal' is often used in opposition to the term 'international'; this cannot be the case here, since it is applied to a set of rules which constitute 'special' international law, 'peculiar to an international organization', and not 'national' law. In the second place, since the term 'internal law' usually refers to State law, it thereby suggests a stratified legal system which is all-inclusive and unified by a centralized legislature and judiciary; it might be claimed that the terms is inappropriate for the entire

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23. *Id.*, at p. 136, para. 54.

24. *Supra* n. 20 at p. 207, para. 54.

25. *Id.*, at p. 207, para. 55.

26. *Id.*, at p. 208, para. 56.

27. *Id.*, at p. 207, para. 54.

28. *Supra* n. 22, at p. 146, para. 18.

29. *Supra* n. 20, at p. 24, para. 4.



system constituted by the law peculiar to an organization.»<sup>30</sup>

It concluded that «[t]hese objections to the use of the expression ‘internal law of any international organization’ are not entirely convincing from the point of view of logic. But, since the expression has connotations which are perhaps best avoided, the draft article uses the expression ‘law peculiar to any international organization’, which is more neutral.»<sup>31</sup>

The reasons for this choice had previously been expounded by Special Rapporteur Reuter, who had noted that such choice «was the logical outcome of his initial position that general international law must be distinguished from the special international law of an organization.»<sup>32</sup>

In the 1974 version of Article 2(2), 1986 VCLT, the ILC replaced «the law peculiar to any international organisation» with «the rules of any international organisation». It stated that Article 2(2) raised a «question of terminology» that was important.<sup>33</sup> It affirmed that «[i]t is scarcely disputed that what article 2, paragraph 2 of the Vienna Convention calls ‘the internal law of any State’ is matched, in the case of international organizations, by a corresponding notion covering rules whose special characteristic is that they are proper to each organization. In the first place there are the rules embodied in the organization’s constituent instrument. In the second place there are the rules which have developed from that instrument, or pursuant to it, either in written form or in practice.»<sup>34</sup> It explained that its choice was made in keeping with the Commission’s choice to use the term in Article 5 of the 1959 VCLT.

In 1975, Special Rapporteur Reuter used the term «internal law of each organization» in his proposition that the meaning of certain terms, «such as ‘acceptance’, ‘approval’ and ‘ratification’ ... could vary».<sup>35</sup>

In 1977, Special Rapporteur Reuter commented on Draft Article 36bis, on

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30. UNITED NATIONS INTERNATIONAL LAW COMMISSION (1974b). Available at: <[http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC\\_1974\\_v1\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1974_v1_e.pdf)>. [Date of Access: 4 July 2013] pp. 143 - 144, para. 2.

31. *Id.*, at p. 144, para. 2, *in fine*.

32. *Supra* n. 22, at p. 134, para. 33.

33. *Supra* n. 30, at p. 296, para. 14.

34. *Id.*, at p. 296, para. 15.

35. UNITED NATIONS INTERNATIONAL LAW COMMISSION (1975). Available at: <[http://untreaty.un.org/ilc/summary\\_records/english/a\\_cn4\\_sr1347.pdf](http://untreaty.un.org/ilc/summary_records/english/a_cn4_sr1347.pdf)>. [Date of Access: 4 July 2013] p. 227, para. 5.

the «Effects of a treaty to which an international organization is party with respect to States members of that organization». In his view, this raised the questions of whether «that purely internal situation could have the effect of creating rights or obligations for the parties to the treaty concluded by the international organization»<sup>36</sup> and whether and to what extent «a provision which was only a provision of the internal law of the organization» could «be invoked against those States».<sup>37</sup>

He proposed, in this latter regard, that: (a) «it must first be recognized that States or international organizations which agreed to contract with an international organization were usually familiar with its constituent instrument»; (b) «[a]t the time of concluding the treaty, they could therefore expect the agreement concluded by the organization to give rise to rights and obligations for its member States and for themselves» and (c) that «they assented thereto in advance; they knew the situation and accepted it.»<sup>38</sup>

Special Rapporteur Reuter pointed out, in relation to Article 23, that it had, among others, «a constitutional aspect concerned with the internal law of international organizations», namely «what organ of an international organization was competent to formulate, accept or object to reservations definitively.»<sup>39</sup> In this connection, he pointed out that «the question who, in an international organization, was authorized to formulate or object to reservations came under its constitutional law, which could vary from one organization to another.»<sup>40</sup>

Commissioner Šahovi pointed out that «[t]he expression ‘relevant rules of the organization’ was as it were the parallel, *mutatis mutandis*, of the formula ‘internal law of the State’.»<sup>41</sup> The «novelty» of the former, in his view, had prompted the ILC to define it, as opposed to the latter, which «did not need

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36. UNITED NATIONS INTERNATIONAL LAW COMMISSION (1977). Available at: <[http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC\\_1977\\_v1\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1977_v1_e.pdf)>. [Date of Access: 4 July 2013] p. 134, para. 33.

37. *Id.*, at p. 134, para 34.

38. *Id.*, at p. 134, para 34.

39. *Id.*, at p. 100, para 21.

40. *Id.*, at p. 100, para. 25.

41. UNITED NATIONS INTERNATIONAL LAW COMMISSION (1981a). Available at: <[http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC\\_1981\\_v1\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1981_v1_e.pdf)>. [Date of Access: 4 July 2013] p. 8, para. 33.

to be defined.»<sup>42</sup>

Commissioner Barboza identified «three ways» in which «the term ‘rules of the organization’ had been used» and that «in a general way» it had been employed as «corresponding to the concept of the internal law of the State».<sup>43</sup>

Commissioner Verosta stated that «the expression ‘rules of the organization’ had no counterpart for States; the ‘rules of the State’ were, in fact, its internal law.»<sup>44</sup> He considered the concept of «rules of the organisation» to be narrower in scope than that of «internal law» of an international organisation.<sup>45</sup>

Special Rapporteur Reuter pointed out that «the Commission had not referred to the ‘internal law’ of the organization, because it had had in mind the organization’s whole legal system, in other words, its own law. But the adjective ‘internal’ had a legal connotation: it was the converse of ‘international’.» He concluded that it would remain «to be seen whether the expression ‘rules of the organization’ was satisfactory.»<sup>46</sup> Nevertheless, Special Rapporteur Reuter continued using the term.<sup>47</sup>

In the 1982 Commentaries on the 1986 VCLT, the ILC explained its decision to use the term «rules of the organisation» throughout the entire set of articles in its Commentary to Article 27(1)(j), as follows: «there would have been problems in referring to the ‘internal law’ of an organization, for while it has an internal aspect, this law also has in other respects an international aspect.»<sup>48</sup>

With respect to the use of the term «rules of the organisation» in Article

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42. *Id.*, p. 8, para. 4.

43. *Id.*, p. 8, para. 23, stating: «the term ‘rules of the organization’ had been used in three ways in the draft: first, in a general way, corresponding to the concept of the internal law of the State; secondly, with the addition of the adjective ‘relevant’, which referred to certain specific rules relating expressly to the aspect concerned; and, thirdly, in a specific sense, in draft article 46.»

44. *Id.*, p. 11, para. 31.

45. *Id.*, p. 11, para. 33.

46. *Id.*, p. 12, para. 39.

47. *Id.*, p. 25, para. 31.

48. UNITED NATIONS INTERNATIONAL LAW COMMISSION (1982). Available at: <[http://untreaty.un.org/ilc/reports/english/A\\_37\\_10.pdf](http://untreaty.un.org/ilc/reports/english/A_37_10.pdf)>. [Date of Access: 4 July 2013] p. 21, para. 25.

27(2), it noted that several members had expressed the view that «could not be assimilated to the internal law of a State since those rules themselves constituted rules of international law». <sup>49</sup> It notes, nonetheless, that the rule is identical in content to that in Article 27(1), as the two provisions only differ in that «the term ‘rules of the organization’ simply being substituted for the term ‘internal law’ which is used in the case of States.» <sup>50</sup>

### Reservations to Treaties

The terms «internal law of each State» and «relevant rules of each organisation» are used in the guidelines on the «formulation of interpretative declarations at the internal level», <sup>51</sup> «the absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations» <sup>52</sup> The term «their internal law» is used in the guideline concerning the «periodic review of the usefulness of reservations» in relation to both «States and international organisations». <sup>53</sup>

In relation to the guidelines on reservations to treaties, the view was expressed in the General Assembly Sixth Commission that «in draft guideline 2.5.3 the words ‘internal law’ as applied to international organizations should be replaced by the words ‘rules of international organizations’.» <sup>54</sup>

Commissioner Candiotti, in his capacity as Chairman of the Drafting Committee, asserted, in relation to the draft guideline related to «statements concerning modalities of implementation of the treaty at the internal level», that

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49. *Id.*, p. 38, para. 2.

50. *Id.*, p. 38, para. 3.

51. UNITED NATIONS INTERNATIONAL LAW COMMISSION (2005). Available at: <[http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC\\_1981\\_v1\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1981_v1_e.pdf)>. [Date of Access: 4 July 2013] p. 177.

52. *Id.*, p. 181.

53. *Id.*, p. 180, stating: «In such a review, States and international organizations should devote special attention to the aim of preserving the integrity of multilateral treaties and, where relevant, give consideration to the usefulness of retaining the reservations, in particular in relation to developments in their internal law since the reservations were formulated.»

54. UNITED NATIONS GENERAL ASSEMBLY (2004). Available at: <[http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_537.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_537.pdf)>. [Date of Access: 4 July 2013] p. 41, para. 175.

«[t]he Drafting Committee had also debated the appropriateness of the phrase «at the internal level» in connection with an international organization and concluded that it could be used in that context, since the words «internal law» of international organizations had become current with their development.»<sup>55</sup>

In a statement, the Chairman clarified that «[t]he Drafting Committee replaced the words ‘internal legislation’ with ‘internal law’ in order to be equally applicable to international organizations.»<sup>56</sup> Also, he pointed out that the «the words ‘internal law’ in guideline 2.5.3 had a broader and a more general meaning, whereas in this guideline 2.5.5 the ‘rules of the organization’ referred to a more specific issue, that of the competence to withdraw reservations.»<sup>57</sup>

### **The Law of International Responsibility**

In the 1974 Commentaries to ARSIWA, Commissioner Kearney used the term «internal law» in relation to the legal order of sub-state territorial entities. In fact, he proposed that acts of organ of such entities should be made explicitly attributable to the respective state. He referred to such legal order as the «the internal law of a territorial governmental entity».<sup>58</sup>

Commissioner Economides expressed the view that the internal law of the organization is part of international law in its entirety and that, therefore, the fourth sentence of Paragraph 10 of the Commentaries to Article 2 of the ARSIWA, to the effect that «‘some further parts of the internal law of the organization’ belonged to international law» was incorrect. He proposed «the end of the sentence should be amended to read: ‘and the other parts of its internal law, which belonged to international law’.»<sup>59</sup> In his response to this proposal, Commissioner Pellet stated that the matter was «much more complex and

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55. UNITED NATIONS INTERNATIONAL LAW COMMISSION (1999). Available at: <[http://untreaty.un.org/ilc/summary\\_records/english/a\\_cn4\\_sr2597.pdf](http://untreaty.un.org/ilc/summary_records/english/a_cn4_sr2597.pdf)>. [Date of Access: 4 July 2013] p. 219, para. 44.

56. UNITED NATIONS INTERNATIONAL LAW COMMISSION (2003b). Available at: <[http://untreaty.un.org/ilc/sessions/55/dc\\_statement\\_reservations.pdf](http://untreaty.un.org/ilc/sessions/55/dc_statement_reservations.pdf)>. [Date of Access: 4 July 2013] p. 4.

57. *Id.*, at p. 5.

58. *Supra* n. 30, p. 33, para. 11.

59. UNITED NATIONS INTERNATIONAL LAW COMMISSION (2003a). Available at: <[http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC\\_2003\\_v1\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_2003_v1_e.pdf)>. [Date of Access: 4 July 2013] p. 238, para. 66.

controversial» than suggested by Commissioner Economides and that the ILC should not take a «definite position» in the context of «a commentary to a draft article». <sup>60</sup>

Commissioner Gaja, in his capacity as Special Rapporteur, pointed out that «it was by no means certain what was part of the internal law of an organization» and illustrated this proposition by reference to the constituent instrument, which was arguably part of the internal law of international organisations, yet remained indisputably a treaty, governed by international law and could hardly be regarded as not being part of international law, as stated in the 1959 VCLT. <sup>61</sup>

He further stated that, while the internal law of a state, «which was the result of its unilateral choice, could not prevail over international law», «[t]he same did not necessarily apply for international organizations, whose internal laws might well be the result of the collective choice of member states and might even affect treaties that were in force among them.» He also pointed out that «[o]ne could not assume that states were bound inter se by treaties in such a way that the law of an international organization could not have any consequence for them» and that «[t]he question of the hierarchy between international law and the internal law of the organization did not need to be addressed at this stage», as its relevance was unclear, in his view. <sup>62</sup>

Commissioner Galicki expressed the view that the «original intention» of Article 3, ARSIWA, «to differentiate between international and internal law systems» was not served by the reference to the «international law of international organisations», as «the Commission would in fact remain within the same realm of international law.» <sup>63</sup>

Commissioner Escarameia pointed out that the «attempt to assimilate the concept of an international organization to that of a state» was misguided, as illustrated by «the concepts of internal versus international law, and of governmental functions», the latter being «was not appropriate, since international organizations in fact performed functions very different from those of Governments.» She concluded that «that internal law should be excluded, for, in addition to the hierarchical problems to which it might give rise, the scope of

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60. *Id.*, at p. 238, para. 37

61. *Id.*, at p. 14, para. 69

62. *Id.*, at p. 15, para. 70

63. *Id.*, at p. 23, para. 16

the term itself was unclear.»<sup>64</sup>

Commissioner Pellet expressed the view that «the law of an organization was anchored in general international law and had far too complex a relationship with it» and, thus, that a simplistic approach could not be taken.<sup>65</sup> He specified that «[f]rom the standpoint of the organization's internal law, however, any organization, and not just the European Union, created its own legal system which was a particular kind of international law.»<sup>66</sup> He pointed out that the ILC would have to deal with two questions:<sup>67</sup> (a) «the question of the nature and the existence of the obligation whose breach gave rise to the organization's responsibility»<sup>68</sup> and (b) «problems of the organization's own legal system, of which the law of the international civil service was just one example».<sup>69</sup>

Commissioner Koskenniemi pointed out that «the relationship between the internal law of an organization and international law» should be treated in detail and illustrated the importance of the topic by referring to cases in which an act of international organisations such as the EU or the WTO is lawful under «European law» and «WTO law», yet «illegal under international law». He observed that this problem highlighted issues as to the «fragmentation of international law» and «normative hierarchy within international law».<sup>70</sup>

Commissioner Brownlie reportedly made the following statement: «[t]he basic problem seemed to be the individuality of international organizations. Each had its own internal applicable law. Of course, states too had their own internal law, but the interrelation between the internal law and the external relations of states was much more easily recognized and better established than the relationship between the external relations of international organizations and their 'internal law'.»<sup>71</sup> Commissioner Pellet agreed with the above statement and expressed that «applicable law was a sound basis on which to

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64. *Id.*, at pp. 24 - 25, para. 24.

65. *Id.*, at p. 27, para. 51.

66. *Id.*, at p. 28, para. 52.

67. *Id.*, at p. 27, para. 51.

68. *Ibid.*

69. *Id.*, at p. 27, para. 52.

70. *Id.*, at p. 16, para. 7.

71. *Id.*, at p. 17, para. 16.

proceed». <sup>72</sup>

Commissioner Kabatsi was of the opinion that, in spite of the unlikelihood of conflict between «the two legal orders», namely «international law» and «internal law arrangements», «cases might arise when the internal rules of international organizations ran counter to the provisions of international law, and it might be useful to provide for treatment similar to that given to states.» <sup>73</sup>

In 2004, the Sixth Committee of the United Nations General Assembly considered DARIO. Several references were made to «internal law».

It was observed that the concept of «internationally wrongful act» «did not cover the responsibility of the organization under internal law». <sup>74</sup> It did not specify whether it referred to the internal law of states or of the international organisation in question.

In connection with the attribution of acts of organs of an international organisation, it was clarified that «the issue was the status of the organ for the purposes of attribution of the wrongful act and not in the sense of the internal law of the organization.» <sup>75</sup>

In relation to the reference to «rules of the organisation», an analogy with Article 4, ARSIWA was made, and the view that it was «appropriate to establish a parallel between the internal law of States and the «internal law» of international organizations» was expressed. In this regard, the internal law of a state was regarded as consisting «of the legislation and regulations constituting the legal order of States and, similarly, the internal law of international organizations consisted of the texts establishing the rules governing their organization and functioning.» <sup>76</sup>

Also, it was pointed out that «the rules of the organization could not be clearly differentiated from international law ... Most of the rules of international organizations normally took the form of a treaty and constituted international law: when they were violated, international law was violated.» <sup>77</sup>

With respect to the «adequacy of the definition of ‘rules of the organisation’» in Article 2(1)(j), 1986 VCLT, it was observed that «an international

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72. *Id.*, at p. 17, para. 18.

73. *Id.*, at p. 20, para. 44.

74. *Supra* n. 54, at p. 8, para. 16.

75. *Id.*, at p. 16, para. 46.

76. *Id.*, at p. 17, para. 50.

77. *Id.*, at p. 17, para. 51.



organization could not invoke one of its internal operating rules to justify an act entailing responsibility» and that, in this sense, «[t]he term «constituent instrument» used in the Vienna Convention was limitative and might lead to confusion, since it was only one of the forms that the treaty establishing an international organization could take.» In this latter regard, it was suggested that the «more general formula» of «the operating rules of the organization» should be used.<sup>78</sup>

In the Commentaries to DARIO, as adopted on first reading in 2009, the ILC referred to the internal law of the organization.

In paragraph 5 of the Commentary to Article 4, it posited that «some further parts of the internal law of the organization may be viewed as belonging to international law», in addition to an international organisation's constituent instrument, which it characterised as «a treaty or another instrument governed by international law».

These statements were made in connection with the proposition that the second sentence of Article 3, ARSIWA, «cannot be easily adapted to the case of international organizations», for «[t]he difficulty in transposing this principle to international organizations arises from the fact that the internal law of an international organization cannot be sharply differentiated from international law.»

It concluded that «the relations between international law and the internal law of an international organization appear too complex to be expressed in a general principle.»<sup>79</sup> The above commentaries had been made previously, particularly in paragraph 10 of the Commentary to Article 3.<sup>80</sup>

In paragraphs 5 and 6 of the Commentary to Article 9, it asserted that (a) «[t]he legal nature of the rules of the organization is to some extent controversial»<sup>81</sup> and that the controversy was «far from theoretical for the purposes of the present article, since it affects the applicability of the principles of international law with regard to responsibility for breaches of certain obli-

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78. *Id.*, at p. 19, para. 59.

79. UNITED NATIONS INTERNATIONAL LAW COMMISSION (2009). Available at: <[http://untreaty.un.org/ilc/reports/english/a\\_64\\_10.pdf](http://untreaty.un.org/ilc/reports/english/a_64_10.pdf)>. [Date of Access: 4 July 2013] p. 55, para. 5.

80. *Id.*, p. 48, para. 10.

81. *Id.*, p. 78, para. 5.

gations arising from rules of the organization».<sup>82</sup>

Furthermore, it pointed out that there were four positions in relation to the controversy: (1) «the rules of treaty-based organizations are part of international law»; (2) «although international organizations are established by treaties or other instruments governed by international law, the internal law of the organization, once it has come into existence, does not form part of international law»; (3) «international organizations that have achieved a high degree of integration are a special case», as noted in the European Court of Justice's 1964 judgment in the *Costa v. E.N.E.L.* case; and (4) on the basis of a «distinction according to the source and subject matter of the rules of the organization», it would be necessary to «exclude, for instance, certain administrative regulations from the domain of international law.»<sup>83</sup>

The use of «rules of the organisation» instead of «internal law» of the organisation: Concluding Analysis

This last part analyses the use of the concepts in question in the final versions of the draft articles in the areas analysed above, summarises the reasons for the use of «rules of the organisation» instead of «internal law» of the organisation, and draws conclusions.

The use of the concepts of «internal law» of states and international organisations and of «rules of the organisation» in the 1959 and 1986 VCLT, the final version of the Guidelines on Reservations and ARSIWA and DARIO

The concept of «internal law of a state» is contained in the following rules contained in VCLT:

Article 2(2) provides that the use of terms in VCLT is without prejudice to their meanings under «the internal law of any State.»

Article 27 sets out the rule that «internal law» cannot be invoked by a state as a «justification for its failure to perform a treaty.» This prohibition is expressly said to be without prejudice to the rule under Article 46.

Article 46 is to the effect that the violation of rules of internal law on competence to conclude treaties cannot be invoked as a ground for the invalidity of a treaty, unless such violation is (1) manifest and (2) in breach of an «internal rule of fundamental importance.»

The concept of «rules of an organisation» is used in conjunction with «internal law of a state» in Articles 2(2), 27(2), and 46(2), 1986 VCLT, which

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82. *Id.*, p. 79, para. 6.

83. *Id.*, pp. 78 – 79, para. 5.

set out *mutatis mutandis* the same rules as VCLT. The use of «rules of an organisation» is analysed in further detail below. Article 2(1)(j), 1986 VCLT, defines such rules as follows: «‘rules of the organization’ means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization.»

Furthermore, and in spite of its choice to use «rules of an organisation» instead of «internal law of international organisations», the ILC used the latter in its Guide to Practice on Reservations to Treaties.<sup>84</sup> This use is also commented on in further detail below.

In ARSIWA, the ILC used the concept of «internal law» in the following rules:

Article 3 states that characterisations of conduct as lawful under «internal law» are without prejudice to the characterisation of the same conduct as wrongful under international law.

Article 4(2) provides that the «internal law» of a state governs the characterisation of a person or entity as a state organ for the purposes of attribution of conduct to a state.

Article 32 is to the effect that states may not rely on their internal law as a «justification for failure to comply with its obligations under» Part II of the Articles, which sets out the content of international responsibility.

In DARIO, the ILC used the term «rules of the organisation», instead of «internal law», in the following rules:

Articles 2(c) and 6(2) provide that the status of organ of an international organisation is defined by its rules and that the rules define the functions of organs and agents, respectively.

Article 10(2) includes breaches of obligations by international organisations towards its members under the rules of the organisation into the conditions for the existence of international responsibility.

Article 32(1) provides that the organisation may not rely on its own rules as «a justification for failure to comply with its obligations under» Part II of the Articles, also concerning the content of international responsibility. Paragraph 2 states that Paragraph 1 is without prejudice to the applicability of such rules the relations between the organisation and its members.

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84. UNITED NATIONS INTERNATIONAL LAW COMMISSION (2011). Available at: <[http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1\\_8\\_2011.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_8_2011.pdf)>. [Date of Access: 4 July 2013] p. 9, para. 2.5.3 (2), referring to «their internal law».

Article 64, on '*lex specialis*', provides that DARIO does not apply «where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.»

Article 2(b) states: «'rules of the organization' means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization».

The reasons for choosing to use «rules of the organisation» instead of «internal law» of the organisation

The reasons for the above choice, as discussed in Part II, can be summarised as follows:

The concept of «rules of the organisation» encompasses both international and internal aspects of the law of an internal organisation. It, therefore, avoids the need to characterise it as «international» or «internal».

To the extent that international organisations are most prominently constituted by treaties, and that treaties are indisputably of an international law character, the characterisation of the law of an international organisation as «internal» would be contradictory with the internal nature of the treaty.

## Conclusions

As for the reasons to choose «rules of the organisation» instead of «internal law» of the organisation», the following conclusions can be drawn:

The fact that rules of international law are integrated into the internal law of a state is not without prejudice to the internal character of the law of a state. Indeed, as pointed out by the ILC, internal law encompasses rules which incorporate rules of international law into internal law.<sup>85</sup> This would be predicable of the internal law of an international organisation, all the more taking into account that an international organisation constituted by treaty is not party to the constituting treaty.

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85. *Cf., supra* n. 3.

To the extent that the only element of an international organisation which is not internal is the constituting treaty, the latter can be deemed as incorporated into the internal law of the international organisation, rather than as merely a treaty. It must be noted that, otherwise, the position of members which are not parties to the treaty could not be properly explained, as their constitution would be a treaty by which they, as third parties, are not bound.

As for the reasons to characterise the law of an international organisation as «internal law», in addition to the arguments expressed above, in para 3.1, the following reasons are worthy of further consideration:

The use of «internal law» instead of «rules of the organisation» would make the rules in Article 27(2), 1986 VCLT and 64, DARIO more consistent with the parallel rules governing states, under VCLT and ARSIWA. Indeed, the constitutional rules under the constituting treaty would be treated in their internal aspect, as rules incorporated into the internal law of the international organisation, without prejudice to the obligations which they create under international law. Such obligations, nonetheless, would be predicable of members *qua* parties to a given treaty or bound by a given custom or principle, as not *qua* members.

To the extent that neither the 1986 VCLT has entered into force, nor DARIO has been fully incorporated into customary law, there is room for a more consistent approach to the law of international organisations, which may be regarded as «internal law».

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