THE ERIK CASTRÉN INSTITUTE OF
INTERNATIONAL LAW AND
HUMAN RIGHTS

Constructing the Powers of International Institutions

by
Viljam Engström

MARTINUS NIJHOFF PUBLISHERS

Constructing the Powers of International Institutions

The Erik Castrén Institute Monographs on International Law and Human Rights

General Editor

Martti Koskenniemi

VOLUME 14

The titles published in this series are listed at brill.nl/ilmc

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MARTINUS
NIJHOFF
PUBLISHERS

LEIDEN · BOSTON
2012

Library of Congress Cataloging-in-Publication Data

Engström, Viljam, 1973-
Constructing the powers of international institutions / By Viljam Engstrom.
p. cm. -- (The Erik Castren Institute monographs on international law and human rights ; 14)
Includes bibliographical references and index.
ISBN 978-90-04-22030-0 (hardback : alk. paper)
1. International agencies. 2. International law. 3. Implied powers (Constitutional law)
4. Sovereignty. 5. Power (Social sciences) I. Title.

KZ4850.E56 2012
341.2--dc23

2012010635

This publication has been typeset in the multilingual "Brill" typeface. With over 5,100 characters covering Latin, IPA, Greek, and Cyrillic, this typeface is especially suitable for use in the humanities. For more information, please see www.brill.nl/brill-typeface.

ISSN 1568-2765
ISSN 978 90 04 22030 0 (hardback)
ISBN 978 90 04 22031 7 (e-book)

This book is printed on acid-free paper.

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FOREWORD

International organizations, it is safe to say, occupy a prominent place in the landscape of global governance. Much international law is made within the confines or under auspices of international organizations – so much so that some authors have identified a corpus of *institutionalisiertes Völkerrecht*. And organizations are not just suitable subjects for academic study by somewhat eccentric international lawyers: our everyday lives too are influenced by what happens in international organizations and the activities they undertake. The availability of goods and services in our shops depends, to a large extent, on the existence of the World Trade Organization; our position as workers owes something to the International Labour Organization; the World Health Organization can take some well-deserved credit for its contribution to the eradication of polio and the containment of other diseases; the safety of our air traffic has something to do with the existence of the International Civil Aviation Organization – and sometimes people even get injured or killed through the activities of international organizations. Indeed, one may also look at things from the other end, and notice that two of the more prominent crises in global governance in recent years (the financial meltdown, and the environmental meltdown) occur precisely in areas where formal international organizations are missing.

Given the relevance of international organizations, it is a curious circumstance that the discipline of international (institutional) law has hitherto had a hard time understanding these creatures. The theoretical framework was developed, in essence, a century ago by Paul S. Reinsch, fined-tuned in subsequent decades by the Permanent Court of International Justice and its successor, the International Court of Justice, and has remained firmly in place, virtually unchanged. New approaches to global governance, new forms of organization (from the supranational European Union to the extra-legal Organization for Security and Cooperation in Europe) are often simply grafted on to this existing theoretical framework, without paying much attention to how organizations actually function, as a legal matter. And while important work has been done in recent years on the modalities of power transfers to international organizations, little work has been done on conceptualizing those powers themselves.

The challenge of making sense of international organizations is taken up by Dr Engström in this ambitious study, concentrating on the fundamental question of the powers of international organizations. Dr Engström recalls that these powers can be understood in terms of two distinct doctrines: the doctrine of attributed powers, the doctrine of implied powers, and he carefully provides these doctrines with 'hands and feet'. In the process, he also suggests that more attention should be paid to the precise relationship between the functions of an organization and its powers: typically, the two terms are used interchangeably in the literature, but as Dr Engström points out, doing so may overshadow vital conceptual distinctions. Dr Engström concludes, eventually, that the discourse on powers is reproduced in constitutionalization discussions, yet may benefit from a constitutional prism which would help elucidate the question of who gets to decide on powers (and 'who gets to decide on who gets to decide'). Constitutionalism therewith makes the politics of international institutional law more visible, while simultaneously allowing for political regeneration.

What is also salutary is that Dr Engström does not stick to a rigid and narrow definition of international organization, but applies his framework also to institutions not always regarded as formal international organizations. This conveys the vital point that such entities too are, somehow, in need of explanatory and justificatory concepts. This is especially salient with respect to the current trend of setting up institutions that may fall short of formal international organizations but nonetheless play a pivotal role in global governance: be it the Conferences of the Parties or Meetings of the Parties set up under multilateral environmental agreements, or high-level meetings under frameworks such as G7, G8, or G20.

At the end of the day, Dr Engström reminds us that international organizations, whether formal or not so formal, exercise public power, and as such are in need of some form of justification. The flipside of powers, so to speak, is control, and he is surely correct in arguing that the precise powers of any given organization are politically granted and that the various doctrines are themselves subjected to political use: the very aim of Dr Engström's study is to look beyond they ways in which institutional powers are often construed.

With the current work, Dr Engström provides a marked contribution to the study of the law of international organizations, filling a gap in the existing literature and forcing the community of international institutional lawyers to re-think and re-consider some of their more foundational concepts. This is a mature and sophisticated work of legal

scholarship, based on a doctoral thesis prepared at Åbo Akademi University and publicly defended in May 2009. In the interest of full disclosure, I should add that I had the honour and pleasure of serving as Dr Engström's opponent.

Jan Klabbers
Helsinki
Professor of International Law, University of Helsinki
Deputy-Director, Erik Castrén Institute of International Law
and Human Rights

ACKNOWLEDGEMENTS

The starting point of my career as a researcher can be traced back to the examination of my master's thesis at Åbo Akademi University in 1999. In the (rather brief) part that was written on the merits of that thesis, the two-man examination committee (Professor Martin Scheinin and Professor Markku Suksi) came to the conclusion that the author displayed a capacity for performing academic research. I remember feeling kind of proud back then. In finalizing my PhD thesis ten years later I guess I proved the examination committee right.

The PhD thesis was written under the supervision of Professor Martin Scheinin, and was published by Åbo Akademi University Press with the title 'Understanding Powers of International Organizations: A Study of the Doctrines of Attributed Powers, Implied Powers and Constitutionalism – with a Special Focus on the Human Rights Committee'. I successfully defended the thesis in May 2009 at Åbo Akademi University. The opponent at the defense was Professor Jan Klabbers.

The present book is a revised (and hopefully improved) version of that PhD thesis. Since the defense I have had the opportunity to further develop the theme of legal powers. Working on various articles has allowed me to test and reassess the claims of the thesis. The comments of Jan Klabbers (as the opponent) and of several anonymous reviewers (of articles) have been very useful in this process.

The editor of this monograph series, Professor Martti Koskenniemi, provided extensive comments in preparing the manuscript for this book. Discussions with Martti Koskenniemi eventually lead to the decision to present the discourse on powers as a more active process than I had done in the PhD. From 'understanding powers', focus has been turned to how powers of organizations are 'constructed'. As a result the content has been restructured and many of the chapters have been extensively rewritten. Another notable change is that the notion 'institution' is substituted for 'organization' in the title of the book. Even if the question of powers is mostly discussed in the context of intergovernmental organizations, this change of vocabulary underlines the fact that the exercise of legal powers is not the sole property of more well-established organizations. Instead, the question of powers is of interest to a broader set of international actors. Finally, the entry into force of the Treaty of Lisbon brought with it

both substantive and linguistic changes that needed to be taken into account.

Writing this book would not have been possible without a leave from my job as University teacher in constitutional law and international law at Åbo Akademi University. I wish to thank Professor Elina Pirjatanniemi for providing me with the opportunity to work as a post-doctoral researcher at the Institute for Human Rights.

Viljam Engström
Postdoctoral researcher
Åbo Akademi University

ABBREVIATIONS

ASEAN	Association of Southeast Asian Nations
BVerfGE	Das Bundesverfassungsgericht
CFC	Common Fund for Commodities
DSB	Dispute Settlement Body
EC	European Community
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECJ	Court of Justice of the European Communities
ECR	European Court Reports
ECSC	European Coal and Steel Community
EEC	European Economic Community
ERTA	European Road Transport Agreement
EU	European Union
EURATOM	European Atomic Energy Community
FAO	Food and Agriculture Organization
GATT	General Agreement on Tariffs and Trade
HIV	Human Immunodeficiency Virus
HRC	Human Rights Committee
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDA	International Development Association
IEA	International Energy Agency
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
ILA	International Law Association
ILC	International Law Commission
ILO	International Labour Organization
IMO	International Maritime Organization
ITU	International Telecommunication Union

MIGA	Multilateral Investment Guarantee Agency
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
OAS	Organization of American States
OECD	Organization for Economic Co-operation and Development
OJ	Official Journal of the European Union
ONUC	United Nations Operation in the Congo
PCIJ	Permanent Court of International Justice
SEA	Single European Act
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRIP	Trade-related Aspects of Intellectual Property Rights
UK	United Kingdom
UN	United Nations
UNEF	United Nations Emergency Force
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNCTAD	United Nations Conference on Trade and Development
UNIDO	United Nations Industrial Development Organization
UNOSOM	United Nations Operation in Somalia
UNPROFOR	United Nations Protection Force
UPU	Universal Postal Union
US	United States
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WMO	World Meteorological Organization
WTO	World Trade Organization

CHAPTER ONE

INTRODUCING THE QUESTION OF POWERS

The exercise of legal powers is one of the most tangible ways by which international actors make their presence felt. The notion of 'powers' does not capture any uniform set of activities. Instead, every organization possesses an individual set of powers. Whereas for one organization the clearest exercise of a power can be the conclusion of an agreement with the electric company at the location of its headquarters, another organization can be equipped with powers to restrain the means for conducting foreign policy of its member states.

In addition to this variety of powers, the exact scope of the means at the disposal of organizations has proved difficult to define. The ambiguity attached to defining the extent of powers of organizations has many sources, beginning with an uncertainty concerning what powers an organization possesses. The explicit wording of the constituent instrument of an organization does not necessarily capture the full range of powers at the disposal of the organization.[1] Nor is the exact scope of an individual legal power necessarily clear. The question of what an organization is legally entitled to do is therefore a matter of interpretation.

Interpretative differences have their source in different conceptions of the proper extent of activities of the organization. In this way, while at the heart of the concept of legal powers there is an entitlement for an organization to perform certain tasks, both the source and extent of this entitlement give rise to continuing debate. In this debate differences concerning what an organization can or should do are commonly expressed

[1] Among the specialized agencies of the United Nations, FAO, ILO, UNESCO, WHO and UPU have a 'Constitution'. ICAO, IMO, ITU, UPU, WMO, MIGA and WIPO are based on a 'Convention', the CFC is established by an 'Agreement', while the UN itself has a 'Charter'. All instruments of European integration are labeled 'Treaty'. The International Court of Justice on its part held that: "In order to delineate the field of activity or the area of competence of an international organization one must refer to the relevant rules of the organization and, in the first place, to its constitution", *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion, 8 July 1996), ICJ Reports 1996, para. 19 (hereinafter *WHO* opinion). In the following the notion 'constituent instrument' will be used for indicating the instrument which defines the object and purpose, functions, and powers of the organization.

by invoking two legal doctrines; the doctrine of attributed/conferred powers, and the doctrine of implied powers.[2] The aim of this book is to explore the nature and function of these doctrines.

1.1. An Evergreen or Ignored Subject?

First academic writings and case law on powers of organizations date far back in time. The question of powers was of central concern already when the Permanent Court of International Justice (PCIJ) attempted to characterize organizations as independent actors in the 1920s. However, a more general debate on the attributed and implied character of the legal powers (of government) finds its roots in the drafting of the US Constitution in the late 18th century and the debate between James Madison and Alexander Hamilton on the form of US constitutionalism. Whereas Hamilton defended the necessity of a small and powerful central government (and especially a powerful judiciary), Madison placed his emphasis on a division of powers and the establishment of checks and balances. They also disagreed on the proper extent of the federal government. One expression of this disagreement was the dispute over whether the federal government had a power to establish a national bank. This particular question eventually ended up before the US Supreme Court in the case *McCulloch v The State of Maryland* et al. in 1819. The case is commonly considered to contain the first legal definition of the implied powers doctrine.[3]

The most common way of discussing powers of organizations is to focus on a specific organization and explore its competence in a specific field. The question of United Nations (UN) Security Council powers under Chapter VII and the external relations of the (late) European Community (EC) are good examples of such a focus, as both issues have been explored

[2] While some authors prefer the 'attribution' notion (recently see e.g. Blokker (2010)), especially in EU law the notion 'principle of conferral' is widely used, see Treaty on European Union (Lisbon consolidated version) (13 December 2007), OJ C 83/13 (30 March 2010) (hereinafter TEU), Article 5. It is not rare however to find references also to the 'principle of attributed powers' (see e.g. Besselink, Pennings, and Prechal (2011), at 234) or the 'doctrine of conferred powers' (see e.g. Chalmers, Davies and Monti (2010), at 211). A lexical definition reconciles the principle/doctrine dichotomy as 'doctrine' is defined as a principle that is widely adhered to. Garner (2004). As to the notions of 'attribution' and 'conferral', these are in the following used synonymously.

[3] *McCulloch v The State of Maryland* et al., 1819, 17 US (4 Wheat.) 316. Also see Loughlin (2010), at 55–59.

in an endless amount of literature.[4] However, in spite of the fact that the attributed and implied powers doctrines have often been put to use in arguing for or against a substantive power of an organization, any attempts at general conceptualization of the doctrines have been rare. While it is not uncommon that the legal basis of a decision of the United Nations or the European Union (EU) is located in an implied power, the nature of implied powers reasoning has evaded closer analysis. The same goes for the doctrine of attributed powers, which has only recently attracted more comprehensive analytical attention.[5]

This absence is perhaps not surprising, given that it is only more recently that organizations have become targets of conceptualization at large. It is only from the 1990s or so onwards that interest has shifted towards critically analyzing organizations as actors on the international scene, why they are needed, and how they perform or should perform. Along with the growing impact of organizations on our daily lives, also the question of the precise scope of the activities of organizations and the source of their powers has become more acute.[6] In fact, contemporary international legal debates seem to put the question of powers right (back) at the heart of international organizations. The ever more popular theme of constitutionalization of organizations can basically be seen as a discussion on the nature and extent of the autonomy of organizations. In a similar way the nature of powers of organizations underlie the recent initiative to search for general principles of international public authority.[7]

While the question of powers of organizations seems as important as ever, it is simultaneously perceived with some unease or even outright disappointment. In this respect some authors have suspected that different principles of interpretation (including the doctrines) have been, and still are, used by both courts and academics without them always having a clear image of their function. As one author put it, "The IMF, like others,

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[4] On the UN, see de Wet (2004 'The Chapter'), and Schweigman (2001). As to EU law one classic is Mcleod, Hendry, and Hyett (1996). For a more recent contribution, see Eeckhout (2004).

[5] Earlier conceptualizations mainly consist of shorter articles. On the implied powers doctrine see Rama-Montaldo (1970) and Skubiszewski (1989). In EU law recent contributions are Schütze (2003), and Dashwood (2009). As to the doctrine of attributed powers see Sarooshi (2005) and in respect of EU law e.g. Soares (2001).

[6] On this development, see Klabbers (2001 'The Life').

[7] On international public authority, see von Bogdandy (2010), at 755.

has relied on them as substitutes for hard thought".[8] Irrespective of whether the accusation is true or not, the statement itself expresses a frustration with reasoning on powers, a frustration that attempts at conceptualization have not managed to settle. This frustration has its source in the fact that the formal use to which the doctrines are often put, is uninformative of the way in which the doctrines serve to produce different images of powers of organizations.[9]

Many examples could be mentioned. A particular line of reasoning may be criticized for constituting a misconstruction of the attributed or implied powers doctrines, or of the principles of interpretation of the Vienna Convention on the Law of Treaties.[10] Closely resembling such an argument is a claim that an interpretation is a departure from earlier interpretative practice (and for that reason unacceptable).[11] An increased use of implied powers has also been seen to result in an erosion of the attribution principle.[12] A not uncommon claim is also that teleological interpretation (and hence, use of implied powers) is somehow intrinsic to the nature of organizations, due to their special character (mainly meaning that they embody an object and purpose and are hereby goal-oriented).[13]

Implied powers are also commonly regarded as more politicized than attributed powers. This follows from the perceived political character of the functional necessity concept at the heart of implied powers reasoning. Correspondingly restrictions upon the use of implied powers would result in an objectification of the issue of powers, the argument goes.[14] In a converse way, attributed powers are often perceived as less ambiguous

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[8] Gold (1996), at 46–47.

[9] For a more general critique, targeting lawyers involved with international institutions for having an overly formal conception of law, see Kennedy (1994), at 352.

[10] For such notes on interpretation in general and for examples from the WTO context, see Klabbers (2005 'On Rationalism'), e.g. at 414. Also see the Dissenting Opinion by Judge Weeramantry, *WHO*, ICJ Reports 1996, at 149.

[11] White criticizes the *WHO* opinion in such terms. White (2001), e.g. at 100, and at 108 calling the interpretation by the ICJ a "regression".

[12] See Martin Martinez (1996), at 105, Soares (2001), at 63, and von Bogdandy (2010), at 756.

[13] See Judge Alvarez in his Individual Opinion in *Conditions of Admission of a State to Membership in the United Nations* (*Article 4 of the Charter*), (Advisory Opinion, 28 May 1948), ICJ Reports 1948 (hereinafter *First Admission*), and Sato (1996), at 267: "… it has always been an important preoccupation … that collective organisms could *only* be legally regulated by giving their *inherent dynamism* an appropriate place" (emphasis in original).

[14] See Frid (1995), at 79–80.

than implied powers.[15] Such a faith can also take the form of relying on precise and detailed drafting of the provisions that define the powers of an organization as a way of decreasing the risk of excessive functional interpretation.[16]

The argument made here is not that such statements are somehow wrong, or that they constitute a misunderstanding of legal reasoning. On the contrary, they are completely plausible legal arguments. However, as a way of coming to terms with the function of the doctrines as tools for making different constructions of powers of organizations, such statements are not very revealing. If anything, reasoning on powers of organizations in such terms can serve to hide the actual substantive controversy from sight.[17]

This is where the present work taps in. The aim is to explore the framework of making claims concerning powers that the two doctrines convey, and more specifically, how that framework enables different constructions of powers. The discussions will demonstrate how the doctrines fail to produce definitive answers on a question of the 'right' construction of powers in the abstract. Instead then of looking for the ultimate definition of these doctrines by trying to exhaust the elements that go into the reasoning through them, the aim is in a way the opposite. The question of powers will be presented as a question about the preferred nature of cooperation. A disagreement over the powers of an organization is therefore pictured as a struggle through which different actors seek to assert their preferences. Different participants in this debate make use of the doctrines in different ways to make their point. The task of this book is to demonstrate how the doctrines work in such a struggle. In this respect the task that lays ahead amounts to something to the effect of "cracking the code of legislation", or at least, paraphrasing Unger, to shed some light on the shaping power of what we ordinarily take for granted.[18]

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[15] See the Dissenting Opinion by Judge Hackworth in *Reparation for Injuries*, ICJ Reports 1949, at 204.

[16] See Morawiecki (1986), at 100–101. Also see the Discussion Paper on Delimitation of Competence between the European Union and the Member States – Existing System, Problems and Avenues to be Explored, 15 May 2002, CONV 47/02.

[17] Klabbers presents this critique concerning principles of interpretation in general. The risk is that "creativity goes towards somehow subsuming interpretative efforts under the heading of a general rule [principles of interpretation]" to the detriment of discussing the political issue at the heart of the controversy. Klabbers (2005 'On Rationalism'), at 424.

[18] Unger (2001), at xvii. "Cracking the code of legislation" meaning a search for the "cluster of ideas, beliefs and assumptions that represent a certain way of thinking about legislation and interpretation at any given time", Hutchinson and Morgan (1984), at 591.

1.2. 'A Power' vis-à-vis 'Power'

As a grammatical issue, 'powers' is simply the plural form of 'a power'. However, whereas 'powers of an organization' (or 'competence') denotes the legal means available to an organization, the 'power of an organization' is a question of the influence and impact of the activities of organizations (on its members and international relations at large).[19]

Hohfeld, in his classical definition of fundamental legal conceptions, identified a legal power as one of the (eight) lowest common denominators of law. Hohfeld argued that these elements (right/duty, privilege/no-right, power/liability, immunity/disability) are present in all legal relationships. They are also *sui generis* in the sense that they do not lend themselves to formal definition.[20] Hohfeld distinguished a legal power from a mental or physical power. In the scheme of "opposites and correlatives" pictured by Hohfeld, a legal power constitutes the opposite of legal disability. As to its "intrinsic nature" a legal power entails the possibility of changing legal relations as a result of some "superadded fact", the nearest synonym being "(legal) 'ability' ". What distinguishes the legal power from (*de facto*) power is the element of authorization.[21] In this characterization the concept of a legal power refers to the authority of the power-holder to make a decision.

'Power' defined as an ability of a person or an institution to produce an intended effect (upon another) is dependent on certain preconditions. One common precondition is the presence of legal powers. The fact that exercise of power is determined by legal rules (that is, is expressed as legal powers) confers *prima facie* legitimacy on the exercise of power. This means that the fact that the power exercised derives from an institutionalized legal power is an important (although not necessarily a sufficient) element of the authority of the act.[22]

Another central element of a legal power is that it is exercised through the performance of a special kind of act. As the element of a decision

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[19] In a lexical definition, 'power' is the "Dominance, control, or influence over another; control over one's subordinates", Garner (2004). As to the notions 'legal power' and 'legal competence', the choice may be a matter of linguistic preference only. Spaak notes that British and American writers tend to favor the former notion, whereas Scandinavian and continental European writers often use the latter. The two are commonly used interchangeably. Spaak (1994), at 2.

[20] Hohfeld (1919), at 36 *et seq*. on these relationships. Also see Spaak (1994), at 76–79.

[21] Hohfeld (1919), at 50–52.

[22] Beetham (1991), at 43–63. On the source(s) of authority/legitimacy also see e.g. Bodansky (2008).

will always be present, it has even been called a paramount feature of a legal power.[23] Furthermore there is a close relationship between a legal power and the concept of validity. To say that someone possesses a legal power to do something indicates that the act can validly be performed by the actor. Turned around, in many cases of (in)validity, the question at stake is whether or not the actor has the competence or power to perform the act.[24]

On the face of it, this characterization of legal powers does not perhaps stand out as being groundbreaking. To say that powers are exercised by someone through a special act seems something of a truism. However, the question need not always be as simple as it first appears. To use Hohfeld's terms, the scope of the legal ability of an organization can be subject to dispute. In such a dispute different constructions of the legal ability of the organization will result in different images of which legal relations the organization is entitled to change and by what means.

While every organization possesses an individual set of powers, also the nature of powers vary between organizations. The powers of some organizations provide a technical ability whereas other organizations are equipped with the means for coping with highly political issues (such as world peace). Some organizations strive to assert their influence universally whereas others confine themselves to facilitating cooperation between a limited membership. Further, some organizations assert their influence by means of binding regulation, whereas others exercise a more subtle impact. Variations in the range of powers of organizations, in the kind of powers organizations are exercising, and in the kinds of issues the exercise of powers concerns, will also result in different expectations in respect of authorization.[25]

In a comparative perspective it is still far more common for international organizations to adopt binding decisions in institutional and budgetary matters only. Authorization to adopt binding acts beyond such matters is exceptional, and unanimous or consensual decision-making is in such a case often required.[26] Authority to make binding decisions is however what characterizes the UN Security Council (when acting under

[23] Halpin (1996), at 140–144.

[24] See Spaak (1994), at 9–10.

[25] This paraphrases Bodansky (2008), at 316 who prefers the 'legitimacy' notion.

[26] Unanimity and subsequent conduct may however provide a recommendation with a binding character, Zemanek (1997), at 97. See also Amerasinghe (2005), at 163–175, White (1996), at 106, and Klabbers (2002 'An Introduction'), e.g. at 220.

Chapter VII of the Charter), and even more so the European Parliament and the Council of the European Union (when adopting regulations or directives).[27] Yet, whereas these may be the most visible instances of exercises of powers by organizations, in a formal sense the adoption by the United Nations General Assembly of the UN budget, or the conclusion of a headquarters agreement by the World Intellectual Property Organization, are no less examples of an exercise of powers.[28]

Any exercise of legal powers will also result in an exercise of power. One of the main features of the supranational character of EU law is that the Union legislation adopted (as a result of the exercise of legal powers) can be directly applicable in domestic courts, and supreme in relation to national legislation.[29] The power of the EU to affect the daily lives of EU citizens hereby has its source (or at least one of its sources) in the legal power to adopt legally binding acts.

UN member states have given up their right to use force in their interstate relations. Instead, use of force can only be authorized by the Security Council (or be used in self-defense). The Security Council can however authorize members to use force through the exercise of its legal powers for maintaining international peace and security. Hereby the UN (and the UN only) has the power to determine when force is to be used and by whom. Turned around, when the Security Council fails to address a crisis as a "threat to the peace", and consequently is unable to exercise its legal powers, the UN is criticized for being powerless.

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[27] Charter of the United Nations (26 June 1945), 1 United Nations Treaty Series xvi (hereinafter UN Charter), Chapter VII, and Treaty on the Functioning of the European Union (13 December 2007, OJ C 83/47 (30 March 2010) (hereinafter TFEU), Article 288, which reads: "In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and principles. A decision shall be binding in its entirety upon those to whom it is addressed …".

[28] See UN Charter, Article 17, and the Convention Establishing the World Intellectual Property Organization (14 July 1967), 828 United Nations Treaty Series 3, Article 12(2).

[29] The classical sources are Case C-26/62, *N.V. Algemene Transport – en Expeditie Onderneming van Gend & Loos v Nederlandse administratie der belastingen* (*Netherlands Inland Revenue Administration*), [1963] European Court Reports 1 (hereinafter *Van Gend en Loos*), and Case C-6/64, *Flaminio Costa v ENEL,* [1964] European Court Reports 585 (hereinafter *Costa v ENEL*).

As to the World Trade Organization (WTO), the Agreement Establishing the World Trade Organization does not confer legal powers upon the WTO comparable to those of the UN Security Council or the EU.[30] Instead it is mainly through the Dispute Settlement Body (DSB), designed for settling disputes between members, that an organ of the WTO has a direct impact upon members. The DSB has the sole authority to establish panels to consider cases and to accept (or reject) the findings of these panels (or the results of an appeal). It monitors how rulings are implemented, and can authorize sanctions in case of non-compliance.[31] The WTO dispute settlement system is basically a mechanism for dealing with member complaints (against another WTO member), and not for making legal decisions that would affect the position of all members. However, the question of powers (as an issue of scope of jurisdiction) can be raised also in this context. Claims have for example been made that the dispute settlement panels and the Appellate Body should expand their jurisdiction and take human rights considerations into account in their decision-making. Such a development would provide these bodies with an opportunity to develop and express their conception of human rights. As a consequence they would also become powerful sources of interpretation of international human rights law.[32]

Picturing the notions of 'legal powers' and 'power' in such a relationship, demonstrates how the question of legal powers is an issue of amplification of the role of an organization in international cooperation: powers is the "legal cipher" for power.[33] By adding to the legal powers of an organization, the organization grows more powerful in relation to its members (but also potentially in relation to other organizations). The question of powers can therefore even become a competition between different actors for the authority to have the final word on a certain issue. This also links the question of extent of legal powers to the discussion on the fragmentation of international law.[34]

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[30] One of the foremost powers of the WTO may be that of the Ministerial Conference and the General Council to adopt authoritative interpretations. See Agreement Establishing the World Trade Organization (15 April 1994), 1867 United Nations Treaty Series 3 (hereinafter WTO Agreement), Article IX(2). On the peculiarities of the WTO, see Tietje (1999).

[31] See Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the WTO Agreement, 1869 United Nations Treaty Series 401 (hereinafter Dispute Settlement Understanding).

[32] See Petersmann (2001). For a critique, see Alston (2002).

[33] The expression is used by von Bogdandy (2010), at 755.

[34] On fragmentation, see Koskenniemi and Leino (2002).

There is however also another side to the relationship between 'legal powers' and 'power'. An organization will always exercise (some) power. Whether this is the result of an exercise of a legal power (that is, a rule conferring competence on the organization), is a matter of the design of the individual constituent instrument. The question of how powerful an organization is cannot be exhaustively answered by looking at its legal powers only.[35] International organizations are today of immense influence. While this may be especially visible to those living within the boundaries of the EU or for those targeted by UN Security Council actions, these examples fail to take into account that it may be hard to think of an activity that is not in one way or another the concern of an international organization.[36] Focusing on legal powers only does not necessarily capture this impact.

All structuring and facilitation of cooperation between states does not entail the imposition of legal obligations upon members. Instead, organizations also exercise power for example through classifying and organizing information and knowledge, defining concepts, and transmitting norms and models of good behavior. No extensive legal power is needed in order for an organization to discuss the content of the concept of sustainable development. Yet an organization may enjoy such authority that these discussions have far-reaching consequences on the behavior of member states. In this way all changes, even in legal relations, need not be the result of an exercise of legal powers.[37]

Having said that, it is interesting to note that while all disputes on the role of the UN Security Council cannot (and should not) be dealt with as an issue of legal powers, this is nevertheless often the case. As Johnstone puts it, in respect of issues of international peace and security (where opinions more often than not are sharply divided), the actual surprise is perhaps not the instance of dispute, but rather the fact that this discourse is so often conducted in legal terms.[38] This makes it all the more important to understand legal reasoning on powers of organizations.

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[35] Power can also "leak away" from organizations despite the possession of formal legal powers if actual decision-making escapes the organization. See Klabbers (2002 'Restraints'), at 158, and Weiler (1999), e.g. at 98–99.

[36] The point is made by Klabbers (2002 'An Introduction'), at 1.

[37] On ways of how organizations assert and exercise power, see Barnett and Finnemore (1999). For a more general discussion, see Halpin (1996), at 144.

[38] See Johnstone (2003), at 438. A similar point is made by Klabbers (2002 'Restraints'), at 155, arguing that the language of powers often substitutes that of rights, liberties, or entitlements.

1.3. Who Can Possess Powers?

In historical perspective the question of legal powers has been most frequently debated in the context of well-established organizations such as the UN or the EU. The question of legal powers has therefore also been closely tied to the question of legal personality. Possession of legal personality has sometimes even been considered a threshold for acting at the international level.[39] How this threshold is claimed to enter is demonstrated by the example of the pre-Lisbon EU, for which the lack of express provisions on legal personality was by many perceived as an obstacle to the performance of independent acts. The lack of personality also served to uphold a distinction between the EU and the EC.[40] For this reason the inclusion of a provision on international legal personality was at the top of the list of treaty-revisions needed.[41]

In considering legal personality as a threshold for acting, the actual identification of such personality has often reconciled personality with the definition of an international organization.[42] Practically every major work on international organizations begins with a chapter defining an international organization. The aim is often to define the scope of the work by omitting or including certain actors. Yet, when it comes to enumerating the elements of that definition difficulties arise. At best some common elements can be identified such as: an organization should be created through an international agreement which serves as its constituent instrument, its membership should consist of states (or other organizations), it should have at least one organ through which it expresses an independent 'will', and it should be established in accordance with international law. Through these criteria it is possible to distinguish organizations for example from non-governmental organizations (NGOs) and transnational corporations. The International Law Commission Draft

[39] Notably, legal personality is not only attached to political institutions. The Statute of the International Criminal Court (ICC) expressly confers upon it both international and national legal personality. See the Rome Statute of the International Criminal Court, UN Doc. A/CONF 183/9 (17 July 1998), 2187 United Nations Treaty Series 90 (hereinafter ICC Statute), Article 4(1) and Article 4(2). Also see Gallant (2003), at 555–557.

[40] On the complex relationship and for an overview of discussions around the time of the Amsterdam agreement, see Curtin and Dekker (1999), at 111–112, and Cremona (1999), at 166–174.

[41] In this respect, see TEU, Article 47.

[42] For an overview and critique of different approaches to legal personality, see Klabbers (1998).

Articles on the Responsibility of International Organizations define an organization as "… established by a treaty or other instrument governed by international law and possessing its own international legal personality".[43] Independence, in such a definition, is derived from legal personality. Put differently, legal personality is seen to provide the organization with the independent 'will'.[44]

At the same time the range of international actors is steadily increasing. The present era has been described both as an "age of non-state actors" and as an era in which new forms of cooperation (such as the Codex Alimentarius Commission, Organization for Security and Cooperation in Europe, the G7/G8, or the International Jute Study Group), which display less fixed institutionalized structures than traditional intergovernmental organizations, are on the rise.

In fact, international institutions whose structures do not assert them as traditional intergovernmental organizations have existed as long as intergovernmental organizations. Chronologically, first examples of such institutions would include the General Agreement on Tariffs and Trade (1947) and the Antarctic Treaty (1959). While there are numerous examples of such institutions in the environmental field, they exist also in the field of arms control (such as the Treaty on the Non-Proliferation of Nuclear Weapons).[45] Treaty bodies of human rights conventions are also a case in point. For example the Human Rights Committee (HRC) seems to fulfill some of the criteria of an international organization. The Committee is created through an international agreement, the International Covenant on Civil and Political Rights (ICCPR), which is governed by international law.[46] Through the exercise of its powers the Committee can also express a 'will' that is distinct from the ICCPR state parties. However, in spite of the fact that the HRC does fulfill some criteria of the definition of an international organization, the far more common characterization of the HRC is

[43] International Law Commission, Report of the Sixty-first session, 4 May to 5 June and 6 July to 7 August 2009, UN Doc. A/64/10, at 20. On the independent 'will', see Schermers and Blokker (2003), at 26–39, and Klabbers (2002 'An Introduction'), at 7–13.

[44] See also Blokker (2010), at 37–42.

[45] Nijman (2004), at 354, Churchill and Ulfstein (2000), and Klabbers (2002 'An Introduction'), at 338–339. Of course these institutions may also turn into intergovernmental organizations, as was the case with the Association of Southeast Asian Nations (ASEAN), see the Kuala Lumpur Declaration on the Establishment of the ASEAN Charter, Kuala Lumpur, 12 December 2005.

[46] International Covenant on Civil and Political Rights, United Nations General Assembly Resolution 2200A (XXI) (16 December 1966), 999 United Nations Treaty Series 171 (hereinafter ICCPR).

that it is something of a borderline case between an expert organ and a quasi-judicial body (sometimes even unhelpfully labeled a *sui generis* entity).[47] For example an uncertainty concerning whether the ICCPR could properly be regarded as the constituent instrument of the HRC poses questionmarks for the characterization of the Committee.[48]

This means that a host of institutions exist which fulfill most of the criteria of international organizations, but not necessarily all. Nor do they confer legal personality upon the institution. At the same time many of these institutions possess legal powers, and even make claims to expand those powers. One of the most articulate of such claims, at least in the human rights field, was made by the HRC in General Comment 24 in 1994 (Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant).[49] However, many other examples also exist.[50] The ever more active and visible role of a range of different institutions in decision-making and policy implementation has even brought with it calls for a redefinition of international institutional law, so as to better cope with this changing reality.[51]

From this a couple of things follow. First of all, legal personality fails as a threshold for the exercise of powers. Instead, as Klabbers noted already some time ago, the relationship should instead be turned around; once an institution performs acts which can only be explained on the basis of legal personality, then the possession of legal personality is confirmed. An absence of legal personality cannot in itself have an impact on whether an institution can act or not.[52] In asserting the personality of an organization this 'presumptive' approach hereby builds on the evidence it can find. Instead of personality being a precondition for powers, the actual exercise

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[47] See Ghandhi (1998), at 40-41, and McGoldrick (1991), at 53–55.

[48] See Scheinin (2004), at 44 illustrating how the Vienna Convention on the Law of Treaties could allow for such a characterization, and Baylis (1999), at 296–298 who considers the ICCPR to be the constituent instrument of the Committee, but nevertheless disqualifies it as a constitution of an independent international organization.

[49] Human Rights Committee, General Comment 24: *Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994) (2 November 1994) (hereinafter Human Rights Committee, General Comment 24).

[50] On environmental institutions and CITES in particular, see Churchill and Ulfstein (2000).

[51] See the many articles in von Bogdandy et al. (2010).

[52] See Klabbers (1998), at 243 *et seq*. This is also the approach of Schermers and Blokker (2003), at 989.

of powers may instead prove the legal personality of an organization.[53] This point was also made in the debate on the proper character of the pre-Lisbon EU. Evidence of the performance by the EU of independent international acts proved, in the minds of some authors, the legal personality of the EU.[54] In a similar way the question on the extent of the powers of the HRC can be pictured as a discussion on whether the Committee could be characterized as an independent legal actor (and perhaps even an international organization).[55]

Because of this constitutive role of legal powers, the possession of powers cannot be excluded even in the context of less well-established institutions due to a lack of legal personality. There is therefore nothing wrong with defining the powers of a multitude of international institutions by using principles and doctrines of international institutional law (including the attributed and implied powers doctrines).[56] Since the exercise of powers can serve to prove the existence of legal personality, that legal personality cannot at the same time be a precondition for the possession of powers. Hence, making claims to legal powers cannot be reserved for

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[53] Klabbers (1998), at 248–252. In a converse way Eaton (1994), at 224 considers non-usage of functions as proof of lack of personality.

[54] Common examples mentioned were: the international representation of the EU through the Presidency, engagement in electoral monitoring, the conclusion of agreements with the Federal Republic of Yugoslavia (defining the tasks of the European Union Monitoring Mission) and the Western European Union, exchange of letters for example with Finland, Sweden, Norway and Austria during their accession process, and the administrative tasks of the EU in the Bosnian city of Mostar. Other arguments used in the personality discussion aimed to demonstrate why the EU is not properly characterized as an 'ordinary' treaty regime. Features such as the principles of a single institutional framework and coherence of the Treaty on European Union were considered incompatible with the idea that the union 'borrows' the personality of the Community. The Treaty on European Union (Nice consolidated version) also used the notion 'member states' instead of 'contracting parties'. See Klabbers (1998), at 232-233, and Curtin and Dekker (1999), at 97–98 and 109-111.

[55] Scheinin (2009), at 32.

[56] Churchill and Ulfstein reconcile "autonomous institutional arrangements" with traditional intergovernmental organizations in this respect. Compared with other institutional arrangements Churchill and Ulfstein note that the ICCPR does not establish a plenary organ in which all members would be represented. Apart from this circumstance, the ICCPR regime does seem to fall within their definition of an institutional arrangement, exercising a supervisory function, convening periodically, having a secretariat, supervising compliance, and developing the normative content of the ICCPR. See Churchill and Ulfstein (2000), at 625-628. Also see Young who considers it disingenuous, when discussing the HRC, not to use the same legal standards and doctrines that are considered to govern the operation of established international organizations, since the Committee is operating at the international level and applies international (human rights) norms. Young (2002), at 29.

international organizations that are already established international legal persons.

Recognizing that claims to powers can be made also by other actors than those intergovernmental organizations that fulfill the set of criteria mentioned above, means that the doctrines can be used for constructing the powers of any institution established through law. For present purposes this means that although the UN, the WTO, and the EU are the three most frequently reoccurring examples in the consequent chapters, the discussions are of no less relevance for other institutions as well.

1.4. Struggling to Define Powers

1.4.1. *Disagreeing on Correct Power*

International organizations face multiple (and potentially conflicting) expectations. The very existence of diverging interpretations of the powers of an organization is an expression of these different expectations. Maintenance of international peace and security, one of the main purposes of the United Nations is a good example. Conflicts that escalate into threats to international peace and security are by definition controversial and politically sensitive. The Security Council, being charged with acting in face of such threats, is commonly expected to provide a swift and effective solution. This was the very idea behind creating the Council in the first place.[57] The central role of the collective enforcement mechanism is also reflected in the wide discretion that the Security Council was granted when drafting the UN Charter.[58]

At the same time this wide discretion makes disagreement over Security Council decision-making all the more visible. Above all, in determining whether a "threat to the peace, breach of the peace, or act of aggression" exists (Article 39 UN) and in deciding on the proper response, disagreement on what the 'right' or at least the 'proper' thing to do would be is often as visible between the parties of the conflict as between members of the Council. The critique that the UN is not doing enough stands in opposition to the claim that the UN is doing all that it can. Although this discussion is mostly of a political character, the question also has a legal

[57] Efficiency, Kelsen claims, was the reason for emphasizing a strong executive branch in designing the UN. Kelsen (1945), e.g. at 46.

[58] See Nasu (2009), at 67-68 in particular.

dimension. Different arguments on what the UN should (or should not) do in a particular case is in legal terms transformed into a question of what the UN is legally entitled to do.

One of the classical examples of an activity of an organization that is not expressly attributed to the organization, is United Nations peacekeeping. This absence of express provisions has enabled a development of peacekeeping. However, some of these developments have also raised questions concerning their legality. One of these questions concerns the relationship between the UN General Assembly and the Security Council.

The main responsibility for the maintenance of international peace and security is in the UN Charter accorded to the Security Council. However, during the Cold War the Council was more or less paralyzed and could not perform this function. As a consequence the General Assembly made some attempts at developing its own powers in the field. The most notable expression of this was the adoption of the Uniting for Peace resolution (1950).[59] That resolution, by referring to the purposes of the UN and the fact that the Security Council had not been able to perform its functions, concluded that such a failure did not prevent the Assembly from acting in order to maintain international peace and security. Hence, despite the absence of any explicit authorization, the Assembly assumed for itself a power to establish peacekeeping forces. This implied power has also been exercised by the General Assembly for example in launching the peacekeeping mission UNEF I (in 1956) as a reaction to the so-called Suez crisis.[60] A deadlocked Security Council was hereby bypassed by the General Assembly in order to achieve a cease-fire and to establish the mission.[61]

The question of the General Assembly's powers was eventually also dealt with by the International Court of Justice (ICJ) in the *Certain Expenses* opinion.[62] The ICJ concluded that the Assembly could indeed authorize peacekeeping operations. However, it is indicative of the controversy surrounding the question, that as a consequence of this decision

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[59] United Nations General Assembly Resolution 377(V), *Uniting for Peace*, 3 November 1950 (UN Doc. A/1775).

[60] United Nations General Assembly Resolution 1000 (ES-1), 5 November 1956 (UN Doc. A/RES/1000), authorizing the establishment of the First United Nations Emergency Force (UNEF I) was adopted with reference to the Uniting for Peace resolution.

[61] For an overview of the complex political nature of the crisis, see Bellamy et al. (2004), at 103–106.

[62] *Certain Expenses of the United Nations* (*Article 17, paragraph 2 of the Charter*), (Advisory Opinion, 20 July 1962), ICJ Reports 1962, at 165 (hereinafter *Certain Expenses*).

such political tensions were generated within the UN that the General Assembly was not able to meet during 1964 and part of 1965.[63] The Uniting for Peace resolution has since its adoption been relied upon on a number of occasions. More recently the mechanism established therein has been recalled as a potential path for the authorization of humanitarian intervention by the UN General Assembly (in case the Security Council fails to provide such authorization).[64] Critics of such an idea fear that reliance on the resolution can potentially subvert the balance of power within the UN.[65]

1.4.2. *Disagreeing on Extent of Powers*

While an uncertainty concerning the legality of the establishment of peacekeeping missions by the General Assembly has its source in the absence of an express entitlement in the UN Charter, a similar uncertainty (at some point) was true for the peacekeeping powers of the Security Council. The Council has mainly two sets of tools for dealing with threats to international peace and security, "Peaceful settlement of disputes" (Chapter VI), and "Action with respect to threats to the peace, breaches of the peace and acts of aggression" (Chapter VII). Peacekeeping in its traditional form means a concrete military presence, and is therefore something more than the recommendatory means enumerated in Chapter VI. However, it also lacks the enforcing character which is typical for measures adopted under Chapter VII. This means that even if explicit mention of peacekeeping would be added to the UN Charter, it would be difficult to place this activity among the existing means.[66] Nonetheless, peacekeeping is safely confirmed as an activity falling within the object and purpose of the UN.

An additional uncertainty concerns the scope of the power to launch peacekeeping missions. Peacekeeping missions have evolved. Nowadays many missions perform enforcement tasks (examples often mentioned as indicatory of this change are the missions in Bosnia (UNPROFOR) and

[63] Martin Martinez (1996), at 92–93.
[64] Lepard (2003), e.g. at 364 *et seq*.
[65] See e.g. Tomuschat.
[66] Suggestions have even been made to add a chapter in between chapters VI and VII. See Karl and Mützelburg (2002), at 1364–1372. Koskenniemi (1996), considers that due to the wide variety of design of peacekeeping missions the only common feature of these operations may be that it is difficult to place them under the provisions of Chapter VII of the UN Charter.

Somalia (UNOSOM)). The action thus resembles more the use of enforcement measures which are provided for under Chapter VII. In recent years the Security Council has in fact increasingly invoked Chapter VII of the UN Charter when authorizing the deployment of peacekeeping missions. However, Chapter VII does not mention enforcement by peacekeepers as something that the Security Council could engage in.[67] While there is general acceptance that the UN Security Council can deal with threats to international peace and security through peace enforcement, the legal power for deploying such missions is not expressly laid down in the UN Charter.

Peacekeeping has also gradually moved into something called peace building. Peace building means undertaking action that aim at reducing the risk of domestic problems lapsing into a conflict. The Report of the Panel on United Nations Peace Operations (the Brahimi Panel report) from August 2000 defines peace building as including (both not limited to): rebuilding civil society, strengthening the rule of law (through reforming the police and the judiciary), improving the human rights situation (through monitoring, education, and investigation), developing democracy, tackling corruption, HIV education and control, and promoting conflict resolution and reconciliation.[68] As a practical example of the change that this brings with it in the role of the UN, the development of the role of UN Police from monitoring into taking over the tasks of the national police has been mentioned.[69] Mégret and Hoffman claim that there is virtually no sector of public administration that the United Nations has not had its hands on. In effect this has meant engagement in activities which are "not so much, despite the occasional military uniform, peacekeeping or even peacemaking in any conventional military sense, as the kind of policing and order-maintenance work that is usually taken care of by the state".[70]

These implicit developments of the powers that the Security Council can exercise under chapter VII of the UN Charter have enjoyed widespread support. Yet, all resolutions endorsing peace building activities

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[67] Peacekeeping and peace enforcement are roughly distinguished from one another by whether UN forces supervise an existing peace or make the peace themselves. See McCoubrey and White (1996), at 6–11, and Daniel and Hayes (1997), at 105–110. Also see *Peacekeeping Operations: Principles and Guidelines*, United Nations (2008).

[68] United Nations General Assembly and United Nations Security Council, *Report of the Panel on United Nations Peace Operations*, 21 August 2000 (UN Doc. A/55/305 - S/2000/809), para. 13.

[69] See Chandler (2006), at 297.

[70] Mégret and Hoffman (2003), at 328–329.

have not passed without dissent. For example United Nations supervision and administration of Iraq (as set forth in S/RES/1483) did raise legality concerns. A disapproval of the administrative activities was expressed by claiming that the Security Council had exceeded its competence (and acted *ultra vires*).[71]

1.4.3. *Disagreeing on Extent of Consent*

Another example of how the question of powers manifests itself as a disagreement can be found in the context of the Human Rights Committee. While there are many examples of uses of implied powers by the Committee, the question of whether the Committee has a power to determine the compatibility of reservations to the ICCPR and the Optional Protocols with the object and purpose of that Covenant is probably the best documented (and most debated).[72]

As a starting point, reservations to treaties are a common phenomenon in international law. The general rules on the formulation, acceptance, legal effects, and on objecting to reservations, are laid down in the 1969 Vienna Convention on the Law of Treaties.[73] The ICCPR and the first Optional Protocol are on their part silent on the question of reservations. At the same time some Committee members have for a long time perceived that the Committee suffers from an enforcement problem. The practice by many states of not agreeing to the whole text of the Covenant or the Protocol through submitting reservations to them has been regarded as one of the foremost expressions of this problem. Such reservations indicate that the reserving state does not consent to the reserved parts of the instrument. In other words, the reserving state

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[71] See de Wet (2004 'The Direct'), at 312–318, and Kirgis (2003). The evolution of peacekeeping is by no means the only example of exercise of implied powers by the UN. Zemanek (1994), at 31–32, claims that many decisions by the UN Security Council in respect of Iraq in 1991 were exercises of implied powers. In a more general sense the entire practice of delegating UN Charter Chapter VII powers to members has been regarded an exercise of implied powers. See Kirgis (1995), at 521, and Sarooshi (1999), esp. Chapter 5. The establishment of criminal tribunals has been characterized as an exercise of implied powers. Kirgis (1995), at 522. Marschik suggests that many legislative activities by the UN Security Council in respect of terrorism find their basis in implied powers. See Marschik (2005), at 463.

[72] The protocol referred to is the Optional Protocol to the International Covenant on Civil and Political Rights, United Nations General Assembly Resolution 2200A (XXI) (16 December 1966), 999 United Nations Treaty Series 302.

[73] Vienna Convention on the Law of Treaties (23 May 1969), 1155 United Nations Treaty Series 331 (hereinafter 1969 Vienna Convention).

hereby considers itself bound by the Covenant or the Optional Protocol with the qualification expressed in the reservation.

Among Committee members (and academics) the growing number of reservations to both the ICCPR and the Optional Protocol, have been perceived as a growing threat to the protection of civil and political rights. In fact, some authors have feared that reservations could eventually ruin the entire monitoring system.[74] The response by the HRC came through the adoption of General Comment 24 in 1994. The reasoning in General Comment 24 begins with an outline of the threat of reservations:

> Some of these reservations exclude the duty to provide and guarantee particular rights in the Covenant. Others are couched in more general terms, often directed to ensuring the continued paramountcy of certain domestic legal provisions. Still others are directed at the competence of the Committee. The number of reservations, their content and their scope may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States parties.[75]

As a response to this threat, General Comment 24 established something of a revolutionary policy on reservations. Rather than leaving the compatibility of reservations with the object and purpose of the ICCPR to be settled by the mechanism provided by the Vienna Convention regime (reciprocally between states), the Committee itself undertook the task.

What this meant in practice was that the Committee redefined the scope of its powers. A power of the Committee to determine the compatibility of reservations, although nowhere expressly provided for, was claimed to arise from the inappropriateness for leaving this determination to be made by state parties. Furthermore such a power was considered a necessary prerequisite for the effective performance by the Committee of its functions.[76] The logic used was that of the implied powers doctrine. The HRC has also exercised this implied power for example in respect of the United States (US), Trinidad and Tobago, and Kuwait.[77]

However General Comment 24 has met with severe criticism, some authors even arguing that a majority of states do not like an "assertive"

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[74] Consider in this respect Lijnzaad (1995), and Higgins (1989).

[75] Human Rights Committee, General Comment 24, para. 1.

[76] Human Rights Committee, General Comment 24, para. 18.

[77] See Concluding Observations of the Human Rights Committee: United States of America, UN Doc. CCPR/C/79/Add.50 (1995), para. 279, *Mr. Rawle Kennedy v. Trinidad and Tobago*, Human Rights Committee, Communication No. 845/1999, Views (31 December 1999), UN Doc. CCPR/C/67/D/845/1999, para. 6.7, and Concluding Observations of the Human Rights Committee: Kuwait, UN Doc. CCPR/CO/69/KWT (2000), para. 5.

reservations regime, and do not want to equip the HRC with the power to determine the compatibility of reservations.[78] General Comment 24 was challenged immediately after its adoption by the US, the United Kingdom (UK) and France in separate observations (issued in accordance with Article 40(5) of the ICCPR).[79] The reasoning in these observations presented a different image of the powers of the HRC. While the UK shared the analysis of the Committee on the point that the Committee must be able to take a view on reservations if this is required for the Committee to perform its pre-existing functions, it emphasized that any additional powers, however necessary, could only be created through an amendment of the Covenant. In this way, the UK indicated that express attribution of any widened competence would be necessary.[80]

The claim by the US was similar in emphasizing the importance of taking state consent into account. In the mind of the US, General Comment 24:

> … can be read to present a rather surprising assertion that it is contrary to the object and purpose of the Covenant not to accept the Committee's views on the interpretation of the Covenant. This would be a rather significant departure from the Covenant scheme, which does not … confer on the Committee the power to render definitive or binding interpretations of the Covenant.[81]

A similar approach can be found in the work of the International Law Commission (ILC). In the Preliminary Conclusions on Reservations to Normative Multilateral Treaties, Including Human Rights Treaties, from 1997, the ILC recognized that monitoring bodies have an implicit competence to "comment upon and express recommendations" with regard to the admissibility of reservations.[82] However, according to the Preliminary

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[78] Tyagi (2000), at 257.

[79] Observations of States parties under article 40, paragraph 5, of the Covenant, United States of America, and Observations of States parties under article 40, paragraph 5, of the Covenant, United Kingdom of Great Britain and Northern Ireland, in Nineteenth Annual Report of the Human Rights Committee, United Nations General Assembly Official Records, 50th session, Suppl. No. 40 (UN Doc. CCPR A/50/40) (1995) (hereinafter Observations of States parties (UK)/(US)), at 126 and 130 respectively. As to the French observation, see Observations of States parties under article 40, paragraph 5, of the Covenant, France, in Twentieth Annual Report of the Human Rights Committee, United Nations General Assembly Official Records, 51st session, Suppl. No. 40 (UN Doc. CCPR A/51/40) (1996)), at 104. All observations are also annexed to Gardner (1997), at 193 *et seq*.

[80] Observations of States parties (UK), (Official Records) at 133, para. 12(a).

[81] Observations of States parties (US), (Official Records) at 126.

[82] Report of the International Law Commission on the work of its Forty-ninth Session, 12 May-18 July 1997, Official Records of the General Assembly, Fifty-second session,

Conclusions this cannot affect the traditional modalities of control by the contracting parties. The ILC stated that in the absence of express attribution, the legal force of the monitoring bodies' findings cannot exceed that which the bodies have for their general monitoring role.[83] The reasoning of the ILC built on the preparatory work of Special Rapporteur Alain Pellet, who in his Second Report on Reservations to Treaties (1996) had claimed that ineffectiveness of the protection of civil and political rights (assuming that this even would be the result of a lack of such a power), cannot by itself serve as a ground for making an alternative system (to the Vienna Convention regime) legally acceptable. The reason for this, the claim was, is the consensual nature of international law which meant that additional obligations can only be created through the expression of consent by ICCPR state parties.[84]

The text of the draft guidelines constituting the Guide to Practice on Reservations to Treaties from 2010 reaffirms the clash with the Vienna Convention regime by stating that both contracting states and treaty monitoring bodies may, within their competences, assess the permissibility of reservations. The provisions of the Guide also correspond to the 1997 comments in repeating that treaty monitoring bodies cannot exceed the legal effect of their general monitoring role.[85] The commentary to the provisions on the permissibility of reservations also explicitly states that General Comment 24 of the Human Rights Committee contradicts these general guidelines, and that the situation is one of concurring competence.[86]

1.4.4. *Disagreeing on Who Determines the Extent of Powers*

Evolutionary interpretations and use of non-express powers have also been common features of EU law. In European integration implied

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Suppl. No. 10, UN Doc. A/52/10 (1997) (hereinafter Report of the International Law Commission, Forty-ninth Session), at 57, para. 5.

[83] Report of the International Law Commission, Forty-ninth Session, paras 7-8.

[84] Second Report on Reservations to Treaties, by Mr. Alain Pellet, Special Rapporteur, International Law Commission, Forty-eighth session, 6 May-26 July 1996, UN Doc. A/CN.4/477/Add.1 (1996) (hereinafter ILC, Second Report on Reservations), para. 205.

[85] Report of the International Law Commission on the work of its Sixty-first Session, 4 May-5 June and 6 July to 7 August 2009, Official Records of the General Assembly, Sixty-fourth session, Suppl. No. 10, UN Doc. A/64/10 (2009), at 59-60.

[86] Report of the International Law Commission on the work of its Sixty-second Session, 3 May-4 June and 5 July to 6 August 2010, Official Records of the General Assembly, Sixty-fifth session, Suppl. No. 10, UN Doc. A/65/10 (2010), at 290, note 744, and at 293.

powers have in fact been utilized to the extent that the implied powers doctrine (or, the 'flexibility clause') has been labeled the "true locus" of expansion.[87] During the history of European integration the flexibility clause has been perceived differently at different moments. Use of the clause has both been praised for making European integration more effective, and accused for transcending the limits of legislative competence. In a concrete disagreement a picture of the article as a necessary tool for effective integration on the one hand, and as a threat to member sovereignty on the other have on several occasions come to stand against each other. This antagonism was picked-up for example by the German Bundesverfassungsgericht in its judgment on the Treaty of Lisbon.[88]

The apex of the discussion on the powers of the EU was reached through the Laeken Declaration and the subsequent work of the European Convention. The driving forces behind the work of the Convention (as set down in 2001 in the Laeken Declaration on the Future of the European Union), these being, a better division of competence, simplification of instruments, increased democracy, transparency and efficiency, and the need for a "Constitution for European citizens" can all in one way or another be referred back to the issue of powers.[89] The Declaration also explicitly raised the question of whether the flexibility clause would need to be reviewed in order to avoid a creeping expansion of EU powers.[90]

However, perhaps more than in other organizations, the reach of EU powers has also been approached as a question of who is ultimately in charge of defining that reach. A *Kompetenz-Kompetenz* of the EU has been feared to lead to unlimited expansion of competence. For this reason also Working Group V of the European Convention emphasized that the clause "must never give the impression that the Union defines its own competence".[91] At the same time the Working Group also recognized the importance of maintaining a capacity for the Union to develop dynamically. The question of powers would always need to be open.

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[87] For the characterization, see Weiler (1999), at 52.

[88] German Constitutional Court, Judgment of 30 June 2009, 2 BvE 2/08. Also see the Czech Constitutional Court, Judgment of 26th November 2008, Pl. US. 19/08.

[89] Laeken Declaration on the future of the European Union (15 December 2001), SN 300/1/01 REV 1 (hereinafter Laeken Declaration). The final reports of all working groups can be found at http://european-convention.eu.int.

[90] See Laeken Declaration on the Future of the European Union (15 December 2001), Annex I to *Presidency Conclusions of the Laeken European Council* (14-15 December 2001), SN 300/1/01 REV 1.

[91] European Convention, Final Report of Working Group V, CONV 375/1/02 (4 November 2002), at 14.

1.5. The Aim of the Book

The purpose of this book is not to construct the ultimate theory of powers of organizations. Instead, in exploring the nature and function of the attributed and implied powers doctrines, the eventual aim is to understand what it is that lawyers, judges and academics do when they invoke the doctrines in defense of a particular construction of powers of an organization.

In this venture it is assumed as a point of departure that it is impossible to make legal claims which would not also express values or preferences. The distinction between 'right' and 'wrong' uses of law, whether as a question of interpretation of a legal provision or as a question of choice between competing provisions, is in essence dictated by non-legal elements. While legal reasoning does involve certain specialized ways of thinking, this is a question of being familiar with legal systems and their rules of legal reasoning. However, law is not in itself a mechanism for reaching substantive outcomes.[92] The purpose of this book is to show what this means in the context of legal reasoning on powers of organizations.

The consequent chapters will approach the doctrines from different perspectives. In a historical context the twists and turns of international case-law will be reflected upon against the background of more general ideological shifts in the perception of organizations. However, powers must always be defined in relation to the individual organization. The second step will be to discuss the two doctrines as means for presenting competing visions of an organization. As will be seen, a disagreement on the extent of powers can not only be expressed as a clash between the two doctrines. Instead, a discourse on the extent of powers can also take place within the doctrines individually. This adds yet another dimension to constructing powers of organizations.

Because the question of powers of organizations has always been thought of as ambiguous, attempts at structuring the question have also been numerous. Apart from focusing on the relationship between the doctrines and their internal structure, the idea of structuring will therefore also be dealt with. This discussion also provides a link to the topical

[92] In this sense there is no aspect of legal reasoning that would not also be political ('political' here and in the following meaning that the reasoning expresses values and preferences). See Koskenniemi (2005), at 590–596, and Hertzberg (1994).

theme of constitutionalism. The idea of a constitutionalization of international organizations can be seen to bring with it a promise of structuring. After all, constitutionalism as we know it from the national context is in essence about defining the extent (and limits upon) the exercise of governmental power. The way in which such a structuring effect could enter is not however completely self-evident. If anything, constitutionalization claims seem able to reproduce various claims on powers.

Finally a note should be made concerning the generalizing approach of the book. Although the UN, the EU, and the WTO will serve as reoccurring examples, international organizations are discussed in general. Every such generalizing approach has its limits as all organizations display their own particular characteristics. This handicap is common to all of institutional law. The more the substantive features of an individual organization are emphasized, the less room there is for making conclusions of general applicability.[93] It is perhaps needless therefore to emphasize how different for example the EU and the Human Rights Committee are from one another. While the HRC struggles to display all the characteristics commonly identified with intergovernmental organizations, the EU is sometimes said to transcend a characterization as an intergovernmental organization. Yet, for the purpose of discussing reasoning on powers, the exact legal nature or comparability of the HRC and the EU is not important. Although the two may constitute far ends of the spectrum of international institutions, the legal language by which to construct their powers remains the same.

[93] On the nature of international institutional law, see Schermers & Blokker (2003), at 15–19, and Amerasinghe (2005), at 15–20.

CHAPTER TWO

POWERS AS A WAY OF IMAGING ORGANIZATIONS

The attributed and implied powers doctrines have been established in international law (and more specifically, international institutional law) through the case law of international courts. The history of the attributed and implied powers doctrines in international legal reasoning simultaneously constitutes an essential part of the history of international organizations. For long this history was presented as a linear development towards ever more and deeper cooperation in organizations. Another side to this image was the claim that state sovereignty is under change, to the benefit of organizations.[1] Whether there is any merit to an image of steadily expanding powers of organizations will be returned to in due course. Before that, a general characterization of the attributed and implied powers doctrines will be provided through a focus on the emergence of these doctrines, on the structure of the legal argument made through them, and by situating the emergence of the doctrines in a historical framework.

2.1. The Idea of Attributed Powers

2.1.1. *Early Powers. Organizations as Standing Conferences*

To some extent it is a matter of definition to pinpoint when the first international organization emerged. Looking back in time, river commissions and administrative unions of the 19th century seem like natural forerunners to international organizations as we know them today. While in the 18th century there was practically no institutionalized interaction between states, on entering the 19th century, the system of sovereign states had become stable enough to enable organized interstate activities. The Congress of Vienna (1815) resulted in the creation of various river commissions (such as the European Commission of the Danube), which could be characterized as restricted organizations. The Congress of

[1] See in this respect Martin Martinez (1996), e.g. Chapter 2, at 63-98. Also see Rosas (1994–1995).

Vienna also generated a conference system without precedent in the world (the so-called Concert of Europe).[2] However, the precursors to modern organizations worked in a climate of absolute state sovereignty. Obligations upon states could only come about through the expression of voluntary consent. Hence, treaties became the prime instruments of collaboration and legal development.[3]

The Universal Telegraphic Union (UTU) of 1865 and the Universal Postal Union (UPU) of 1874 would be two of the earliest public international unions. These unions emerged mainly as responses to technical developments and the unprecedented international flow of goods, services, people, and the development of communications. These unions were marked by a permanence (mainly through their possession of standing organs) that distinguished them from periodic conferences. However, they were mainly concerned with the administration of technical matters. The institutional design of these unions did not challenge the sovereignty of their members. Instead, their foremost contribution to the development of intergovernmental cooperation was the establishment of standing procedures. For this reason the UTU and the UPU of the time were characterized as administrative unions, with a permanent secretariat for arranging periodic conferences.

One common feature of those early international institutions was that they could not produce independent decisions without the consent of all member states. Further, with the exception of some river commissions, when institutions did possess legally binding powers, these usually only concerned their internal order.[4] For this reason many authors of the time equated constituent instruments with 'ordinary' treaties.[5]

The Concert of Europe marked the end of eighteenth century anarchy, but did not evolve into an international organization. Instead it remained an international regime for great powers with its main tool being international diplomacy.[6] The few river commissions and international administrations that existed did however appear as a possible model for dealing also with more politically controversial issues. Colonial administration

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[2] See Brölmann (2007), at 41–42. For an account of the Congress of Vienna, see Simpson (2004), at 96–115.

[3] See de Visscher (1968), at 46, and Brölmann (2007), at 38.

[4] See Reinsch (1907), at 584 considering consent a "general principle", demanded by the sovereignty of members (writing on the ITU). In general also see Sands and Klein (2001), at 6–9, and Brölmann (2007), at 43.

[5] Brölmann (2007), at 44–45.

[6] Simpson (2004), at 114.

was another area where the idea of institutionalization arose. Institutions were to uphold the mission of transforming backward societies. This was an expression of a gradual acceptance of institutions as tools for (European) states. Institutions, it seemed, could be a path for achieving political goals. However, institutional initiatives of the time were not aimed at transcending the (European) states.[7]

Discussions on a true international legal system only emerged towards the end of the 19th century. It was as part of this discussion that the idea of a separate legal identity of organizations could gradually emerge. The Concert of Europe was substituted by the Hague conferences. What distinguished these conferences from the Concert of Europe was the marked ambition to universality and the use of law as a tool for achieving peace. The Hague conferences were more clearly divorced from a focus on specific problems, and addressed international questions in the abstract. This contributed to the establishment of standing procedures.[8] Another difference was that a strict view of state sovereignty began to be questioned in favor of sovereign equality. This was also reflected in the increased representativity of the Hague conferences.[9]

The idea of an institutionalization of international relations was gradually becoming more and more plausible. Eventually a more firm conceptualization of international organizations as distinct legal actors began to take shape in the first decades of the 20th century. One of the leading figures in advocating the idea of international organizations, Walther Schücking (writing in 1912), regarded the Hague conferences of 1899 and 1907 as the *ipso facto* creation of a world confederation.[10] As another indication of the emerging institutionalization the membership of the UPU had grown from 14 (in 1865) to universal membership in 1914.[11] The First World War eventually destroyed belief in political sovereignty in Europe. Instead sovereignty increasingly began to be regarded as compatible with (and even defined by) participation in networks and establishing relations with other states, preparing ground for the "turn to international institutions".[12]

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[7] See Koskenniemi (2002), at 121 and 169–177, and Brölmann (2007), at 38.

[8] Claude (1964), at 24–29. Also see Carty (1986), at 15, and 65 *et seq*.

[9] See Simpson (2004), chapters 4 and 5, and at 126-131 in particular.

[10] Koskenniemi (2002), at 217 (referring to Walther Schücking, "Die Annäherung der Menschenrassen durch das Völkerrecht," in Walther Schücking, *Der Bund der Völker*, Leipzig, 1918), and Brölmann (2007), at 44.

[11] Simpson (2004), at 258.

[12] Kennedy (1987 'The Move').

With this in mind it is not that remarkable that the PCIJ, faced in the early 1920s with a request for an advisory opinion concerning the competence of the ILO, was somewhat hesitant in regarding the organization as somehow different from a treaty construction. In the first *Agricultural Productions* opinion (1922) the PCIJ was asked whether the ILO had the competence to deal with questions of agricultural labor.[13] In reaching its conclusion the PCIJ paid explicit respect to member sovereignty:

> It was much urged in argument that the establishment of the International Labour Organisation involved an abandonment of rights derived from national sovereignty, and that the competence of the Organisation therefore should not be extended by interpretation. There may be some force in this argument, but the question in every case must resolve itself into what the terms of the Treaty actually mean, and it is from this point of view that the Court proposes to examine the question.[14]

The construction of the Treaty of Versailles (establishing the ILO) convinced the PCIJ that agricultural labor was indeed within the competence of the ILO.[15]

Some years later the Court again faced a request for an opinion on the ILO, this time concerning whether the organization had the competence to draft and propose legislation that incidentally regulates the same work when performed by the employer. The request resulted in the *Personal Work of Employers* opinion, in which, in order to answer the question on the extent of competence (in the affirmative), the Treaty of Versailles was once again turned to.[16] In the mind of the PCIJ there was indeed an

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[13] *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture* (Advisory Opinion, 12 August 1922), PCIJ Publications 1922, Series B, no. 2 (hereinafter *Agricultural Productions*).

[14] *Agricultural Productions*, PCIJ Publications 1922, at 23.

[15] In another opinion delivered on the same day the PCIJ also dealt with whether development of methods of agricultural production fell within the competence of the ILO. In order to answer this question the PCIJ used similar reasoning as in the first *Agricultural Productions* opinion. However, the PCIJ eventually refused to extend the powers of the ILO into regulating agricultural production. Although the Court recognized that effects upon production processes may arise incidentally, and that such effects should not prevent the organization from dealing with matters specifically committed to it, principles of organizing and developing production from an economic point of view was in itself an activity "alien to the sphere of activity marked out for the International Labour Organisation". See *Competence of the ILO to Examine Proposals for the Organization and Development of the Methods of Agricultural Production* (Advisory Opinion, 12 August 1922), PCIJ Publications 1922, Series B, no. 3, at 55–59.

[16] *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer* (Advisory Opinion, 23 July 1926), PCIJ Publications 1926, Series B, no. 13 (hereinafter *Personal Work of Employers*), at 14.

intention by the contracting parties to provide the organization broad powers of cooperation. The Court concluded that it would not be conceivable that parties intended to prevent the organization from reaching its ends. If such a limitation would have been intended, it could be expected to be expressly stated in the Treaty. Although the Court considered it understandable that such a special case as the present was not included in the express provisions of the Treaty, there were also specific provisions that potentially assumed such incidental regulation.[17]

The Court acknowledged that controversial questions concerning the incidental character may arise, hence also raising concerns of national sovereignty. This, however, was regarded as a political issue, counterbalanced by precautionary mechanisms against an excess of competence. Referring to its first *Agricultural Productions* opinion (above), the main interest of the Court was to establish the intention of the founders:

> … without regard to the question whether functions entrusted to the International Labour Organization are or are not in the nature of delegated powers, the province of the Court is to ascertain what it was the Contracting Parties agreed to. The Court, …, is called upon to perform a judicial function, and … there appears to be no room for the discussion and application of political principles or social theories ….[18]

Towards the end of the opinion the PCIJ even explicitly stated that the question of discretionary powers exceeds the competence of the court.[19] In this way the court indicated that it did not consider the question of extent of powers to be a legal question to begin with. Instead a question concerning the extent of the "domain reserved to the Members who ratify the Conventions", and the question concerning "if and in what degree it is necessary and opportune to embody in a proposed Convention provisions destined to secure its full execution" was to be determined by the Labour Conference.[20]

Considering that the League of Nations had already been established in 1919, marking in the minds of many authors a clear move to modern international organizations, the Court seemed surprisingly hesitant to address the question of powers.[21] One reason may lie in the fact that all of these cases concerned the ILO, which was regarded as a semi-private institution.[22] Be that as it may, the fact remains that in addition to

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[17] *Personal Work of Employers*, PCIJ Publications 1926, at 18.
[18] *Personal Work of Employers*, PCIJ Publications 1926, at 23.
[19] *Personal Work of Employers*, PCIJ Publications 1926, at 24.
[20] *Personal Work of Employers*, PCIJ Publications 1926, at 23.
[21] See Kennedy (1987 'The Move'), e.g. at 841–842.
[22] See Reinsch (1907), at 601.

outlining some issues that the question of competence may give rise to (such as concerns of member sovereignty), the PCIJ clearly avoided any more principled reasoning on the relationship between the ILO and its members. The PCIJ did not in these cases make any attempts at discussing the nature of the independence that international organizations were beginning to display.

The legal image of organizations was nevertheless in a process of change. One example of such a change was the conclusion of agreements (by organizations) with both members and non-members. This practice suggested that international organizations had developed into autonomous legal actors.[23] There was hereby an increasing need for a firm articulation of the source of that autonomy. Only one year after the *Personal Work of Employers* opinion this was crystallized in the form of the doctrine of attributed powers.

2.1.2. *Attributed Powers as Independence*

In entering the 20th century there was only one true political authority on the international arena, the sovereign state, which was absolute within its territory and equal in respect to other sovereigns. Overlapping authorities or variations in degree of sovereignty were unthinkable. The 20th century on its part is characterized by a process of demystification and rationalization of law. One expression of this rationalization was the formulation of legal doctrines that elaborated the concepts of sovereignty and statehood. Besides a focus on the legal character of statehood, a discussion on the subjects and objects of international law began. In this respect "nothing less than the heart and soul of the discipline were at stake" and the legal status of organizations was a major part of this debate.[24]

The PCIJ had in the *S.S. "Wimbledon"* case (1923) asserted that "the right of entering into international engagements is an attribute of State sovereignty".[25] This expressed the idea that the legal capacity to conclude international agreements was linked to sovereignty and was hereby reserved for states. The main challenge to this idea came with the establishment of the League of Nations. The need for a general legal definition of the League

[23] The question was also discussed among academics, see multiple references in Brölmann (2007), at 54–57. Also see Klabbers (2001 'The Life'), at 291–295.

[24] Bederman (1996), at 333–335 (quote at 333).

[25] *Case of the S.S. "Wimbledon"* (Judgment, 17 August 1923), PCIJ Publications 1923, Series A, no. 1, at 25.

(and other organizations) became urgent.[26] The task of lawyers became to explain and justify how organizations could possess similar capacities to states. After all, this seemed to challenge the idea of absolute state sovereignty. Or, as Kennedy puts it, a new polemic was needed for the new-born international cosmopolitanism.[27]

When a first characterization of the independence of international organizations eventually was formulated, great care was taken not to challenge the position of states. In 1927 when the PCIJ delivered its *Lotus* decision on the question of whether international law is a system of freedom or restraint, the well-known verdict was that "Restrictions upon the independence of States cannot … be presumed", hereby reaffirming the firm basis of the international legal system in state consent. Furthermore: "The rules of law binding upon States … emanates from their own free will as expressed in conventions …".[28] Such an emphasis on the consent of states is also at the heart of the *Jurisdiction of the European Commission of the Danube* opinion rendered the same year. The all-important shift in the reasoning that the PCIJ did make in the *Danube* opinion when compared to the opinions concerning the ILO was, however, that no longer did the emphasis of consent mean that the exercise of legal powers is the exclusive property of states. Instead the PCIJ recognized the existence of different international authorities.[29]

The competence of the European Commission of the Danube had been the target of much controversy throughout the conferences leading up to the establishment of the Commission. In these negotiations Austria, France and Great Britain, who were keen on freeing the river from trade restrictions, wished that the Commission would have an active decision-making capacity, whereas Russia claimed that such a role would constitute a threat to its sovereignty, consequently aiming to assign a mere technical role to the Commission.[30] The question put before the PCIJ in the 1920s concerned the competence of the European Commission of the Danube in ports, and more specifically how to divide that competence between the Commission and Romania (a question that Romania had

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[26] Brölmann (2007), at 56–62.

[27] See Kennedy (1996), at 404–420. Also see Kennedy (1987 'The Move'), at 893–899.

[28] *The Case of the S.S. "Lotus"* (Judgment, 7 September 1927), PCIJ Publications, Series A, no. 10, at 18. Also see Kennedy (1996), at 402–403.

[29] *Jurisdiction of the European Commission of the Danube between Galatz and Braila* (Advisory Opinion, 8 December 1927), PCIJ Publications 1927, Series B, no. 14 (hereinafter *Danube*).

[30] See Krehbiel (1918).

brought up repeatedly in wishing to limit the scope of the Commission). The PCIJ concluded that although the Commission is independent from territorial authorities, and although it has "independent means of action and prerogatives and privileges which are generally withheld from international organizations" (referring to the jurisdictional powers of the Commission e.g. in respect of policing), it does not possess exclusive territorial sovereignty. Thus, in all those respects that are not incompatible with the powers of the Commission, Romania is territorially sovereign.[31] The Court even put this into more general terms in finding that the differentiation between two "independent authorities" must be made by reference to their functions.

> When in one and the same area there are two independent authorities, the only way in which it is possible to differentiate between their respective jurisdictions is by defining the functions allotted to them. As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfillment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it.[32]

This meant that the Commission is an independent actor which possesses powers (or as the PCIJ put it in the quote above, "functions bestowed upon it"). The Court hereby formulated the doctrine of attributed (or conferred) powers.[33]

Whereas in earlier cases the PCIJ had failed to identify any special characteristics of organizations, the Court hereby made a general characterization of the source and extent of the jurisdiction of organizations. By anchoring the independent capacity of the Commission in the attribution by members, the PCIJ remained faithful to the idea of state consent as the source of legal obligations. Whereas the Court in dealing with the ILO had focused on interpretation of the terms of the constituent instrument in order to find out what the drafters had intended the organization to do, the idea of an independent exercise of attributed powers changed this vocabulary into one of empowerment. To underline the point the PCIJ emphasized the power of the Commission to exercise its powers to their full extent. The reasoning not only indicated that there was an independence to the Commission, but also that international law allowed other

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[31] *Danube*, PCIJ Publications 1927, at 63–64.

[32] *Danube*, PCIJ Publications 1927, at 64.

[33] 'Functions' here meaning 'powers', Klabbers (2002 'An Introduction'), at 63.

actors than states to make legal claims. This was at the same time a hint at the possibility that organizations could also be legal persons.[34]

The Court also discussed in a more detailed manner what a "power to exercise … functions to their full extent" means. First of all, assuring freedom of navigation (which was the main task of the Commission) was considered incomplete in case ports were excluded. The jurisdiction of the Commission could therefore be extended to navigation in and out of ports. Further, not only did this include moorings, maneuvers, and admission in a port, but also activities such as supervision of loading and unloading, warehousing, and access to railways.[35] A right to intervene in case of violation of freedom of navigation or equal treatment of all flags was also regarded a "necessary corollary to the duties of the European Commission".[36]

The idea that there are 'necessary corollaries' to the performance by an organization of its attributed powers expresses the idea that powers should be interpreted so as to guarantee their fullest effect, also known as the principle of *effet utile*. This principle was even more clearly formulated in the *Greco-Turkish Agreement* opinion, where the legal dispute concerned whether the Mixed Commission for the Exchange of Greek and Turkish Populations could refer questions to arbitration.[37] Although the agreement establishing the Mixed Commission had failed to identify the party entitled to resort to arbitration, the PCIJ found that:

> … from the very silence of the article …, it is possible and natural to deduce that the power to refer a matter to the arbitrator rests with the Mixed Commission when that body finds itself confronted with questions of the nature indicated.[38]

The Court spent some time demonstrating the "spirit" of various instruments on the exchange of Greek and Turkish populations, and on defining the role of the Commission. The Court enumerated the judicial functions of the Commission and especially the express power to "… take the measures necessitated by the execution of the Convention and to decide all

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[34] Spiermann (2005), at 267. Also see Brölmann (2007), at 62.

[35] *Danube,* PCIJ Publications 1927, at 65–66.

[36] *Danube,* PCIJ Publications 1927, at 67.

[37] Interpretation of the Greco-Turkish Agreement of December 1st, 1926 (Final Protocol, Article IV) (Advisory Opinion, 28 August 1928), PCIJ Publications 1928, Series B, no. 16 (hereinafter *Greco-Turkish Agreement*).

[38] *Greco-Turkish Agreement*, PCIJ Publications 1928, at 20.

questions to which it may give rise (paragraph 3)".[39] It followed, said the Court, that any interpretation or measure capable of impeding the work of the Mixed Commission must be regarded as contrary to the spirit of these clauses. The Court also identified in this "spirit" an urgency for carrying out the provisions.[40] A body possessing jurisdictional powers (i.e. powers to interpret and apply the law) was furthermore regarded to have, as a general rule, the right to determine itself in the first place the extent of its jurisdiction. To decide on the right of reference would be such a question of extent of jurisdiction, the Court concluded.[41]

While the PCIJ already in the *Danube* opinion spoke of a right to exercise attributed powers to their full extent, now the Court used the same logic but applied it in respect of the "spirit" of the institution. This was a much wider construction of *effet utile* reasoning. The reasoning has even been regarded as a first recognition of implied powers of organizations.[42] It would however take another twenty years before the idea of implied powers was established as an integral part of the international legal vocabulary.

2.1.3. *Using Attribution to Limit Powers*

The doctrine of attributed powers was to be forgotten for almost 60 years. Born as it was out of an effort to explain the nature of the legal competence of international organizations (while simultaneously being respectful of state sovereignty), it soon proved too rigid for expressing the functional approach to organizations that was gaining ground. In the strong drive towards strengthening organizations that gained pace especially after the establishment of the UN, all eyes were on explaining the expansion of powers. In this process the implied powers doctrine became central. However, the attributed powers doctrine was to make a resurrection. It was incorporated into EU law by the Maastricht Treaty of 1992 through what was to become known as the 'principle of conferral' (then Article 3b, now Article 5 TEU): "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives

[39] *Greco-Turkish Agreement,* PCIJ Publications 1928, at 18.
[40] *Greco-Turkish Agreement,* PCIJ Publications 1928, at 18–19.
[41] *Greco-Turkish Agreement,* PCIJ Publications 1928, at 20–21.
[42] Klabbers (2002 'An Introduction'), at 67.

assigned to it therein". Article 4 (now Article 7 TEU) reasserted this principle for the individual institutions.[43]

The ICJ was to rely on the doctrine in 1996 when dealing with the competence of the World Health Organization (WHO) to address questions of the legality of use of nuclear weapons.[44] In that opinion, the ICJ found no link between the claimed competence, and the purposes of the WHO. As none of the functions of the WHO had a sufficient connection to the question before it, a power to request an advisory opinion on the legality of the use of nuclear weapons was not found to lie within the scope of WHO activities:

> Interpreted in accordance with their ordinary meaning, in their context and in the light of the object and purpose of the WHO Constitution, as well as of the practice followed by the Organization, the provisions of its Article 2 may be read as authorizing the Organization to deal with the effects on health of the use of nuclear weapons, or of any other hazardous activity, ... The question put to the Court in the present case relates, however, not to the effects of the use of nuclear weapons on health, but to the legality of the use of such weapons in view of their health and environmental effects. ... Accordingly, it does not seem to the Court that the provisions of Article 2 of the WHO Constitution, interpreted in accordance with the criteria referred to above, can be understood as conferring upon the Organization a competence to address the legality of the use of nuclear weapons ....[45]

The ICJ hereafter proceeded to the question of constitutional interpretation. In its reasoning the Court elaborated on the character of the attributed powers doctrine, and on its role in qualifying teleological interpretations:

> The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the "principle of speciality", that is to say, they are invested by the States which create them with powers ....[46]

In defining the principle of speciality, the Court referred to the *Danube* opinion of the PCIJ, hereby making it clear that this was another name for the attributed powers doctrine:

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[43] Treaty establishing the European Community (Maastricht consolidated version) (7 February 1992), OJ C 224/1 (31 August 1992).

[44] *WHO*, ICJ Reports 1996.

[45] *WHO*, ICJ Reports 1996, para. 21.

[46] *WHO*, ICJ Reports 1996, para. 25.

> The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers .... It is generally accepted that international organizations can exercise such powers, known as "implied" powers. ... In the opinion of the Court, to ascribe to the WHO the competence to address the legality of the use of nuclear weapons – even in view of their health and environmental effects – would be tantamount to disregarding the principle of speciality; for such competence could not be deemed a necessary implication of the Constitution of the Organization in the light of the purposes assigned to it by its member States.[47]

Judges Weeramantry and Koroma, dissenters to the majority opinion, considered the refusal of a power to request an advisory opinion on the legality of nuclear weapons as a restrictive application of principles of treaty interpretation, neither in accordance with the spirit of the WHO Constitution, nor with the purposes of the Court's advisory opinion. Judge Weeramantry also claimed that the principle of speciality should not mean that there can be no overlap at all within the UN system since other instances of overlap indicate the contrary.[48]

The denial of a power by reference to the principle of speciality in the *WHO* opinion became regarded as the end of an era of functional interpretations of constituent instruments of organizations – an era in which the finding of ever more (implied) powers of at least the UN had started to look almost automatic. For this reason the *WHO* opinion was seen by many as an outright departure from earlier jurisprudence.[49]

In EU law the express inclusion of the principle of conferral into the Maastricht Treaty signaled a changing perception of European integration. It was only a matter of time when the case law of the ECJ was to follow. In the so-called *ECHR* opinion in 1996 concerning the competence of the EC to accede to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR), the ECJ linked implied (parallel) powers to the principle of conferral, and emphasized the need of an internal power as the basis for an implied power.[50] As such a general power (to enact legislation in the field

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[47] *WHO*, ICJ Reports 1996, para. 25.

[48] Dissenting Opinion of Judge Weeramantry, *WHO*, ICJ Reports 1996, at 150.

[49] See Akande (1998), e.g. at 439.

[50] Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, [1996] European Court Reports I-1759, paras 23-26 (hereinafter *ECHR*).

of human rights) did not exist internally, the Court found no legal basis for such external action either. This underlined the importance of express attribution as a prerequisite for external competence.[51]

In order to demonstrate that there are limits to Article 352 TFEU (which is the second source of EU implied powers), the ECJ also made use of the principle of conferral:

> Article 235 [present Article 352 TFEU] is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty.
>
> That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those which define the tasks and activities of the Community. On any view, Article 235 [352 TFEU] cannot be used as the basis for the adoption of provisions whose effect would in substance be to amend the Treaty without following the procedure which it provides for that purpose.[52]

In the *Tobacco Advertising* case (2000) the ECJ relied even more explicitly on the principle of conferred powers. As part of its reasoning in annulling a directive because of a lack of legal competence the court claimed that:

> To construe that article [present Article 114 TFEU] as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions … but would also be incompatible with the principle embodied in Article 3b of the EC Treaty (now Article 5 TEU) that the powers of the Community are limited to those specifically conferred on it.[53]

The principle of conferral has found its most elaborate expression to date in Article 5 TEU (as consolidated by the Treaty of Lisbon):

> The limits of Union competences are governed by the principle of conferral.
> …
>
> Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the

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[51] For an overview, see Cremona (1999), at 149–151, and Dashwood (1998), at 115.

[52] *ECHR*, [1996] European Court Reports I-1759, paras 29–30.

[53] Case C-376/98, *Federal Republic of Germany v European Parliament and Council of European Union*, [2000] European Court Reports I-8419, para. 83 (hereinafter *Tobacco Advertising*).

> Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.[54]

The inclusion of such a detailed definition of the principle of conferral has been regarded as the return to a Union of limited competence. On a more general level the renewed emphasis on the attributed powers doctrine has also been perceived as a turn of tide and a sign of reaching the limits of powers of organizations.[55] While such a conclusion may be overly categorical, the examples nevertheless do demonstrate the change that the attributed powers doctrine has undergone. Having first entered international legal discourse (in the *Danube* opinion) as a characterization of the independence of organizations, the idea of attributed powers was in the *ECHR* and *WHO* cases relied upon in order to limit organizations. Article 5 TEU also refers to the principle of conferral as a principle that governs the "limits" of EU law. It is in this capacity that the attributed powers doctrine has come to serve as the counterpart of claims to implied powers.

2.2. The Idea of Implied Powers

2.2.1. *Implied Powers as Institutional Effectiveness*

In the timeframe in between the *Danube* (1927) and the *WHO* (1996) opinions, the image of independence of organizations had its heyday. The construction of powers that was made by the PCIJ in the *Danube* and *Greco-Turkish Agreement* opinions can be seen as a forerunner to the idea of implied powers that was to be established in the case law of the ICJ. After all, the doctrine of attributed powers initially served to express the autonomy of organizations in legal terms. Yet, a competence to exercise existing powers to their full extent soon proved too restrictive to meet the growing expectations that international organizations faced.

2.2.1.1. *The ICJ on the UN*

In the changing international climate organizations were increasingly pictured as actors in their own right. The possession and exercise of

[54] TEU, Article 5, paras 1 and 2.

[55] See Klabbers and Leino (2003), at 1300 arguing that this makes the finding of any implied powers unlikely. Although Klabbers and Leino discuss the Draft Treaty establishing a Constitution for Europe the contents of the two treaties are nearly identical. Also see Klabbers (2002 'An Introduction'), at 78–80.

powers by organizations also became an expression of their status as subjects of international law. By the next time (after the *Danube* and *Greco-Turkish Agreement* opinions) that the question of powers of an organization was dealt with by an international court some further remarkable changes had occurred. On the institutional side the PCIJ and the League of Nations had been replaced by the ICJ and the UN. The League of Nations had proved unsuccessful in preventing the Second World War, thereby failing to deliver on its most important task. However, instead of a rejection of international organizations as futile, this collapse of world order was met with a determination for further institutionalization. Many of the features of the United Nations can in fact be seen as direct responses to the deficiencies of the League.[56] The establishment of a host of organizations after the Second World War testifies that the enthusiasm towards institutions did not fade, but in fact grew stronger through the experience.[57]

This enthusiasm had its source in the political climate of the time. In political theory Hans Morgenthau, who himself characterized his approach as "functional", foresaw what was to become the ideological mindset from the mid-20th century onwards.[58] In his vision international cooperation was something that could be considered the least bad alternative for transcending the state system. In Morgenthau's mind it would take a "world state" or "world government" to ensure international peace. Organizations would serve as tools in this development. As "world community" must antedate the "world state", organizations could help achieve this goal by solving common problems that stand in the way of such a development.[59]

International cooperation as the path for achieving world peace was also at the heart of the political theory of David Mitrany.[60] In the functionalism of Mitrany the sovereignty of states needed to be sacrificed and loyalties transferred to international institutions. Mitrany's idea was that cooperation for goals that are perceived as important would lead to states suppressing and resolving their conflicts. This cooperation would gradually spill-over from one functional area to another. Human needs

[56] Claude (1964), at 51–73.
[57] See Klabbers (2001 'The Life'), at 298–299.
[58] Morgenthau (1940), at 274.
[59] See Morgenthau (1967), at 483–516.
[60] Mitrany (1975), at 268.

and public welfare were specifically given priority over the sanctity of the nation-state.[61]

In order to meet these expectations, an image of organizations as technical agencies was insufficient. Instead, organizations needed to be consensus producing mechanisms. They also needed a capacity to respond to functional requirements. A gradual expansion of the tasks of organizations was also necessary in order for spill-over to take place. In this expansion organizations themselves were to be active.[62] In fact, Mitrany himself did not regard the League of Nations as a functional organization, but as an organization with the rather restricted task of organizing stability. He also regarded the lack of functional features (such as a continuing adaptation to changing needs) as the very reason for its failure.[63]

Mitrany was aware of the fact that his approach would raise sovereignty concerns. His solution on how to weld together the common interests of states, without interfering unduly with the particular concerns of any individual state built on centralized planning and control. In striking the balance between public and private action, and in assessing the need for public action, Mitrany sought to allow for as much liberty for organizations to move along with such changes as possible, instead of overly rigid constitutional drafting.[64] In his mind: "This new approach towards the goal of international collaboration is free from dogma and avoids the cramping limitation of a more nicely designed but hard and fast system" (hereby targeting the idea of a world constitution and a unitary legal system).[65] Instead the form of the collaboration was to be determined by its function, all in the name of the effective working of the "international experiment".[66]

A functional approach to international relations entails a dynamic picture of organizations, even to the extent that rigid legal structures are seen to impede effectiveness. Functionalism was to become the dominant approach to organizations. Among other things, this meant that a dynamic approach to interpretation of constituent instruments was encouraged.[67] Picturing organizations as actors with a capacity to act and adjust to

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[61] Rosamond (2000), at 32–33.
[62] See e.g. Harrison (1975), at 125, and Groom (1975), esp. at 98–99.
[63] Mitrany (1975), at 105–106.
[64] Mitrany (1975), at 115–116.
[65] Mitrany (1975), at 126.
[66] Mitrany (1975), at 132 on the UN and world order.
[67] For contextual overviews, see e.g. Johnston (1988), and Rosamond (2000).

changing circumstances, to the benefit of which concerns of national sovereignty should be sacrificed, was in sharp contrast with the logic of attributed powers as defined in PCIJ case-law.

One of the most notable expressions of the internationalist sentiments of the time was the creation of the United Nations (as well as a host of other organizations). It is also in the case law of the ICJ on the UN that the idea of implied powers is shaped. Three advisory opinions of the ICJ constitute the core of the evolution of the implied powers doctrine in international law. In these three opinions, delivered between 1949 and 1962 the Court gradually worked out and widened the doctrine in an ever more functional manner.

The first of these opinions, *Reparation for Injuries*, has gained a position as a milestone in developing the law of international organizations. On the one hand this is due to the fact that in finding that the UN is an international legal person (and defining the meaning of this personality in legal terms), the ICJ put an end to discussions on whether international law permits other legal subjects than states.[68] On the other hand, as part of the definition of the nature of UN independence, the ICJ constructed the powers of the UN in an innovative way.

The *Reparation for Injuries* opinion is in many ways the epitome of the functional approach to organizations. As a brief piece of background, Count Folke Bernadotte, United Nations mediator in Palestine, died while on duty. This resulted in several questions of law being submitted to the ICJ by the UN General Assembly. At the very outset, the ICJ characterized the UN in functionalist terms:

> The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community.[69]

The crucial issue was whether the UN could bring an international claim in respect of damage caused, not only to the organization, but also to its agents. The reason for uncertainty was that no express provision in this regard could be found in the UN Charter. At the same time, from a functional point of view, the neutrality of the international civil service is a cornerstone in detaching organizations from national interests of member states.[70]

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[68] Bederman (1996), at 367–368.
[69] *Reparation for Injuries,* ICJ Reports 1949, at 178.
[70] See e.g. Johnston (1988), at 22, note 71.

In its reasoning the ICJ first proceeded to examine whether the UN has a power to bring claims against those responsible for damage caused to the UN. The Court thought it clear that the UN can bring a claim against one of its members for breaching its obligations towards the organization. Further, the Court thought it possible that a situation could occur where it could not be assumed that members or the defendant would bring the claim. Thus, if the UN were not to have the legal power, obtaining reparation could be impossible.[71]

Secondly, the Court considered whether such a power also existed in order to bring a claim in respect of the damage caused to the victim (or persons entitled through him). In defining the scope of UN powers the Court held that:

> Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication, as being essential to the performance of its duties. This principle was applied by the Permanent Court of International Justice to the International Labour Organization [in the Personal Work of Employers Opinion] … and must be applied to the United Nations.[72]

The reference to PCIJ case law can be criticized as incorrect since in the Personal Work of Employers no powers were found to arise out of "necessary implication" only.[73] The passage is nevertheless remarkable on its own terms. The Court thought that the home states of agents would perhaps sometimes not be justified in bringing a claim, or would not feel inclined to do so. Hereby, in order to ensure the "efficient and independent performance of these missions and to afford effective support to its agents, the Organization must provide them with adequate protection".[74] This lead to the more general conclusion:

> Upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter.[75]

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[71] *Reparation for Injuries,* ICJ Reports 1949, at 180–181.

[72] *Reparation for Injuries,* ICJ Reports 1949, at 182–183.

[73] See Dissenting Opinion by Judge Badawi Pacha, *Reparation for Injuries,* ICJ Reports 1949, at 214, and Klabbers (2002 'An Introduction'), at 69.

[74] *Reparation for Injuries,* ICJ Reports 1949, at 183.

[75] *Reparation for Injuries,* ICJ Reports 1949, at 184.

No conflict was found between this power and the right to bring a claim by the state of which the agent is a national.[76] In addition, the court specifically underlined the independence of the organizations vis-à-vis its members.

> It must be noted that the effective working of the Organization the accomplishment of its task, and the independence and effectiveness of the work of its agents require that these undertakings should be strictly observed. … In particular, he [the agent] should not have to rely on the protection of his own State. If he had to rely on that State, his independence might well be compromised, … The obligations entered into by States to enable the agents of the Organization to perform their duties are undertaken not in the interest of the agents, but in that of the Organization.[77]

A functional ideology is prominently present in this reasoning. An organization needs to be effective in the performance of its duties. In the name of this effectiveness the ICJ first found a general competence of the UN to bring claims as well as a more specific competence concerning damages caused to the victim.

The reasoning did however raise dissent. Judge Hackworth was the most eloquent. He actually concurred with the conclusion that the UN would have a power to bring claims for damage caused to the organization. His grounds for identifying such a power were however different. Hackworth based his reasoning on express Charter provisions and on the Convention on the Privileges and Immunities of the United Nations, from which Hackworth derived an implied power much in the same way the PCIJ had done in its early case law, as a corollary of express powers.[78]

However, as to a power to bring claims in respect of damage caused to the victim, Hackworth was convinced that no such implied power existed. He denied the existence of any necessity in order to maintain the independence and effectiveness of the UN. Instead, Hackworth held that employees would be properly protected by customary principles. According to Hackworth reliance on the protection offered by states would not compromise the independence of UN agents. The fact that UN claims may sometimes be more persuasive was not in his mind a judicial reason, whereas for the Court, this seemed to constitute a crucial point.[79]

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[76] *Reparation for Injuries,* ICJ Reports 1949, at 185–186.

[77] *Reparation for Injuries,* ICJ Reports 1949, at 183–184.

[78] Dissenting Opinion by Judge Hackworth, *Reparation for Injuries,* ICJ Reports 1949, at 196.

[79] Dissenting Opinion by Judge Hackworth, *Reparation for Injuries,* ICJ Reports 1949, at 198–202.

In his dissent, Hackworth presented a different definition of the implied powers doctrine altogether:

> There can be no gainsaying the fact that the Organization is one of delegated and enumerated powers. It has to be presumed that such powers as the Member States desired to confer upon it are stated either in the Charter or in complementary agreements concluded by them. Powers not expressed cannot be freely implied. Implied powers flow from a grant of expressed powers, and are limited to those that are "necessary" to the exercise of powers expressly granted. No necessity for the exercise of the power here in question has been shown to exist. … The exercise of an additional extraordinary power in the field of private claims has not been shown to be necessary to the efficient performance of duty by either the Organization or its agents. … The results of this liberality of judicial construction transcend, by far, anything to be found in the Charter, as well as any known purpose entertained by the drafters of the Charter.[80]

Hackworth hereby presented a more restrictive view of the UN Charter. Whereas the ICJ derived the legal power from the Charter at large, Hackworth contended that the function of the doctrine was only to make express powers more effective. According to Hackworth his approach would provide the organization all that it needs from a practical point of view, through conventional principles, free from uncertainty and irregularity.[81]

In the *Effect of Awards* opinion the question raised before the ICJ was whether the UN General Assembly could establish an administrative tribunal competent to render binding judgments on the entire organization.[82] Again, no express provision in this respect can be found in the UN Charter. The Court argued that while disputes on the law governing staff members are likely to occur, the UN however enjoys immunity from national courts. For this reason it would be inconsistent with the UN Charter purposes not to afford judicial remedies to its own staff. The ICJ relied on its argument in the *Reparation for Injuries* opinion:

> In these circumstances, the Court finds that the power to establish a tribunal, to do justice between the Organization and the staff members, was essential to ensure the efficient working of the secretariat, and to give effect

[80] Dissenting Opinion by Judge Hackworth, *Reparation for Injuries,* ICJ Reports 1949, at 198–199.

[81] Dissenting Opinion by Judge Hackworth, *Reparation for Injuries,* ICJ Reports 1949, at 204.

[82] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, (Advisory Opinion, 13 July 1954), ICJ Reports 1954 (hereinafter *Effect of Awards*).

> to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter.[83]

The critique against this assumption was that the General Assembly cannot delegate judicial functions to the United Nations Administrative Tribunal, as it does not possess such powers itself. This was also the main point of dissenting Judge Hackworth:

> The doctrine of implied powers is designed to implement, within reasonable limitations, and not to supplant or vary, express powers. The General Assembly was given express authority by Article 22 of the Charter to establish such subsidiary organs as might be necessary for the performance of its functions … Under this authorization the Assembly may establish any tribunal needed for the implementation of its functions. It is not, therefore, permissible, in the face of this express power, to invoke the doctrine of implied powers to establish a tribunal of a supposedly different kind … [with authority to make binding decisions].[84]

Judge Hackworth emphasized Article 22 of the UN Charter as the sole authorization for the establishment of a tribunal. If established under that article, the tribunal would be a subsidiary organ of the General Assembly, the main benefit being that the General Assembly hereby maintains the possibility of reviewing the decisions of the tribunal if necessary.[85]

However, the majority argued that the Assembly was not delegating powers at all. The Administrative Tribunal was not regarded as an organ of the General Assembly to begin with, but as a staff tribunal for the entire UN. In this way the Assembly did not delegate any powers it did not have itself. The binding effect did not arise from the relationship between the Assembly and the tribunal, but out of the Statute of the Administrative Tribunal. Through this construction it became possible to identify a functional necessity of a power to establish a tribunal which eventually may bind even the Assembly itself.[86] The ICJ did admit that the Tribunal could have been vested with non-binding powers as well. However, it indicated

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[83] *Effect of Awards*, ICJ Reports 1954, at 57.

[84] Dissenting Opinion by Judge Hackworth, *Effect of Awards*, ICJ Reports 1954, at 80–81.

[85] Dissenting Opinion by Judge Hackworth, *Effect of Awards*, ICJ Reports 1954, at 81.

[86] *Effect of Awards*, ICJ Reports 1954, at 58–62. This case has later been referred to by the Appeals Chamber of the ICTY in *Prosecutor v Dušco Tadić* in establishing that the ICTY had the competence to examine a plea against its jurisdiction. See *Prosecutor v Dušco Tadić*, ICTY, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72 (2 October 1995), paras 15–18.

that there was no need to assume that implied powers would need to be restricted to those only "absolutely essential".[87]

Finally, in the *Certain Expenses* opinion of 1962, the request of the General Assembly aimed at clarifying whether certain expenditures relating to UN operations in the Middle East (UNEF) and the Congo (ONUC) qualified as "expenses of the Organization" within the meaning of Article 17(2) UN.[88] For a study on the (implied) legal basis of peacekeeping powers of the UN the case has several interesting aspects regarding the authority of both the General Assembly and the Security Council. It is however with respect to the powers of the Security Council that the Court once again relied upon (and developed) the implied powers doctrine in order to arrive at its opinion. The ICJ first of all indicated that the enumeration of certain procedures in the UN Charter does not exclude alternative means:

> It cannot be said that the Charter has left the Security Council impotent in the field of an emergency situation when agreements under Article 43 [on agreements on armed forces] have not been concluded.[89]

The Court indicated that there might be implied powers at work in this field. Whether the costs were "expenses of the organization" or not had to be decided with reference to the purposes of the UN at large (thus, if expenditures were to arise which did not fall within those purposes, they could not constitute "expenses of the Organization").[90] The UN purposes therefore constituted the test of legality:

> These purposes are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. Save as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action. But when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization .... If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization.[91]

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[87] *Effect of Awards*, ICJ Reports 1954, at 58.

[88] "The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly", UN Charter, Article 17(2).

[89] *Certain Expenses*, ICJ Reports 1962, at 167.

[90] *Certain Expenses*, ICJ Reports 1962, at 167.

[91] *Certain Expenses*, ICJ Reports 1962, at 168.

From the point of view of the evolution of the implied powers doctrine, this is perhaps the most remarkable passage of the case. While the argument in the *Reparation for Injuries* and *Effect of Awards* opinions was that implied powers existed when there was a necessary need to better fulfill duties and ensure effective performance of an organization, this now indicated that if only a power could be related to the purposes of an organization, it would also be legal.[92] President Winiarski was critical of this construction:

> The Charter has set forth the purposes of the United Nations in very wide, and for that reason, too indefinite, terms. But … it does not follow, far from it, that the organization is entitled to seek to achieve those purposes by no matter what means. The fact that an organ of the United Nations is seeking to achieve one of those purposes does not suffice to render its action lawful …. It is only by such procedures which were clearly defined, that the United Nations can seek to achieve its purposes. It may be that the United Nations is sometimes not in a position to undertake action which would be useful for the maintenance of international peace and security …, but that is the way in which the organization was concerned and brought into being.[93]

In his view the intentions of the drafters were clearly to abandon the possibility of useful action rather than to sacrifice the balance of established fields of competence.

> The same reasoning applies to the rule of construction known as the rule of effectiveness (*ut res magis valeat quam pereat*) and, perhaps less strictly, to the doctrine of implied powers.[94]

Judge Quintana followed a similar line of reasoning in arguing for a more appropriate distribution of responsibilities and powers both between the organs of the UN, as well as between the UN and member states:

> Each organ has its due function. Implied powers which may derive from the Charter so that the organization may achieve all its purposes are not to be invoked when explicit powers provide expressly for the eventualities under consideration. The problem, thus stated, seems to focus on the specific

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[92] The ICJ also used similar reasoning in the *Namibia* case. In exploring the legal basis of Security Council resolution 276 (1970) the court stated that: "… the Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter", *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) *notwithstanding Security Council Resolution 276* (*1970*), (Advisory Opinion, 21 June 1971), ICJ Reports 1971 (hereinafter *Namibia*), at 52.

[93] Dissenting Opinion of President Winiarski, *Certain Expenses*, ICJ Reports 1962, at 230.

[94] Dissenting Opinion of President Winiarski, *Certain Expenses*, ICJ Reports 1962, at 230.

> provisions which govern the functioning of the organs … and not on those provisions laying down its general purposes.[95]

Judge Koretsky feared recourse to a method where "the end justifies the means" and argued in favor of stricter observation and interpretation of the UN Charter provisions.[96] Skepticism towards this liberty of construction was also raised among academics. Tunkin, for example, characterized such a liberal use of implied powers as an excuse not to respect treaties, and feared that this would eventually lead to chaos in international relations.[97] Nevertheless, these were but lone objections in an institutional environment that was geared towards making organizations ever more effective.

2.2.1.2. *The Doctrine as a Tool for European Integration*

By the time of signing the 'Treaties of Rome', the implied powers doctrine had already been firmly established in the case law of the ICJ. The vision of the post-war architects of integration was to integrate modestly as a first step in areas of low politics, to create a high authority as the driving force of integration (with ability to act), which would then lead to further integration and institutionalization (also known as the 'Community method'). To achieve this, institutions needed to be purposeful, supranational, and active in promoting the integration process.[98] It is against this ideological background not surprising that it is also in the Treaties of Rome that express provisions on implied powers can be found.[99] But the

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[95] Dissenting Opinion of Judge Moreno Quintana, *Certain Expenses*, ICJ Reports 1962, at 245–246.

[96] Dissenting Opinion of Judge Koretsky, *Certain Expenses*, ICJ Reports 1962, at 268. Notably, an even wider construction of the implied powers doctrine has been made by Alvarez: "An institution, once established, acquires a life of its own, independent of the elements which have given birth to it, and must develop, not in accordance with the views of those who created it, but in accordance with the requirements of international life", Individual Opinion by Judge Alvarez, *First Admission*, ICJ Reports 1948, at 67.

[97] Tunkin (1975), at 187.

[98] Rosamond (2000), at 38–73.

[99] See Treaty establishing the European Coal and Steel Community (18 April 1951), 261 United Nations Treaty Series 140, Article 95: "In all cases not expressly provided for in the present Treaty in which a decision or a recommendation of the High Authority appears necessary to fulfill, in the operation of the common market for coal and steel and in accordance with the provisions of Article 5 above, one of the purposes of the Community as defined in Articles 2, 3 and 4, such decision or recommendation may be taken subject to the unanimous concurrence of the Council and after consultation with the Consultative Committee", and Article 235 of the Treaty establishing the European Economic Community (25 March 1957), 298 United Nations Treaty Series 11: "If any action by the Community

development of implied EU powers is not only interesting because of these express provisions, but also because of the twists and turns that the use of implied powers displays. These twists are an expression of how the pace of the integration process has varied, despite the shared idea of a united Europe.[100]

There are two main mechanisms for developing the legal powers of the EU: the so called parallelism mechanism and Article 352 TFEU. The classical example in ECJ case law on the use of the first of these can be found in the *ERTA* case. The issue at stake in that case was whether the authority conferred under EEC Treaty Article 75 (on the implementation of a common transport policy within the Community), extended to the negotiation and conclusion of international agreements with third countries (in this case the European Road Transport Agreement (ERTA)). The ECJ held that:

> To determine in a particular case the Community's authority to enter into international agreements, regard must be had to the whole scheme of the Treaty no less than to its substantive provisions.
>
> Such authority arises not only from an express conferment by the Treaty … but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions.
>
> In particular, each time the Community, with a view to implementing a common policy envisaged by the treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.[101]

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appears necessary to achieve, in the functioning of the Common Market, one of the aims of the Community in cases where this Treaty has not provided for the requisite powers of action, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall enact the appropriate provisions".

[100] Neo-functionalism (as another word for 'integration theory') while sharing many of the basic ideological assumptions of functionalism (such as the end goal of lasting peace and the logic of functional spillover), also entailed some significant differences. Mitrany himself disliked regional integration since he saw it as a reproduction of state-problems writ large. Mitrany (1975), at 123–132.

[101] Case C-22/70, *Commission of the European Communities v Council of the European Communities*, [1971] European Court Reports 263, paras 16 and 17 (hereinafter *ERTA*). For another example of *effet utile* reasoning, see Case C-8/55, *Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community*, [1954-1956] European Court Reports 291, at 299: "… without having recourse to a wide interpretation it is possible to apply a rule of interpretation generally accepted in both international and national law, according to which the rules laid down by an international treaty or a law presuppose the rules without which that treaty or law would have no meaning or could not be reasonably and usefully applied….". Similarly in the *Migration Policy* case the ECJ reasoned: "… where

There was no question that the Community could act (internally) in the field of transport. This followed from the express wording of the EEC Treaty.[102] What the Court did in the *ERTA* case was to enable the Community, within that field, to also conclude international agreements.[103]

Advocate General Lamothe had contested such a logic by emphasizing the intentions of the founders.

> … the argument of implied and automatic transfer of authority outside the cases laid down by the treaty meets with very serious objections quite apart from a general objection relating to the principles of interpreting the Treaty. … No matter what legal basis the Court finds for it, recognition of the Community's authority in external matters for negotiating and concluding the AETR [ERTA] concedes by implication that the Communities authorities exercise, in addition to the powers expressly conferred upon them by the Treaty, those implied powers whereby the Supreme Court of the United States supplements the power of the federal bodies in relation to those of the confederate States. … I for my part consider that Community powers should be regarded as those termed in European law "conferred powers". Such conferred powers may indeed be very widely construed when they are only the direct and necessary extension of powers relating to intra-community questions, … but … It appears clear from the general scheme of the Treaty of Rome that its authors intended strictly to limit the Community's authority in external matters to the cases which they expressly laid down.[104]

The line of reasoning of the ECJ was repeated in the *Kramer* judgment,[105] and in the *Laying-up Fund* opinion, where the Court added that:

> … authority to enter into international commitments may not only arise from an express attribution by the Treaty, but equally may flow implicitly from its provision. The Court has concluded inter alia that whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments

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an Article of the EEC Treaty … confers a specific task on the Commission it must be accepted, if that provision is not to be rendered wholly ineffective, that it confers on the Commission necessarily and per se the powers which are indispensable in order to carry out that task", Joined Cases C-281, 283-5, 287/85 *Federal Republic of Germany and others v Commission of the European Communities* [1987] European Court Reports 3203, para. 28.

[102] *ERTA*, [1971] European Court Reports 263, paras 20–30.

[103] However also see Klabbers (2002 'An Introduction'), at 72 arguing that the reasoning of the ECJ was not similar to that of the ICJ in *Effect of Awards* and the *Reparation for Injuries* cases, but was more concerned with maintaining legal unity.

[104] *ERTA*, [1971] European Court Reports 263 (Opinion of Mr. Advocate-General Dutheillet de Lamothe, 10 March 1971), at 291 and 293.

[105] Case C-3, 4 and 6/76, *Cornelis Kramer and others*, [1976] European Court Reports 1279, at 1308.

> necessary for the attainment of that objective even in the absence of an express provision in that connexion.
>
> This is particularly so in all cases in which internal power has already been used in order to adopt measures which come within the attainment of common policies. It is, however, not limited to that eventuality....[106]

The reasoning of the court indicated not only that the Community possesses external competence, but in addition that the Community competence could be exclusive, without even having exercised its internal (pre-existing) competence. Through the *ERTA, Kramer*, and *Laying-up Fund* cases, the nature and extent of external Community competence was outlined (and gradually widened) by the creation of the so-called doctrine of parallelism (*in foro interno, in foro externo*).[107]

While parallelism provides one tool for expansion of EU competence, there is also a second mechanism – Article 352 TFEU (former 235/308). This article now reads in its entirety:

> 1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.
>
> 2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.
>
> 3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.
>
> 4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to

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[106] Opinion 1/76, *Draft Agreement Establishing a European Laying-up Fund for Inland Waterway Vessels,* [1977] European Court Reports 741, at 755, paras 3 and 4.

[107] See Cremona (1999), at 138-140. Dashwood however claims that the very notion 'parallelism' is misleading, as things which are parallel should run alongside each other, whereas this is not the relationship between internal and external powers of the EU. The external dimension rather emerges through an interpretation of the *effet utile* of the internal power. Dashwood (1998), at 120. For an overview of different ways of characterizing parallel powers of the EU (and a critique of Dashwood), see Schütze (2004), at 234–240.

> this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.[108]

While literature on EU law displays many ways of defining the mechanism provided in Article 352 (and its predecessors), that article in essence expresses the idea of implied powers as known in international law.[109] It has even been argued that the SEA, Maastricht and Amsterdam Treaties can all to some extent be regarded as codifications of previous developments, enacted largely by Article 352.[110] There are certainly some differences between the two mechanisms, although the effect of the exercise of either is the expansion of EU competence. Whereas parallel powers arise from internal powers, Article 352 relates to the objectives of the EU at large. A parallel power exists in an area in which the EU is already permitted to act. The new power enables more effective (external) action in a field where the EU already has competence to act. The power implied is not new, but merely an extension, which can be utilized in order to reach the objective for which the original (internal) express power was attributed. Parallelism hereby pertains more to the *effet utile* principle in the sense that the parallel power seeks to avoid a situation where the (internal) express power would become ineffective and useless.[111] Article 352 on its part builds on the absence of a power and the implied power is derived so as to fulfill an objective of the EU. In short, parallelism entails deriving external powers from internal competence while Article 352 serves primarily to create internal competence.[112]

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[108] TFEU, Article 352.

[109] Article 352 has been labeled e.g. the implied powers clause, residual power, open-ended power, competence reservoir, *Kompetenz-Kompetenz*, and flexibility clause. Very explicit on the comparison to the implied powers doctrine as formulated by the ICJ are e.g. Weiler (1999), Nergelius (2009), at 52–53, and Lebeck (2008). It should be noted that some authors deny a characterization of Article 352 as an express embodiment of the implied powers doctrine. In making such a distinction the implied powers doctrine is often defined in an overly narrow way. This is particularly apparent when the implied powers doctrine is described as a tool for the effective exercise of pre-existing powers only, or as limited to the creation of "indispensable" powers. See e.g. Schütze (2003), at 103 who talks about the "reduction" of Article 352 to an "instrument for the canalization of implied powers". Also see e.g. Craig and de Búrca (2007), at 90–94.

[110] See Usher (1998), at 72, and McGoldrick (1997), at 62. For a practical example, see Cremona (1999), at 151, note 59.

[111] This is the characterization of Hartley (1999), at 156–157.

[112] In the words of Advocate-General Tizzano: "… just as, in the absence of internal powers, the Council may, subject to the conditions and in accordance with the procedure specified in Article 235 [Article 352 TFEU], create such powers if they are 'necessary' for the attainment of an objective of the Community, so may the Community, if an agreement is 'necessary' to attain one of its objectives, affirm its own competence … to conclude that

Up until 1972, Article 352 was only infrequently relied upon. A reinterpretation of the article was agreed upon at the Paris summit of 1972, where members decided to make full use of it and utilize it as an integrationist tool.[113] The European project was to be given a fresh start through a reinforcement of institutions. It is telling of the mood of the political commitments made, that the statement of the summit spoke about the "… need to coordinate more closely the economic policies of the Community and for this purpose to introduce more effective Community procedures", and agreed that "… for the purpose in particular of carrying out the tasks laid down in the different programmes of action, it was desirable to make the widest possible use of all the dispositions of the Treaties, including Article 235 [Article 352 TFEU] of the EEC Treaty".[114] Article 352 was hereby elevated into a central tool to be used for enhancing European integration. As a result, from the summit until the adoption of the Single European Act (SEA), there was a quantitative rise in use, as well as a change in the understanding of the scope of the article.[115] It is worth

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agreement, deriving it by implication from the corresponding internal competence, even if the latter has not yet been exercised. And if the corresponding internal competence is also lacking, the same result can be achieved … by resorting directly to Article 235 [352] at the time of concluding the agreement", Joined Opinion of Mr. Advocate General Tizzano (31 January 2002), Cases C-466/98, 467/98, 468/98, 471/98, 472/98, 475/98, 476/98, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland, Kingdom of Denmark, Kingdom of Sweden, Kingdom of Belgium, Grand Duchy of Luxemburg, Republic of Austria, and Federal Republic of Germany,* European Court Reports [2002], I-9427, para. 48.

[113] See Declaration of the Paris Summit (19-20 October 1972), in EC Bulletin 10-1972.

[114] See Declaration of the Paris Summit (19-21 October 1972), in EC Bulletin 10-1972, paras 3 and 15.

[115] Weiler (1999), at 54. Several organs and funds have been created through reliance on Article 352, such as the European Regional Development Fund, the European Bank of Reconstruction and Development, and the European Economic Interest Grouping. In creating the European Monetary System the European currency unit was defined in a Council regulation (3181/78) enacted under Article 352. For these and other examples, see Shaw (1993), at 92-93, McGoldrick (1997), at 62, and Joutsamo et al. (2000), e.g. at 187–189, 709, and 726. Even new policy areas have been introduced through it. In the field of environmental law express powers were not granted to the EU until the conclusion of the Single European Act. However, several international environmental agreements had already before this been concluded on the basis of Article 352. The same is true for consumer protection, which was introduced by the Maastricht treaty, but which the EU had already earlier become a significant actor in. See Weatherill (2004), at 6–7. These examples are only a scratch at the surface. A search conducted by Usher shows over 1000 legislative acts either made directly through recourse to Article 352 or by referring in part to it, see Usher (1998), at 72–87. More recently Schütze has reported an average of 27 legislative acts based upon Article 352 per year since its inception, and an average of 17 per year since 2000, see Schütze (2003), at 82 and 110, note 140. For a graphic illustration of different kinds of acts adopted on the basis of the flexibility clause see Bungenberg (1999), at 100.

noting that it is also in the latter part of the 1970s that the nexus between (parallel) external competence and exclusivity is substantively developed by the ECJ.

The ECJ was also to interpret Article 352 ever more widely. In the *Massey Ferguson* case (1973) a Council regulation (based on Article 352) was contested with the argument that the article could only apply in the absence of a specific provision. The Court however found that the 'necessity test' of Article 352 was satisfied and that this sufficed for its use. The existence of alternative legal bases did not prevent recourse to Article 352.

> If it is true that the proper functioning of the customs union justifies a wide interpretation of Article 9, 27, 28, 111 and 113 of the Treaty and of the powers which these provisions confer on the institutions to allow them thoroughly to control external trade by measures taken both independently and by agreement, there is no reason why the Council could not legitimately consider that recourse to the procedure of Article 235 [now Article 352 TFEU] was justified ....[116]

Apart from the powerful tool that Article 352 provides for developing EU competence, it should be noted that Article 352 requires unanimity. Thus, in utilizing it as a tool for widening EU competence, the creation of powers is subject to the consent of all EU members. This results in something of a dilemmatic picture: Was it decided that Article 352 was to be revived because of its expansive nature, or was it decided that expansion was to utilize that article because of the unanimity requirement?

Notably the two possibilities do not exclude each other. The revival of the mechanism was clearly an indication of a desire to enhance European integration. The fact that Article 352 requires the consent of all Council members at the same time gave members a right of veto. Another aspect of the dual function of the article was more recently emphasized in the joint *Kadi* and *Al-Barakaat* cases by the ECJ. By relying on Article 352 the EU can on the one hand avoid unilateral member action (hereby safeguarding the operation of the common market), while reliance on the article on the other hand also means engaging the European Parliament in the decision-making (compared with certain other articles), hereby enabling an input of EU citizens into the decision.[117]

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[116] Case 8/73 *Hauptzollamt Bremerhaven v Massey-Ferguson GmbH* [1973] European Court Reports 897, para. 4. In general on the revival of Article 352 TFEU, see Weiler (1999), at 51-60 and Martin Martinez (1996), at 117 *et seq*.

[117] Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission, OJ C 285/2 (8 November 2008), paras 230 and 235.

2.2.2. *Implied Powers as 'Competence Creep'*

As an effect of the revitalization in the 1970s, EU institutions began utilizing the flexibility clause without even considering other legal bases. Weiler claims that the usage of the clause up until the SEA in 1986 opened up practically any realm of state activity to EU law.[118] Looking back at the claims to implied powers made up until the *Certain Expenses* opinion and the developments up until the SEA in EU law, a functional approach to organizations is prominently present. The attributed powers doctrine that was outlined by the PCIJ in its early cases was a distant memory, only occasionally invoked in dissenting opinions. It is no surprise that it was also in the 1960s that Finn Seyersted suggested that even the implied powers doctrine may be too narrow a tool for describing the true range of powers of organizations. In his mind organizations, once established, inherently possess powers to perform all the acts needed in order to attain their aims. The decisive difference to the idea of implied powers is whether powers are to be regarded as 'derived from the constituent instrument' or 'inherent in the organization'. Seyersted defended the preferability of the inherent powers approach with the absence of any necessity test.[119] In practice the necessity test did indeed seem almost absent. So strong was the agreement on the need for efficient organizations that the existence of implied powers was simply assumed.[120]

This is not to say that criticism was altogether absent (as the dissenting opinions in ICJ case law demonstrate). Nor does it mean that only functional interpretations of constituent instruments would have been made by international courts. In EU law there are examples on the refusal of powers that the High Authority of the ECSC claimed to possess dating back to the 1960s.[121] The ICJ had on its part in the *IMCO* opinion (1960) indicated that there was no automatic connection between constituent

[118] Weiler (1999), at 55, note 120, and 60.

[119] Seyersted characterizes the necessity criteria as too restrictive. See Seyersted (1961), at 455-456. Also see Bekker (1994), at 68–69. The inherent powers doctrine will be discussed further below in Chapter 3.1.2.

[120] White therefore considers the reasoning of the ICJ in the *Certain Expenses* opinion as an expression of the idea of inherent powers. See White (1996), at 131–132.

[121] A claim on the behalf of Italy and Netherlands led the ECJ already in cases *20/59* and *25/59* (1960) to deny a power of the High Authority to implement decisions on transport matters. Case C-20/59, *Government of the Italian Republic v High Authority of the European Coal and Steel Community* [1960] European Court Reports 325, at 336 *et seq*. The exact same reasoning was used in Case C-25/59, *Kingdom of the Netherlands v High Authority of the European Coal and Steel Community* [1960] European Court Reports 787.

instruments and teleological interpretation, and that strictly textual interpretations of constituent instruments were also possible.[122] Questions also began to be raised whether acts of organizations could be *ultra vires* to begin with, that is, whether there were any limits to the competence of organizations.[123]

Nevertheless, it is only when entering into the 1990s that a clearer shift in reasoning on powers can be identified. The foremost example is the sudden reemergence of an emphasis of the attributed powers of the WHO in the *WHO* opinion. What the ICJ in the *WHO* opinion suggested was that UN agencies should confine themselves to technical tasks. Providing full functional effectiveness to the object and purpose no longer appeared to be a paramount consideration.[124] The *IMCO* opinion was also invoked in academic literature as an example of a forgotten alternative way of interpreting constituent instruments of organizations.[125] The general political atmosphere was more and more concerned with the role of states in shaping outcomes. In political theory this shift is pictured as a move to a "new institutionalism" which brought with it a redefinition of the nature of organizations.[126] Concerns about the role of the ECJ as an advocate of European integration and how to avoid 'competence creep' were expressions of this changing mood.[127]

A shift in the reasoning of the ECJ can also be identified. The logic of the *Laying-up Fund* opinion (1977) had been that since it was not possible to fully realize the objectives of the EC without the conclusion of an international agreement, it was necessary to derive a (parallel) power to enter into that agreement.[128] When the European Commission defended such a construction in respect of the WTO Agreement on Trade in Services, the

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[122] See *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, (Advisory Opinion, 8 June 1960), ICJ Reports 1960, at 159–160 (hereinafter *IMCO*).

[123] Weiler describes especially the period from the mid-1970s to the 1980s as one of erosion of the limits to competence. See Weiler (1999), at 51–63, esp. at 60. Telling in this respect are also the views of ECJ judges, see Rasmussen (1986), at 176–183. Also see Rosenne (1985), at 121 writing on treaties in general, and Efraim (2000), at 141 on the IMF.

[124] See Akande (1998), at 445-447.

[125] Makarczyk argues that the case is not sufficiently known in legal doctrine. Makarczyk (1984), at 513. Another author emphasizing the rarity of the approach is Singer (1995), at 109–112.

[126] See e.g. Rosamond (2000), at 115–116 writing on European integration.

[127] On the ECJ see e.g. Rasmussen (1986). For a recent concern over 'competence creep', see von Bernstorff (2010), at 784–785.

[128] See Opinion 1/76, [1977] European Court Reports 741, para. 3.

ECJ in the *WTO Agreements* opinion in 1994 rejected that approach by means of a stricter view. The Court held that the:

> … attainment of freedom of establishment and freedom to provide services for nationals of the Member States is not inextricably linked to the treatment to be afforded in the Community to nationals of non-member countries….[129]

Not only did the ECJ deny the necessity of the claimed power (to conclude the General Agreement on Trade in Services), it also adopted a completely new vocabulary with which to measure the degree of necessity: the idea of an "inextricable link".[130]

The *ECHR* opinion in particular has been read to emphasize the limits of EU competence. In its reasoning on whether the EC had the competence to accede to the European Convention on Human Rights the ECJ argued that Community powers do have limits, and that these derive from the attributed character of Community powers. The declaration on Article 352 of the Treaty on the Functioning of the European Union now restates the reasoning of the ECJ.[131] Soon after, the question of limiting Article 352 for example through the adoption of a catalogue of competences arose in the negotiation process on the Treaty of Amsterdam.[132]

In the *Tobacco Advertising* case, in addition to relying on the principle of conferral to limit powers, the court also spelled out that articles expanding competence cannot be used to circumvent express exclusions of harmonization.[133] This limitation was later also included explicitly into

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[129] Opinion 1/94, *Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property - Article 228(6) of the EC Treaty*, [1994] European Court Reports I-5267 (hereinafter *WTO Agreements*), para. 86. Regarding TRIPs the ECJ concluded: "… unification or harmonization of intellectual property rights in the Community context does not necessarily have to be accompanied by agreements with non-member countries in order to be effective", *WTO Agreements*, [1994] European Court Reports I-5267, para. 100. Also see Frid (1995), at 71–74.

[130] The reasoning has been later repeated in the so-called Open Skies cases. See Case C-467/98, *Commission of the European Communities v Kingdom of Denmark*, [2002] European Court Reports I-9519, paras 61–62.

[131] *ECHR*, [1996] European Court Reports I-1759, para. 30. For overviews of the case, see Cremona (1999), at 150–152, Burrows (1997), at 62, and Schütze (2003), at 91–95. Also see Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, 13 December 2007, No. 42: Declaration on Article 352 of the Treaty on the Functioning of the European Union, Annexed to the Treaty on the Functioning of the European Union.

[132] Bungenberg (1999), at 255–269.

[133] Case C-376/98, *Federal Republic of Germany v European Parliament and Council of European Union*, [2000] European Court Reports I-8419, para. 79.

Article 352 TFEU through the Treaty of Lisbon. Concerns of 'competence creep' culminated in the Laeken Declaration (2001) which explicitly raised the question whether Article 352 would need to be reviewed. In the consequent work of the Constitutional Convention it was emphasized that "a flexibility clause must never give the impression that the Union defines its own competence".[134]

Similar concerns have been raised also on a more general level. The International Law Association (ILA) in its final report on the accountability of international organizations (2004) picks up the concern that organizations may act in excess of their powers, and introduces a "principle of constitutionality" in order to guide the interpretation of powers.[135] A move beyond functionalism is explicitly called for. This call is made in the name of respecting the limited democratic legitimacy and the diversity of constituent polities of organizations.[136] Such a focus on 'competence creep' has also been characterized as a "constitutional turn".[137]

2.3. Shifting Ideologies and the Interpretation of Powers

The uses to which the doctrines of attributed and implied powers have been put in the case law of the ICJ and the ECJ demonstrate some remarkable similarities. This makes it appealing to think about the twists and turns that the use of these doctrines has taken in terms of general trends. In a very general sense there may be some merit to the idea of an evolution of reasoning on powers of organizations. The fact that international organizations can utilize powers that are not expressly enumerated in their constituent instrument seems to gradually have become accepted beyond doubt. Although the ICJ in the *WHO* opinion denied the WHO the power it claimed to possess, the Court nevertheless explicitly affirmed the existence of the implied powers doctrine. Despite the denial, this represents quite a different image of organizations from what the early attempts by the PCIJ to characterize the powers of the ILO conveyed. So as to emphasize that a fundamental change in how to define powers of organizations has taken place, the ICJ in the *Reparation for Injuries*

[134] The European Convention, Final Report of the Working Group V, CONV 375/01/02 (4 November 2002), at 14.

[135] International Law Association, *Accountability of International Organisations*, Final Report (2004), at 13.

[136] von Bogdandy et al. (2010), at 22 and 32 in particular.

[137] On the EU, see Chalmers and Tomkins (2007), at 68 and 215.

opinion even called the implied powers doctrine a "principle of law".[138] In the sense that the emergence of the idea of implied powers as a principle of law historically succeeds that of attributed powers, a development of the legal construction of powers of organizations can be identified.

As far as the construction of non-express powers is concerned a similar pattern can be identified. A recognition of organizations as autonomous actors, possessing powers to exercise attributed powers to their full extent (*effet utile*) proved inadequate. In the ever deepening functional mindset a need arose for more effective and self-adjusting institutions (in order to restrain states). Hence, the idea of implied powers emerged. Case by case both the ICJ and the ECJ also loosened the requirements for the exercise of such powers.

The idea of attributed powers which initially was used to explain the independence of organizations (and to tie that independence to the sovereignty of member states), gradually turned into a tool for emphasizing the limits of competence. As state sovereignty had become something of a bad thing and an idea which (for legal purposes at least) many authors began to regard as an outdated relic of the past, an erosion of the attributed powers doctrine was welcomed.[139] Expectations were therefore high when the request for an advisory opinion on the legality of the use of nuclear weapons was filed with the ICJ. No wonder then that the fact that the ICJ denied the WHO the claimed power and relied upon the idea of attributed powers to state its case, was met with some astonishment. In what seemed to constitute a sharp contrast with functional ideology, the court, in limiting the powers of the WHO, now emphasized the status quo as expressed in the wording of the constituent instrument (but also in respect of the UN system at large).[140] For the functionally minded this sudden reemergence even lead to fears of a complete displacement of the 'principle of effectiveness' (which lies at the heart of the implied powers doctrine).[141]

The emergence and development of institutional law mechanisms by which to construct powers of organizations should however be separated from the interpretation of powers in the particular case. Whereas the

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[138] *Reparation for Injuries*, ICJ Reports 1949, at 183.

[139] Writing just before the *WHO* case, see Martin Martinez (1995), at 101 *et seq*., and Henkin (1995), at 8–10, and at 296 characterizing state sovereignty as a relic and a major obstacle to making and enforcing international law.

[140] See Klabbers (2009).

[141] Darrow (2003), at 140–141.

birth of both the attributed and implied powers doctrines has a background in the general political ideology of the time (and the image of organizations in particular), the use of those doctrines in the individual case need not follow such a pattern. It does indeed seem logical to view the reemergence of more restrictive reasoning on EU powers against the background of other developments indicating a change of political attitudes towards integration. The inclusion of the subsidiarity principle into the EC Treaty in 1992 is especially remarkable. In contrast to the neo-functional assumption that integration will always be preferable, the subsidiarity principle introduced the requirement of a separate justification for the possession of a particular legal power.

However, when assessing individual claims to powers the explanatory force of such general patterns is unclear. Had the WHO request to the ICJ (in the *WHO* opinion) not dealt with the legality of the use of nuclear weapons which is probably one of the most controversial questions of international politics, the outcome could have been different. Had there not been a simultaneous request from the General Assembly on the legality issue, the answer might also have been different (as the ICJ could not as easily have referred to the structure of the UN system in order to deny the power). In fact the denial of powers can also be seen as an attempt at addressing fragmentation fears, as a reconceptualization of international law in severing the definition of WHO powers from the sovereignty of its membership, and even as an attempt at framing the UN system in terms of domestic forms of political organization.[142] The one conclusion that can be made from the *WHO* opinion is that in the mind of the ICJ, the functional character of the WHO does not include a power to request an advisory opinion on the issue of legality of nuclear weapons. At the same time the denial of that power can be seen to promote broader functional concerns.

The *ECHR* opinion of the ECJ is also a somewhat ambiguous expression of a turn to emphasizing the limits of EU powers. Building on the idea that fundamental rights create positive obligations to take specific measures, accession would have had an impact on member jurisdiction through providing the (then) EC with legislative powers in the human rights sphere. Read in this way, the reasoning of the ECJ could be interpreted as a way of

[142] Klabbers (2009), at 25–27 in particular.

avoiding such an expansion of competence. Instead, the ECJ appears to have safeguarded the sovereign prerogatives of member states.[143]

If, however, the impact of an accession on the role of the ECJ as ultimate arbiter of EU law is emphasized, the conclusion could be the opposite (meaning that the opinion in fact safeguards the prerogatives of EU law). The ECJ had already in the *EEA* opinion (in 1991), as a reaction to the planned EEA court, argued that the establishment of the court would affect the autonomy of the Community legal order adversely.[144] An alternative reading of the *ECHR* opinion therefore suggests that the case primarily reflected a desire of the ECJ not to submit itself to superior jurisdiction by the European Court of Human Rights.[145] Adding to this the fact that many authors do not discern a general trend in the case law of the ECJ (after the *ECHR* opinion) toward a more restrictive interpretation of the powers to begin with (which on its part also explains why the critique of 'competence creep' has constantly grown stronger), the reasoning of the ECJ eventually stands out as rather functional.[146]

To present the historical development of powers of organizations as a story about a changing perception of sovereignty and the functional image of organizations, reflects the dichotomous nature of debates over powers of organizations. While changes in interpretations of powers of organizations surely may express more general ideological changes (such as a more hostile environment towards European integration, or an emerging focus on issues of democratic legitimacy), the relationship does not work in the reverse. General trends cannot be turned to in order to explain the construction of powers in the particular case.[147] To come to terms with the underlying reason in the individual case for a certain construction of powers, interest should be turned to the common interests (or lack of such) as expressed by the members of the organization. As the ICJ put it in the *WHO* opinion; limits of the powers of an organization

[143] See Toth (1997), at 502–512, and Leino (2004), at 182–185.

[144] Opinion 1/91, *Draft agreement between the European Community and the countries of the European Free Trade Association relating to the creation of the European Economic Area*, [1991] ECR I-6079, paras 34–35, and 41–46.

[145] See Leino (2004), 179–181.

[146] For one discussion of the twists and turns in ECJ reasoning, see Conway (2010), at 968.

[147] Edgeworth makes the point in more general terms. Although metanarratives can be helpful as descriptions to help grasp broad shifts in social structures, an exaggerated universalization that overlooks or oversimplifies local practices will be distorting and misguiding. See Edgeworth (2003), e.g. at 239.

"… are a function of the common interests whose promotion those States entrust to [international organizations] …".[148]

A disagreement on extent of powers can be expressed through the attributed and implied powers doctrines. In this disagreement, the idea of attributed powers is commonly invoked in order to emphasize a limited character of the organization and to underline the basis of the activities of the organization in the consent of its members (as expressed in the constituent instrument). The driving force in claiming implied powers is to increase the functional effectiveness of the organization beyond those express means. The rich case law on the doctrines demonstrates the use of the doctrines as opposites to one another.[149] However, a disagreement on the extent of powers can also be expressed in other ways. The discussion on the *WHO* and *ECHR* opinions suggested that even a denial of powers can be claimed in the name of functional effectiveness. A dichotomous use of the two doctrines is therefore not exhaustive of argumentative possibilities in reasoning on powers of organizations. The consequent chapters will explore this idea in more detail.

[148] See *WHO*, ICJ Reports 1996, para. 25.

[149] In such a composition of the two doctrines, the attractions of the one can be explained through what is disliked in the other. Klabbers (2002 'An Introduction'), at 73.

CHAPTER THREE

POWERS – A DEBATE BETWEEN FAMILIAR ADVERSARIES

An international organization consists of its members. Without any members (or at least two members) there would not be an organization. This is a common element of any definition of an international organization. Also the powers of an organization are granted to it by its members. At the same time, once an organization exercises its powers, irrespective of the extent of those powers, this act will bestow upon the organization an element of autonomy. By conferring powers to an organization members express a desire to subject themselves to the rules and procedures of the organization. The eventual decision will be presented as a decision of the organization. Yet, members are the ones who vote for or against that decision.

These two aspects of international organizations were identified by Virally in his classic search for a theory of international organizations as state sovereignty on the one hand (members of organizations being predominantly states), and the concept of 'function' on the other.[1] This dualism establishes itself in all organizations and in various ways. As many authors have noted, the two images exist simultaneously, express themselves through all of institutional law, and carry with them "the seeds of conflict" in their eternal search for balance.[2] The relationship has even been described as one of competing sovereignties.[3]

The Laeken Declaration on the Future of the European Union explicitly took account of the dual image of organizations as a special challenge for redrafting the competence of the Union, by emphasizing that a redefined division of competence would have to ensure institutional dynamics,

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[1] M. Virally, "La notion de fonction dans la théorie de l'organisation internationale", in S. Bastid et al., *Mélanges offerts á Charles Rousseau – La communauté internationale*, 1974, Pedone, 277–300. The thoughts of Virally are reproduced in Schermers and Blokker (2003), at 10 *et seq*.

[2] Claude (1964), at 8-11. Klabbers (2002 'An Introduction') uses this dichotomy to explore several areas of international institutional law. Also see Brölmann (2007), at 259–260 and more elaborately Brölmann (2001), at 320–324.

[3] Maduro (2003 'Contrapunctual'), at 505 and de Búrca (2003), at 451–455.

while at the same time avoiding 'competence creep'.[4] As to the WTO, Cass argues that one of the reasons for ambivalence in WTO Appellate Body case law has been the constant balancing between according control over policy-making to states and ceding trade decisions to the WTO (or more generally, between maintaining diverse national policies and integrating international trade).[5] A conferral of powers is also a way of manifesting an organization – an organization 'needs' powers in order to display an autonomy. At the same time, as states cooperate for different reasons, they will also have different perceptions of what activities the organization should be engaged in. These differences can be expressed in various ways.

3.1. Powers as A Manifestation of Autonomy

3.1.1. *Constituting Organizations*

In demonstrating the importance of powers for organizations interest must be turned to the basic question: What is an organization? Answering this is by no means an easy task due to vast variation in between organizations. It may even be that any comprehensive definition is outright unattainable.[6] In a most general sense, organizations could be characterized as vehicles for cooperation (whatever the end goal of that cooperation). This conclusion is borne out of the fact that organizations consist of members.[7] The logical follow-up question to ask would be: Why do states cooperate? Why do states wish to create and bestow autonomy upon an actor?

This question has often been approached through abstractions. Realism, regime theory, functionalism, and institutionalism have all been presented as theories through which to explain the driving force for cooperation through organizations. Indeed, power-politics, selfishness, common challenges/interests, altruism, or domestic reasons may all serve as plausible explanations.[8] Above all, the autonomy of an organization

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[4] Laeken Declaration on the Future of the European Union, 15 December 2001, Annex I to Presidency Conclusions of the Laeken European Council, 14–15 December 2001, SN 300/1/01, REV 1, and Weatherill (2003), at 45.

[5] For several examples, see Cass (2005), at 127–128.

[6] Klabbers (2002 'An Introduction'), at 7–8 suspects that international organizations as social creations defy comprehensive definitions.

[7] Whereas organizations are mainly vehicles for *state* cooperation, this should not hide the fact that organizations may also have other organizations as members. For an account of the EU and its membership in organizations, see Frid (1995).

[8] For a brief overview of theoretical stances, see Klabbers (2002 'An Introduction'), at 28–34, and Abbott and Snidal (1998).

must eventually rest on the reasons that individual states have for delegating authority to an organization.[9] As the motives of states may not only vary in time, but also between states, and most certainly varies between different organizations, the reason for cooperation will not allow for a general answer. To borrow an example from Inis Claude, the reason for cooperation is hardly the same when joining the Central Bureau of the International Map of the World in the Millionth Scale and when joining the UN.[10] Although theoretical approaches to international organizations aim at explaining the relationship between the organization and its members, none of the theories can hereby exhaust the matter.[11]

States may seek the establishment of stronger enforcement of obligations than ordinary agreements can provide for. The agenda-setting role of an organization may look promising to a state that is facing stalemate in a negotiation that it perceives as important. Recourse to an organization may also be a matter of wishing to avoid the making of awkward decisions. Some action may be outright illegal if performed individually by states, whereas other acts may be more legitimate (such as imposition of conditionality criteria) if backed up by a larger membership.[12] Creating and empowering organizations can also be seen as a way of maintaining hegemonic positions. This means that states, by empowering organizations, seek to elevate particular interests into a more general interest. To other states membership in an organization may also bear with it a promise of contesting some hegemonic position.[13]

Whatever the motive for wishing to establish an organization, a claim to powers is necessary in order to realize that wish. Empowerment is the tool by which to make an organization 'visible'. The possession of powers also serves to distinguish constituent instruments from 'ordinary' treaties. A most basic characterization of a constituent instrument would identify the object and purpose of the organization and the means it has for fulfilling that object and purpose. The institutional structure is different from an 'ordinary' treaty through the fact that the purpose of an organization is not solely to introduce immediate regulation on a defined issue, but primarily to provide the means for cooperation concerning that issue for an

[9] Venzke (2010), at 72.
[10] Claude (1964), at 4.
[11] Klabbers (2002 'An Introduction'), at 34.
[12] Venzke (2010), at 73-76 with further references.
[13] See Koskenniemi (2011). Also see Sarooshi (2005), at 98-100 discussing US support for the establishment of the WTO Dispute Settlement Body.

undefined period of time. While an 'ordinary' treaty hereby typically serves to settle a particular question among parties through prohibitions or allowances, the constituent instrument instead defines in what respects and through what means the organization can work towards its goal. This distinction captures the fact that whereas an 'ordinary' treaty is clearly an expression of the collective 'will' of its members, a constituent instrument establishes an autonomous entity.[14]

As a consequence, without the exercise of some powers through which to display that autonomy, it would be hard to characterize an entity as an organization. The very definition of an international organization reflects this idea. The criteria that an organization should be created through an international agreement which serves as its constituent document, that it should have members, and that it should have at least one organ through which it expresses an independent 'will', are all central elements of the process of conferral of powers on an organization. Powers, in this logic, are granted by states, through an agreement, to an organ. Without a display of an autonomous identity, an independent 'will' does not manifest itself. The most visible impact of the constituent instrument would in such a case arise from the provisions that define the obligations of members, while the provisions establishing the institutional decision-making system would be a dead letter. In this sense the organization would become indistinguishable from other treaty arrangements, and would instead appear as a mere web of inter-state relations between its members.[15]

As a matter of demonstrating the existence of an autonomous (legal) actor, the actual extent of the powers of an organization need not be decisive. In some cases the independent character of an organization stands out more clearly, as when the EU exercises its supranational decision-making powers or when the WTO exercises its legal power of settling a trade dispute between members.[16] However, the autonomy can also be tied to other features such as institutional design (when the European Commission exercises its power to initiate legislation), the performance of particular functions (authoritative settlement of interpretative disputes),

[14] See Detter (1965), at 23–25, recognizing a two-fold nature of constituent instruments, being both agreements among states and constitutions for an independent entity.

[15] The goal-oriented character and the possession of powers were also among the arguments emphasized in first advancing the idea of organizations as distinct legal entities in the early 1900s. See Bederman (1996), at 336–343 with further references.

[16] These examples are used by Sarooshi as instances of full transfers of powers by states to organizations. See Sarooshi (2005), at 65 *et seq*.

or the making of majority decisions.[17] Even when the UN General Assembly adopts recommendations (acting under Article 10 of the UN Charter) an element of functional autonomy presents itself. Although the exercise of a power by an organization to discuss issues and formulate recommendations does not result in legally binding obligations for the members of that organization, the recommendation is nevertheless the result of an organ of the organization performing its tasks.[18]

The constitutive effect of powers can also be witnessed in practice. Schermers and Blokker claim that the perceived need to develop the powers of the United Nations Industrial Development Organization led to its conversion from an organ of the UN General Assembly into an international organization. In a converse way the autonomy of the former GATT was always in doubt, mainly because of the lack of organs (through which to exercise powers).[19] It is in fact in cases of less well established institutional actors that the interconnection between an exercise of powers and the autonomous existence of that actor stands out most clearly. Hence, the very fact that institutions established by multilateral environmental agreements exercise certain powers has also raised the question of their nature and enabled their identification as autonomous actors.[20] In a similar way the existence of a membership and independent organs (the meeting of states parties and the Human Rights Committee) with defined powers, has been claimed to potentially qualify the regime of the International Covenant on Civil and Political Rights as an international organization.[21]

The difficulty with characterizing the (pre-Lisbon) EU could also be mentioned. As already mentioned, in the absence of an express recognition of its legal personality many authors denied the character of the EU

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[17] As to authoritative settlement of interpretative disputes in respect of the WTO, Article IX(2) of the WTO Agreement provides that the Ministerial Conference and the General Council of the WTO have exclusive authority to adopt interpretations of the WTO Agreement, the Dispute Settlement Understanding in Article 3(2) states that the dispute settlement system should clarify the provisions of the WTO Agreement. Out of these two mechanisms it is the authority provided for the political bodies that grants the possibility to adopt interpretations that are of general validity for all WTO Members.

[18] See Klabbers (2002 'An Introduction'), at 206–212 and note 45. A completely different matter is the category of 'soft' organizations. Although 'soft' organizations may be just as effective from a political point of view, they do not strictly speaking possess legal powers. See Klabbers (2001 'Institutional'), esp. at 408–410.

[19] Schermers and Blokker (2003), at 30–36.

[20] Churchill and Ulfstein (2000).

[21] See Scheinin (2009), at 32.

as a legal actor. However, examples of the EU in practice performing certain tasks made it plausible to nevertheless draw the opposite conclusion. Especially the exercise of treaty-making powers proved, in the minds of many, the autonomous existence and even legal personality of the EU.[22] The EU example also demonstrates how the question of powers and the concept of legal personality become intertwined: those in favor of a capacity to act emphasized that the EU needs legal personality in order to remove uncertainties (which affect external treaty-making capacity adversely), whereas critics feared that bestowing legal personality upon the EU would lead to an erosion of member sovereignty (through a consequent exercise of powers).[23] In objecting to the possession of legal powers the absence of express provisions was relied upon as decisive proof of a lack of capacity to act. On the other hand, in claiming such a capacity (in the absence of express provisions) the very question of personality was downplayed as unimportant (and as a mere presumption).[24]

3.1.2. *Extreme Hegemony? The Idea of Inherent Powers*

Although powers are the means by which organizations display an autonomy in discharging functions, this autonomy is not unlimited. To use the expression of the ICJ in the *Reparation for Injuries* opinion:

> It must be acknowledged that its members by entrusting certain functions to it [the UN], with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged .... Whereas a state possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions, as specified or implied in its constituent documents and developed in practice.[25]

This means that all organizations possess an individual set of powers (so as to realize the purposes and functions of the individual organization). At the same time organizations do in fact have many powers in common, such as the power to adopt a budget or to conclude treaties (it is e.g. hard to think how an organization could function without a power to conclude a headquarters agreement with its host state).[26] The commonality of

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[22] See Schermers and Blokker (2003), at 987 and 992, Curtin and Dekker (1999), at 109–112, and Koskenniemi (1998), at 28–29 and 42.

[23] Wessel (2000), at 520.

[24] On legal personality, see above, Chapter 1.3.

[25] *Reparation for Injuries,* ICJ Reports 1949, at 179–180.

[26] Even the WTO, which is often characterized as void of legal powers, does possess the power to conclude a headquarters agreement, see WTO Agreement, Article VIII (5).

certain powers has tempted some authors to locate those powers in the possession of legal personality. Legal personality is in such a logic regarded as the container of a number of automatic legal consequences.[27] Maybe the best known proponent of this approach has been Finn Seyersted. Whereas the legal personality of an organization is simply based on the fact of its existence, the legal consequences that follow from that legal personality are in Seyersted's terminology called inherent powers. The only limitations on these powers are in Seyersted's mind negative provisions in the constituent instrument, purposes of the organization, and a requirement of special legal basis to make binding decisions.[28]

Although inherent powers claims have not been all that common in respect of political organizations, the idea of inherent powers (or inherent jurisdiction) has been prominent in the context of judicial bodies.[29] Inherent powers reasoning departs from an idea that there is a bulk of powers of organizations (and courts) that are of a customary nature.[30] As soon as an organization (or a court) comes into existence, it will enjoy all of these powers. As to its basic point of departure (and in sharp contrast to the reasoning of the ICJ quoted above), in the inherent powers approach organizations are seen as potentially free, like states, to perform any sovereign act which they are in a practical position to perform.[31] The claimed advantages of the approach would be that an organization could fulfill its aims independently of individual provisions, and that this would enable accurate review of the organization since there are two (allegedly) clearly definable legal controls: the action should aim to achieve the purpose of the organization, and there should be no express prohibition of such acts. Hereby the troublesome necessity test which lies at the heart of the idea of implied powers would be overcome. Acts performed in order to attain aims covered by the constituent instrument could not be challenged on the ground that they are unnecessary for the achievement of the object and purpose of the organization. Nor would it be necessary to look for specific provisions, precedents, or interpretations of texts to justify the acts of organizations. So as to emphasize the extreme functionalism at the heart of the idea of inherent powers, Seyersted explicitly claimed

[27] The exact contents of which vary according to different authors. For a brief overview, see Rama-Montaldo (1970), at 116–122.

[28] For early accounts, see Seyersted (1963), and Seyersted (1961), at 485–489.

[29] For an overview of the practice of multiple courts, see Brown (2005), at 211–222. As to the ECJ, see Arnull (1990). For a recent example before the ICJ, see *LaGrand Case* (*Germany v. United States of America*) (Judgment, 27 June 2001), ICJ Reports 2001, at 484, para. 45.

[30] Seyersted (2008), at 35.

[31] Seyersted (2008), at 393.

that the necessity criterion (of implied powers reasoning) is too rigid to be useful.[32]

If traces of such reasoning were to be looked for in ICJ case law concerning the UN, the *Certain Expenses* opinion may bear some resemblance to the inherent powers logic.[33] As mentioned above, it was in the aftermath of the opinion that many authors in fact did start doubting whether there actually were any limits to powers of organizations. A discussion of the inherent powers idea is hereby interesting not only because of its occasional occurrence as a semi-independent theory of powers of organizations, but above all because inherent powers claims serve as yet another way of emphasizing the autonomy of organizations.

However, on a theoretical level a number of problems have been noted with the idea of legal personality as a container of powers. First of all, as the inherent powers approach derives powers from legal personality, how is this personality to be established? The problem is that only a few organizations have express provisions in their constituent instrument ascribing them international legal personality. For this reason Seyersted's criteria for identifying whether an institution possesses legal personality is the performance of sovereign acts.[34] This would mean that in the absence of express provisions on personality, the powers of organizations should be looked at in order to determine whether or not such sovereign acts are performed. However, as a consequence it becomes somewhat circular to hereafter describe these powers as inherent in legal personality.

A practical concern is also that express prohibitions which, in Seyersted's mind, would serve to define the range of inherent powers are rarely (if at all) present in constituent instruments. Furthermore, emphasizing the idea of inherent powers means insisting that something inheres in the nature of organizations. This, on its part, raises an issue of internal coherence for the theory, for if indeed something follows by nature from an organization, then it cannot be prohibited. As Klabbers has argued, if the notion 'inherent' is to have any meaning, then members should not be able to set such powers aside.[35]

More importantly for present purposes it appears that a claim to inherent powers aims at excluding the members of the organization from the assessment of the extent of powers. Seyersted himself expresses this quite

[32] Seyersted (1961), at 154–155, and 455–456.
[33] See White (1996), at 131–132.
[34] Seyersted (1963), at 47–48.
[35] Klabbers (2002 'An Introduction'), at 77.

clearly in emphasizing that the legal power of the UN to establish and operate military forces, in the absence of specific provisions, arises from an inherent capacity of the UN, and is not something that is done "… in certain emergencies, when the Members present recognized the need for a force and therefore refrained from raising legal difficulties".[36]

In detaching the definition of powers from the intent of the members of the organization, and in relating inherent powers to the object and purpose of an organization Seyersted assumes that this will enable a simple and objective test for defining the scope of powers of an organization.[37] This assumption on its part departs from a possibility of defining the object and purpose in the abstract. Because of this 'objectivist' logic of the inherent powers approach, it is not surprising that it is in the context of courts that such claims to inherent powers can most commonly be found. After all, the idea of objective settlement of disputes lies at the heart of the judiciary.

For this reason it is also all the more interesting to note that in those cases where inherent powers claims have been made (concerning courts), these claims have not been completely coherent. By way of two examples, the *Prosecutor v Tihomir Blaškić* case of the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the *Nuclear Tests* case of the ICJ could be mentioned, since an explicit distinction was made in both cases between implied powers and inherent powers. In both of these cases inherent powers of these bodies were also seen to derive from the mere existence of those courts.[38]

In the case *Prosecutor v Tihomir Blaškić* before the ICTY, the Appeals Chamber elaborated on the principles of implied and inherent powers and their relationship. The Appeals Chamber regarded the notion inherent powers to be preferable with respect to those non-express powers which are judicial in nature, whereas the notion implied powers was seen to better describe an extension of the competence of political organizations. However, it seems clear from the references to ICJ case law, and from the many references to an assessment of the necessity of powers,

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[36] Seyersted (1966), at 160, and at 143–144 explicitly arguing that an assumption that powers are delegated to organizations is false.

[37] Seyersted (2008), at 393–394.

[38] *Prosecutor v Tihomir Blaškić*, ICTY Appeals Chamber, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, Case No. IT-95-14-AR, and *Nuclear Tests Case* (*Australia v France*), (Judgment, 20 December 1974), ICJ Reports 1974 (hereinafter *Nuclear Tests*). For many other examples of inherent powers reasoning, see e.g. Bohlander (2001).

that the Appeals Chamber had a hard time separating the two in practice. Interestingly, the Chamber even explicitly quoted (albeit in a footnote) the reasoning of the ICJ in the *Nuclear Tests* case.[39] In that case the ICJ had emphasized that:

> … [the ICJ] possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, …, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the Court, and to "maintain its judicial character". Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of states, and is conferred upon it in order that its basic judicial function may be safeguarded.[40]

In claiming to possess inherent powers the logic seems to be that there inheres in the nature of the (judicial) body a need for the performance of certain acts. Without such powers, the logic is, the body would lose its (judicial) character. However, what makes the quoted passage of the *Nuclear Tests* case interesting is that the inherent jurisdiction, after stating that the ICJ owes its existence to the consent of states, is characterized as "conferred upon" the Court.[41] Again a question of internal consistency occurs: If something is inherent, how can it be conferred? If anything, the reference to the conferred nature of powers seems to establish a link to the consent of states.[42] In making claims to powers through an emphasis of their inherent nature, the aim is to avoid a necessity assessment of those powers. Yet, the examples above indicate that the language in which inherent powers have been claimed has not been consistent. Inherent powers reasoning cannot escape the fact that there may be disagreement as to those inherent powers. In fact, the dissenting judges in the *Nuclear Tests* case specifically emphasized that all aspects of the jurisdiction of the Court cannot be characterized as inherent. Any such conclusion

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[39] *Prosecutor v Tihomir Blaškić*, ICTY Appeals Chamber, Case No. IT-95-14-AR, para. 25 and esp. corresponding note 27. Also see e.g. para. 33 of the case. In general, see Buteau and Oosthuizen (2001), and Carrillo-Salcedo (1999).

[40] *Nuclear Tests*, ICJ Reports 1974, para. 23.

[41] As to the concepts of 'competence' and 'jurisdiction' there may in reality be no useful way of separating the two, as the essence of the concepts is the same (the generation of the activity of an actor). See Amerasinghe (2003), at 80-82.

[42] See Lauterpacht (1996), at 477–478.

would in their minds bypass the consent of states as a source of jurisdiction.[43]

In the classical image whereby attributed powers and implied powers are pictured as counterparts to one another, an emphasis on the functional efficiency (and hence, autonomy) of an organization is often seen to challenge the position of members as the source of international legal obligations. Inherent powers claims are extreme forms of this challenge. Yet, even a characterization of powers as inherent does not result in a *carte blanche* for the organization to act; for the individual institution the extent of powers can still be challenged.[44] However attractive and important the image of functional independence is, inherent powers claims are not undisputable. A characterization of certain powers as inherent does not remove the possibility of disagreement concerning those powers. By invoking the inherent powers vocabulary a dispute over the extent of powers is rather rephrased as a question about the (judicial) nature of the institution.[45]

3.2. Tracing Member Preferences

3.2.1. *Looking for the Source of International Obligations*

In identifying the character and contents of international legal obligations, interest is commonly turned to sources of international law. The traditional point of departure is Article 38 of the ICJ Statute.[46] In the words of Alvarez:

> [L]awyers … remain in the grip of a positivistic preoccupation with an ostensibly sacrosanct doctrine of sources, … codified in Article 38 of the

[43] *Nuclear Tests,* Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, ICJ Reports 1974, para. 28.

[44] For this conclusion in respect of judicial bodies, see Brown (2005), e.g. at 228–229.

[45] For a discussion on the inherent powers of WTO panels and Appellate body, cf. e.g. Bartels (2006) with Henckels (2008). For a discussion in respect of international criminal tribunals, see Bohlander (2001).

[46] Statute of the International Court of Justice (26 June 1945), 1 United Nations Treaty Series xvi (hereinafter ICJ Statute), Article 38 reads: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto".

> Statute of the International Court of Justice, which originated before most modern IOs were established and which, not surprisingly, does not mention them.[47]

Correspondingly, when dealing with sources not mentioned in that list, such as decisions of organizations, the question is often raised what the character of those decisions is, and how they fit the traditional definition of sources of international law.[48]

However, the question of sources of international legal obligations can also be carried beyond issues of hierarchies and doctrinal boundaries, and be seen as a question concerning the authority of legal instruments. In this form the question of sources is a discussion on the binding force of international law and a search for the origin of that binding character.[49] Locating the source of powers in the constituent instrument of an organization and situating that instrument among other instruments of international law might be helpful for identifying and structuring the range of obligations of members.[50] Yet such a focus is uninformative as a way of exploring the nature of the powers of organizations (as well as the question of why members obey those decisions).[51] The nature of international obligations has by Bederman been described as the Rorschach test for international lawyers in that different images of why international actors obey legal rules also result in different ways of characterizing sources, processes and doctrines of international law.[52]

Historically, what has been characterized as the great epistemological break entailed a move from the divine natural law of the medieval to idea of social order based on the consent of individuals. Gradually consent came to be perceived as both the initial authorization of power, as well as a constraint upon any exercise of power.[53] In international law, the dichotomy between an emphasis on state 'will', and an emphasis on sources of law independent from state 'will', constitutes a similar divide.[54]

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[47] Alvarez (2005), at x.

[48] The traditional image of sources as such has only recently become seriously challenged. See Alvarez (2005).

[49] For a claim that a focus on hierarchies and boundaries of international law is an overly abstract way of dealing with norms, see Kennedy (1987 'International'), at 11–29, with extensive references.

[50] This is a common approach. See Amerasinghe (2005), at 161–163.

[51] See Alvarez (2005), at xvii.

[52] Bederman (2002), at 3.

[53] For a discussion on how the thoughts of Locke and Rousseau departed from the Hobbesian idea of objective interests, see Koskenniemi (2005), esp. at 83.

[54] Spiermann (2005), at 43–44.

In discussing the nature of international legal obligations use is often made of different conceptual pairs as an expression of the dichotomy, such as: naturalism/positivism, community interest/state 'will', or consensualism/non-consensualism.

In emphasizing the consensual nature of international law, legal obligations are seen to arise only through voluntary consent.[55] As Oppenheim put it:

> If the method of the science of international law is to be positive, no rule must be formulated which can not be proved to be the outcome of international custom or of a law-making treaty. … [T]he science of international law has no right to lay down the rule concerned as really existent and universally or generally recognized unless it can be ascertained that the member of the family of nations have customarily or by a law-making treaty accepted the rule.[56]

However, such a consensualist logic also needs to rely on non-consensualist/naturalist elements. In order to overcome accusations of being arbitrary (in the sense that whatever states consent to becomes law), restraints on state consent have been derived for example from historical developments or the requirements of the "nature of the system".[57] A consensual approach cannot explain why consent should bind a dissenter without reference to non-consensualism. On the other hand the contents of a non-consensual norm cannot be explained without referring back to consensual standards.[58]

This familiar tension is present in different ways also in characterizations of international organizations. As a choice between whether to characterize constituent instruments of organizations as treaties or constitutions, it was noted in the making of the 1969 Vienna Convention. Although distinguishing between these two types of instruments was considered during the drafting process of present Article 5, the ILC

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[55] For the definition and an overview of different meanings of consensualism, see Koskenniemi (2005), at 309, note 14.

[56] Oppenheim (1908), at 334.

[57] See Koskenniemi (2005), at 143 *et seq*. on the former, and on the latter at 313 *et seq*. (quote is from note 26). As Koskenniemi puts it, in order to reach closure, recourse will ultimately have to be made to both: "Naturalism needs positivism to manifest its content in an objective fashion. … Positivism needs natural law in order to answer the question 'why does behavior, will or interest create binding obligations?' ", Koskenniemi (2005), at 308.

[58] Kennedy (1987 'International'), at 30–32.

decided to make all articles applicable even to treaties constituting international organizations.[59] This is explicitly stated in the Convention:

> The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.[60]

While this provision basically defines constituent instruments as treaties, its scope is nevertheless qualified in favor of the "relevant rules of the organization".[61] The dual character of constituent instruments has also been recognized by the ICJ, more recently in the *WHO* opinion:

> … the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. … [T]heir character … is conventional and at the same time institutional; ….[62]

Organizations can on the one hand be pictured as representing a community interest and as independent actors charged with the (functional) task of restraining the acts of sovereign states.[63] On the other hand this can be contrasted with an approach to organizations as a web of inter-state relations.[64]

As to the United Nations, the organization can be characterized both as intergovernmental and transnational, the former taking hold of the UN as

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[59] For a summary of the discussions and the work of the Special Rapporteurs, see Rosenne (1989), at 200–211.

[60] Article 5, 1969 Vienna Convention.

[61] The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (21 March 1986), 25 International Legal Materials 543 (hereinafter 1986 Vienna Convention), Article 2(1)(j) defines "rules of the organization" as entailing the constituent instrument, decisions and resolutions adopted by the organization, and the established practice of the organization. Also see Rosenne (1989), at 190–191.

[62] *WHO,* ICJ Reports 1996, para. 19.

[63] A claim that the attributed powers of organizations are simply epiphenomenal of state power is most visibly challenged by the EU. However, also experiences from the human rights sphere indicate that organizations promote policies that have not (initially) been supported by any strong state. Barnett and Finnemore (1999), at 714–715.

[64] Compare Arend (1999), at 44-45 arguing that from the point of view of creation of international law organizations are not truly independent actors, and Vignes who claims that "… in reality … one cannot but acknowledge that in their constitutional and institutional existence, organizations have no real autonomy as they depend so much on the good will of their member states", Vignes (1983), at 839, with Alvarez (2007), at 679, and Rosenne (1972), at 226–227.

an association of states, the latter emphasizing an image of the organization that is greater than the sum of the interests of the member states. The dichotomy can also be identified in interpretations of individual articles of a constituent instrument. Article 24(1) UN which is the general grant of authority to the Security Council reads:

> In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.[65]

This article can be read in different ways. The article can be seen to emphasize the link to UN members through the reference to the conferred nature of Security Council powers, whereas for others the essence of the article is that it emphasizes the performance by the Security Council of its duties (hereby even acting as something resembling a world legislature). This demonstrates that instead of providing normative closure on the question of the source of legal obligation, constitutional provisions can themselves be subjected to foundational debate.[66]

Whether an international organization can make binding decisions or not, does not have a decisive bearing on the characterization. The UN, for example, can be characterized as transnational even beyond a focus on legal powers through the fact that some missions of the UN do not involve states (such as humanitarian assistance), that states might be reluctant to get involved in some activities (as in exposing human rights violations or prosecuting war crimes), that the UN constituency involves NGOs (although not as full members), and that it has its own identity to which individuals and domestic groups can turn.[67] von Bogdandy even claims that all institutions display autonomous features already due to the fact that all institutions have a secretariat of some sort. In addition many organizations make majority decisions at least on some questions.[68] For many authors the varied forms in which organizations influence international law-making, bear with it a promise of more "efficient, politically legitimate, and democratic" standards – a development in which a redefinition

[65] UN Charter, Article 24(1).
[66] Compare Werner (2007), at 358 and 361, with Delbrück (2002), at 449.
[67] For one account, see Cronin (2002).
[68] Von Bogdandy (2010), at 752.

of the role of state consent as the basis for legal obligations is desirable (and necessary).[69]

The counter image underlines that organizations are forum in which states participate and cooperate in different forms. Organizations are based on international agreements that contain rights and obligations for the contracting parties.[70] In organizations with few concrete tasks and where even the existence of independent organs is in some doubt (perhaps better labeled 'institutions'), the activities of those actors can be difficult to phrase in terms of a challenge to the consensual nature of international law. Instead, the institution stands out as practically indistinguishable from its membership. In such a case it is hard not to regard the common 'will' formulated as an aggregate of the 'will' of the members.[71] Further, even in organizations where the means at the disposal of the organization are more tangible, members are the ones who vote for the adoption of decisions. Although organizations may perform functions through organs where members are not even directly represented (such as the EU Commission), members are the ones who eventually vote for the adoption of those decisions. In this way, whatever the impact (or lack of such) of an organization upon international law-making, members can always be located behind that impact in one form or another.

This qualifies the non-consensual image of organizations, since the autonomy of an organization hereby appears as the preferred form of cooperation of members. Perhaps most visibly this has been discussed in EU law as a question of who are the *Herren der Verträge*. On the one hand the role of members is emphasized through pointing out that members vote on policies and decisions in the Council of the European Union. Members are also the drafters of the founding treaties, and have the possibility of amending those treaties.[72] The competence of the ECJ to determine the limits of EU powers has been perceived as a particularly strong challenge to the image of members as *Herren der Verträge*.[73] Yet, on the other hand, preferences of states can also be located behind assigning

[69] See e.g. the concluding chapter of Alvarez (2005), quote at 650. In a similar vein e.g. Tietje regards the WTO a close failure, because of the emphasis of the organization on the will of its members as the source of its activities. Tietje (2010), at 814.

[70] Detter (1965), at 24–25.

[71] Schermers and Blokker (2003), at 35-36 mention GATT as an example. Also see Klabbers (2002 'An Introduction'), at 12–13.

[72] See Hartley (1999), at 127–128, and de Witte (2000), at 304.

[73] For a classical debate, see Schilling (1996), and Weiler and Haltern (2000).

such a role to the ECJ to begin with. Weak states have emphasized and supported a strengthening of the ECJ in order to 'equalize' power-relations. More powerful states have on their part seen economic benefits with a federalization of Europe, and have therefore preferred a strong ECJ as an engine of that development.[74] Against this background, the autonomy of the EU legal order appears to be a sum of different strategies of its members.

The image of organizations as an interplay of relations between states suggests that diverging views on powers of organizations do not only emerge as a dichotomy between members and the organization, but also between members. Or more correctly, while a dispute over the extent of powers of an organization may manifest itself between an organ of the organization and a member (or members), members can also be located behind the claim to powers of that organ. This makes a disagreement between members and the organization on how to construct the powers of an organization, at heart, a dispute between members. For this reason, for example in the ongoing discussion on the powers of treaty-monitoring bodies, Pellet was careful to conclude that "the attitude of the States concerned is not such as would establish the existence of contrary opinio juris" to the practice of the Human Rights Committee to determine the status and effect of a reservation (where this is required in order to permit the Committee to carry out its pre-existing functions). Because of this absence of contrary opinio juris, Pellet concluded, there is no use of denying such a power for the Committee. Similarly both the ICJ and the dissent in the *WHO* opinion examined the practice of the WHO ("establishing an agreement between members of the Organization") in support of their interpretation of powers.[75]

3.2.2. *Locating Member Consent*

While differences between members can be pinpointed as the source of different constructions of powers of organizations, the consequent question becomes; how does the consent of members shape the scope of legal powers? In seeking to explain decision/law-making by organizations, different ways of locating member consent serves to present different images of institutional autonomy. In a restrictive approach to organizations consent is demanded in respect of every single decision made. In this logic

[74] For a discussion, see Alter (1998), esp. at 141–142.

[75] ILC, Second Report on Reservations, at 70, para. 210, and *WHO*, ICJ Reports 1996, para. 27, and dissenting Judge Weeramantry, at 152–153.

decisions of organizations, especially if they require unanimity, will hereby become analogous to multilateral treaties.[76] The logic of such a 'treaty analogy' can be found for example in critical reactions to claims to powers by institutions. When the Human Rights Committee in General Comment 24 in 1994 claimed to possess a power to determine the compatibility of reservations of state parties with the ICCPR, dissenting states took hold of the need for express attribution of such a power. While concurring with the HRC in that the Committee must be able to take a view on reservations if this is required for the Committee to perform its functions, the United Kingdom emphasized that any binding competence could not arise implicitly. Such a power, the UK claimed, could not come into being in face of a silence or absence of law. Instead, an amendment of the ICCPR would be required.[77]

While article 51 of the ICCPR (on amending the Covenant) does not require unanimous decision-making, it does however echo the general rule of amending treaties of the Vienna Convention on the Law of Treaties in that the amendment only becomes binding in-between consenting state parties.[78] In this way the emphasis on the need of express attribution (through amendment) by the UK, was in effect a way of seeking to provide all state parties an opportunity to express their view on the matter. At the same time this underlined the treaty-character of the ICCPR regime.

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[76] The approach can be traced back to the reasoning of the PCIJ in *Railway Traffic between Lithuania and Poland* (*Railway Sector Landwarów-Kaisiadorys*) (Advisory Opinion, 15 October 1931), PCIJ Publications 1931, Series A/B, no. 42, at 116 where Lithuania and Poland were found to be bound by a resolution (of the Council of the League of Nations) due to the fact that the states had participated in the adoption of that resolution. Also see Klabbers (2002 'An Introduction'), at 203.

[77] Human Rights Committee, General Comment 24, and Observations of States parties (UK) (Official Records), at 132–133, paras 11–12.

[78] ICCPR, Article 51 reads: "1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favor a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval. 2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes. 3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.".

The ECJ also seemed to express a similar logic in the *ECHR* case, when claiming that Article 352 TFEU could not be used as the basis of accession to the ECHR, since this would constitute a *de facto* amendment of the treaty without following the proper amendment procedure.[79] Interestingly, in this case even unanimity in the Council (which Article 352 requires) was claimed to be insufficient. Instead, by emphasizing the formal amendment procedure also national parliaments would have been brought into the process of expanding the legal order.

Yet, in order to remain viable an organization may have to adapt itself to changing circumstances. While changing the express wording of the constituent instrument through the formal amendment process would guarantee all members a say in the matter, the amendment process is often rigid. It cannot hereby be considered a functional alternative to the interpretation of competence that organizations make as part of their everyday work, including the occasional finding of implied powers.[80] As a theory of law-making the treaty analogy has been accused of failing to appreciate that cooperation through organizations results in something more than the sum of its parts, and for not being easily reconcilable with the actual characterization of organizations as actors (and legal persons) in their own right.[81] In the alternative image, then, it would not be necessary for all members to express consent in every single case, since:

> … once States have adhered to a treaty, a Constitution, which establishes an international organisation they have agreed to assume certain legal obligations in the future without their actual consent in the individual case.

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[79] *ECHR*, [1996] European Court Reports I-1759, paras 29–30.

[80] Although all amendments of the constituent instruments for example of the UNESCO and the WMO have entered into force on the date of their approval, more commonly amendments take considerable time to enter into force. This is particularly true if ratification by member governments is required. The amendments of the UN Charter adopted so far have all entered into force in 2-3 years after their adoption, whereas the first amendment of the ILO constitution took 12 years to enter into force. Schermers and Blokker (2003), at 741–742.

[81] Klabbers (2002 'An Introduction'), at 65-66 and 203-204. A similar logic can also be used when the constituent is another organ/organization. As the Appeals Chamber of the ICTY put it in *Prosecutor v Dušco Tadić*, para. 15: "To assume that the jurisdiction of the International Tribunal is absolutely limited to what the Security Council 'intended' to entrust it with, is to envisage the International Tribunal exclusively as a 'subsidiary organ' of the Security Council (see United Nations Charter, Arts. 7(2) & 29), a 'creation' totally fashioned to the smallest detail by its 'creator' and remaining totally in its power and at its mercy", *Prosecutor v Dušco Tadić*, ICTY, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72 (2 October 1995).

> This principle appears to be one particular aspect of the rule *pacta sund servanda* which governs the underlying Constitution.[82]

In this logic, by signing the constituent instrument, members have given their consent "to all 'necessary' primary acts".[83] This theory of abstract consent is used to explain why member states are bound by agreements concluded between the organization and other international entities, as well as why members are bound to respect unilateral acts.

Elias and Lim have made a similar claim in respect of the UN Security Council. The fact that a member of the UN may find itself bound by activities of the UN Security Council although the state has never consented to that specific act of the Security Council, can nevertheless be seen to follow from the consent of the state due to the indivisibility of the consent once awarded. This means that once consent to a constituent instrument has been awarded, then that consent will be subject to the regulation pre-existing within the international legal order:

> By lending itself to the operation of an autonomous legal order, the State submits itself to international legal rule … In such contexts, *consent is a question of law*, not one of fact to be determined by a State whose consent is at issue.[84]

This was also how claims to powers in respect of the Human Rights Committee were phrased. In General Comment 24 the Committee emphasized that ICCPR state parties have given their abstract consent to the Committee for developing the ICCPR (and the powers of the Committee):

> The Committee's role under the Covenant, … entails interpreting the provisions of the Covenant and the development of a jurisprudence. Accordingly, a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty.[85]

The US, in expressing its critical stance towards a further empowerment of the Committee, was careful to point out that in its mind, this could not mean that states would automatically have to accept the interpretations

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[82] Detter (1965), at 322.

[83] Detter (1965), at 322.

[84] Elias and Lim (1998), at 240–248 (quote at 248, emphasis in original). This means that consent, for example to the jurisdiction of a third-party decision-maker to decide a case according to law is consent "to have the substantive rules of law, including the rules on identifying the law *and their consensual character*, applied in the case", Elias and Lim (1998), at 199 (emphasis in original).

[85] Human Rights Committee, General Comment 24, para 11.

of the Committee. This was another way of saying that despite the abstract consent provided to the Committee for the performance of its tasks, the decision of whether to give effect to those interpretations still rests with ICCPR state parties – in effect a treaty analogy claim.[86]

In both the treaty analogy and the theory of abstract consent, members are located as the source of legal obligations. The difference between these two ways of reasoning follows from how consent is seen to enter the decision-making of organizations. At the same time the two ways of locating member consent serve to transmit very different images of the autonomy of organizations. Departing from an initial empowerment of an organization, the idea of abstract consent is a tool by which to grant an organization a degree of autonomy in defining its powers. A state that disapproves of an expansion of powers would claim that the interpretation transcends the abstract consent provided. The way of ensuring that its consent is taken into account becomes to underline the use of the formal amendment procedure (which in essence is a process of renegotiating the treaty among the entire membership).

3.3. A Dual Image of Organizations

Different perceptions on what an organization can and cannot do, are in legal terms expressed as a question of extent of powers. The most common way of utilizing the doctrines of attributed and implied powers presents the former as a way of emphasizing the limited character of organizations, whereas the latter underlines the autonomy and functional effectiveness of an organization. By way of an example, the ICJ in the *WHO* opinion did not say simply that the WHO lacks the implied power it claimed, but had recourse to the principle of speciality to make its point. It did this, as the doctrines carry with them certain associations. By resurrecting the attributed powers doctrine in the *WHO* opinion, the Court not only expressed a restrictive stand on the powers of the WTO, but underlined that the claimed power would transcend the consent of members (at least as interpreted by the ICJ). Above all, the ICJ was able to present its interpretation in the language of general principles (or, doctrines).

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[86] See Observations of States parties (US) (Official Records), at 126: "… the Committee appears to dispense with the established procedures for determining the permissibility of reservations and to divest States Parties of any role in determining the meaning of the Covenant …".

The dichotomous use of the two doctrines has its roots in the dual nature of legal powers. On the one hand an exercise of powers serves to constitute organizations as autonomous actors. The more far-reaching powers an organization enjoys, the more the decision-making by the organization will affect its members. On the other hand member consent is the source of the autonomy of organizations. The extent of powers of an international organization is therefore an expression of member desires. The construction of powers of any organization is always a result of a balancing act between these images of dependence and independence. When members agree on the extent of powers, this balancing act will seem absent. In some cases an agreement on the necessity of a power may even be so widely shared that the organization seems to possess that power inherently - as a result of its very existence. Yet, organizations can not possess any powers by automacy. A member can always object that a particular construction of powers transcends its consent. Blokker has expressed the idea of balancing between interests of members rather crudely in claiming that organizations either become redundant because they do not respond effectively, or they become redundant because they respond so effectively that they lose the support of too many members.[87] Either way, the redundancy will have its source in the membership.

Recognizing that the exercise by an organization of its powers (and the very existence of those powers in the first place) has its source in the members of the organization, not only underlines the importance of state consent as the source of obligations, but in addition, it also enriches the image of organizations as complex interplays of different relations in between member states.[88] Although the views of members may concur on some questions (or even most), this will not always be the case. There need not be agreement within the community of members of an organization as to what to make of the independence of the organization, or in other words, what the proper extent of the powers of the organization is. This means that although the exercise of powers by an organization may seem unitary, it is often the result of deliberation and contestation.

This contestation can take different forms. As the *WHO* opinion demonstrates, questions of powers need not always turn on balancing member sovereignty concerns with the effectivity of an organization as such (although, any interpretation of the powers of an organization will

[87] For examples, see Blokker (2002), at 300.
[88] Bederman (1996), at 371–372.

inevitably have a bearing upon this balance). A denial of powers can be seen as a question of preference of one organ/organization before another (and thus, as the preference e.g. of a particular form of representation or voting before another). After all, a change of venue not only affects whose consent counts, but may also change the way in which that consent enters. Likewise, a desire to make an organization more effective need not automatically indicate a desire to remove the source of international legal obligations from the ambit of states. To the contrary, a (weak) state may wish to develop the powers of a particular organ/organization in order to better present and protect its sovereignty concerns.[89]

[89] For one example, see Krisch who discusses the dispute over genetically modified organisms and the permissibility of sale and use as foodstuff of such organisms. While this is substantively a conflict between the US and the EU, institutionally the conflict is between the EU and the WTO. While for the US the issue is mainly trade related, it emphasizes the use of the WTO Dispute Settlement Body (and hence an international constituency). The EU phrases the matter as a question about the values and policies of the European polity. As a consequence Europeans insist on the tie to the European national constituency. Krisch (2006), at 256–259.

CHAPTER FOUR

ON THE INHERENT AMBIGUITY OF POWERS CLAIMS

A historical overview on the attributed and implied powers doctrines reveals some characteristics of the reasoning through them. In the most common use, an emphasis on attribution serves as a way of underlining the limits to powers of organizations. Any claim to implied powers will on its part aim at making an organization more effective and at expanding its sphere of action. At the same time any exact definition of the doctrines has stayed out of reach. The evasiveness of the line between attributed powers, *effet utile*, and implied powers demonstrates this, as does the different constructions of the implied powers argument by the ICJ. In fact, the critique of the idea of 'trends' in reasoning on powers of organizations indicated that there might be more to the relationship between attributed and implied powers than the dichotomous image manages to convey. This suspicion grew even stronger by the fact that member consent was found to underlie any construction of powers. While an overview of the history of reasoning on powers of organizations suggested that attributed and implied powers are commonly used as counterarguments to each other, it will be seen below that a discourse on extent of powers can also take place within the doctrines individually.

4.1. The Elusiveness of Implied Powers

4.1.1. *Implied Powers or Implied Functions?*

Before exploring the nature of implied powers reasoning more in detail, a preliminary question of how an implied power is to be identified should be addressed. Are all instances of widening the competence of organizations exercises of implied powers? The issue was already briefly touched upon in discussing the constitutive effect of powers. Further light on this question can be shed through focusing on the distinction between powers and functions.

The preamble to the 1986 Vienna Convention on the Law of Treaties states that: "…international organizations possess the capacity to conclude treaties which is necessary for the exercise of their functions and

the fulfillment of their purposes", indicating that the actual treaty-making competence is related not only to purposes, but also to functions.[1] In such a distinction between powers and functions, powers describe the range of activities that an organization is entitled to undertake whereas functions describe the tasks of an organization. While both are tools for defining how the organization works towards its object and purpose, the difference is that functions of an organization indicate what activities the organization is engaged in (in order to reach its purpose), whereas powers are the means for performing that function.[2]

In this vein the function of the UN Security Council is to bear the main responsibility for maintaining international peace and security. It has the right to engage in this activity, whereas the powers by which to perform this function are more closely enumerated in Chapters VI–VIII (and entail activities such as initiating investigations, negotiations, blockades or operations by military forces). To use another example, in exercising its function of purchasing and selling tin for the purpose of stabilizing tin prices, the International Tin Council had the competence to enter into agreements on purchasing and selling tin.[3] This is also the way the ICJ used the terms in *Reparation for Injuries* opinion:

> It must be acknowledged that its Members, by entrusting certain functions to it [the UN], with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.[4]

However, it is not always possible to uphold such a clear distinction. Rama-Montaldo, for example, is critical of any attempts at separating functions and powers. Instead he claims that most constituent instruments of international organizations are drafted in a manner that does not make such a distinction, but rather use the two notions indiscriminately.[5] As has been seen earlier, functions and powers may become next to indistinguishable. This is the case when implied powers are derived for the effective performance of pre-existing powers (*effet utile*). In this case the pre-existing power could be characterized as a function or a goal that the implied power serves to fulfill.[6]

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[1] Preamble, 1986 Vienna Convention.

[2] Magliveras (1999), at 256–257.

[3] The example is from Bekker (1994), at 75.

[4] *Reparation for Injuries,* ICJ Reports 1949, at 149.

[5] Rama-Montaldo (1970), at 149–151. On the distinction between purposes and functions, see Bekker (1994), at 45–47.

[6] Also see Ducat and Chase (1992), at 144, who discuss the US Supreme Court case *McCulloch v The State of Maryland.*

Moreover, an overly strict distinction between functions and powers may fail to capture changes in the use of powers. When the UN Security Council acts, based on an expansive interpretation of Article 39 (concerning the determination of the existence of a threat to the peace, breach of the peace, or act of aggression), does this automatically imply the existence of additional powers (i.e. powers beyond those enumerated in Chapter VII of the UN Charter)? In the sense that such an expansive interpretation creates new ways for fulfilling the object and purpose of the UN, the answer could be affirmative. The notion "threat to the peace" has been expanded to also encompass global threats posed by non-state actors. This development has also been coupled with a broadening of the set of measures that the Security Council can impose on states.[7]

However, such a development need not necessarily be the case. A characterization of a novel situation as a "threat to the peace" need not provide the Council with additional means to begin with, but can rather constitute a case of expanding the applicability of existing powers. A classic example of such a move would be the characterization of not only inter-state, but also intra-state conflicts, as a "threat to the peace".[8] If no powers are added, then the change could at least as a semantic issue be more properly described as a case of 'implied functions'.

Another illustration of the complex relationship between functions and powers can be derived from the North Atlantic Treaty Organization (NATO) context. The end of the cold war posed serious problems for NATO. Many authors predicted that the disappearance of its adversary (mainly the Soviet Union, and with it, the Warsaw Pact) would entail the withering away of NATO as well. After all, the very purpose of NATO was to defend its members against military threats. However, NATO persisted and is by many today considered to be one of the most important security organizations. The actions that NATO has undertaken in recent years as a response to international crises, both with and without a UN mandate attest (in different ways) to such a conclusion.[9] Whatever the decisive incentive for the persistence of NATO is, this development has entailed a changed role for the organization through a redefinition of its tasks.[10]

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[7] Rosand (2005), at 555.

[8] Notably, even a characterization of intra-state conflicts as a "threat to the peace" does, however, commonly build on the international dimension of the crisis by emphasizing international humanitarian concerns, or the impact on neighboring countries, de Wet (2004 'The Chapter'), at 150–175.

[9] For an overview of the mandate issues, see Morton (2002).

[10] For different ways of explaining the persistence of NATO, see McCalla (1996). The new tasks of NATO were spelled out in *The Alliance's Strategic Concept*, Approved by the

The reform has not entailed a change in the legal powers of NATO. Instead, the development has been described as a " 'creeping' reform of the functions of NATO".[11]

It seems clear from these examples that there are many ways in which to implicitly modify the activities of an organization. First of all, the scope of application of a power may change (as in the case of a widened definition of "threat to the peace" (Article 39 UN), or the change in the functions of NATO). Secondly, completely new powers may be derived which had previously been the property of member *domaine resérvé*. Thirdly, the character of a power may change (as in the case of the move from UN peacekeeping to peace enforcement). The end result of all of these changes is an implicit modification of the scope of activity of an organization.[12] However, there is also an important difference between these: redefining the functions of an organization (NATO) or the scope of a threshold provision for the use of powers (Article 39 UN) is a different act from that of constructing an implied power in that it is only when new powers are created that the body of legal means available to the organization expands.

4.1.2. *Different Expressions of a Functional Character*

At the heart of the implied powers argument lays the finding of a functional necessity. Whenever there is a perceived need for improving upon the performance of an organization, be it for the fulfillment of purposes or in order to avoid that express powers become nugatory, no further arguments are needed for justifying that activity than its functional necessity. The word 'functional' apparently resonates with the ideology of functionalism.[13] Functional necessity reasoning could be distinguished from functionalism by the fact that the latter is something of a macro theory on the instrumental value of organizations, whereas functional necessity is more closely related to the identifiable purposes and functions of the individual

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Heads of State and Government participating in the meeting of the North Atlantic Council in Washington D.C. on 23rd and 24th April 1999 (available at www.nato.int).

[11] Dekker and Myjer (1996), at 416.

[12] For many examples of how the scope of legislative powers of the UN Security Council has changed, see Akram and Shah (2005), at 448–449. The implied powers reasoning of the ICJ also displays some grammatical differences. The court speaks both of powers arising by necessary implication as being essential to the performance of duties, of powers necessitated by the discharge of functions, and of powers that are appropriate for the fulfillment of stated purposes. At least semantically these formulations are different from one another. See Amerasinghe (2005), at 97, and Campbell (1983), at 532–533.

[13] On functionalism, see above Chapter 2.2.1.

organization. As a device whereby the pursuit of the purposes and functions of an organization is made more effective, functional necessity reasoning is one of the means by which organizations can self-adjust along with changing expectations.[14]

The functional nature of organizations is visible in different ways. The idea of functional necessity can be found at the heart of privileges and immunities of organizations and their employees. The UN Charter, for example, states that "The organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes".[15] The functional logic underlying this provision is that it would be contradictory to set up an organization and endow it with certain tasks, but then to thwart the organization in the pursuit of its purposes. Instead, the UN is granted those privileges and immunities that it considers necessary.[16]

As to the exercise of powers, as far as powers are expressly provided for in the constituent instrument of an organization there is no further need for functional justification of their exercise. It is rather when the express powers appear as insufficient that functional necessity is invoked, most notably through claiming the existence of implied powers. As was seen in discussing the case law on constructing powers of organizations, at some point there may have been such an unquestionable enthusiasm towards organizations that practically any expansion of the powers of organizations seemed a foregone conclusion. Nevertheless, as legal persons organizations have never possessed a freedom to act similar to that of states. This restricted character of organizations is the basic distinguishing feature between states and organizations. As the ICJ put it: whereas states are in principle free to perform any act they choose, organizations are restricted by their purposes and functions.[17] If there is agreement among members on an expansion of powers this restriction may seem non-existent. Nevertheless, any claim to implied powers must build upon the necessity of that power for the fulfillment of one of the purposes of the organization. This link is also inherent in Article 352 TFEU in that the implied powers arrived at shall be an "appropriate measures". The notion invokes the proportionality of the implied power. Any use of Article 352 must therefore be tied to the attainment of an objective of the EU and

[14] Bekker (1994), at 44.
[15] Article 105, UN Charter.
[16] Singer (1995), at 65–66.
[17] *Reparation for Injuries*, ICJ Reports 1949, at 179–180.

prove that the implied power remains within the proportions of that objective.[18]

A similar construction is present in all articles providing for functional development of organizations. The Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, in establishing the International Seabed Authority provides that:

> … The powers and functions of the Authority shall be those expressly conferred upon it by the Convention. The Authority shall have such incidental powers, consistent with the Convention, as are implicit in, and necessary for, the exercise of those powers and functions with respect to activities in the Area.[19]

As to the specialized agencies of the UN, the International Bank for Reconstruction and Development (IBRD) Board of Governors and the Executive Directors:

> … to the extent authorized, may adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Bank.[20]

The International Development Association (IDA) Articles of Agreement provide that:

> In addition to the operations specified elsewhere in this Agreement, the Association may: … (vi) exercise such other powers incidental to its operations as shall be necessary or desirable in furtherance of its purposes.[21]

In the same fashion the Agreement Establishing the International Fund for Agricultural Development (IFAD) states:

> In addition to the operations specified elsewhere in this Agreement, the Fund may take such ancillary activities and exercise such powers incidental to its operations as shall be necessary in furtherance of its objective.[22]

This is almost identical to the provision in the International Finance Corporation (IFC) Articles of Agreement:

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[18] See TFEU, Article 352.

[19] Agreement relating to the Implementation of Part XI of the UN Convention on the Law of the Sea of 10 December 1982 (28 July 1994), 33 International Legal Materials 1309, Article 157(2).

[20] Articles of Agreement of the International Bank for Reconstruction and Development (22 July 1944), 2 United Nations Treaty Series 134, Article V, Section 2(f).

[21] Articles of Agreement of the International Development Association (26 January 1960), 439 United Nations Treaty Series 249, Article V, Section 5.

[22] Agreement establishing the International Fund for Agricultural Development (13 June 1976), 1059 United Nations Treaty Series 191, Article 7, Section 3.

> In addition to the operations specified elsewhere in this Agreement, the Corporation shall have the power to: … (v) exercise such other powers incidental to its business as shall be necessary or desirable in furtherance of its purposes.[23]

The Agreement Establishing the Common Fund for Commodities (CFC) states that the fund shall:

> … (c) exercise such other powers necessary to further its objectives and functions and to implement the provisions of this agreement.[24]

To serve its objective the Multilateral Investment Guarantee Agency (MIGA) shall:

> … (c) exercise such other incidental powers as shall be necessary or desirable in the furtherance of its objective …[25]

In a slightly different manner the International Maritime Organization (IMO) Assembly is empowered:

> … to take such action as it may deem appropriate …[26]

The Convention establishing the World Intellectual Property Organization (WIPO) states that:

> In order to attain the objectives described in Article 3, the organization, through its appropriate organs, … (vii) shall take all other appropriate action.[27]

The General Assembly on its part is empowered to:

> … (x) exercise such other functions as are appropriate under this convention.[28]

The functions of the Food and Agricultural Organization (FAO) state that:

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[23] Articles of Agreement of the International Finance Corporation (11 April 1955), 264 United Nations Treaty Series 117, Article III, Section 6.

[24] Agreement establishing the Common Fund for Commodities (27 June 1980), 1538 United Nations Treaty Series 3, Article 16(D).

[25] Convention establishing the Multilateral Investment Guarantee Agency (11 October 1985), 1508 United Nations Treaty Series 99, Article 2.

[26] Convention on the International Maritime Organization (6 March 1948), 289 United Nations Treaty Series 48, Article 15(k).

[27] Convention establishing the World Intellectual Property Organization (14 July 1967), 828 United Nations Treaty Series 3, Article 4.

[28] Convention establishing the World Intellectual Property Organization (14 July 1967), 828 United Nations Treaty Series 3, Article 6(2).

> It shall also be the function of the Organization: … (c) generally to take all necessary and appropriate action to implement the purposes of the Organization as set forth in the Preamble.[29]

The International Telecommunications Union (ITU) Convention empowers the Council to:

> … take any necessary steps, with the agreement of a majority of the Members of the Union, provisionally to resolve questions not covered by the Constitution, this convention, the Administrative regulations and their annexes and which cannot await the next competent conference for settlement.[30]

The United Nations Industrial Development Organization (UNIDO) General Conference is empowered to:

> … take any other appropriate action to enable the organization to further its objectives and carry out its functions.[31]

The World Health Organization (WHO) constitution provides that:

> In order to achieve its objective, the functions of the Organization shall be: … (v) generally to take all necessary action to attain the objective of the Organization.[32]

Further, the functions of the Health Assembly shall be:

> … (m) to take appropriate action to further the objective…[33]

Judge Weeramantry, dissenter to the majority in the *WHO* opinion of the ICJ in fact relied on Article 2(v) in claiming that the WHO is not prevented from dealing with issues of peace and security:

> WHO is also empowered by Article 2(v) of its Constitution "generally to take all necessary action to attain the objective of the Organization". The objective of the Organization is set out in Article 1 to be "the attainment by all

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[29] Constitution of the Food and Agriculture Organization of the United Nations (16 October 1945), in Food and Agriculture Organization, Basic Texts of the Food and Agriculture Organization of the United Nations, 2004 (Volumes I and II), Article I (3).

[30] Convention of the International Telecommunications Union (22 December 1992), in International Telecommunication Union, Collection of the Basic Texts of the International Telecommunication Union adopted by the Plenipotentiary Conference 2007, Article 4, (11(13)).

[31] Constitution of the United Nations Industrial Development Organization (8 April 1979), 1401 United Nations Treaty Series 3, Article 8(3)(f). See also Article 9(4)(h).

[32] Constitution of the World Health Organization (22 July 1946), 14 United Nations Treaty Series 185, Article 2.

[33] Constitution of the World Health Organization (22 July 1946), 14 United Nations Treaty Series 185, Article 18.

> peoples of the highest possible level of health". The highest possible levels of health must obviously be achieved both by curative and preventive processes, there being no restriction to the former.[34]

The World Meteorological Organization (WMO) enumerates in the last sentence of the article on the functions of Congress that:

> … Congress may also take any other appropriate action on matters affecting the organization.[35]

Although these formulations are similar at first sight, they do show some variation in design. Some of the provisions empower certain organs of the organization (IBRD, IMO, WIPO, FAO, ITU, UNIDO, WHO, WMO). Other articles target the organization in general (IDA, IFAD, IFC, CFC, MIGA, WIPO). From a member perspective there certainly is a difference between allowing a plenary organ with no binding powers to take "necessary measures" for the performance of a specific function, and the tool that Article 352 TFEU constitutes. On the other hand, as international case law testifies (and especially the *Effect of Awards* opinion of the ICJ), there is nothing that would *prima facie* exclude the implication by an organ (for the organization at large) of even more far-reaching powers than it originally possessed itself.[36]

Many of the articles also use notions such as 'incidental' and 'ancillary' (International Seabed Authority, IDA, IFAD, IFC, MIGA), while others contain no such specification. However, whether such notions should be read in their lexical meaning as indicating a subordinate or supplementary (and hereby a restricted) character is uncertain. Both the US Supreme Court in the *McCulloch v The State of Maryland* case and the ICTY in the *Prosecutor v Dušco Tadić* case used the notion 'incidental powers' as synonymous to implied powers. Yet the reasoning in these two cases was not identical. While the reasoning in the *McCulloch* case on the powers of the US Congress could be read as an implication of powers for the exercise of express powers, the ICTY reasoning was clearly broader and derived powers from the "exercise of the judicial function".[37] The characterization of a

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[34] Dissenting Opinion by Judge Weeramantry, *WHO*, ICJ Reports 1996, at 133.

[35] Convention of the World Meteorological Organization (11 October 1947), 77 United Nations Treaty Series 143, Article 8.

[36] On the *Effect of Awards* opinion, see above, Chapter 2.2.1.1.

[37] See *McCulloch v The State of Maryland* et al., 1819, 17 US (4 Wheat.) 316, at 388, 406, and 421, and *Prosecutor v Dušco Tadić*, ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72 (2 October 1995), para. 18 where the Appeals Chamber reasoned that *Kompetenz-Kompetenz* "… is a necessary component in the exercise of the judicial function …" and a "major part, of the

non-express power as incidental does not hereby necessarily seem to imply a more narrow scope of that power.

What all of the articles quoted above do have in common, is that the powers implied are to be necessary or appropriate for the achievement of the objectives (of the organ or the organization). Some organizations even combine the two, similar to Article 352 TFEU. For example the FAO is to "take all necessary and appropriate action" for implementing its purposes, whereas the IBRD Board of Governors and the Executive Directors may adopt "necessary or appropriate" rules and regulations to conduct the business of the Bank. All of these functional provisions hereby not only bring with them the possibility for institutional development, but also contain a reminder of the limits of the functional character of organizations.

4.1.3. *The 'Problem' with Functional Necessity Claims*

That the functional necessity concept can be put to various use has been clear from the early days of conceptualization. Virally recognized a triple quality to the concept. Functional necessity can serve as a tool for authorization, and for setting a standard of measure. Functional necessity reasoning hereby determines and constitutes the justification of activities. The third quality identified by Virally is that of obligation. This works in two directions. Functions create obligations for states (not to impede the organization in its pursuit of its purposes), but also obliges the organization both to carry out its functions, and not to assume functions other than those attributed to it. Whereas the first two underline the enabling function of the concept, the third quality emphasizes the potentially restricting effect of emphasizing the functional character of organizations.[38]

This two-fold quality was also dealt with by the ILC in its work on Relations between States and International Organizations. In the course of that work, Al-Baharna recognized in the formulation by the ICJ of the powers of the UN in the *Reparation for Injuries* opinion both positive and negative implications, the positive implications being that organizations

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incidental or inherent jurisdiction of any judicial or arbitral tribunal ….". In doing this the Appeals Chamber seemed to reconcile incidental powers with inherent powers. As has been discussed earlier, a distinction between inherent powers and implied powers may also be difficult to uphold. See above, Chapter 3.1.2.

[38] This builds on M. Virally, "La notion de fonction dans la théorie de l'organisation internationale", in S. Bastid et al., *Mélanges offerts á Charles Rousseau – La communauté internationale*, 1974, Pedone, as reproduced in Bekker (1994), at 48–51.

can transcend their constituent instruments, the negative being that the powers are at the same time limited to those that are functionally necessary.[39] The functional necessity concept can hereby be used both as the means by which an organization can make full use of its independent capacities (be it through powers or immunities), and as a tool by which to limit the reach of activities of organizations.

A common presumption is that there inheres in the functional necessity concept some guidance regarding its contents in that any use of the concept will automatically be geared towards increasing the functionality (or, effectiveness) of organizations.[40] In a very basic sense there might be some merit to such a presumption. As Singer notes, it is difficult to find an organization whose statement of purposes would resist a functional reading. The aim of the International Institute of Refrigeration, for example, is to:

> [C]ollaborate closely in the study of scientific and technical problems relating to refrigeration and in the development of the uses of refrigeration which improve the living conditions of mankind.[41]

This aim is seemingly narrow and unsuitable for functional interpretations. However, these purposes nowadays concern issues such as the use of Chlorofluorocarbons (CFC) refrigerants, global warming, and demographic issues (aiming to reduce the need for refrigeration), therefore subjecting the question of proper aims of the organization to political debate, and consequently raising the question of what the function of the organization in respect of these issues should be.[42]

To claim that all constituent instruments of organizations can be read functionally is really to demonstrate the political character of all organizations. Although a particular issue can stand out as technical in the eyes of some states, for others the matter can be far more contentious. To use the example of Klabbers, whereas issues of fisheries will hardly deprive the Swiss of their sleep, it will probably raise heated debate in Iceland. In other words, what counts as a technical or political issue will in itself be a contestable issue.[43] Especially in delegating decision-making to expert

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[39] See Al-Baharna in the *Yearbook of the International Law Commission*, 1987 (vol. I) (UN Doc. A/CN.4/SER.A/1987), at 202, para. 33. Also see Bekker (1994), at 78–79.

[40] The concept of 'necessity' has by Lauterpacht been defined as: "Something more than 'important', but less than 'indispensably requisite' ", Lauterpacht (1976), at 430–431.

[41] International Agreement concerning the International Institute of Refrigeration (1 December 1954), 826 United Nations Treaty Series 191, Article 1(1).

[42] Singer (1995), at 105.

[43] Klabbers (2002 'An Introduction'), at 26.

bodies and committees, there is a presumption of objectivity. Yet, for example the Codex Alimentarius commission, which has a technical mandate and consists of governmental experts and private interest groups, deals with highly political issues such as assessing genetically modified products.[44] Questions of assigning wavelengths for radio broadcasting may be more easily solvable than the question of world peace. Nonetheless, both may turn out to be politically controversial. In fact, all issues can be argued to be politicized in the sense that the question of distribution and allocation of finite resources can always be raised.[45]

As the case law discussed earlier revealed, it is indeed often the case that functional necessity claims are made in order to make an international organization more effective. Increased effectiveness is after all the fundamental drive of a functional approach to organizations. However, by emphasizing the political character of organizations no guidance follows as to which way this tilts the interpretation of the scope of powers of an organization. Reliance on functional necessity reasoning does not automatically entail an expansion of the powers of an organization. Instead of being inherently geared either way, it would seem more correct to regard functional necessity reasoning as the embodiment of a balancing act, allowing a range of different constructions of powers.

To illustrate the point, functional necessity reasoning has also been used to deny an expansion of powers. A central argument of the IMF in refusing to develop a capacity to systematically consider human rights issues in its decision-making has been the lack of express attribution of such powers. Because of this absence of legal mandate, the argument goes, the IMF cannot interfere in the political affairs of its members. In addition, the IMF has considered the maintained institutional effectiveness in dealing with its primary objectives (macro-economic stabilization and short-term financing) as a reason for not developing an implicit capacity to deal with human rights issues.[46] Proponents of the idea of adding a human rights dimension to the work of the IMF on their part

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[44] von Bernstorff (2010), at 795.

[45] White (2001), at 106. In this respect it is also interesting to note that the denial of a power by the WHO to request an advisory opinion on the issue of legality of nuclear weapons, built on the idea that while the UN has general political competence, specialized agencies have a more narrow and technical competence only. The question of the legality of nuclear weapons could not fall within the competence of a technical organization, as this would confuse the distinction, and consequently "render virtually meaningless the notion of a specialized agency", *WHO,* ICJ Reports 1996, para. 26.

[46] Darrow (2003), at 170–171.

emphasize that the organization could easily gain such a mandate through the use of implied powers. In making their case they build on the fact that the IMF has relied on implied powers in other contexts, for example when adopting new policies for facilitating economic growth.[47]

Similarly, if the reasoning of the ICJ and the dissent of Judge Hackworth in the *Reparation for Injuries* opinion are contrasted with each other it seems that both make their case in terms of functional necessity. On the question of whether the UN has a right to bring claims on behalf of the organization Judge Hackworth considered that power to be "self-evident".[48] However, as to the finding by the ICJ of an implied power to bring claims in respect of damage caused to the victim, Judge Hackworth denied the functional necessity of such an implied power. In objecting to the implied power Hackworth did not deny the functional character of the organization as such, but argued that the UN is functionally effective as it is, without an implied power to bring claims in respect of damage caused to the victim.[49]

The separate opinions of Judges Higgins and Kooijmans in the *Legality of Use of Force* (*Serbia and Montenegro v. Belgium*) case express a similar idea in arguing that the ICJ should use its inherent power to decline jurisdiction.[50] Judge Higgins noted that:

> The Court's inherent jurisdiction derives from its judicial character and the need for powers to regulate matters connected with the administration of justice, not every aspect of which may have been foreseen in the Rules. It was on such a basis that the Permanent Court had admitted the filing of preliminary objections to jurisdiction even before this possibility was regulated by the Rules of Court. The Court stated that it was "at liberty to adopt the principle which it considers best calculated to ensure the administration of justice" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 16). … The very occasional need to exercise inherent powers may arise as a matter *in limine litis*, or as a decision by the Court not to exercise a jurisdiction it has. … The question is whether the circumstances are such that it is reasonable, necessary and appropriate for the Court to strike the case off the List as an exercise of inherent power to

[47] See Riesenhuber (2001), at 345–349.

[48] Dissenting Opinion by Judge Hackworth, *Reparation for Injuries,* ICJ Reports 1949, at 198.

[49] See above, Chapter 2.2.1.1.

[50] Henckels, however, expresses this as an exercise by the ICJ of its inherent power to comity. Henckels (2008), at 586.

> protect the integrity of the judicial process. … I believe the answer is in the affirmative.[51]

Because of this dual nature, Bederman characterizes necessity reasoning as an "anomalous motivation" and as a concept through which all actors seek to justify their conduct:

> For every instance of necessity being used as a ground to extend the freedom of action of international actors, there are occasions where it is used to restrain behavior.[52]

Mitrany made the same point in respect of functionalism more generally by claiming that:

> Function is never still, but it attaches to society the things that brought it there; and to be true to its social purpose it must implicitly be self-adjusting. At no point of action are conditions exactly as they were before or likely to be later; ….[53]

In the *McCulloch v Maryland* case the US Supreme Court did not accept a suggestion that the necessity notion limits the right to pass laws for the execution of the granted powers, only to those indispensable, without which the power would be nugatory. In characterizing the concept the Supreme Court recognized the absence of any fixed definition:

> To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. … The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison …[54]

As even contradictory claims can be presented as functionally necessary, the concept is often perceived as highly problematic.[55] For example in the context of immunities the vagueness of the functional necessity notion (in failing to say anything about the material contents of immunities) has even been characterized as a disadvantage.[56] The claim made here is that

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[51] *Legality of Use of Force* (*Serbia and Montenegro v. Belgium*),(Preliminary Objections, 15 December 2004), ICJ Reports 2004, separate Opinion of Judge Higgins, paras 10–12.

[52] Bederman (2002), at 126.

[53] Mitrany (1975), at 258.

[54] *McCulloch v The State of Maryland* et al., 1819, 17 US (4 Wheat.) 316, at 414.

[55] For one such characterization, see Reinisch (2000), at 206.

[56] J.-F. Lalive, "L'immunité de jusridiction des étates et des organisations internationales", in 84 *Recueil des Cours* 1953, at 304, referred to in Bekker (1994), at 113.

the functional necessity concept need not be given such a grim face. To the contrary, it is the absence of fixed contents that enables the concept to be used for both expansive and restrictive purposes.

It is quite common for constituent instruments of organizations not to contain prohibitions or allowances for solving substantive issues. Instead the constituent instrument provides the organization with a framework for coping with questions that arise before it. The implied powers doctrine constitutes part of such tools. The desirability (or undesirability) of implied powers is expressed through references to their functional necessity (or the lack of it). As it cannot be assumed that the most expansive approach possible would always be among the desires of members (or even that agreement could be reached on what the most expansive approach possible would be), different preferences will emphasize different 'necessities'. This means that there can be no inherent meaning to functional necessity which is detached from a particular conception (by members) of the proper range of activities of an organization.[57] The consequence of this is not that any definition of functional necessity is utterly subjective. What it does mean, however, is that any 'right' meaning of the concept is present only as a result of an agreement on whether an expansion of powers is desirable or not.[58] It is only when there is agreement between members on the activities of an organization that a particular power (or the denial of it) stands out as necessary for the effective functioning of the organization. In the absence of such agreement, competing constructions of powers of an organization can all be presented as functionally necessary.

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[57] For an interesting account of a discussion between Luhman and Habermas in this respect, see McCarthy (1978), at 213–232.

[58] In this respect necessity reasoning could be characterized as 'contested'. The idea of 'contested concepts' was launched by Gallie in order to explain how controversy over certain notions can be explained by the fact that different people interpret differently even the most paradigm examples of its use. Because of this substantive disagreement about the meaning of the concept (and not just about its application) the concept can be characterized as "essentially contested". See Gallie (1955–1956). Hurley developed this characterization and added that "component features" of such contested concepts "characteristically compete with one another to influence application of the former". Hurley (1985), at 83. The meaning(s) of such concepts derives from the practices and customs in which the speaker participates. A concept is only understood similarly when these practices and customs result in something of a shared "form of life". For an overview see Bix (1993), at 53–62. The idea of 'contested concepts' has in political and legal writings been used as a way of conceptualizing a variety of concepts, see Waldron (2002) on the rule of law, Sarooshi (2005), at 3–5 on sovereignty, and von Bogdandy (2004), at 889–890 on democracy.

4.2 The Attributed Character of all Powers

4.2.1. *Attribution by Treaty*

The discussion on the nature of functional necessity reasoning suggested that although functional necessity arguments have commonly been used for claiming an expansion of powers of an organization, there is no automacy in this respect. Instead, conflicting claims can be phrased in terms of functional necessity. This conflation of attributed and implied powers reasoning can also be approached in another way. Not only is an emphasis on express provisions of constituent instruments and claims to implied powers intertwined in the determination of the functional necessity of those powers, all implied powers can also be characterized as attributed/conferred. This underlines the role of consent as the source of all powers of organizations.

Organizations possess certain powers due to the conclusion of a treaty by which those powers are assigned to them. This treaty can be either a constituent instrument or a separate treaty concluded between a group of states. Either way an attribution or conferral of powers from states to an organization takes place.[59] Out of these the constituent instrument is the more common source for the powers of an organization, whereas nothing precludes states from conferring additional powers on an ad hoc basis.[60]

The attribution of powers can take different forms. Sarooshi distinguishes between agency relationships, delegations, and transfers of power. In Sarooshi's typology, the further the move towards a transfer of powers, the lesser is the degree of direct control that a single state can have over the exercise of that power.[61] The powers conferred by states on international organizations can even be described as public powers of government in that they derive from the sovereignty of states.[62] Sometimes this is provided for explicitly in national constitutional law. The Belgian constitution, for example, states that: "The exercising of specific powers can be

[59] For examples, see Sarooshi (2005), at 19.

[60] See Sarooshi (2005), at 18–19. As an example of an *ad hoc* conferral Sarooshi mentions the Peace Treaty between Italy, UK, US, France, and the Soviet Union, conferring on the latter four the power to decide on the future of Italian colonies in Africa. This Peace Treaty provided that in case of disagreement the power of decision was to be given to the UN General Assembly. Sarooshi (2005), at 19, note 4.

[61] Sarooshi (2005), at 28 *et seq*.

[62] However, when states confer powers on organizations they do not confer their sovereignty as such, but specific powers that states possess by virtue of their sovereignty. Sarooshi (2005), e.g. at 9–10, and Martin Martinez (1996), at 68–69.

assigned by a treaty or by a law to institutions of public international law".[63] The fact that powers of organizations as expressed in the constituent instrument are conferred by members does not mean that these powers are always inferior to the powers of states. Organizations may through collective conferral by states gain powers which no one state possesses individually, such as a power to resolve disputes, to authorize the use of force, or a power to issue authoritative interpretations.

Constituent instruments can make explicit reference to such an attribution of powers. The UN Charter does this separately for different organs, Article 24(1) of the UN Charter providing for the Security Council that:

> In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security....[64]

In EU law a different construction is used. The TEU states in a more general fashion that:

> Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.[65]

Whereas Article 3 TEU identifies the purposes of the EU, the first articles of the TFEU specify the areas in which the EU shall exercise its competences. For each of these policy areas powers are then conferred separately.[66]

As a conceptual issue, 'allocation', 'ceding', 'alienation', 'transfer', 'delegation' and 'authorization' are all used in a happy mix in order to describe a conferral of powers.[67] The choice of word may serve to indicate certain characteristics of that conferral, such as whether the conferral is revocable, whether and to what degree states retain control over the exercise of the power, and whether the organization possesses an exclusive right of

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[63] The Constitution of Belgium, Coordinated text of 14 February 1994 (English translation by the Belgian House of Representatives, October 2007), Article 34. Also see de Witte (2000), at 282. For a number of examples in national law, see Sarooshi (2005), at 66, note 3.

[64] UN Charter, Article 24(1).

[65] TEU, Article 5(2).

[66] TEU, Article 3 and TFEU Articles 1–4 in particular.

[67] Sarooshi (2005), at 28. In the *WHO* case the ICJ also talked about the "investment" by states that create organizations of powers in those organizations, ICJ Reports 1996, para. 25.

exercise of the power.[68] Despite such potential differences the basic spirit of these notions nevertheless remains the same in the sense that powers emanate from the consent of members. This holds true even in the EU context: as the sovereignty of members has not been absorbed in the sovereignty of the Union the principle of conferral still lies at the heart of EU competence.[69] As was seen when discussing the case law on the attributed powers doctrine, this is also how the notion of attribution has come to serve in the reasoning of international courts. The element of conferral emphasizes a link to the membership. Hence, a violation of the attributed powers doctrine in the *WHO* opinion basically meant that in the mind of the ICJ, the power claimed by the World Health Assembly had not been agreed to by the WHO members.[70]

4.2.2. *Attribution by Implication*

Departing from the idea of attribution of powers as the empowerment by members of an organization, the most obvious source for identifying the extent of the empowerment would be the constituent instrument. The dissent in the *Reparation for Injuries* and *Effect of Awards* opinions to the claim to implied powers therefore built upon the intentions of the drafters to make their case.[71] Similarly the ICJ in the *WHO* opinion reasoned that conformity with the principle of speciality (or the doctrine of attributed powers) means compliance with the constitution of the WHO and its purposes as "assigned to [the WHO] by its member States".[72]

Yet, however tempting it would be to think of the notion of attribution as the opposite to the idea of implied powers, this is not all there is to the relationship. What makes the notion of attribution/conferral more complex is that eventually also implied powers can be characterized as attributed/conferred. In fact, the ICJ itself in the *Reparation for Injuries* opinion not only found that the UN has an implied power to bring claims in respect of damage caused to its agents, but also found that those implied powers were conferred upon the organization:

> … the Organization must be deemed to those powers which, …, are conferred upon it by necessary implication, as being essential to the

[68] Such differences may in turn have an impact, for example, on issues of responsibility for the exercise of the power. This is the main theme of Sarooshi (2005).

[69] See e.g. Bermann and Nicolaïdis (2001), at 485–486.

[70] See above, Chapter 2.1.3.

[71] See especially the dissent by Judge Hackworth above, Chapter 2.2.1.1.

[72] *WHO*, ICJ Reports 1996, para. 25.

> performance of its duties. … [T]he capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter.[73]

Apart from the reference to conferral it is also interesting to note that the ICJ underlined the intended character of the implied power. The reference to "necessary intendment" was repeated in the *Effect of Awards* opinion.[74] The reference to the conferred character of implied powers also makes an explicit link to the constituent instrument as the source of that conferral. Hence, the power implied is described as one that arises "out of the Charter". As Judge Shahabuddeen put it in another context: "In the last analysis, all the powers of a body must be conferred by its constituent instrument, whether expressly or impliedly…".[75]

When characterizing the powers of organizations in general in the *WHO* opinion the ICJ held that:

> The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers … known as "implied" powers.[76]

The reasoning makes no distinction, by way of conferred character, between express powers and implied powers. Furthermore, to use implied powers in this particular case, the Court claimed, would be "tantamount to disregarding the principle of speciality".[77] The ICJ was hereby in effect saying that attributed powers come in two forms: as express provisions and implicitly. The ICJ was not hereby making a choice between whether to restrict the WHO to its attributed powers or invoke the implied powers doctrine. Instead, the ICJ was exploring whether the attribution of powers from WHO members to the organization could be interpreted so as to include the claimed implied power. In EU law this connection is even clearer. As Article 352 TFEU is an express provision that provides for the use of implied powers, the possibility for implicit expansion of EU competence is undoubtedly intended by the members. This must also have been in the mind of the ECJ in the *ECHR* opinion, when characterizing

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[73] *Reparation for Injuries*, ICJ Reports 1949, at 184.

[74] *Effect of Awards*, ICJ Reports 1954, at 57.

[75] See Dissenting Opinion of Judge Shahabuddeen, *Land, Island and Maritime Frontier Dispute*, ICJ Reports 1990, at 41.

[76] *WHO,* ICJ Reports 1996, para. 25.

[77] *WHO,* ICJ Reports 1996, para. 25.

Article 352 as: "… an integral part of an institutional system based on the principle of conferred powers ….".[78]

These contentions (again) conflate the two doctrines.[79] A common contention is that the ICJ references to the conferred character of implied powers express the idea that had the drafters of the organization only realized the need of implied powers, they would have expressly attributed them to the organization. However, the reference to the conferred character of implied powers could also be read to indicate not only a link to the original membership of the organization, but also to the current members. To paraphrase the ICJ in the *WHO* opinion, all powers of an organization are attributed to it. This is what makes them a "function of the common interests whose promotion those States entrust to [international organizations] …".[80] In this way, if there is agreement among members of an organization on the use of a particular implied power in the pursuit of that common interest, then that implied power is part of the means that members have conferred upon the organization.

Against this background an image of reasoning on powers in which reliance on either the attributed or implied nature of powers would echo a consensual/non-consensual distinction suddenly seems inaccurate. In expanding the powers of an organization the image of the organization as an autonomous actor is indeed enhanced. However, as soon as this results in the exercise of implied powers, those powers need to find firm ground in member consent. For this reason Blokker warns that:

> [T]he mistake must not be made to 'interpret the organization away' from the member states by using the stated objectives in the constitution as crowbars for overactive involvement of the organization in affairs in which members do not want such a role.[81]

To emphasize the conferred character of implied powers is no automatic safeguard against such "overactive" interpretations. The characterization of all powers of international organizations as conferred does however

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[78] *ECHR*, [1996] European Court Reports I-1759, para. 30.

[79] In a similar way Klabbers talks about the "reconciliation" of the two doctrines, Klabbers (2002 'An Introduction'), at 73.

[80] *WHO*, ICJ Reports 1996, para. 25. However, also see Bekker (1994), at 68–69 rejecting this connection and claiming (in the spirit of the idea of inherent powers) that an emphasis on the intended character of implied powers does not establish a link to the drafters, members, or even the constituent instrument, but is instead an abstract "functional institutional intendment".

[81] Blokker (2002), at 314.

serve to emphasize that there are no powers that an organization can possess without a basis in member consent.[82]

There are some consequences to a characterization of all powers of organizations as conferred. If all powers of organizations are conferred, then an emphasis on the conferred character of organizations no longer automatically entails an emphasis on a restrictive or static image of an organization. Instead, the vocabulary of conferral/attribution appears as a tool through which conflicting claims to powers can be made. In approaching a disagreement over the extent of powers as a question of conferral, interest rather turns towards whose conception of conferral (or in other words, whose consent) is to be taken into account.[83]

As a result, as all powers can be characterized as attributed the distinguishing force of the two doctrines as different ways of constructing powers of organizations is lost. In a restrictive approach to an organization, there is nothing else to that organization than the express provisions of its constituent instrument. In that case the attributed powers equal the express powers of the organization. However, as soon as a claim to implied powers is made, those implied powers will be characterized as conferred upon the organization, in order to indicate that there is support among members to those powers. In this way the attributed nature of powers can be emphasized in order to express both the approval and the disapproval of the use of implied powers.

4.3. On the Use(lessness) of the Attributed and Implied Powers Doctrines

From having pictured the attributed powers and implied powers doctrines as mechanisms through which to present different (and even

[82] As to how that consent is to be established is a complex matter of its own and the mere characterization of an implied power as conferred does not reveal how member consent enters the definition of that power. As to the UN this issue was discussed already at the San Francisco conference in 1945, where it was agreed that although each organ will in the first place define the scope of its competence, it is not fully up to an organ to decide which powers can be implied and which can not. Instead, the interpretation must receive general acceptance from member states. Report of the Committee IV/2 of the United Nations Conference on International Organization, (12th June 1945), Doc. 933, IV/2/42, at 172–173 (13 *United Nations Conference on International Organization* 1945, at 709–710). Connected issues concern when it can be said that general practice has been established, and whether unanimous acceptance is required. See in this respect Blokker (2002), at 310–312, and on practice also Amerasinghe (2005), at 49–55.

[83] For example the US observation on General Comment 24 of the Human Rights Committee, in objecting to the claim by the Committee to possess the power to

opposing) constructions of the powers of an organization, the discussions above have approached the two doctrines on another level. In an opposing use of the doctrines they stand out as tools through which to express differences on the extent of activities of an organization. However, a closer focus on these doctrines has showed that such differences can also be expressed through the doctrines individually. The image of the two doctrines as competing is therefore not completely accurate. Put differently, both doctrines can be used to express a number of positions in a discourse on powers. As a result the doctrines only get their content and meaning in contestation with one another.

In respect of implied powers and more specifically the functional necessity concept at the heart of implied powers claims, the ideological heritage of the functional necessity concept suggests that it is tilted towards increasing the effectiveness of organizations. At the same time this does not necessarily entail an increase or development of the powers of an organization. Instead, even a denial of powers can be claimed to be functionally necessary. Apart from practical examples from individual organizations, traces of such a converse logic can also be found in systemic claims. By way of an example, the so-called public law approach (to international institutions) states that its ideological driving force is the creation of a more integrated world community that is governed by public international institutions. Yet, despite this rather functionalist goal, the approach emphasizes the need for a restrictive approach to institutions in order to achieve that goal.[84]

An image of competing necessities is not easily reconcilable with the idea that the notion is automatically tilted towards adding to the powers of organizations. This also has some consequences for the characterization of the implied powers doctrine. The point of departure is that when claims to implied powers are made, such claims build on the functional necessity of those powers. In other words, it is in order to enhance

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determine the compatibility of reservations with the ICCPR, not only emphasized that in the mind of the US a power to render binding interpretations of the Covenant is not conferred upon the Committee, but also that "The drafters of the Covenant could have given the Committee this role but deliberately chose not to do so". Observations of States parties (US), at 126. A claim that attributed powers are limited to what the drafters provided for the organization can easily be met by the counterclaim that that attribution never intended to exclude such powers that are needed for the exercise of those (original) powers, or by emphasizing that instead of the (restrictive) intent of the drafters, the current (expansive) intent should be preferred.

[84] von Bogdandy et al. (2010), at 32.

the functionality of the organization that the implied powers doctrine is invoked. In this sense any use of implied powers is geared towards increasing the effectiveness of an organization. However, the relationship does not work in the reverse. An emphasis on the functional efficiency of an organization need not automatically translate into widened competence.

Although even a static construction of powers of organizations can be presented as functionally necessary, more commonly a limited image of an organization is expressed through underlining the attributed nature of powers. In a contrasting use of the implied and attributed powers doctrines, the latter is commonly invoked against an expansion of the activities of the organization. However, as also implied powers can be characterized as attributed/conferred, the attribution/conferral notion stands out as a means by which to link a particular exercise of powers (whether express or implied) to the consent of members. As an effect, there is a conflation of the two doctrines. Implied powers can be objected to by claiming that an organization is functionally effective already due to its explicitly attributed powers. In constructing implied powers the conferred character of those powers need to be underlined in order to demonstrate member support.

This insight questions some of the assumptions commonly attached to the two doctrines. As attributed powers reasoning is commonly invoked to emphasize the status quo, it is only natural that attributed powers reasoning has also become perceived as more unambiguous (than a use of implied powers). After all, there is presumably a pre-existing agreement on the extent of and limits upon the expressly attributed powers. For the reverse reason (lack of pre-existing agreement) implied powers claims have been considered to import an element of politicization and uncertainty into the definition of powers. However, the fact that both doctrines can be used to express both restrictive and expansive constructions of powers underlines the political nature of all claims to powers.

Another basic assumption that is affected by the characterization above, is the claim that the doctrines bear with them guidance on how to construct powers of organizations. The attributed and implied powers doctrines *can* be used to present different claims to powers of organizations. An emphasis of the attributed powers of an organization *can* serve to safeguard member prerogatives through the preservation of the status quo, whereas an emphasis on functional effectiveness *can* serve to

expand the means available to an organization.[85] However, since the same contestation can also be expressed as different conceptions of attribution and functional necessity, the doctrines fail to provide any abstract guidance on how to construct the powers of an organization.[86]

[85] As was seen in the *WHO* opinion, all questions of scope of powers need not directly turn on the question of impact upon the jurisdiction of members, but may also be a question of division of functions between different organizations (the WHO and the UN). Yet, even in such a case, if an organization is found to possess implied powers, the nature of the relationship between the organization and its members will be affected.

[86] Such an openness of legal reasoning has even been characterized as an essential aspect of international law's acceptability, as it is only by remaining open to different constructions that international legal rules can fulfill the different (and changing) purposes for which they were adopted. Koskenniemi (2005), at 591.

CHAPTER FIVE

STRUCTURING THE QUESTION OF POWERS

The activities of an organization need not raise concerns to begin with. Instead, there may be (and often is) agreement between members on the extent of powers of an organization. Yet, this does not remove the 'living' character of constituent instruments. As early as 1946, one year after the adoption of the UN Charter, Pollux stated:

> The Charter, like every written constitution, will be a living instrument. It will be applied daily; and every application of the Charter, every use of an article; implies interpretation; on each occasion a decision is involved which may change the existing law and start a new constitutional development. A constitutional customary law will grow up and the Charter itself will merely form the framework of the Organization which will be filled in by the practice of the different organs.[1]

It is this practice of organs that will also define the extent of powers. As a result of the 'living' character, this practice can always change. In other words, the future extent of powers of an organization will always be uncertain. In order to structure and come to terms with this uncertainty, faith is often put in various legal mechanisms.

5.1. Looking for Guidance in the Constituent Instrument

5.1.1. *On the Limiting Effect of the Express Wording*

In looking for parameters that would constrain the 'living' nature (and the consequent possibility of developing powers) interest is first of all turned to the constituent instrument as the primary source of law governing the activities of an organization.[2] For example the International Law Association, in its final report on the Accountability of International Organisations defined the contents of the principles of constitutionality and institutional balance in the following way:

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[1] Pollux (1946), at 54. Pollux is a pseudonym for Edvard Hambro.

[2] See 1986 Vienna Convention, Article 2(1)(j).

> 1. Each IO is under a legal obligation to carry out its functions and exercise its powers in accordance with the rules of the organisation.
> 2. Organs of an IO in carrying out their functions must respect the institutional balance laid down in the constituent instruments of the IO.
> 3. Organs and agents of an IO, in whatever official capacity they act, must ensure that they do not exceed the scope of their functions.[3]

Out of the provisions of the constituent instrument the object and purpose of the organization assume special importance. This follows from that the object and purpose basically state the reason for the existence of the organization and hereby constitutes the goal that all powers of an organization serve to achieve. The restraining effect follows from the nature of international organizations, and the fact that an organization possesses only those powers which fall within its object and purpose. The ICJ reasoning is as clear on this as is the express wording of Article 352 TFEU: the object and purpose essentially defines the proper sphere of activity of an organization.

Having said that, it should immediately be noted that the character of the object and purpose as a limit to the exercise of powers of organizations is affected by the nature of that object and purpose. At the high peak of European integration this resulted in such a generous interpretation of the objectives of the EC Treaty, that it was doubted whether there is any activity which could not be included within them.[4] As no sphere of society seemed to be excluded from the legislative competence of the (then) EC, no domestic area of member states appeared immune to Community law. Whatever activity was regarded by members as politically desirable could be realized through use of Article 352.[5]

If the objectives of the EU are vague, the same is certainly true of the purposes of the UN.[6] There is simply no way of defining what maintenance of international peace and security, or the development of friendly relations might mean in the abstract. Instead, the fulfillment of those purposes is an ongoing task, assuming new dimensions as expectations of states change. As a result the contents of notions such as 'friendly relations' and 'international peace and security' will change in time.[7]

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[3] International Law Association, *Accountability of International Organisations*, Final Report (2004), at 12–13.

[4] Weiler (1999), at 54.

[5] Hartley (1999), at 57–58.

[6] The purposes of the UN are: to maintain international peace and security, to develop friendly relations, to achieve international co-operation in solving international problems, and to be a center for harmonizing the actions of nations. UN Charter, Article 1.

[7] Perhaps for this reason the object and purpose of treaties has also been called an "enigma". See Buffard and Zemanek (1998). In general, see Klabbers (1997).

Any object and purpose of a multilateral treaty (whether or not that treaty serves as the constituent instrument of an international organization) may allow for different interpretations.[8] As a consequence the limiting effect of the object and purpose cannot be defined in the abstract either. While the UN may admittedly be something of a special case in respect of broadly defined purposes, the same holds true for the object and purpose of any organization.[9] In the words of the WTO Appellate body, most treaties (such as the WTO Agreement) have no "single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes".[10]

The adoption of General Comment 24 by the Human Rights Committee and the counter reaction also illustrate the point. By defining the object and purpose of the ICCPR as the creation of legally binding standards and an efficacious supervisory machinery, the Committee emphasized the importance of effective protection of the shared interest of states. The Committee interpretation of the object and purpose of the ICCPR was hereby geared towards safeguarding the integrity of human rights protection.[11] In the objection by the US a different understanding of the object and purpose of the ICCPR was presented. In denying the existence of such a power the US claimed that the Committee had misinterpreted the object and purpose of the Covenant. While recognizing that the object of the Covenant is to protect human rights, the US emphasized more strongly the "… primary object … to secure the widest possible adherence, with the clear understanding that a relatively liberal regime on the permissibility of reservations should therefore be required".[12]

As for using other elements of constituent instruments of organizations as limits on powers, in the ICJ *Effect of Awards* opinion the question arose as to whether the use of implied powers was prohibited by the existence of express powers. The ICJ argued that the use of an implied power was not prevented by the existence of similar express powers. This, however, did not mean that the application of implied powers could not be restricted by express powers. The indication in the *Effect of Awards*

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[8] As Addo puts it, any interpretation of the object and purpose will be "as compelling as the alternative", Addo (2006), at xliii.

[9] For the example of the International Institute of Refrigeration, see above, Chapter 4.1.3. On the WTO Appellate Body, see Van Damme (2010), e.g. at 634.

[10] WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (*US-Shrimp*), AB-1998-4, WT/DS58/AB/R, para. 17.

[11] See Human Rights Committee, General Comment 24, para. 19 where the notion 'integrity' is explicitly used.

[12] Observations of States parties (US) (Official Records), at 127. Also see Carrozza (2003), at 60.

opinion was therefore that an implied power incompatible with an express power should not be accepted: "… an implied power to impose legal limitations upon the General Assembly's express Charter powers is not legally admissible".[13]

Further, the ICJ noted that powers might even be expressly excluded, and that it would consider such a prohibition as absolute. The Court also carefully concluded that the binding jurisdiction of the established tribunal did not affect the budgetary or administrative powers of the General Assembly, therefore making certain that existing powers were not infringed.[14] As with the object and purpose, there is good reason to safeguard the express powers of an organization. While the possibility of using implied powers reduces the possibility of identifying the totality of powers of an organ/organization, even the least amount of legal certainty would be extinguished if the existence of at least the expressly enumerated powers could not be assumed.[15]

Similarly, concerning a division of competence between organs, both the ICJ and the ECJ have emphasized the importance of respecting the balance of powers between organs. In the *Second Admission* opinion the ICJ rejected an interpretation that would have curtailed the powers of the UN Security Council:

> To hold that the General Assembly has power to admit a State to membership in the absence of a recommendation of the Security Council would be to deprive the Security Council of an important power which has been entrusted to it by the Charter. It would almost nullify the role of the Security Council in the exercise of one of the essential functions of the Organization.[16]

Would there be no such respect, then the entire idea of different organs performing different functions would be lost. In EU law the principle is established explicitly in Article 13(2) TEU:

> Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and

[13] *Effect of Awards*, ICJ Reports 1954, at 59. Also see Campbell (1983), at 526–527.

[14] *Effect of Awards*, ICJ Reports 1954, at 56–59.

[15] Martenczuk (1999), at 537.

[16] *Second Admission*, ICJ Reports 1950, at 8–9. The question was also central to the *Effect of Awards* and *Certain Expenses* opinions, in both of which the ICJ carefully demonstrated that an institutional balance had not been upset. See Campbell (1983), at 530–531. In the *WHO* opinion such a balance was also claimed to govern the relations between different actors of the UN system at large: "… the WHO Constitution can only be interpreted, as far as the powers conferred upon that Organization are concerned, by taking due account not only of the general principle of speciality, but also of the logic of the overall system

> objectives set out in them. The institutions shall practice mutual sincere cooperation.[17]

To regard both express powers and a division of competence as a limit upon an expansion of powers fits nicely with the general assumption that the *raison d'être* of an organization must have a certain permanence.[18] Through the words of Judge Shahabuddeen:

> However elastic may be the test to be applied in determining the existence and extent of implied powers - and undue rigidity is surely to be avoided - it seems in any event clear that a constituent instrument cannot be read as implying the existence of powers which contradict the essential nature of the organization which creates to exercise them. Powers of that kind could not be described as "required" or "essential" (within the meaning of the Reparation case) to enable the organization effectively to discharge the functions laid upon it by its organic text.[19]

The passage was part of Shahabuddeen's argument in dissenting to a decision that it was for the Chamber (of the ICJ) formed to deal with the case to decide whether the application for permission to intervene should be granted. The main doubt of Shahabuddeen was whether a Chamber constituted according to the wishes of the parties would guarantee a fair procedure.[20] Undoubtedly the majority would have agreed on the quoted part of his argument. What is decisive is the interpretation on when a power contradicts the constituent instrument, and what actually the "essential nature" of the organization is.[21]

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contemplated by the Charter. If, according to the rules on which that system is based, the WHO has, … 'wide international responsibilities', those responsibilities … cannot encroach on the responsibilities of other parts of the United Nations system", *WHO*, ICJ Reports 1996, para. 26.

[17] TEU, Article 13(2).

[18] See *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, (Second Phase), (Advisory Opinion, 18 July 1950), ICJ Reports 1950, at 229: "The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat,* often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit".

[19] Dissenting Opinion of Judge Shahabuddeen, *Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras: Nicaragua Intervening*), Application for Permission to Intervene by the Government of Nicaragua, Order of 28 February 1990, ICJ Reports 1990 (hereinafter *Land, Island and Maritime Frontier Dispute*), at 41–42.

[20] Dissenting Opinion of Judge Shahabuddeen, *Land, Island and Maritime Frontier Dispute*, ICJ Reports 1990, at 40–41.

[21] This is a point that can be made also concerning other expressions of constituent instruments or decisions of organizations. Use of ambiguous expressions may even be deliberate in order to allow different members (due to a lack of agreement) to interpret the

The express provisions of a constituent instrument are what states reflect upon when considering whether or not to become members of an organization. In the face of this it would seem odd to assume that these provisions could be in doubt once the organization begins to act. Put differently, why would it be necessary to write down purposes and express powers in the first place, if they could be disregarded at any moment? Yet, however reasonable this sounds as a starting point, the restrictive effect of express powers or a division of competence (as part of the "essential nature" of an organization) need not be as absolute as it first appears. Although an organ may have primary responsibility to decide a matter, a claim can always be made that this responsibility is insufficient or ineffective.[22] Responsibilities may also be concurrent or shared, and allow for simultaneous treatment of matters.[23] The conclusion of the ICJ in the *Certain Expenses* opinion could also be recalled, stating that if action was taken by the wrong organ, this would be a question of internal distribution of functions, and would not necessarily presuppose invalidity of the act outside the organization.[24] Any exercise of powers may under this presumption produce its effects even if it would be in breach of a distribution of functions within an organization. This also means that an organization or its members may be bound towards third parties by an act of an organ which is *ultra vires* on procedural grounds, as long as that act does not transcend the object and purpose of the organization at large. In other words, in spite of the fact that an act would be *ultra vires* the division of competence, this need not affect the obligations of members.[25]

Eventually the principle that the express wording of the constituent instrument should be respected, would also suggest that implied powers can be used only in cases where the constituent instrument has not

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provision/decision in different ways. See in this respect e.g. Byers (2004), at 166, on UN Security Council Resolution 1441.

[22] See e.g. United Nations General Assembly Resolution 377(V), *Uniting for Peace*, 3 November 1950 (UN Doc. A/1775).

[23] See Article 10, Article 12 and Article 14 of the UN Charter, providing for the General Assembly the right to deal with every conceivable international issue, the only restriction being that the General Assembly cannot make recommendations if the Security Council is simultaneously concerned with the matter. Also see Amerasinghe (2005), at 148.

[24] *Certain Expenses,* ICJ Reports 1962, at 168. For an overview of ECJ case law, see Cremona (1999), at 149–150.

[25] See Amerasinghe (2005), at 208–216, and Osieke (1983), at 240–246. Also see Gowlland-Debbas (1994), at 672.

exhaustively defined or explicitly excluded certain means. A common consequent claim is hereby that a high degree of detail of the constituent instrument (or an outright exclusion of powers) leaves little room for implied powers.[26]

However, not even an explicit denial of implied powers manages to settle the *vires* issue once and for all. The Charter of the Organization of American States (OAS) is an interesting example in this respect. The OAS Charter provides that: "The Organization of American States has no powers other than those expressly conferred upon it by this charter…".[27] At first sight this would seem to exclude any implied powers. However, a valid question to ask would be, if later practice can change the application of express provisions, then why not this provision as well? If credit is given to this line of thinking, then it would seem that whether the drafters of the OAS Charter had omitting implied powers in mind or not can be irrelevant. It has in fact been argued that the powers of the OAS Secretary-General have expanded in ways not explicitly envisaged in the OAS Charter.[28] Read in this way, instead of excluding the use of non-express powers, the provision would rather seem to emphasize a link between an expansion of powers and express powers. By claiming that the reference of the OAS article to express provisions should not be seen to exclude effective fulfillment of those (express) powers (*effet utile*), the article no longer serves to exclude a widening of OAS competences.

Article 352 TFEU expresses a similar idea in stating that:

> Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation … This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.[29]

These formulations are undoubtedly aimed at excluding some policy areas from the ambit of Article 352. Yet, as for example the discussion on

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[26] See Amerasinghe (2005), at 98, and Sato (1996), at 261. On the EU, see the Discussion Paper on Delimitation of Competence between the European Union and the Member States – Existing System, Problems and Avenues to be Explored, 15 May 2002, CONV 47/02, especially para. 4(b), and Tschofen (1991), at 478.

[27] Charter of the Organization of American States (30 April 1948), 119 United Nations Treaty Series 4, Article 1.

[28] See Caminos and Lavalle (1989), at 396.

[29] TFEU, Article 352(3).

the *Kadi* and *Al Barakaat* cases has demonstrated, the definition of common foreign and security policy is highly contentious.[30]

This lengthy discussion on the limiting effect of the express wording of the constituent instrument boils down to the conclusion that however plausible a principle of safeguarding the express wording of the constituent instrument (and especially the object and purpose, express powers, and division of competence) sounds in the abstract, the usefulness of such an abstract contention is limited. This conclusion does not imply poor drafting of constituent instruments, but is rather a demonstration of the way in which different interpretations of the express wording affect the limiting function of it. Explicit exclusion of subject areas can serve as an initial limit on the possibilities for expanding powers of an organization, yet an agreement on expanding the powers of an organization can also always find a way of eroding that limiting impact.

While it makes good sense to identify a general principle of safeguarding the core features of the organization, this does not do away with the political nature of the decision of when a contradiction is at hand. In this way the principle is too abstract to be helpful. A claim that an implied power will have a fundamental impact upon the nature of an organization (thus rendering an implied power impermissible), will build on a particular view on what the relevant 'fundamentals' are and why they are relevant. An assumption that express provisions restrict the use of implied powers can therefore in the subsequent practice of an organization only be meaningful as part of a particular construction of powers.

None of this means that identifying fundamental features of organizations (such as the object and purpose) would be of no use. To the contrary, a presumption to the effect that the object and purpose or express provisions of an organization could be contradicted at any time, would render them useless to begin with. This would make it impossible to know the character of an organization when considering membership in it. However, the question of when an implied power contradicts other elements of the constituent instrument is always a question of how the express wording is interpreted. An expansive interpretation will not only arrive at an implied power, but will also reinterpret the limiting impact of other provisions. Although more detailed drafting can provide for more

[30] *Yassin Abdullah Kadi & Al Barakaat International Foundation* v. *Council and Commission*, 3 September 2008, Joined Cases C-402/05 P and C-415/05 P, paras. 198–201. See e.g. Tridimas, who criticizes the reasoning of the ECJ for allowing engagement in foreign policy issues through forging a link to the internal market. Tridimas (2009), at 6–7. Also see Johnston (2009), at 1–4.

exact and detailed counterarguments when criticizing a particular construction of powers, it cannot however exclude the use of implied powers.[31] Different images of the limiting effect of the constituent instrument are mirror images of changing preferences on the extent of powers.[32] A characterization of the implied powers and *ultra vires* doctrines as different sides of the same coin therefore needs to be further qualified.[33] An argument that the *ultra vires* doctrine has no limiting impact or loses its 'meaningfulness' once implied powers claims are made is not completely accurate.[34] Instead, the *ultra vires* doctrine will only get its contents (and hence usefulness) in a disagreement on how to construct the powers of an individual organization/organ. *Vires* considerations do not disappear however extreme the functional approach of members of an organization is. As soon as there is no agreement among members on the construction of the powers of an organization, dissenters can always refer to the *ultra vires* character of the act, and the erroneous interpretation of the object and purpose, functions, or powers, as a way of presenting a competing conception of the proper scope of powers of an organization.

5.1.2. *Safeguarding Member Prerogatives*

The 'Lotus principle', as defined by the PCIJ in the *S.S. Lotus* case establishes consent of states as the sole source of legal obligations.[35] This principle has even been held to entail an assumption that state sovereignty must be given the most extensive interpretation possible.[36] The preservation of the components of statehood is for this reason sometimes referred to as an even more elementary limit upon the activities of organizations

[31] As more detailed drafting will add and make explicit the preconditions which are to be fulfilled in using implied powers, this adds further accounts on which an expansive interpretation can be challenged. In other words, the more numerous the accounts on which an interpretation appears to stretch or redefine the constituent instrument, the easier it will be to formulate a challenge to such an interpretation. However, at the same time it would be futile to exhaustively try to enumerate the powers of an organization. See Weiler (2002). In contrast, see Morawiecki (1986), at 100–101 who argues that precise, detailed and exhaustive formulation of statutory rules dealing with powers is an effective way of decreasing the risk of excessive functional interpretation.

[32] As to EU law, see e.g. Prechal (1998), at 276 on the principle of institutional balance.

[33] The graphic characterization was made by White (1996), at 128.

[34] A claim of lost meaningfulness is e.g. made by von Bernstorff (2010), at 785.

[35] *Lotus*, PCIJ Publications 1927, quoted above in Chapter 2.1.2.

[36] Frowein (1999), at 99 invokes the 'Lotus principle' as the "objective principle" which in unclear cases should settle interpretations.

than peremptory norms.[37] However, the 'Lotus principle' does not imply that state sovereignty never could be (validly) restricted. In discussing the powers of the European Commission of the Danube (in the same year as the *Lotus* decision was delivered), the PCIJ stated that:

> ... as the Court has had occasion to state in previous judgments and opinions, restrictions on the exercise of sovereign rights accepted by treaty by the State concerned cannot be considered as an infringement of sovereignty.[38]

As far as an organization possesses powers that states do not have individually, or the exercise of certain powers has been withheld for the organization (as for example the authorization to use force in the case of the UN), the performance by members of sovereign acts is restricted.[39] In this vein the ECJ in *Costa v ENEL* described the transfer of power from member states to the Community as a permanent limit to the sovereign rights of members.[40] Membership in an international organization will therefore have an impact on member sovereignty regardless of whether the organization exercises any implied powers. Naturally, the more extensive the powers of an organization, the greater that impact will be. Yet, following the logic of the *Danube* opinion, as long as no member perceives the exercise of powers of an organization as an excess of the consent provided, there is no infringement upon the sovereignty of states.

A claim that members know what they engage in (through the membership), and can hereby anticipate the impact on member sovereignty when joining an organization, is only accurate for a certain moment in time. While it could be argued that members should anticipate that an organization may develop in time and possibly come to possess powers not foreseen at the time of drafting the organization, there is no way a member can tell exactly what those powers will be. As a way of institutionalizing the possibility to challenge an expansion of the organization, a domestic jurisdiction clause is often explicitly included in the constituent instrument. By way of an example, Article 2(7) of the UN Charter provides that:

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[37] See Herdegen (1994), at 156.

[38] *Danube*, PCIJ Publications 1927, at 36.

[39] White (1996), at 57.

[40] Case C-6/64, *Flaminio Costa v ENEL* [1964] European Court Reports 585 (hereinafter *Costa v ENEL*), at 593–594. However, only the exercise of sovereign acts is restricted and not sovereignty as such. In case of termination of the organization the right to perform such acts returns to the state. See de Witte (2000), at 282.

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state ….[41]

Article 5 TEU displays an even more complex balancing mechanism:

> 1. … The use of Union competences is governed by the principles of subsidiarity and proportionality.
> 2. … Competences not conferred upon the Union in the Treaties remain with the Member States.
> 3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. …
> 4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. ….[42]

There are (at least) two interesting aspects to this clause. First of all the domestic jurisdiction of members is safeguarded by the principle of subsidiarity. The impact of the principle of subsidiarity is determined by two tests: the EU shall act only if members cannot 'sufficiently achieve' the objectives of the activity, and it must be shown that the objective of the action is better achieved by the EU (than by members). Notably, neither of these tests is apolitical.[43]

Secondly the article introduces a more general proportionality test. This proportionality test regulates the relationship between the objectives to be fulfilled and the means to pursue them. It requires that the

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[41] UN Charter, Article 2(7). On such clauses in general, see Schermers and Blokker (2003), at 157–162. On the UN specifically see Martin Martinez (1996), e.g. at 94–97.

[42] TEU, Article 5. Something similar can be found also in the WTO context. Article 3(2) of the Dispute Settlement Understanding provides that the dispute settlement system of the WTO "…serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements". However, also see Klabbers who claims that in practice dispute settlement may adopt interpretations that go beyond what the WTO member states had in mind. Klabbers (2005 'On Rationalism'), at 412–414.

[43] Estella (2002) calls these the "sufficiency" and "value-added" criteria, at 93–95. Estella also demonstrates the political character of the use of the subsidiarity principle in respect of regulation of waste-management and noise pollution, Estella (2002), at 108–111. Dehousse at one point even argued that engagement in questions of subsidiarity by the ECJ would create a legitimacy problem for the ECJ due to the political character of the question. Dehousse (1994), at 119.

measure adopted must be suitable for attaining the objective and remain within the proportions of that end.[44] Proportionality differs from subsidiarity in that subsidiarity involves an assessment of relative efficiency, whereas the proportionality principle does not weight interests of the organization and members against each other. Nevertheless, any determination of whether a measure 'exceeds what is necessary' is bound to be as contentious as an assessment of who would be better equipped to attain objectives.[45]

The effect and impact of such clauses as an objection to widened competence apparently depends upon the interpretation of the sphere of domestic jurisdiction of member states. The notion of 'appropriate measures' of Article 352 TFEU has been read to explicitly include the requirements of proportionality and subsidiarity in the assessment of the existence of implied EU powers.[46] Hence, when Article 352 is relied upon, it is presumed that the activity is both proportionate and in accordance with the principle of subsidiarity. A denial of an expansion of powers will on its part make its case by claiming a violation of the subsidiarity and proportionality principles (hereby arguing that the sovereign rights of members are infringed upon).[47] Instead of being a way of invoking some absolute limits on EU action, the principles become additional tools by which to present a competing conception of powers.

In the heydays of internationalism an absence of challenges to the exercise of powers by organizations made some authors characterize domestic jurisdiction clauses as of symbolic interest only, unsuitable for limiting activities of organizations.[48] However, the PCIJ had already in the *Nationality Decrees* opinion (1923) characterized domestic jurisdiction issues as "essentially relative".[49] Domestic jurisdiction clauses are

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[44] Furthermore, the principle entails the requirement that the measure must be chosen that least affects individuals. In this respect, see Jacobs (1999).

[45] Hartley (2007), at 151–152. However in contrast also see Dehousse who characterizes the proportionality principle as more justiciable. Dehousse (1994), at 114–115.

[46] Hartley (2007), at 106–110.

[47] As was the case in *Tobacco Advertising*, [2000] European Court Reports I-8419, para. 83 (although the reasoning did not explicitly concern Article 352 TFEU).

[48] For an example, see Schermers and Blokker (2003), at 161–162. In EU law the absence of precedents on the use of the subsidiarity principle as a challenge to legislation even lead some authors to consider such challenges impossible. For an example, see Usher (1998), at 99–100. In a similarly (albeit converse) way Seidl-Hohenveldern argued that any raising of domestic jurisdiction claims against an organization would impair the independence of that organization and prevent it from fulfilling its functions, Seidl-Hohenveldern (1965), at 50–51.

[49] *Nationality Decrees issued in Tunis and Morocco* (*French zone*) (Advisory Opinion, 7 February 1923), PCIJ Publications 1923, Series B, no. 4, at 24.

compatible with a state living in "hermetic isolation", as well as with a state having surrendered its decision-making to a supranational organization.[50] Turning to domestic jurisdiction clauses for guidance on what an organization is legally entitled to do does therefore not manage to resolve the question of proper scope of powers. Instead they become part of the debate. An absence of limiting impact of such clauses only testifies to the existence of agreement on the scope of powers.

5.2. Looking for Guidance in Principles of Interpretation

Another source to which interest is often turned in order to find guidance on what an organization is legally entitled to do, are principles of interpretation.[51] As constituent instruments of organizations in their basic form constitute treaties, the starting point for interpretative guidance would therefore be the 1969 Vienna Convention on the Law of Treaties. That the process of treaty interpretation is affected by the character of the principles of interpretation was recognized already during the drafting of the Vienna Convention:

> They [the principles of treaty interpretation] are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document. Their suitability for use in any given case hinges on a variety of considerations which have first to be appreciated by the interpreter of the document .... Even when a possible occasion for their application may appear to exist, their application is not automatic

[50] See Koskenniemi (2005), at 240 *et seq*., and esp. at 243. As to subsidiarity, see Estella who demonstrates the absence of abstract legal contents, and instead characterizes the principle as a "catch-all formula of good government and common sense", Estella (2002), at 96.

[51] Any exercise of powers is naturally also subject to the rules of international law. As organizations operate under the auspices of the international legal order, this means that organizations are to respect treaties concluded, peremptory norms, general principles of law, and customary law. In general, see Schermers and Blokker (2003), at 832–835, and Hirsch (1995), at 30–37. As to peremptory norms, they are by some authors considered the only true limits when transforming organizations. However, for example a conflict between the right to self-determination (as a peremptory norm) on the one hand, and safeguarding the interests of international public order (through exercise of implied powers by the UN Security Council when acting under Chapter VII of the UN Charter) on the other, does not allow for any categorical solution. Instead the conflict can only be resolved by a balancing act. Wheatley (2006), at 542 *et seq*. On the relationship between the UN Security Council and *jus cogens*, also see e.g. Orakhelashvili (2006), at 416–422. For an account of the right to self-determination (among others) as a peremptory norm, limiting the activities of organizations, see Schweigman (2001), at 200, and Gill (1995), at 79.

> but depends on the conviction of the interpreter that is appropriate in the particular circumstances of the case. In other words, recourse to many of these principles is discretionary rather than obligatory and the interpretation of documents is to some extent an art, not an exact science.[52]

This does not mean that principles of interpretation would not exist, but is rather a statement about the nature of those principles and the character of the choice between them. It is all the more surprising therefore that interpretation is often seen as a rational search of control. Reliance on firmly established principles of interpretation is expected to reveal the true meaning of a provision.[53] In other words, principles of interpretation are relied upon in order to come to terms with the uncertainties of law. The meaning of a provision can be discovered, the idea is, if not by logic alone, at least by careful application of the rules of interpretation.

Such a faith has been identified in different contexts. The Appellate Body of the WTO Dispute Settlement Mechanism, for example, has been claimed to utilize the rules of interpretation of the Vienna Convention as a way of depoliticizing its decisions. In a similar way the ICJ has been noted to reach interpretations by relying on abstract principles instead of really explaining how those interpretations were arrived at.[54] Such a faith in principles of interpretation may also explain why different ways of reading the same legal instrument are sometimes traced back to the application of different interpretive approaches instead of tracing the use of different principles of interpretation back to political preferences.

Before discussing the character of principles of interpretation any further, the articles on interpretation of the 1969 Vienna Convention should be recalled. Article 31 of the Vienna Convention presents as a "General rule of interpretation" that a treaty shall first of all be interpreted in accordance with the "ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The context referred to shall on its part comprise the text (including the preamble and annexes), and agreements and instruments relating to the treaty (accepted by all parties to the treaty). In addition, together with the context, any subsequent agreement between the parties regarding the interpretation of the treaty, subsequent practice in the application of the treaty (which

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[52] Report of the International Law Commission on the work of its Eighteenth Session, 4 May-19 July 1966, Official Records of the General Assembly, Twenty-first Session, Suppl. No. 9, UN Doc. A/CN.4/191 (1966), at 218. Also see Sato (1996), at 20–21.

[53] Klabbers notes such a tendency in WTO and EU law. Klabbers (2005 'On Rationalism'), at 408–411, and note 15.

[54] See Klabbers (2005 'On Rationalism'), at 416 and 421–426.

establishes the agreement of the parties regarding its interpretation), and relevant rules of international law shall be taken into account. A special meaning shall also be given to a term if it is established that the parties so intended. In addition, Article 32 of the Vienna Convention provides that as a "Supplementary means of interpretation", use may be made of "preparatory work of the treaty and the circumstances of its conclusion", in order to confirm an interpretation arrived at through the application of Article 31, or if an interpretation according to Article 31 leaves the meaning of a treaty ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.[55]

When drafting these articles the ILC aimed at codifying and combining a number of principles into one single rule of interpretation. This is also why the singular form is used in the title of Article 31.[56] While relegating preparatory work to a fairly limited role, the ILC remained silent on how the rest of the elements of the interpretative process are related. Besides good faith, respect should be paid to the ordinary meaning of the terms of the treaty, the context, object and purpose, and the additional criteria arising from the context. In other words, considerations emphasizing the object and purpose, and subsequent practice of a treaty constitute part of the ordinary meaning of that treaty.[57] This is also how international courts take on a search for the meaning of the provisions of a treaty. In EU law a characteristic example was provided in the *Continental Can* case, where the ECJ reasoned that:

> In order to answer this question … one has to go back to the spirit, general scheme and wording …, as well as to the system and objectives of the Treaty.[58]

Similarly in the *WHO* opinion, the ICJ held that:

> Interpreted in accordance with their ordinary meaning, in their context and in the light of the object and purpose of the WHO Constitution, as well as of the practice followed by the Organization, the provisions of its Article 2 may be read as ….[59]

This is not to say that the different elements could not be contrasted against each other. In fact, the very history of treaty interpretation has

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[55] 1969 Vienna Convention, Article 31 and 32.

[56] McDougal et al. (1994), at lxiii.

[57] Amerasinghe (2005), at 41.

[58] Case C-6/72, Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities, [1973] European Court Reports 215, para. 22.

[59] *WHO*, ICJ Reports 1996, para. 21.

been described as reflective of the dichotomy between consensualism and non-consensualism, resulting in contrasting uses of principles of interpretation.[60]

Regarding the object of treaty interpretation especially with a view to constituent instruments of organizations, three main approaches are often singled out. Textual interpretation defines the task of the interpreter as the determination of the 'ordinary' meaning of the text. A variation of this is contextual (or structural) interpretation, which means that provisions are placed in their framework. A historical focus aims at establishing the intentions of the drafters. The teleological interpreter emphasizes the object and purpose of the instrument and works so as to fulfill these.[61] In-between these approaches, competing constructions of powers can be expressed as a question of whether a textual interpretation should be adopted, whether a meaning should be given in the light of the object and purpose, or whether intentions should be emphasized. However, differences may also take the form of whether a text is unambiguous to begin with, whether a particular meaning is the 'ordinary' meaning of the text, what the object and purpose of a document entail, and what the underlying intention of the framers was.[62]

To begin with the last of these, recourse to preparatory materials as a guide on how to construct powers of organizations runs into a host of problems. The first of these is the issue of confidentiality. However, even when preparatory work is available, statements made during the preparatory process can be of little help in discovering an unambiguous meaning of legal provisions. As such statements express the standpoints of individual states, they can consist of a number of different views. In a concrete interpretative disagreement all parties could in such a case find support in those intentions. A further question becomes how to relate the original intent to the views of subsequent members (a group which may even be larger than the original membership). While preparatory work can be claimed to express state consent, that original consent can be opposed to by emphasizing the current intent of members.[63] This was the logic of

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[60] Koskenniemi (2005), at 333 with further references.

[61] This characterization is widely shared. See Fitzmaurice (1986), at 42, and for authors writing on international organizations, Sato (1996), at 22–33, Amerasinghe (2005), at 44–59, Schermers and Blokker (2003), at 839, Brown and Kennedy (1994), at 311, and Levasseur and Scott (2001), at 466–483.

[62] Amerasinghe (2005), at 33.

[63] In such a case an emphasis on preparatory work would appear as non-consensual. Koskenniemi (2005), at 342–343.

Judge Alvarez in the *Second Admission* case, in dissenting to the denial by the majority of a power of the General Assembly to make a decision to admit a state as a member to the UN in the absence of a recommendation by the Security Council (required by Article 4(2)UN):

> It is … necessary, when interpreting treaties – in particular, the Charter of the United Nations – to look ahead, that is to have regard to the new conditions, and not to look back, or have recourse to *travaux préparatoire*. A treaty or a text that has once been established acquires a life of its own. Consequently, in interpreting it we must have regard to the exigencies of contemporary life, rather than to the intentions of those who framed it.[64]

As to textual and teleological interpretation, a textual method is commonly considered to be the best path for achieving a clear, natural, plain, or ordinary meaning of the words that are subject to interpretation. For this reason textual interpretation is pictured as less ambiguous and more coherent than teleological reasoning.[65] Textual interpretation is often also thought of as the starting point of interpretation, which, if successful, renders any further interpretative considerations unnecessary.[66] This stands in marked contrast to the idea that an organization, in order to be dynamic and operate independently, should work to effectively fulfill its object and purpose, and that the constitutional character of constituent instruments of organizations warrants special attention to teleological considerations.[67] In the words of the ICJ:

> Such treaties can raise specific problems of interpretation owing, inter alia, to their character which is conventional and at the same time institutional;

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[64] Competence of the General Assembly for the Admission of a State to the United Nations, (Advisory Opinion, 3 March 1950), ICJ Reports 1950 (hereinafter Second Admission), at 18. In practice courts, tribunals and other organs have had recourse to preparatory work primarily as support for an interpretation already arrived at by other means. On the issue, see Fitzmaurice (1986), at 42–47, Peters (1997), at 24, Schermers and Blokker (2003), at 843, and Amerasinghe (2005), at 56–59. While it is true, as Klabbers points out, that any legal argument also needs historical backing, for example in order to know why a certain word was used instead of another, Klabbers (2003), at 284–285, this does not remove the possibility of reassessing the importance of that historical setting.

[65] See McDougal et al. (1994), at 7.

[66] This was the logic of the ICJ in the *Second Admission* case: "The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.… When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning", *Second Admission*, ICJ Reports 1950, at 8.

[67] Rosenne (1989), at 232–233.

> the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret the constituent treaties.[68]

In contrasting teleological and textual interpretation to one another, the alleged political nature of necessity-reasoning is often recalled. Teleological reasoning (especially in organizations) is often accused for importing a vagueness to the interpretation of a treaty and the establishment of the proper meaning of its terms that otherwise would not exist.[69] Due to the dynamic nature of teleological interpretation, recourse to teleology has even been claimed to transcend a proper act of interpretation and instead lead to "decision-making on the basis of judicial policy" (the suggestion being that other principles of interpretation would not involve decisions of policy).[70] In the *South West Africa* cases (second phase) the ICJ (in denying a right claimed by states) concluded that:

> … the whole "necessity" argument appears, in the final analysis, to be based on considerations of an extra-legal character, the product of a process of after-knowledge …. [T]hat necessity, if it exists, lies in the political field. It does not constitute necessity in the eyes of the law. If the Court, in order to parry the consequences of these events, were now to read into the mandates system, by way of, so to speak, remedial action, an element wholly foreign to its real character and structure as originally contemplated when the system was instituted, it would be engaging in an *ex post facto* process, exceeding its functions as a court of law ….
>
> It may be urged that the Court is entitled to engage in a process of "filling in the gaps" in the application of a teleological principle of interpretation …. [I]t is clear that it can have no application in circumstances in which the Court would have to go beyond what can reasonably be regarded as being a process of interpretation, and would have to engage in a process of rectification or revision. Rights cannot be presumed to exist merely because it might seem desirable that they should.[71]

Judge Gros structured his critique of the idea that the UN General Assembly would possess a power of revocation of mandates along the same lines in the *Namibia* opinion:

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[68] *WHO*, ICJ Reports 1996, para. 19. See even Rosenne (1989), at 195, and note 23 for extensive references to earlier cases.

[69] In this respect e.g. Gordon considers that implied powers reasoning injects "unidentified criteria" into the determination of proper meanings. Gordon (1965), at 821.

[70] Hartley (2007), at 74.

[71] *South West Africa cases* (*Ethiopia v South Africa; Liberia v South Africa*), Second Phase (Judgment, 18 July 1966), ICJ Reports 1966, paras 89 and 91.

> To say that a power is necessary, that it logically results from a certain situation, is to admit the non-existence of any legal justification. Necessity knows no law, it is said; and indeed to invoke necessity is to step outside the law.[72]

During the work of the European Convention (charged with the task of drafting a Constitutional Treaty for Europe), the question was also raised whether the imprecise nature of Article 352 TFEU could be addressed through a high degree of enumeration and detail. A suggestion was even made to introduce a catalog of powers as a way of reducing ambiguity in defining the scope of powers of the EU.[73] The logic of such a proposal would be that textual interpretation of express provisions could avoid the uncertainties attached to implied powers reasoning. However, even if the proposal would have been successful, it is doubtful whether the desired result could have been reached.

An emphasis on the need of express provisions/textual interpretation does not manage to escape the ambiguities at the heart of defining powers of organizations. First of all, there may be competing claims to what the 'ordinary' meaning of a text is. Any textual interpretation will therefore prefer a particular construction of a provision. Put differently, the ordinary meaning cannot be ascertained without choosing between different conceptions of what is ordinary. In this respect a finding of an ordinary meaning constitutes an interpretation in itself.[74] This means that the ordinary meaning can be made to support both a restrictive as well as an expansive reading of the constituent instrument.[75] Although an ordinary meaning of the text is often invoked as the point of departure and superior to teleological interpretation, any construction of the ordinary meaning will simultaneously be a particular interpretation of the object and purpose of the organization. No interpretation of the constituent instrument of an organization (however textual) can therefore avoid simultaneously expressing itself also on the teleology of that instrument.[76]

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[72] Dissenting Opinion of Judge Gros, *Namibia*, ICJ Reports 1971, at 339.

[73] See the Discussion Paper on Delimitation of Competence between the European Union and the Member States – Existing System, Problems and Avenues to be Explored, CONV 47/02 (15 May 2002), esp. para. 4(b).

[74] Koskenniemi (2005), at 333–336. Also see Goodrich (1986), at 109 arguing that a literal meaning is always an interpretative meaning due to the fact that a choice has to be made between several possible literal meanings.

[75] For an account on textualism in the WTO, see Van Damme (2010), at 625. For a more general argument in this respect, see Klabbers (2005 'On Rationalism'), at 414.

[76] Instead then of being value-free, all methods of interpretation "carry with them strikingly different values", Bederman, (2002), at 131.

5.3. Changing the Framework of Debate

5.3.1. *From Powers as Evidence of a Constitutional Character...*

Whatever label is used for the founding instruments of international organizations (constitution, charter, treaty, agreement, etc.) the basic character of these instruments is an agreement.[77] Such instruments can also be defined as treaties in the sense of the Vienna Convention on the Law of Treaties, in that those documents are concluded between states, in written form, and are governed by international law.[78] Constituent instruments of organizations are also international conventions in the meaning of Article 38 ICJ.[79] However, at least since the emergence of the United Nations, it has been clear that a treaty characterization of constituent instruments is inadequate. At the very founding conference of the UN, the UN Charter was expressly compared to a constitution that grows and expands as time goes on.[80]

While the existence of an agreement between states is a crucial prerequisite for an organization to come into existence, this treaty transforms into a constitution for the organization once an autonomous entity emerges.[81] The constitution concept has hereby become a generic notion through which to capture all constituent instruments, whatever their formal label. As an expression of this the constitution concept was also used as a common denominator by the ICJ in the *WHO* opinion.[82]

At the same time any use of the constitution concept comes with a number of associations such as: the organization of communal life through rules, in the form of a convention, possibly containing constitutional rights, the expression of a social contract, a definition of the sources

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[77] Rosenne (1989), at 190. Article 103 of the UN Charter expresses this explicitly: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". For a more recent account see Rama-Montaldo (2005), at 504–506.

[78] 1969 Vienna Convention, Article 2. Also see Klabbers (1996), at 38. UNCTAD and UNIDO, for example, were founded by UN General Assembly resolutions, and the IEA by an OECD Council resolution. However, formal designation is irrelevant, see 1969 Vienna Convention, Article 2(1)(a), and Voitovich (1994), at 21.

[79] Rosenne (1989), at 251. For the text of Article 38 of the ICJ Statute, see above, Chapter 3.2.1.

[80] Fassbender (1998), at 531.

[81] Tunkin (1988), at 263. The distinction between treaty and constitution was also noted in the making of the 1969 Vienna Convention. For a summary of the discussion see Rosenne (1989), at 190–191, and 200–211.

[82] *WHO*, ICJ Reports 1996, para. 19.

of law, the establishment of a complex of norms, and the creation of a legal order.[83] The 'constitutional law of the EU', for example, is commonly seen to cover issues such as: the form and extent of jurisdiction, the competence and relations between actors, the decision-making processes, and the sources of law.[84] In a most basic definition, the constituent instrument of an organization would entail: the fundamental rules of the system of governance, a definition of the scope and nature of authority and the allocation of powers to organs, and provisions on how these powers are to be exercised. In making a distinction to 'ordinary' treaties, a constituent instrument of organizations has also been identified through features such as: the creation of a legal person, the limits that are imposed on submitting reservations, and the possibility of tacit renewal.[85] At least traces of a constitutional law can therefore be found at the heart of most organizations.[86]

However, the constitutional character of constituent instruments of organizations has also been invoked in order to make particular claims on the construction of those instruments. A constitutional character is for example seen to both enable teleological interpretation, and also more strongly, to make it especially appropriate or even required.[87] Even the ICJ in the *WHO* opinion enumerated as one of the institutional elements of constituent instruments "the imperatives associated with the effective performance of … functions".[88] Sato expresses the idea even stronger:

> The core of the constitutional nature of constituent instruments lies in the fact that constituent instruments provide the legal foundations and framework for the structures and activities of international organizations on the basis of their evolutionary and teleological interpretations so that, despite changing international relations, international organizations can continue to function efficiently, and effectively perform their given purposes and functions. … This implies that constituent instruments will always need to be adapted to changing circumstances for the purpose of the efficient functioning and effective activities of international organizations.[89]

A dual characterization of constituent instruments as both constitutions and treaties is a reproduction of the dichotomous image of organizations

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[83] These are identified by Frankenberg (2000 'Toqueville's'), at 2.

[84] This is the general layout, for example, of Lenaerts, van Nuffel, and Brady (1999).

[85] Schermers and Blokker (2003), at 724–731.

[86] Alvarez (2003), at 431–432. Also see Cass (2005), at 52–54.

[87] See Alvarez (2001), at 104–105, Skubiszewski (1989), at 855, Sloan (1989), at 113–120, and Morawiecki (1986) at 98.

[88] *WHO*, ICJ Reports 1996, para. 19.

[89] Sato (2001), at 325 (footnote omitted).

discussed earlier.[90] It is present in the ICJ characterization of constituent instruments as "treaties of a particular type", and in an oxymoron such as the "Draft Treaty establishing a Constitution for Europe".[91] In such expressions the constitution notion serves as a way of emphasizing the autonomy of the organization.

The move to addressing organizations through the vocabulary of constitutionalism has been described (just as the ideas of attributed powers and implied powers) as a reaction to perceived imperfections of earlier institutional regimes. In the late 19th and early 20th centuries, the idea of the victory of form over substance, combined with the image of organizations as only limited entities (in favor of state sovereignty) governed (thus, the idea of attributed powers emerged). After the Second World War the absolute conception of state sovereignty was redefined, with faith being placed heavily on institution-building (thus, the idea of implied powers emerged). Towards the last decades of the 20th century a new shift of focus has been identified, as interest was increasingly put in a proliferation of dispute resolution. The emergence of a constitutional law within a given legal order, combined with judicial empowerment as a means for upholding and enforcing that constitutional law became the main theme in discussions on the constitutionalization of international law.[92] Such a focus can be characterized as formal or internal constitutionalization.[93] However, constitutionalization also brought with it a different focus, referring not only to the establishment and strengthening of the legal order (and hence, the constitutional character) of an international organization. In addition constitutionalization entails a focus on the relationship between members and the organization.[94] This means that also the question of the proper extent of powers can be addressed as a question of constitutionalization.[95]

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[90] See above, Chapter 3.2.1.

[91] See *WHO*, ICJ Reports 1996, para. 19. On more concrete expressions of this dichotomy in the Draft Treaty establishing a Constitution for Europe, see Diez-Picazo (2004).

[92] Kennedy (1994), esp. at 367. Also see Peters (2006), at 582, and Hirschl (2004 'The Political'), at 71.

[93] See Wiener (2003), at 6, and von Bogdandy (2010), at 746–747.

[94] See Weiler and Wind (2003), at 3, and Peters (2006), at 582.

[95] One of the more recent compilations of international constitutional mechanisms in place is presented by Dunoff and Trachtman. In order to assess the degree of constitutionalization of international actors they focus on: allocation of governance authority both horizontally (separation of powers) and vertically (grants and limits on authority of organizations), supremacy of constitutional norms, stability, the protection of fundamental rights, mechanisms of review for testing the legality of laws and acts of governance, and

On the one hand, constitutionalization claims are made in order to limit the political power of organizations (which they may or may not assert through the exercise of legal powers) and subject them to the rule of law. On the other hand, constitutionalization is advocated as a revitalization of international organizations. Such a revitalization may even entail a hope that an organization would exercise a stronger regulative role towards its members (e.g. through the establishment of legal hierarchies and integration).[96] Calls for the constitutionalization of an organization can hereby convey different visions concerning the development of its legal order.

5.3.2. *... To Powers as an Issue of Constitutionalization*

5.3.2.1. *The Supranational Constitutionalism of Europe*

EU law has not always been characterized as a constitutional legal order. The three original communities (the ECSC, the EEC, and the EURATOM) were all labeled treaties. The contrast between this label and the contents of the debate from the 1990s onwards on the constitutional character of EU law is remarkable (although the founding instruments still bear the treaty-label). However, already from the early days of European integration, some special features of the EC Treaties were noted. The ECJ ruling in *van Gend en Loos* constituted an early break with a simple treaty characterization of the EU:

> The objective of the EEC treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble of the Treaty which refers not only to governments but to peoples. It is confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens.[97]

What set Community law apart from public international law, was that whereas public international law typically allows the state to determine

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accountability to constituents/commitment to democratic governance. See Dunoff and Trachtman (2009), at 18–22 and 27–29.

[96] Trachtman (2006), at 631 identifies a contradiction here as constraining the organization means reducing the capacity of that organization for constraining its member states. Also see Werner (2007), e.g. at 349.

[97] Case C-26/62, *N.V. Algemene Transport – en Expeditie Onderneming van Gend & Loos v Nederlandse administratie der belastingen* (*Netherlands Inland Revenue Administration*), [1963] European Court Reports 1 (hereinafter *Van Gend en Loos*), at 12.

the method and extent to which international obligations may produce effects for individuals, the domestic impact of Community law was determined by Community law itself, which moreover may prevail over conflicting national law, and which national courts may be required to apply directly.[98] According to the Court, this meant:

> … that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.[99]

What was new about the legal order, was the direct effect of the rights and obligations that are imposed upon citizens.[100] Direct effect has also been regarded as a first step in a progressive movement towards quasi-federal law.[101]

The *van Gend en Loos* case (1963) was closely followed by *Costa v ENEL* (1964), in which the ECJ defined the idea of a supreme legal order:

> By contrast with ordinary international treaties, the EEC Treaty has created its own legal system …. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity, and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community … [it has become] impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity.[102]

While direct effect can be defined as the capacity of a norm to be applied in domestic court proceedings, supremacy denotes the capacity of that norm to overrule inconsistent national laws.[103] The combination of direct

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[98] *Van Gend en Loos*, [1963] European Court Reports 1, at 7.

[99] *Van Gend en Loos*, [1963] European Court Reports 1, at 12.

[100] As a further nuance, direct effect and direct applicability can be distinguished. While direct effect bestows legal rights and obligations, direct applicability refers to the fact that regulations require no implementing legislation within individual member states. Direct effect and direct applicability are nevertheless often used interchangeably. See de Witte (1999), at 181 and note 13, and Eleftheriadis (1996).

[101] Stein (1981), at 24. However, such an effect can also arise in international law. As the PCIJ claimed: "…the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts", *Jurisdiction of the Courts of Danzig* (Advisory Opinion, 3 March 1928), PCIJ Reports 1928, Series B, no. 15, at 17, and de Witte (1999), at 188 and 209.

[102] *Costa v ENEL*, [1964] European Court Reports 585, at 593–594.

[103] See de Witte (1999), at 177–179 and 189–193.

effect and supremacy means that the directly effective norms are not merely the law of the land, but place themselves at the very top of the hierarchy of norms and become the 'higher law' of the land. The feature of constituting the 'law of laws' and the creation of legal hierarchy is on its part one of the most fundamental characteristics of a constitution.[104]

When pre-emption is added (meaning that members may not take concurrent action in the sphere of exclusive powers), these three principles are commonly described as the three hallmarks of normative supranationalism.[105] This supranationalism also became the paramount feature of the constitutional character of EU law. In this way early constitutional characterizations of EU law focused mainly on questions of legal status and empowerment. What made EU law distinguishable from mere treaty law was the supranational legal hierarchy it created. In the 1980s the ECJ further defined the constitutional features by adding that the (then) EC was based upon the rule of law and subject to the supervision of the ECJ.[106] In addition to supranationalism, the protection of fundamental rights and the use of implied powers have also been identified as central features of the constitutional character of the EU.[107]

The role of the ECJ in the EU legal order is unique among other international organizations. Adding to this the fact that both the acts of Union organs and member states are subject to review, and that member governments can be held responsible by individuals (before national courts) for violating EU law, the extent and availability of judicial review stands out as truly exceptional.[108] Because of this, the constitutional character of the EU (the empowering features of the legal order combined with the role of the ECJ in upholding the rule of law), has become the epitome of liberal-legal constitutionalism.[109]

By the time of the Laeken Declaration (setting the agenda for the latest revision of the founding treaties), this 'body' of EU constitutionalism had however also become the target of fierce debate. From adding to or

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[104] It is also therefore the absence of such a hierarchy of laws that has been noted as one of the most serious challenges for the idea of an international constitution. See Peters (2006), at 597–599.

[105] On pre-emption, see Weiler (1999), at 172–174, and Cremona (1999), at 153–155.

[106] See Case C-294/83, *Partie Ecologiste – 'Les Verts' v European Parliament,* [1986] European Court Reports 1339, para. 23, and de Búrca (1999), at 57 *et seq*.

[107] Weiler (1999), at 19–25. The ECJ has also introduced principles of good administration that could be characterized as constitutional, such as proportionality, legitimate expectations, due process, and institutional balance. See Craig (2001), at 129, and de Búrca (1999), at 58.

[108] Sweet (2000), at 306.

[109] The characterization is made by Loughlin (2010), at 66.

defining more precisely the body of EU law, interest has shifted to the question of how to organize European politics. While a proliferation of the role of the ECJ as the ultimate authority for interpreting the contents of EU law has been at the heart of European constitutionalism, the Laeken Declaration laid its emphasis differently. Although the crucial role of the ECJ in upholding EU law was not questioned, the aim of the creation of a "Constitution for European citizens" was to be able to better live up to expectations of democratic legitimacy as the source of EU law.[110]

The discourse on EU constitutionalism has hereby come to transcend matters of empowerment and judicial review. Instead, the ever expanding and deepening integration, along with developments such as the increasing use of majority voting, has given rise to a need for ensuring a proper source for EU legislation, and to reinstitute the faith of the public in the Union. This focus on issues of democracy and legitimacy challenged the original conception of EU constitutionalism.[111]

In the *van Gend en Loos* and *Costa v ENEL* cases the ECJ explained the reach of EU law and its impact on member sovereignty by distinguishing the EC Treaty from ordinary treaties. Eventually this resulted in a characterization of the EU legal order as constitutional (with rather well-defined constitutional features). However, whereas at heart EU constitutionalism is still concerned with the exercise of independent powers, it is no longer the supranational features, nor the supervision and enforcement of EU law that is the most pressing concern (or at least not the sole concern) in the debate on constitutionalism. Alongside the formal constitutional arrangement, the question of political unity (as the source of power) has become a main focal point.[112]

5.3.2.2. *Constitutionalism in the WTO*

Whereas the debate on the constitutional character of EU law date back almost half a decade, the legal order of the WTO has only more recently been discussed in terms of its constitutional character. There is of course a logical explanation to this in that the WTO itself has only existed since 1995. Its predecessor, the GATT system, was commonly not treated as an international organization, but rather as an agreement between states

[110] See Laeken Declaration, Chapter II. On the 'body' of EU constitutionalism, see Maduro (1998), at 8.

[111] See Weiler (1999), at 226–233, and for an account of the period of mutation since the Single European Act, at 63 *et seq*.

[112] Loughlin (2010), at 66.

and a structure for negotiation. Gradually the idea of trade liberalization, through a unified trade system, grew stronger. The realization of this goal required the existence of an institutional system for adopting trade regulation.[113] This materialized when GATT transformed into the WTO.

Similarly to the early discussions in EU law, constitutional characterizations of the WTO emphasizes the distinctiveness of the WTO from 'ordinary' treaties: the fact that the content of WTO law builds on constitutional doctrines (such as proportionality and jurisdictional competence), that international trade law consists of a close community (a constituency), and that there is a high level of compliance with and recourse to WTO principles and processes.[114] Yet, a constitutional characterization of the WTO is also targeted for being flawed. The absence of autonomous legislative capacity, the absence of a legislature, the absence of a division of powers doctrine, and the lack of direct effect in member legal orders are seen to undermine a constitutional characterization of the WTO.[115] This criticism however only makes the question of why the WTO is discussed in terms of constitutionalization all the more interesting.

In a discussion on the constitutionalization of the WTO a number of claims are made in respect of the WTO legal order. Three different paths for constitutionalizing the WTO have been identified.[116] The first focuses on the institutional architecture of the WTO. In this form constitutionalization claims build on the federal tendencies of the EU, advocating for the WTO both a role in, and the means for, defining and enforcing global economic policies.[117] A second approach advocates constitutionalization as a path for the entrenchment of values - a charter of economic rights - or a legal hierarchy helping to overcome troublesome political struggles (such as choosing between costs and benefits in balancing trade and environmental concerns). The constitutionalization of the WTO is in this vision all about rationalizing such struggles into questions of legal hierarchies (economic rights assuming priority).[118] Thirdly WTO constitutionalization is seen as a process of judicial mediation and norm-generation. Three processes have been identified as central for this development:

[113] See Cass (2005), at 58–93.
[114] Cass (2005), at 52–54.
[115] See Dunoff (2006), at 651.
[116] Cass (2005) provides an overview and discusses these in chapters 4–6. Also see Dunoff (2006), for an overview with numerous references.
[117] See Jackson (1998).
[118] See Petersmann (2002).

1) constitutional rules and principles (such as proportionality and jurisdictional competence) are 'borrowed' from other constitutional domains, 2) decisions of the dispute settlement mechanism constitute a process of constitutional system making, and 3) there is incorporation of matters that have traditionally been viewed as national concerns into the agenda of international trade law. In this form the constitutionalization claim emphasizes the authority of the judicial actors of the WTO.[119]

Notably, all of these models of WTO constitutionalism place the dispute settlement mechanism at the heart of the constitutional development. In a way this is not surprising, given the exceptional character of the WTO Dispute Settlement Body in an international system where diplomatic settlement of disputes constitutes the rule. Petersmann even considers WTO dispute settlement to be of such a fundamental importance so as to serve as a model for the constitutionalization of the international legal system as a whole (and especially the UN).[120] Faith is put in the dispute settlement mechanism and the creation of legal hierarchies in order to avoid cumbersome acts of balancing policies. In fact, all of the three visions above emphasize constitutionalization as a way of avoiding trade politics.[121] One of the explicit claims made is, for example, that by only applying procedure-oriented tests for revealing protectionist measures the WTO can invalidate protectionist measures without interfering with national policies. An emphasis on the role of the judiciary is also defended on grounds of efficiency as a judicialization of international trade law is seen to entail a move away from diplomatic negotiations to more exact, principled and authoritative settlement.[122]

An increase of judicial power could potentially also add to the legitimacy of the WTO, the argument goes, by upholding fair procedures, by adding coherence to decision-making through recourse to established principles of interpretation, by being sensitive to other legal regimes, and through a clarification of the texts of the agreements in a discourse between adjudicators and the legal community. However, not all authors are convinced that an emphasis on the role of the dispute settlement mechanism is sufficient for bestowing a constitutional character upon the WTO. While a constitutionalization of the WTO has on the one hand

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[119] See Cass (2005), at 177–203, and Dunoff (2009), esp. at 195.

[120] Petersmann (1996–1997), at 457.

[121] Dunoff calls this "constitutionalism as antidote to trade politics", Dunoff (2006), at 661–664. Also see Howse and Nicolaïdis (2001).

[122] For the former point, see McGinnis and Movsesian (2000), at 572 *et seq*. For the latter, see Petersmann (1996–1997), at 468.

served as an argument for strengthening the legal system, such a focus has also been criticized for leading to an imbalance between the judicial and political input. Constitutionalization, critics claim, should instead emphasize democratic accountability.[123] In this competing conception of the future development of the WTO, a focus on transparency, democratic representativity, accountability, and deliberation is preferred (practical suggestions for improvement ranging from NGO participation to the creation of a Parliamentary Assembly).[124] The claim is that since the WTO has not managed to anchor its authority to act in shared values, any constitutionalization of the WTO should open up spaces for political dialogue and contestation rather than pre-empt such discourse in the name of judicial empowerment.[125]

5.3.2.3. *The UN and the Idea of a World Constitution*

The constitutional character of the UN can be approached in two different ways. The first relates to identifying the UN Charter as the constitutional law of the UN. The second shifts interest to the UN Charter as a global constitution. While the possibility of world constitutionalism is not interesting for present purposes as such, the two are closely connected. Due to the universality of the UN, a claim can be made that the UN Charter assumes a special place in the international legal order. Hence, a constitutional characterization of the UN Charter easily translates into an image of the UN Charter as a constitution of the international community.[126] It is no surprise, therefore, that ideas about developing a cosmopolitan model of democracy also build on the UN.[127] At the same time, such world constitutionalism presupposes the existence of a constitutional law of the UN. It is only through a confirmation and strengthening of this constitutional law that an image of a politically constituted world society can emerge.[128]

A number of features have been recalled in order to demonstrate the constitutional character of the UN Charter. For example Fassbender identifies: the establishment of a system of governance, a defined

[123] See e.g. Howse and Nicolaïdis (2001). For an overview of critical arguments and further references, see Cass (2005), at 177–186.

[124] See Krajewski (2001), at 180–183, von Bogdandy (2001), and Dunoff (2006), at 664.

[125] Gerhart (2003), at 1–2 and 73–75, and Dunoff (2006), at 673.

[126] Crawford (1997), at 8 and 15. Also see Fassbender (2005), at 846–847.

[127] As does David Held, see Held (1995), esp. at 270 *et seq*. Also see already Gordon (1965).

[128] Fassbender (2005), at 847, and Dupuy (1997), at 3. Also see Held (1995), at 279.

membership, and the creation of a hierarchy of norms.[129] The last of these taps into a common emphasis on constitutionalization as the creation of a normative order and on strengthening the impact of that order on members. Constitutionalization of the UN would in such a vision be essentially about creating:

> … norms about the organization and performance of governmental functions …, and the relationship between the government and those being governed. … [P]rovide a legal frame and guiding principles for the political life of a community. … [And be] binding on governmental institutions and community members alike, and paramount law in the sense that law of lower rank has to conform to the constitutional rules.[130]

Some authors have identified traces of such constitutional features in Articles 2(6) and 103 of the UN Charter. The emphasis on Article 103 builds on the legal hierarchy that the article establishes in relation to conflicting international agreements, and which Article 30(1) of the 1969 Vienna Convention on the Law of Treaties reinforces.[131] Because of this hierarchy the UN Charter is claimed to set the framework for any permissible governmental activities.[132] Article 2(6) of the UN Charter can on its part be argued to widen the impact of UN Charter obligations also to non-members.[133] The idea of world constitutionalism is even claimed to be the only image in which these articles of the UN Charter make sense.[134]

Also more recent law-making activities of the Security Council have been mentioned in demonstrating the constitutional character of the UN. Through activities such as the establishment of war crimes tribunals and compensation commissions, imposing disarmament obligations, and by determining borders, the label "world legislature" has been attached to

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[129] Other criteria that Fassbender mentions are the use of the word 'Charter' and the existence of a 'constitutional moment'. Fassbender (1998), at 573–584.

[130] Fassbender (1998), at 569–570.

[131] UN Charter, Article 103: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". Article 30(1) of the 1969 Vienna Convention on the application of successive treaties relating to the same subject matter on its part qualifies the application of that article to the benefit of Article 103 of the UN Charter. Bernhardt (2002), at 1302 claims that Article 103 is an essential element in recognizing the UN Charter as the constitution of the international community.

[132] In general, see Dupuy (1997). For the last point, see Fassbender (1998), at 578.

[133] UN Charter, Article 2(6): "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security". Also see Simma (1994), e.g. at 261.

[134] The claim is made by Fassbender (1998), at 593–594.

the Council.[135] Interest has also been turned to activities of the Security Council in respect of terrorism, and especially Security Council Resolution 1373 which set out a range of abstract measures for all states to undertake in combating terrorism (such as the suppression of financing of terrorist acts, freezing of assets, and criminalization of terrorist acts), and Resolution 1540, which imposes a range of general obligations to keep weapons of mass destruction and their means of delivery out of the hands of non-state actors.[136] These far-reaching legislative acts have even been seen to resemble directives of EU law.[137] It is therefore not surprising that these decisions have been central arguments in demonstrating the constitutional nature of the UN Charter.[138]

The criticism that constitutional characterizations of the UN meet is familiar from the EU and WTO contexts. One of the flaws often taken hold of is the undemocratic nature of the system of governance that the Charter establishes. For this reason both a more representative and an enhanced role for the General Assembly, as well as a more representative Security Council are reoccurring calls for reform.[139] Connected to this are concerns about the institutional balance between the General Assembly and the Security Council. The original idea may have been for the Security Council to establish international order and the General Assembly to deal with the acceptability of that order, and thus for this to constitute something of a separation of powers arrangement.[140] Yet, while there is a rudimentary separation of powers in the institutional structure of the UN, it is by no means flawless. The decisions of the undemocratic Security Council are badly compensated by a weak General Assembly. A political check of decisions may therefore be absent in practice.

The combination of domination of Security Council decision-making by a few states, use of the veto, and the potential absence of a representation of the general opinion in the decisions made, results in what has been termed the "constitutional crisis" of the UN and has been considered as

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[135] See Talmon (2005), at 176 with further examples and references.

[136] United Nations Security Council Resolution 1373, 28 September 2001 (UN Doc. S/RES/1373), and United Nations Security Council Resolution 1540, 28 April 2004 (UN Doc. S/RES/1540). Talmon (2005), at 177 *et seq*. For further examples of UN Security Council law-making also see Alvarez (2005), at 184 *et seq*.

[137] Talmon (2005), at 193.

[138] Werner (2007), at 357.

[139] For one example, see Report of the Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc. A/59/2005 (21 March 2005), paras 167–170. Also see Macdonald (2005), at 896–901 outlining a future "People's Assembly".

[140] For such a characterization of the relationship, see Koskenniemi (1995), at 337–339.

proof of the "unconstitutionality" of the organization.[141] When adding to this the absence of judicial protection (against an overactive Security Council), there is no method for individual members to vindicate their rights against UN organs.[142] Such an absence of judicial protection of members, combined with a lack of capacity to impose decisions are in Macdonald's words "almost universally seen as serious problems of the constitutional perspective".[143]

5.4. The Promise of Constitutionalism

As a way of structuring the question of powers of organizations, interest has been turned to a number of sources. The express wording of the constituent instrument, domestic jurisdiction clauses, and principles of interpretation are all commonly invoked in defining the extent of powers. While invoking these elements do not settle the question of powers in any abstract way, their inclusion into the reasoning does bring with it new parameters by which to phrase a disagreement over the extent of powers. By discussing the extent of powers as an issue of impact of domestic jurisdiction clauses or the applicability of principles of interpretation, new questions are brought to the foreground through which to discuss whether organization X can engage in activity Y.

By way of an example, while the occurrence of domestic jurisdiction clauses in constituent instruments does not tilt interpretations of the scope of powers of a particular organization automatically in favor of member sovereignty, it does turn a discussion on what powers can be derived from the express wording or the object and purpose of an organization, into a question of how to define the *domaine réservé* of members. In a similar way, what distinguishes making claims on the extent of the activities of an organization by invoking the framework of constitutionalism is the shift of focus to the broader question of governance. In turning interest from a discussion on the reach of powers of an organization into discussing the constitutionalization of organizations, a new set of issues arise through which to make claims on the preferred form of cooperation.

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[141] The notion is used by Dupuy (1997), at 25. For general accounts, also see Caron (1993), and Macdonald (2005). On "unconstitutionality", see Arangio-Ruiz (1997), e.g. at 20.

[142] Review of decisions can only arise incidentally in proceedings before the ICJ, see Crawford (1997), at 12–13, and Watson (1993). On judicial protection as an essential element of UN constitutionalism, also see Petersmann (1999), at 142–153.

[143] Macdonald (2000), at 292.

Because of this shift of focus also constitutionalization claims can be seen as attempts at structuring the question of how to define the proper extent of powers of organizations.[144]

At the same time constitutionalization claims can be made in order to emphasize different images of an organization. The more the discussion moves from grandiose theorizing on the possibility of global constitutionalism to the level of international organizations, the more specific the constitutionalization discussion becomes, and the more clearly also constitutionalism stands out as a means by which to express particular preferences on the present nature or desired future construction of a regime.[145]

A desire to limit the competence of an organization can not only be expressed by emphasizing the element of conferral, but can also be expressed as a need for limited government. Constitutionalization claims hereby serve to underline the importance of institutional safeguards against the activities of organizations. In such a use, the constitutionalization of an organization appears as ultimate proof of its limited character (an idea that at some point seemed to be eroding), invoked in order to stabilize the relationship between that organization and its members.[146] This development has been especially visible in EU law where a more "hostile constitutional landscape" towards integration has emerged, with a corresponding shift of emphasis from further integration to the internal processes of EU law.[147]

Yet constitutionalism can not only be used for constraining organizations, but also has an enabling side. Constitutionalization can be invoked as an attempt at strengthening the legal order (e.g. of the WTO). In this respect an expansion of the legal means of an organization can not only be presented as a functional necessity for the better achievement of a particular goal, but can also be expressed in broader terms as constitutional development. As far as such a strengthening can be captured in terms

[144] In a similar way Frankenberg defines constitutionalism as an attempt to straddle "… the mutually exclusive concepts of 'state' and 'international entity' and to solve the problems of legitimate authority and social integration", Frankenberg (2000 'The Return'), at 258.

[145] Scott (2005).

[146] See e.g. Klabbers who claims that focus is shifting from the achievement of aims, towards "providing a stable and legitimate framework for interaction between the regime's subjects and for interaction between those subjects and the powers that be", Klabbers (2004 'Constitutionalism'), at 32–33.

[147] See Weiler (1998), at 366 *et seq*. with further references.

of a judicialization of organizations, the development has even been presented as a particular form of institutionalization.[148]

In all of its uses, constitutionalization is invoked as a remedy for perceived imperfections.[149] At the same time it is not uncommon that there are different interpretations of the source of the imperfection (for example, is it the absence of judicial review or the unrepresentative nature that is the main problem with UN Security Council decision making?). As a result also the prescribed remedy, advocated as a constitutionalization of the organization, can look very different.

[148] Goldstein et al. (2001 'Introduction').
[149] Klabbers (2009), at 11–19.

CHAPTER SIX

CONSTITUTIONALISM AS A FRAMEWORK FOR DEBATING POWERS

The idea of constitutionalism is intrinsically linked to the modern state. It is mainly in the American and European constitutional states of the nineteenth and twentieth centuries that the notion has acquired its modern meaning.[1] Any constituent instrument of an organization will fail in comparison with national constitutions on accounts such as: the degree of delegated authority, the creation of a community or union, accountability to individuals, and the degree to which explicit limits on governmental authority are present. This means that constituent instruments of international organizations and constitutions of nation states are not fully comparable instruments.[2] For this reason some authors also object to using the constitutionalism concept beyond the state context.[3]

Yet, apart from a few skeptical voices, the possibility of constitutionalism beyond the nation state is increasingly accepted. Instead of questioning international constitutionalism as such, discussions have become more concerned with how to best translate constitutionalism onto the international level.[4] In fact, the discussion on the constitutionalization of international law has reached a stage where lists and matrixes of constitutional features are being compiled. This suggests that there is a more or less shared point of departure on a set of building blocks of international constitutionalism, the nature of which are now the target of debate.[5]

Constitutionalization claims were in the previous chapter found to be made for a number of purposes, such as: for limiting the political power of organizations and subjecting organizations to the rule of law, in order to revitalize international organizations and expand their impact upon members, and as a way of focusing on the legitimacy of decision-making in organizations. Because of the national origin, the idea of

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[1] In between these constitutional traditions there are also some differences. See Möllers (2004), esp. at 129–134, and in general Rubenfeld (2004).

[2] Alvarez (2003), at 431–432.

[3] See Walker (2008), at 519–522 for examples.

[4] In general, see Walker (2003).

[5] Compare e.g. Dunoff and Trachtman (2009) with Klabbers et al. (2009), who both focus on a very similar set of issues as the building blocks of international constitutionalism.

constitutionalism comes with strong associations both in respect of substance (democracy, rule of law, separation of powers, fundamental rights), and function (establishment of public power, creation of a legal hierarchy, limiting the exercise of public power, creating a political framework). Constitutionalism therefore has both an enabling and a constraining dimension, and embodies a number of different means for pursuing these different goals. As many (and even conflicting) ideas can be presented as constitutionalization, it is not surprising that the use of the idea in the context of international organizations has been perceived with some unease.[6]

In discussing the constitutionalization of organizations more closely below, the aim will not be to assess the degree of constitutionalization of organizations as such, but to demonstrate how different constructions of powers of organizations can be presented as constitutional claims. Dealing with powers of organizations in the language of constitutionalism will however at the same time invoke some of the classical debates of constitutional theory. Whether there are any merits with transforming a discussion on the extent of powers into a discussion on the constitutionalization of an organization is a question that will be returned to towards the end of the chapter.

6.1. On the Nature of Constitutional Claims

6.1.1. *Identifying Elements of Constitutionalization*

Although the concept of constitutionalism evades any easy definition, this does not mean that different elements of it could not be identified. The definitional difficulties rather stem from the fact that these elements can be emphasized differently. The distinction between an emphasis on the judicial side of constitutionalism and constitutionalism as a search for democratic legitimacy is commonly taken hold of, albeit in various terms. Distinctions between juridical and political constitutionalism,[7] formal and substantive conceptions of constitutionalism (and the rule of law),[8] thick and thin versions of the rule of law,[9] and between liberal and

[6] Weiler claims that because of the strong (and different) associations of the concept, every use of it will be controversial, see Weiler (2005), at 173.

[7] Bellamy (2001), at 22.

[8] Craig (1997). The dichotomy is also used by Wiener (2003), e.g. table 1, at 5.

[9] Hutchinson (1999), at 198. Also see Tamanaha (2004), at 91.

republican constitutionalism,[10] are just some examples of conceptual pairs through which the dichotomy is expressed.[11]

The modern notion of the rule of law that can be found at the heart of the first of these conceptions:

> [R]eflects the belief that citizens are equal in the eyes of the law, that the rule structure should be insulated from gross manipulation and that, as an operative system of rules, legal judgment is quite distinct from political decision-making.[12]

At the international level this takes the form of structuring the international legal system and organizations through legal standards. The driving force is the maintenance of the cohesion and effectiveness of the legal system, and the avoidance of entanglement in political struggle.[13] Apart from creating a body of legal rules, one of the main tools for achieving this structuring is reliance on judicial review: judges are the guardians of the constitutional legal order.[14] Presented in this way constitutionalism becomes an emphasis on rule-oriented behavior and a safeguard against arbitrariness and discretionary authority.[15]

From the expectation that law is to define any exercise of authority certain things follow. First of all there must be a legal system, the rules of which are binding on all (including officials and the legislature). These rules must also be justiciable, meaning that a judicial procedure should serve to implement the superiority of constitutional law and to assess the compatibility of legal acts with it.[16] Furthermore, a division of powers is needed in order to distinguish the exercise of governmental powers from their supervision. In this way an independent judiciary constitutes a fundamental part of the idea of a separation of powers.[17] As to its vision of judging such a formal conception of constitutionalism emphasizes

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[10] Loughlin (2010).

[11] There are also many other ways of demonstrating the different uses to which the constitutionalism concept can be put, see Walker (2008), at 527 *et seq*.

[12] Loughlin (2000), at 79.

[13] See Craig (1997), at 479, and Fassbender (1998), at 551.

[14] Hirschl (2004 'Hegemonic'), at 9.

[15] See Hutchinson (1999), at 198. The *locus classicus* of the phrase 'rule of law' is Dicey's *Introduction to the Study of the Law of the Constitution,* originally written in 1885. Dicey identified three central elements of the rule of law: the supremacy of law as opposed to (political) power, equality before the law for all citizens, and that the constitution is the result of the ordinary law of the land. Dicey (1924), at 183–201. Also see Allan (2001) who expresses this as the "rule of law … as a principle of constitutionalism", at 31.

[16] See Raz (2001), at 153.

[17] Allan (2001), at 31–32.

regularity, predictability, and certainty over the concerns of substantive justice. Rules are seen to have a core meaning, and that meaning should be relied upon to resolve disputes.[18]

All of these constitutional claims can also be found in the context of organizations. Expanding the body of laws and improving law-making capacities has been a central theme in discussions on the constitutionalization of the WTO. An emphasis on legal hierarchies is on its part a central element in claiming a constitutional status of both the EU Treaties and the UN Charter. A principle of separation of powers is perhaps most clearly present in EU law through the principle of institutional balance. That the idea of separation of powers finds its clearest formulation in EU law is of course no coincidence. The more far-reaching powers an organization exercise, the stronger the need for a clear division of powers will presumably be (since the main idea behind that principle is to limit and balance the discretion of governing bodies).[19] A lack of a true separation of powers has on its part been considered as a flaw of both the UN and WTO legal orders, and something that a constitutionalization of those legal orders should address.[20] Finally, a strengthening of judicial mechanisms is also a common theme in constitutionalization claims.[21]

Notably, although the concept of rule of law is often invoked in order to emphasize the limits upon the exercise of authority by the state, the rule of law does in fact demand that all legal actors obey the body of rules.[22] This means that review of the political organs of the organization (lack of which has been considered a flaw with the constitutional character of the UN), binding dispute settlement between members (WTO), and the presence of an ultimate arbiter and supervisor of the conduct of both political organs and member states (EU) can all be subsumed as formal constitutionalization. In-between these there are marked differences in respect of who is the target of the judicial review. Put differently, arguments in favor of the constitutionalization of an organization can be made in order to empower an organ to supervise the exercise of powers of other organs,

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[18] In general, see Hutchinson (1999), at 198–199. Also see Tamanaha (2004), at 114–126.

[19] The principle of institutional balance has even been considered one of the most important principles of EU law. See Prechal (1998), at 280–281. For a discussion on the resemblance (and differences) between the principle of institutional balance and the idea of a separation of powers, see Conway (2011).

[20] See White (2001), at 99, and Cass (2005), at 109–110.

[21] On the UN and the WTO, see above, Chapter 5.3.2.

[22] Or differently, that law (and not the arbitrary will of persons) should govern society at large, Hutchinson (1999), at 196.

but can also be made with the goal of strengthening the enforcement capacities of an organization.

A substantive conception of constitutionalism includes the rule of law as an element of it, but also transcends formal constitutionalism by focusing on the establishment and maintenance of a political system.[23] In the state context this means focusing on the individual as the basic unit of society and creating a political domain which serves as the platform for collective decision-making.[24] Instead of emphasizing the existence and establishment of legal procedures, hierarchies, and mechanisms of supervision, interest is geared towards the nature of the polity itself and especially the establishment of a link between governmental institutions and societies.[25] As Allott puts it, when a government claims to act, it claims to exercise public power. This power is delegated by the society to be exercised in the public interest. As such, the exercise of that power must acknowledge the conditions that inhere in it.[26] When used in this sense, calls for constitutionalization underline the importance of creating a link to the 'constituent power'. Typically this link is expressed through an emphasis on democratic governance.[27] Democratic legitimacy is seen as a prerequisite for empowerment. However, as will be seen, such an emphasis does not only translate into calls for empowering political/representative bodies. Moreover, difficulties with democratizing organizations may even turn into calls for limiting the powers of organizations.

6.1.2. *On the Many Meanings of Legitimacy*

Phrasing discussions on the shape and role of international organizations in terms of their constitutionalization entails a change of vocabulary by which to approach organizations. One aspect of this change is that the question of the legitimacy of (acts of) organizations becomes central. By connecting popular attitudes with institutional decision making, legitimacy has become a parameter by which to assess the authority of

[23] Often also the protection of fundamental rights is perceived as central to substantive constitutionalism, see Gavison (2002), and Fernandez Esteban (1999), at 80 identifying the idea of limited government, rule of law, and protection of fundamental rights as central to constitutionalism. A substantive aspect of the rule of law has similarly been defined as a focus on rules protecting basic human rights and institutionalizing democratic governance. Summers (2000), at 173.

[24] Walker (2008), at 528–529.

[25] In the WTO context, see Howse and Nicolaïdis (2001), e.g. at 228.

[26] Allott (2001), at 91–92.

[27] Walker (2008), at 530–531.

institutional governance. Put differently, the more the question of the scope of activities of international organizations is expressed in constitutional terms, the more the question turns into whether a decision, rule or institution should be accepted as authoritative.[28]

The more extensive the autonomy of an organization (that is, the more constitutional features it displays), the more central the question of legitimacy seems to become. The prime example of this nexus is of course the EU, where a deepening integration has been paralleled by a growing concern about the legitimacy of Union decision making. Bodansky testifies that the same relationship can be identified also in organizations with more limited decision-making powers, for example in the environmental field.[29] In a converse way Howse concludes that with respect to the WTO, the absence of regulatory or executive functions by the WTO and the strong consensual basis of the WTO, seems to "obviate the necessity to even ask the legitimacy question in relation to the formal rules" of the WTO agreement (the one exception being the dispute settlement mechanism).[30]

Yet, it is not only in cases of exercise of extensive legal powers that the authority of an organization may be of concern. Even if most international organizations have no powers to make decisions that are directly binding on states or individuals, those decisions may still have considerable impact upon members.[31] Domestic law that appears homemade is often guided by decisions of organizations (for example through framework conventions, recommendations, or opinions).[32] By considering that such decisions may be drafted by bureaucrats and adopted by experts, with or without an input of non-governmental organizations or of member states, the question of authority of those decisions can be raised.[33] The element of legitimacy therefore serves as a test for the authority of any exercise of power, irrespective of whether or not it is the result of a legal power.

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[28] For such a definition of legitimacy, see Koskenniemi (2003 'Legitimacy'), at 353. Notably, one can disagree with the substance of a decision, but still accept it as legitimate. Bodansky (1999), at 601–602.

[29] Bodansky (1999) at large, and esp. at 597.

[30] Howse (2001 'The Legitimacy'), at 358–359. Bodansky claims that as long as decision-making in an organization is consensual, the legitimacy question is mooted. Bodansky (1999), at 597–598.

[31] This is exemplified by Alvarez (2005), esp. in Chapter 4.

[32] Delbrück (2003), at 35–36.

[33] Also see Efraim (2000) who discusses legitimacy concerns arising out of voting practices.

By referring to the legitimacy (or lack of such) of an organization, different aspects of the authority of that actor can been taken hold of. Beetham, in his study on the concept of legitimacy, identifies three elements of legitimacy: 1) conformity with established rules, 2) justification of rules by reference to shared beliefs, and, 3) existence of consent by the subordinate.[34]

The first of these elements could be labeled formal legitimacy.[35] Franck's formulation is sometimes used as a definition of formal legitimacy:

> Legitimacy is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.[36]

A definition of legitimacy where the legitimacy of a rule is derived from the accordance of that rule with other rules and principles, is akin to the concept of formal validity and hence becomes closely intertwined with the lawfulness or legality of an act.[37]

However, to present legitimacy as a search for the legality of an act is not exhaustive.[38] This is exemplified by the discussions on the intervention by NATO in former Yugoslavia. This intervention (or more precisely, the bombing of Serbia) has been considered illegal (under international law), but nevertheless legitimate.[39] Further, as Weiler has demonstrated in respect of the EU, although questions of formal legal validity may have been the main concern in the early days of European integration, today legitimacy concerns have turned to questions of democratic character and the possibility of founding EU law upon a common identity. A new legitimacy discourse has emerged as the integration of Europe has proceeded. The further the process of integration has proceeded, the more

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[34] See Beetham (1991), at 15–25.

[35] A distinction between formal and substantive legitimacy is used by Koskenniemi (2003 'Legitimacy'), at 354. Also see Hyde (1983).

[36] Franck (1990), at 24. A different question altogether is whether this is a correct characterization of Franck. Cf. Bodansky (1999), at 600, note 27, and at 612, with Koskenniemi who emphasizes that legitimacy for Franck is something less than moral principles, but at the same time something more than positive law. Koskenniemi calls this a "common sense of values" which emphasizes the context-dependent variety of legitimate actions, achievable not through juridical technique, but through the intuitive application of good sense. See Koskenniemi (2003 'Legal'), at 480–481.

[37] Interestingly "lawfulness" is the definition of legitimacy of Black's Law Dictionary, see Garner (2004).

[38] For a concrete example, see Young (2002), at xx.

[39] Koskenniemi (2003 'Legitimacy'), at 358.

insufficient a focus on the legality of EU law has proved as a source of legitimacy.[40]

When invoked in this (substantive) sense, legitimacy concerns take hold of the importance of a justification of the exercise of powers beyond mere legal validity, in order for those in power to enjoy moral authority.[41] After all, a rule may be illegitimate even if it has been lawfully enacted. The paradigm example is the fascist regime, the laws of which may be formally valid, but can be claimed to nevertheless lack substantive legitimacy. On its own, legal validity is insufficient for bestowing substantive legitimacy since the system of governance through which powers are acquired and exercised themselves stand in need of justification. In this sense legitimacy is concerned with the moral authority of the exercise of powers (and the rules and acts that result from that exercise).[42] For this reason the claim is often made that legitimate governance requires that government actively guarantees certain values (or more broadly – morality).[43]

While moral integrity is surely a prerequisite for the legitimacy of a decision, the achievement of such integrity is far from unproblematic. This follows from that an organization may embrace a number of even potentially conflicting values. Above all, whether a particular activity of an organization respects certain values or not can in itself be subject to different interpretations. In this respect, when the legitimacy of WTO rules is derived from their function of protecting economic rights, any such legitimating effect must be assessed against other rights (equality, labor rights, cultural rights, etc.). As a more specific example, a common way of defending the substantive legitimacy of the WTO is to emphasize that the WTO enhances welfare. However, more concrete examples such as the case of intellectual property protection, demonstrates that some countries will gain from such regulation while others may lose.[44]

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[40] See Weiler (1998), esp. at 378–379 on different meanings of legitimacy. Bodansky notes that international law (including organizations) has begun addressing issues that in the past were addressed by national law. As a corollary, expectations increase that international law (including decisions of organizations) should be subject to the same standards of legitimacy as domestic decisions. Bodansky (1999), at 611.

[41] See Beetham (1991), at 57.

[42] The example is used by Habermas (1975), at 100. Procedural criteria are of no necessary avail, as procedural criteria must also be legitimized, Habermas (1975), at 101. Koskenniemi (2003 'Legitimacy') argues that even the presence of proper procedure does not guarantee that the decisions are legitimate, "… that is, it does not necessarily provide a good exclusionary reason to uphold them", at 363.

[43] Koskenniemi (2003 'Legitimacy'), at 369, and Beetham (1991), at 17. Often these values are captured in terms of fairness and justice. Weiler (1999), at 80–81.

[44] Howse (2001 'The Legitimacy'), at 365–368.

Similar concerns apply to other balancing acts, such as between consumer gains from the removal of trade barriers on the one hand and the benefits of avoiding unemployment on the other. These examples demonstrate that the substantive legitimacy of WTO rules is dependent on whose fairness it is that serves as the guiding standard.[45]

Finally, legitimacy can be used to indicate consent by the subordinate. It should be emphasized that this is not necessarily the same thing as the abstract consent of members of an organization (as a source for the exercise of powers).[46] Mere membership in an organization is not enough to legitimate all consequent activities of that organization (such as the decisions of the Council of the European Union or the UN Security Council).[47] Instead, the abstract consent provided can be in need of renewal (for example in the case of exercise of implied powers). Although abstract consent can legitimize the exercise of express powers of an organization, the more the practice of the organization evolves, the stronger the need will be for renewing that consent (in order not to transcend it). For consent to have a legitimizing effect it should hereby be conceived of as a process of constant renewal.

It is this emphasis on the constant renewal of consent, even called social legitimacy, that has been characterized as the all-important criteria which provides this conception of legitimacy a separate identity vis-à-vis both formal and substantive legitimacy.[48] For social legitimacy to arise, the expression of consent has to be available to all. In this way consent serves to reinforce the obligation by inferiors to superior authority.[49] As an effect, social legitimacy becomes the instrument through which both the appropriateness of upholding certain values and the legality of activities is upheld:

> Legitimacy looks beyond law's formal and rigid categories … and limits morality's apparent subjectivism while still accepting that certain attitudes, positions, activities, are simply 'hors de jeu' as a matter of political argument or antagonism in terms of the political community's common sense or culture ….[50]

The one parameter that has been called the "touchstone" of social legitimacy in the modern world is democracy.[51]

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[45] Koskenniemi (2003 'Legitimacy'), at 363.
[46] On abstract consent, see above, Chapter 3.2.2.
[47] Bodansky (1999), at 609–610.
[48] The term social legitimacy is used by Weiler (1999), at 80–81.
[49] Beetham (1991), at 19 and 94.
[50] Koskenniemi (2003 'Legitimacy'), at 371.
[51] Bodansky (1999), at 599.

Legitimacy is essential if an organization is to fulfill its functions successfully. The more legitimate an organization is in the eyes of its members, the greater the prospects for adopting decisions within that organization, the greater the strength of those decisions, and the greater the ability of states to build domestic support to carry them out.[52] Yet at the same time, as Koskenniemi puts it, legitimacy is perspectival.[53] While concerns of formal legitimacy can be presented as a claim for judicializing an organization, an emphasis on social legitimacy becomes an examination of the representativity of the decision-making of an organization (and hence its ability to manifest member preferences).[54] 'Legitimacy' hereby becomes part of the presentation of conflicting images of organizations as a clash between judicial/formal and political/substantive constitutionalism. Moreover, a debate over powers can be waged also within these broad constitutional themes.

6.2. Formal Constitutionalism as Empowerment and Restraint

6.2.1. *Claiming Efficiency Gains*

The need of mechanisms for judicial review is a rather common constitutional claim. Often such a claim is linked to attaining a rule of law. It other words, the fundamental flaw with realizing the rule of law on the international level is often located in the voluntary nature of adjudication.[55] An emphasis on the judicialization of international organizations also fits nicely with a more general trend towards judicializing international law that many authors identify.[56] Furthermore, a "displacement of the political by the juridical" has been identified as a feature not only at the international level, but also in many national democracies.[57] Teubner even argues that it is the phenomenon of global judicialization that implies

[52] On organizations and legitimacy, see Gerhart (2003), at 6, Bodansky (1999), at 602–603, and Caron (1993), at 558.

[53] Koskenniemi (2003 'Legitimacy'), at 356.

[54] Koskenniemi (2003 'Legitimacy'), at 355.

[55] See e.g. Allain (2000), at 4–7.

[56] Several references could be provided. See Romano (1999), Alvarez (2005), at 646–647 (with references), and the many articles in Goldstein et al. (2001 'Legalization'). In the following juridification, judicialization, and legalization will be used synonymously. For a general definition (of legalization), see Abbott et al. (2001), at 17 defining legalization as the existence of legally binding rules, which are precise, and the delegation to third parties of implementation, interpretation, application, and dispute settlement. The higher the degree to which these elements are present, the higher the degree of legalization.

[57] For such a claim in respect of the US and France, see Ferejohn and Pasquino (2003), at 247–248.

that constitutionalization processes may be usable outside the state context to begin with.[58]

Calls for judicializing organizations also take the form of emphasizing dispute settlement mechanisms. The current main policy in organizations is to settle disputes concerning the interpretation of the constituent instrument through political means whereas binding judicial settlement is reasonably rare. Organizations seem especially unwilling to transmit disputes to organs external to the organization.[59] Many organizations in fact explicitly confer interpretative and dispute settlement tasks upon political organs.[60] Although some organizations authorize judicial organs such as the ICJ or arbitral tribunals to settle interpretative disputes, practice indicates that those organizations rarely make use of the possibility and favor political settlement instead.[61]

Out of this general pattern EU law stands out as the supreme exception, due to the exclusive powers of judicial review of the ECJ. Whereas the ICJ can only exercise incidental judicial review of UN decisions, the ECJ is charged (and much utilized) with the task of interpreting EU law and ensuring that EU member states and institutions comply with the EU Treaties.[62] As to the question of why judicial settlement is utilized in only a limited number of organizations, two interrelated explanations have been proposed. One explanation could be that states wish to control policy-making in international organizations. They do not therefore want to create organs that escape their control by transferring the right of interpreting the constituent instrument beyond their reach. Secondly, in most cases states have attributed only limited powers to organizations, whereas for those organizations that can adopt binding decisions, unanimity is

[58] Teubner (2004), at 15–17.

[59] Klabbers (2002 'An Introduction'), at 253, and Schermers and Blokker (2003), at 853.

[60] Among UN specialized agencies this procedure is used by the CFC (Article 52(1)), IBRD (Article IX(a)), IDA (Article X(a)), IFAD (Article 11), IFC (Article VIII(a)), and IMF (Article XVIII).

[61] Out of UN specialized agencies only UNESCO (Article XIV(2)) and ILO (Article 37) refer interpretative disputes directly to the ICJ. ICAO (Article 84), ITU (Article 56) and UPU (Article 52) make use of arbitration, while FAO (Article 17), ICAO (Article 84–86), IMO (Article 55 and Article 56), UNIDO (Article 22), WHO (Article 75), WIPO (Article 28) and WMO (Article 29) only provide a *possibility* for either of the two. In any case, judicial interpretation often serves as a last resort only. On the matter, see the general accounts by Schermers and Blokker (2003), at 857–865, and Sato (1996), at 181–210. Settlement of disputes by political organs has been especially common among economic organizations. See Voitovich (1994), at 127–138.

[62] See TFEU, section 5. For a discussion on ICJ review of Security Council decisions in contentious cases and advisory opinions, see Schweigman (2001), at 267–285.

required. As a result state consent governs that decision-making. Consequently, the argument goes, there is no need for judicial input (which would escape that consent). By converse reasoning, the exercise of substantive powers serve as an explanation for why such review exists in EU law.[63] Any development of the powers of the UN Security Council have also often led to a discussion on the possibility of judicial review of the Council.[64]

Judicialization claims also build on a number of internal shortcomings of international organizations. Irrespective of whether an organization exercises binding or non-binding powers, its decisions may have consequences for the member states and individuals concerned. At the same time these decisions are often made by undemocratic organs or bureaucrats. This potentially creates a need for judicial review.[65] Moreover, an absence of parliaments and democratic control of executive powers underlines the need for judicial supervision of the exercise of authority.[66] In the face of a *Kompetenz-Kompetenz* of political organs, the outcome of a dispute on the reach of powers would be determined by the majority view (or even the minority, as when an unrepresentative organ like the UN Security Council makes that decision). Without the possibility of judicial review this results, in the view of some authors, in judicial nihilism.[67]

In all of its forms, calls for judicialization also build on the assumption that political organs are ill-suited for performing a supervisory role. Political organs of organizations are accused of seeking to increase their relative influence, hereby making them especially poor adjudicators on issues of powers.[68] Also an improvement of the (formal) legitimacy of the organization at large is foreseen in that a judiciary can uphold fair procedures, add coherence to decision-making, and clarify the meaning of texts through its interpretations.[69] The beneficiality of judicialization also builds on certain assumptions regarding the characteristics of courts. It is

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[63] For these conclusions, see Schermers and Blokker (2003), at 485 and 858, and van Themaat (1996), at 254.

[64] For one discussion, see Cronin-Furman (2006).

[65] See Klabbers (2005 'Straddling'), at 817–818 for the example of the UN Sanctions Committee.

[66] Petersmann (1999), at 141–142.

[67] See Rosenne (1989), at 224–225.

[68] Sarooshi (2005), at 119, and de Wet (2004 'The Chapter'), at 120 (both with further references).

[69] On constitutionalism and the WTO, see above, Chapter 5.3.2.2. Also see Franck (1995), at 630–631, Akande (1997), at 336, and de Wet (2004 'The Chapter'), at 116 *et seq*.

not only the separation of different branches of government per se that makes the role of the judiciary so important, but the (assumed) special character of courts when compared to political organs (the legislator and the executive). In this respect it is interesting to note that in discussing the best way to constitutionalize the EU legal system during the work of the Constitutional Convention, a proposal was made that such constitutionalization could require the outright abolishment of evolutionary powers. Proposals for the elimination of Article 352 TFEU altogether as well as the subjection of its use to an *ex ante* opinion of the ECJ were eventually turned down by the European Convention. According to some authors, the fact that the proposals were turned down was more due to a general conservative approach towards altering the basic structures of the Union than anything else. Be that as it may, at any rate the proposals themselves serve to demonstrate the strong faith in the judiciary as a source of increased legal certainty.[70]

Whether the aim is to limit powers of organizations or to widen them through the use of implied powers, what the rule of law promises is an impersonal and general assessment of the question.[71] Such impersonality and generalizability, the claim is, can only be achieved through objective verification by judges. While courts are no less mechanisms for balancing competing values than political organs, what is important is that they are to solve issues of interpretation (and to strike balances between competing values) with recourse to judicial reasoning only. In this vein the legitimacy of judicial review is seen to arise from the disposal of diplomatic (political) means in favor of the "route of law", legalism, and formalism.[72] Whether the aim of the judicialization (and hence, empowerment) of an organ/organization is to increase the compulsory elements of the legal order and the enforcement capacities of organizations, remedying internal flaws with upholding the rule of law, or supervising the political organs of an organization, this "route" is also regarded as a necessity in order to make international organizations more effective. As "any progress of international law passes through the progress in international adjudication", an international rule of law is closely connected to overcoming the problematic unwillingness of states to be bound by

[70] See The European Convention, Final Report of the Working Group V, CONV 375/01/02 (4 November 2002), at 16 explicitly stating that: "Such possibility might avoid deadlocks in the Council on the applicability of Article 308 [now Article 352 TFEU]". On the issue, see Bermann (2004), at 69–70. Also see de Búrca and de Witte (2002), at 213 *et seq*.

[71] Weinrib (1987), at 59–60, and Steinberg (2004), at 250 *et seq*.

[72] See Fernandez Esteban (1999), at 91–94, and Behboodi (1998), at 57–62.

international law.[73] It is against this background that the effectiveness of the EU as a regulatory authority has been described as its paramount legitimating achievement.[74] In picturing the WTO dispute settlement body as a potential engine of constitutionalization, judicialization claims also seem to go two ways: such judicialization is pictured as both capable of generating constitutional law by amalgamating doctrines such as the division of power (which in essence is a limit to powers of organs), and as a way of expanding and constructing the legal system at large.[75]

The fact that both a function of supervising the organs of the organization, and a function of supervising and enforcing obligations of members can be claimed to require judicial empowerment, corresponds to the idea that all subjects, both ruler and ruled, should be governed by the rule of law. At the same time, as the critique of judicialization will demonstrate, such empowerment can also be at odds with the political nature of organizations. For this reason judicialization can even be claimed to be outright undesirable.

6.2.2. *A Critique of Judicial Effectiveness*

6.2.2.1. *Separating Political and Judicial Questions*

In the form presented above, formal constitutionalization becomes a "means of placing law, or the rule of law, above politics".[76] In this approach also the legitimacy of courts derives from their capacity to keep political and judicial issues separated. In other words, judicialization not only emphasizes the role of the judiciary, but also entails the idea that highly political disputes are not to be settled by the judiciary (as this would be detrimental for the rule of law).[77] In order to safeguard this capacity of courts the independence and legal expertise of judges is emphasized. The limited and specialized nature of judicial proceedings is characterized as

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[73] For Allain, member sovereignty is a straightjacket that limits the effectiveness of international law and hence needs to be overcome. This can be achieved by "unbridling international law so that it may serve the purposes of an international society based not on whims of power politics but on the agreed dictates of the rule of law". See Allain (2000), at 180–186.

[74] See Scharpf (2010), at 94–95.

[75] Cass (2005), summarizing at 178. On a monitoring and supervisory aspect of the dispute settlement function, see Iwasawa (2002).

[76] Howse and Nicolaïdis (2001), at 229. Also see Klabbers (2004 'Constitutionalism'), at 45–49.

[77] For a brief overview on the 'political questions' and 'non-justiciability' doctrines, see Reinisch (2000), at 92–99.

"… an essential requirement of the rule of law, enabling … a genuine distinction between law and politics".[78]

Article 36(2) of the ICJ Statute takes the distinction between political and legal issues explicitly into account by limiting the jurisdiction of the Court to legal disputes only.[79] Such express clauses do not however serve to determine which issues are to be characterized as political and which issues as judicial. Instead, this determination is commonly dealt with as a matter of the justiciability of disputes. In this form the question has arisen also in interpreting the scope of powers. In the *Certain Expenses* opinion. Judge Koretsky argued that the question put to the Court was too political to be dealt with by the ICJ. The Court on its part stated that most interpretations of the UN Charter would have political significance, great or small, but refused to attribute "a political character to a request which invited it to undertake an essentially judicial task, the interpretation of a treaty provision".[80]

The underlying question of what makes an interpretative task judicial was also addressed in the *Legality of the Threat or Use of Nuclear Weapons* opinion, where the Court held (by referring to its own case law) that questions:

> "… [F]ramed in terms of law and rais[ing] problems of international law … are by their very nature susceptible of a reply based on law … [and] appear … to be questions of a legal character" (Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 18, para. 15).[81]

As the ICJ was asked (by the UN General Assembly) to rule on the compatibility of the threat or use of nuclear weapons with relevant principles and rules of international law, the question at stake was deemed to be of a legal character:

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[78] Allan (2001), at 198. Also see Alvarez (2005), at 521 *et seq*. for a discussion of the preconditions of legitimate international adjudication.

[79] ICJ Statute, Article 36(2). In its case law the ICJ has held that: "The function of the court is to state the law, and it can decide only on the basis of law … it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequences in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations", *Northern Cameroons* (*Cameroons v United Kingdom*) (Preliminary Objections, Judgment, 2 December 1963), ICJ Reports 1963, at 33–34.

[80] See Dissenting Opinion of Judge Koretsky, *Certain Expenses*, ICJ Reports 1962, at 254, and the Advisory Opinion at 155. For different ways of approaching the question, see e.g. Sugihara (1997), Martenczuk (1999), at 528, Gordon (1965), at 800, and note 37, and Szafarz (1993), at 10–12.

[81] *Legality of the Threat or Use of Nuclear Weapons*, (Advisory Opinion, 8 July 1996), ICJ Reports 1996, para. 13 (hereinafter *Nuclear Weapons*).

> To do this, the Court must identify the existing principles and rules, interpret them and apply them to the threat or use of nuclear weapons, thus offering a reply to the question posed based on law. … The fact that this question also has political aspects, …, does not suffice to deprive it of its character as a "legal question" and to "deprive the Court of a competence expressly conferred on it by its Statute" …. The political nature of the motives which may be said to have inspired the request or the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion.[82]

The Court even ran into more direct definitions of the judicial task (as opposed to that of the legislator):

> It is clear that the Court cannot legislate, and, in the circumstances of the present case, it is not called upon to do so. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable …. The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present *corpus juris* is devoid of relevant rules in this matter. The Court could not accede to this argument: it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.[83]

The one exception that is commonly recognized is the determination of a "threat to the peace" in accordance with Article 39 of the UN Charter, due to the political discretion involved in the assessment.[84] In the *Prosecutor v Dušco Tadić* case before the ICTY the Trial Chamber first upheld a distinction based on justiciability:

> The making of a judgment as to whether there was such an emergency in the former Yugoslavia as would justify the setting up of the International Tribunal under Chapter VII is eminently one for the Security Council and only for it; it is certainly not a justiciable issue but one involving considerations of high policy and of a political nature.[85]

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[82] *Nuclear Weapons,* ICJ Reports 1996, para. 13. Curiously, however, when considering whether the WHO could request an advisory opinion on the question of legality of nuclear weapons in the *WHO* opinion (issued on the same day), the ICJ denied such a power with reference to the political character of the issue, White (2001), at 105–106.

[83] *Nuclear Weapons*, ICJ Reports 1996, para. 18.

[84] See Reisman (1993) and Schweigman (2001), at 264–267. de Wet suggests that a threat to the peace in terms of Article 39 of the UN Charter may only be justiciable as a question of whether an armed conflict exists or not, de Wet (2004 'The Chapter'), at 144.

[85] *Prosecutor v Dušco Tadić*, ICTY, Trial Chamber, Decision on the Defence Motion on Jurisdiction (rule 73), Case No. IT-94-1 (10 August 1995), para. 23. Also see the International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v Joseph Kanyabashi*, ICTR,

However, this reasoning was later reversed by the Appeals Chamber (referring to ICJ case law):

> The doctrines of "political questions" and "non-justiciable disputes" are remnants of the reservations of "sovereignty", "national honour", etc. in very old arbitration treaties. They have receded from the horizon of contemporary international law, except for the occasional invocation of the "political question" argument before the International Court of Justice in advisory proceedings and, very rarely, in contentious proceedings as well.
>
> The Court has consistently rejected this argument as a bar to examining a case. It considered it unfounded in law. As long as the case before it or the request for an advisory opinion turns on a legal question capable of a legal answer, the Court considers that it is duty-bound to take jurisdiction over it, regardless of the political background or the other political facets of the issue.[86]

The ICJ explicitly makes clear that a distinction to a law-creating task is still maintained. In the words of the ICJ the Court "states the existing law and does not legislate", the underlying assumption being that despite the political aspects of a question before the Court, these can be separated from the legal issue.[87]

However, for many authors the example of the *Prosecutor v Dušco Tadić* case (along with other examples) suggest that the dichotomy between political and legal issues (as a matter of justiciability) may in fact be an artificial one.[88] If anything, the justiciability assessment can in itself be a way of expressing a particular political preference. Whereas the justiciability issue explores whether a question is capable of being solved by reference to legal rules, a disagreement over whether there is a 'gap' in the law or not is at heart a matter of different conceptions of that law.[89] This means that the issue of justiciability is also a question about the

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Case no. ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction (18 June 1997), para. 20: "Although bound by the provisions in Chapter VII of the UN Charter and in particular Article 39 of the Charter, the Security Council has a wide margin of discretion in deciding when and where there exists a threat to international peace and security. By their very nature, however, such discretionary assessments are not justiciable since they involve the consideration of a number of social, political and circumstantial factors which cannot be weighed and balanced objectively by this Trial Chamber".

[86] *Prosecutor v Dušco Tadić*, ICTY, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72 (2 October 1995), para. 24.

[87] *Nuclear Weapons*, ICJ Reports 1996, para. 18.

[88] See e.g. Schweigman (2001), at 264 with further references.

[89] This definition of justiciable disputes is made by Gowlland-Debbas (1994), at 652. On the politics of justiciability-issues, see Koskenniemi (1997), at 227 (discussing the works of Hersch Lauterpacht).

possibility of translating the values and priorities of the parties to a dispute, into the language of international law.[90]

Departing from the impossibility of making substantive decisions within the law which would imply no political choice, it also becomes impossible for the judiciary to externalize itself into an objective (apolitical) observant. There are still differences between judicial and political means of settling disputes. Judges are constrained, for example, by their "fidelity to the materials".[91] However, as the law itself is a result of political agreement, the judicial review of any legal question cannot escape making a political claim.[92] This point about the nature of adjudication is not of concern only for judicialization claims as such, but affects all efforts to put faith in expertise (judicial or other) as a safeguard against a politicization of disputes. For example Fatouros demonstrates in respect of the World Bank how an assumption of an apolitical approach to problems of economic development results in an emphasis on technical agencies as administrators of World Bank projects.[93]

A similar faith in the apolitical nature of legal rules can also be found at the heart of the 'managerial' approach to the constitutionalization of the WTO, which emphasizes the role of decision-making techniques and more detailed definitions of core principles as a way of ensuring predictability and avoiding politicization of trade issues. Faith is hereby placed in procedural rules in order to remove ambiguity from decision-making. Adjudicative bodies assume a central role within this approach as they are ultimately charged with the task of applying and upholding those procedural rules.[94] In this way the faith in procedural rules and judicialization become intertwined.[95] The question is not whether procedural criteria are useful or not. There is no reason to doubt the importance of

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[90] Koskenniemi (1999), at 507.

[91] Kennedy (1998), at 212. Higgins claims that interpretative issues cannot be categorized into political and judicial questions. However, the different means that different actors utilize can be distinguished. Higgins hereby makes a distinction between a political and a judicial character of the method used for solving interpretative disputes. The UN Security Council can, for example, use a wider variety of means for reaching agreement between parties than the ICJ. It can also avoid attribution of guilt. See Higgins (1968).

[92] Hutchinson (1999), at 216–217.

[93] Fatouros (1980), at 23.

[94] See overview in Cass (2005), at 99–117, and 143.

[95] For Allan (2001) the authority of a court derives from a focus on questions of legal principle instead of matters of policy. The safeguard against illegitimate judicial policy-making is the procedural character of judicial review, at 189–191. Also see Klabbers (2005 'Straddling'), at 812–813 who seems to consider review of procedural issues as the only way for a court to avoid entanglement with political issues.

procedural criteria as means for structuring political debate.[96] However, any procedural rules cannot be applied in isolation. Procedural rules are always invoked in relation to particular values.[97]

Highlighting the political nature of legal reasoning seems diametrically opposed to the very premise of judicialization. As Cass demonstrates in respect to the WTO, there simply are no apolitical decisions to be made in balancing diversity against integration, or in combining high standards of social regulation with attracting investment. And yet, it is exactly for avoiding the politics of such balancing acts that a constitutionalization of the WTO is advocated.[98] A judiciary can indeed strike such balances. However, because of its (perceived) apolitical nature, a judiciary will avoid reasoning on the political aspects of the question. This way judicialization may serve to hide the substantive disagreement from sight. A consequent risk is also that if this means that the political implications of the balancing act are overlooked altogether (or the adjudicator is not mindful of those implications), judicialization may even serve as a legitimating mask for inequalities.[99]

6.2.2.2. *Politicizing the Judiciary*

A connected problem to that of overlooking the political character of adjudication is that an overly strong reliance on judicial settlement may in fact make the court appear as a policy-maker.[100] Irrespective of whether

[96] Procedural rules serve democracy in the sense that such rules protect against abuse of powers (by government), and provide avenues for representation (of the governed). Writing in a national context, see Jowell (2000), at 16–18.

[97] Koskenniemi (2003 'Legitimacy'), at 365–366. Article 39 of the UN Charter can be used to exemplify the point (albeit the example may admittedly be a bit wild). That article can be considered a procedural requirement in that it constitutes a precondition for UN Security Council action under Chapter VII. See Schweigman (2001), at 184–189. This means that determinations of "threats to the peace", "breaches of peace", and "acts of aggression" are procedural preconditions also for the exercise of implied powers under Chapter VII. Yet, there is hardly a more politicized issue that the UN will be faced with than the question of what constitutes a "threat to the peace". In the face of this a conclusion that procedural requirements avoid politicization would be difficult to maintain. If, on the other hand, the character of Article 39 as a procedural rule is doubted, this only highlights that there need not be agreement on what constitutes a procedural rule to begin with, and that the characterization itself may be part of the (political) debate. Similarly, see Klabbers (2005 'Straddling'), at 813. Although Article 39 of the UN Charter may be an extreme example, it is difficult to see how other procedural requirements, such as lack of competence and abuse of powers (as enumerated in Article 263 TFEU) would be any less political (these are enumerated as procedural criteria by Klabbers (2005 'Straddling'), at 829).

[98] Cass (2005), at 120–132.

[99] See Unger (1976), at 176–181. Also see Hutchinson (1999), at 201 *et seq*.

[100] Allan (2001), at 189 and 198–199.

the constituent instrument of an organization provides for clear guidance on how to settle interpretative disputes, any organ will itself be the primary interpreter of the scope of its powers.[101] In the context of powers this feature is often captured through the French and German equivalents: *compétence de la compétence* and *Kompetenz-Kompetenz*. Although it could be said that the basic justification for this competence (to determine the reach of own competence) derives from the absence of an authoritative interpreter, this circumstance is not decisive. Even in the case where judicial review is established as a mechanism for settling interpretative disputes, each organ will be the first to interpret its powers.[102] The reasons for this are mainly practical: supervising organs can rarely act on their own initiative, nor can they serve as a check on all activities of organs. At the same time it would not be practical if all activities of organizations would have questionmarks as to their legality hanging over them until a judiciary has made its assessment.[103]

On the face of it there is nothing wrong with political organs assessing the extent of their competence. After all, political organs consist of members of the organization. As Waldron puts it:

> [I]f a constitutional provision … is really a precommitment of the people or their representatives, then there is in principle nothing whatever inappropriate about asking them: was this the precommitment you intended?[104]

Yet, interpretations of constituent instruments are likely to vary between members. At the same time there is no element of finality to the interpretation by a political organ (which may consist of only a part of the

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[101] See above, Chapter 6.2.2.2.

[102] See the *Interpretation of Greco-Turkish Agreement* opinion in 1928: "… as a general rule, any body possessing jurisdictional power has the right in the first place itself to determine the extent of its jurisdiction". *Interpretation of the Greco-Turkish Agreement of December 1st, 1926* (*Final Protocol, Article IV*) (Advisory Opinion, 28 August 1928), PCIJ Publications 1928, Series B, no. 16, at 20. As to the UN this was also anticipated during the founding process: "In the course of the operations from day to day of the various organs of the organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functions of any body which operates under an instrument defining its functions and powers.". Report of the Committee IV/2 of the United Nations Conference on International Organization, (12th June 1945), Doc. 933, IV/2/42, at 172–173 (in 13 *United Nations Conference on International Organization* 1945, at 709). This has later been the approach also by the ICJ in the *Certain Expenses* case: "Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted … therefore each organ must, in the first place at least, determine its own jurisdiction.", *Certain Expenses*, ICJ Reports 1962, at 168. In general, see Amerasinghe (2005), at 25, Sato (1996), at 163, and Schermers and Blokker (2003), at 852–857.

[103] See Osieke (1983), at 240–242, and Angelet (1998), at 279.

[104] Waldron (2001), at 281.

membership) of its own powers.[105] The interpretation by the political organ can be challenged. In fact, in the situation where no review mechanism exists, only members can challenge an act of the organization.[106]

To avoid a divergence of interpretations (and hence to remove ambiguity), some organizations withhold interpretative competence for the organization. As already stated above, the role of judicial review as a constraint upon and legality check of political organs is a central feature that is capitalized upon in arguing for a judicialization of organizations. The "beacon for those who advocate the consolidation of the rule of law on the international plane" is the ECJ.[107] In fact, for many authors the EU is the only example of an international legal order based on a true rule of law.[108] In this role, the authority and legitimacy of the ECJ is commonly derived from the (claimed) avoidance of politicization.[109] One of the foremost mechanisms for achieving coherence in interpretations in EU law is the mechanism of preliminary rulings which all national courts of EU member states can (and sometimes must) request.[110] The underlying rationale of this mechanism is that if national courts were to interpret EU legislation differently from one another, this would do away with any uniformity in the application of EU law. The monopoly of interpretative control is not

[105] In this respect the *Kompetenz-Kompetenz* of political organs is dissimilar to that of judicial organs. See in this regard Herdegen (1994), at 156–157, and Martenczuk (1999), at 536.

[106] In an absence of review, or if there is no compulsory element in the review, then the decision-making organ may simply refuse to annul its decision when facing a challenge by members. See Amerasinghe (2005), at 207–208. However, there is no automatic right for members not to follow decisions of an organization, even though they would consider them unconstitutional. This seems logical, as such a right would deteriorate the system of (especially binding) decision-making by organizations. See Doehring (1997), at 107. Although a right to auto-interpretation has been proposed by individual judges in ICJ cases, such a right has not been generally accepted. Osieke (1983), at 254–255. However, see Zemanek (1997), at 96 arguing that members do have such a right, unless they expressly accept limitations to it, as they remain the masters of the constitution.

[107] Allain (2000), at 156. Also see Arnull (2006), at 257–258.

[108] Allain (2000), at 177–179 advocating supranationalism as the model for all organizations.

[109] This is not however the only explanation. See Alter (2000).

[110] "The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice", TFEU, Article 267.

however only established through the mechanism of preliminary rulings, but also follows from the review of the legality of acts (of both members and EU organs) that the Court exercises. Through these mechanisms the determination of the validity of an act by a political organ is in EU law not solely based on *Kompetenz-Kompetenz* of the acting organ itself (although the determination is still, in the first place, made by the acting organ) as that decision can always be subjected to binding review by the ECJ.

But at the same time as the EU legal order is described as the only international legal order with a true rule of law, the ECJ (as the primary upholder of that rule of law) has also been characterized as one of the most politically influential courts in the world. The Court has been accused for being the most proactive element in the EU, these accusations originally arising from the inventions of principles such as direct effect and supremacy.[111] The role of the ECJ in defending and upholding the *acquis communautaire* has been considered of crucial importance for the persistence of the EU.[112] This positions the ECJ as one of the chief architects and upholders of integration. The preliminary rulings procedure has even been characterized as the principal vehicle for ECJ law-making.[113] For these reasons the ECJ has become a primary target in a critique of European integration. The ECJ is accused of strengthening the Union, increasing the scope and effectiveness of EU law, and expanding the powers of EU institutions: in sum, for actively promoting a deepening of European integration. The ECJ has also been accused of over-engagement in controversial social questions, to the detriment of political organs. Eventually this criticism also takes the form of dissatisfaction with the role of the ECJ as ultimate arbiter of the limits of EU law.[114]

While the argument in favor of judicialization builds on the possibility of avoiding a politicization of cooperation in organizations, at the same time politically controversial issues will also pose most difficulties for international courts, since these are exactly the cases in which the decisions of such courts are likely to be contested.[115] To those unsatisfied with the pace of the EU project, judicial effectiveness will stand out as another

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[111] See above, Chapter 5.3.2. Also see Goldstein (1997), at 27, and Rasmussen (1986).

[112] Rasmussen (1986), at 8–9.

[113] For a recent account, see Arnull (2006), at 95–104.

[114] See Ferejohn and Pasquino (2003), at 249, and Hartley (2007), at 77–78.

[115] Holmes (2001), at 72. In this respect, although the Appellate Body of the WTO can make authoritative interpretations of the WTO agreements, the Body has indicated that it would sometimes find guidance by members on a disputed provision of the agreements useful in making its own interpretation. Van Damme (2010), at 611.

name for deepening political integration. As a result the ECJ will also appear to have lost its apolitical authority.[116] Correspondingly, those in favor of a more modest integration process have welcomed the turn by the ECJ from being the engine of integration towards more strongly protecting the prerogatives of the member states as a necessary move in order to avoid a loss of authority.[117]

6.2.2.3. *Judicializing the Political Process*

The (legal) nature of the judiciary is not the only issue through which to debate the merits of judicial empowerment. Another question that critics of judicialization take hold of is that the more the role of judicial bodies is emphasized, the higher the risk becomes of a government by judges.[118] The question of the proper role of courts in constitutional democracies is commonly dealt with under the heading of the counter-majoritarian problem. The counter-majoritarian problem has in fact been called the "obsession of constitutional theorists".[119] Several issues can be subsumed under the notion, all of which are interconnected. The classical discussion with which the counter-majoritarian problem is concerned is the impact of judicial review on the expression of consent by the constituency. In this sense a discussion on the counter-majoritarian problem is also essentially concerned with the relationship between judicial and political constitutionalism.[120]

The counter-majoritarian critique, as presented by Bickel in respect of US constitutional law, holds that judicial review means the thwarting of the will of representatives of the people which takes place when the

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[116] This is a risk that has been noted also in respect of ICJ review of UN Security Council decisions. Alvarez (1996), at 37.

[117] Weiler regards the *Brunner* decision by the German Bundesverfassungsgericht, which challenged the status of the ECJ as the ultimate arbiter of the scope of the EC Treaty, as an insistence on a more polycentric view of constitutional adjudication and hereby also as an incentive to a changing line of reasoning of the ECJ. See *Brunner* et al. *v The European Union Treaty*, German Constitutional Court, Judgment of 12 October 1993, BVerfGE 89, 155 (reproduced in 1 Common Market Law Review 1994), and Weiler (1999), at 321. Also see Arnull (2006), at 255 *et seq*., and 654–655.

[118] As Judge Gros put it in the *Nuclear Tests* case: "There is a certain tendency to submit essentially political conflicts to adjudication on the attempt to open a little door to judicial legislation, and, if this tendency were to persist, it would result in the situation, on the international plane, of government by judges …", Dissenting Opinion by Judge Gros, *Nuclear Tests*, ICJ Reports 1974, at 297.

[119] The notion 'counter-majoritarian problem' was launched by Bickel (1962), at 16. For one characterization and overview of the issue, see Friedman (2002).

[120] See e.g. Ferejohn and Pasquino (2003), and Croley (1995).

(US Supreme) Court declares unconstitutional a legislative act or the action of an elected executive.[121] Two claims lie at the heart of the counter-majoritarian critique, both of which focus on how consent of the constituency is best expressed. First of all the judiciary is regarded as less suitable for expressing the consent of the constituency than political organs. In democratic governance legitimate policy-making demands that policies constitute an expression of the popular will. In disregard of this, the argument goes, judicial policy-making "represents government by a handful of men which are appointed to office, and often for life, and not elected following a general, direct and secret balloting".[122] The second claim emphasizes that a judiciary is not accountable to the people, which on its part is a central characteristic of the legislature.[123]

In the context of the constitutionalization of organizations any systematic counter-majoritarian discussion has been remarkably absent. In respect of the UN, the necessity of judicial review is either presented as an inevitable requirement for the legitimate operation of the collective security mechanism, or then review of collective security matters is discarded as a venture into political issues (allegedly not suitable for adjudication).[124] If any comments on counter-majoritarian concerns have been made, they have mostly been made in passing as calls for further debate.[125] Even the more nuanced constitutional debate that concerns the EU has only emerged over time. Initially the activities of the ECJ did not give rise to counter-majoritarian issues. Instead the court was regarded as the

[121] Bickel (1962), at 16–17.

[122] Rasmussen (1986), at 42 (footnote omitted). However, Rasmussen himself does not consider this critique very useful. For another classical argument on the undemocratic character of courts, see Ely (1980), at 67 "… as between courts and legislatures, it is clear that the latter are better situated to reflect consensus". The legislature may not be optimally democratic in all circumstances, for example due to influences that serve to block certain legislation, nevertheless "… we may grant until we're blue in the face that legislatures aren't wholly democratic, but that isn't going to make courts more democratic than legislatures". The role of courts is hereby, according to Ely, best seen as a mechanism for securing the procedural conditions necessary for the legislative process to be fair and open. For an overview, see Zurn (2002), at 481–482.

[123] For Bickel it is the electoral process that makes all the difference. Although Bickel admits that there can be ways for courts to be responsive, judicial review still works counter to the electoral process. This does not mean that courts as such and by definition would always be illegitimate. Bickel admits that it is vital (in the name of effectiveness) that some federal agency has authoritative powers of applying the law. However, in relation to the legislator a court will always appear counter-majoritarian. The court may well represent the will of the people, but it does not do that through electoral responsibility. Bickel (1962), e.g. at 19 and 33.

[124] Cf. Orakhelasvili (2007), at 194 with Alvarez (1996), at 37.

[125] See e.g. Alvarez (1996) and more recently Ulfstein (2009), at 65–66.

protector of democratic principles (through limiting the powers of the Council and the European Commission).[126] A change in the conception of EU constitutionalism only emerged along with attention being increasingly paid to the non-accountability of the Council of the European Union to the European Parliament.[127] Hence Mattli and Slaughter could as late as 1998 still prophesize that the role of the court in a democratic order would increasingly become a major issue in EU legal debates.[128] The same is also true for the Commission, the role of which for long seemed to be beyond discussion. Weiler noted in 1999 that the (formal) conception of community constitutionalism is facing "reformation". At the heart of this "reformation" was a reevaluation of the ability of non-elected institutions to serve the values of democratic process.[129]

Another context in which such a critique was made forcefully as an objection to judicialization was the American opposition to the International Criminal Court (ICC). In the words of John Bolton:

> The ICC does not fit into a coherent international "constitutional" design that delineates clearly how laws are made, adjudicated, and enforced, subject to popular accountability and structured to protect liberty. There is no such design. Instead, the court and the prosecutor are simply "out there" in the international system. This approach is clearly inconsistent with, and constitutes a stealth approach to eroding, American standards of structural constitutionalism.[130]

A judicialization of the WTO has also been objected to in similar terms: In the absence of a legislative body who would define common standards, it will be left to a judicial body to determine (*ex post*) which national rules are compatible with WTO regulations and which are not.[131]

Lack of representativity and accountability are not however the only critiques that can be made against judicialization processes. In addition,

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[126] Weiler (1999), at 203–206.

[127] However, individual ECJ judges had publicly problematized the role of the court. See Douglas-Scott (2002), at 215.

[128] Mattli and Slaughter (1998), at 205.

[129] Weiler (1999), 195 *et seq*. and on the Commission e.g. at 222 and 230–234.

[130] Bolton (1999), at 38. Curiously, it is reported that in the drafting of the ICC the US pressed for a veto, which can also be considered rather undemocratic. See Leigh (2001), at 126–129.

[131] Holmes (2001), at 70. Judicialization also potentially has an impact upon domestic governance. Especially in EU law (due to the supranational character) the balance between political and judicial organs is 'exported' to the national level. See in this respect Alter (2001), at 229. For a recognition of a similar problem in respect of the WTO, see Howse (2002), esp. at 112.

judicialization can be targeted for placing unwarranted faith in a "doctrine of expertise".[132] For example Alvarez has expressed concern in these terms over the ICC, and whether it is desirable or even possible for international organs to second guess national engagements and compromises.[133] In a similar vein (albeit not concerning judges) Fatouros demonstrates how replacing political debate with technocratic decisions in the World Bank context results in an imposition of certain ways of thinking under the veil of apolitical decision-making.[134]

Yet another form of questioning judicialization is to emphasize that politically controversial issues should not be dealt with in technical (judicial) terms, but should instead be kept open to public debate.[135] While there may be some merit with abstracting substantive claims into rights and principles, at the same time something may be lost if the legal reasoning fails to deal with the political and moral dilemmas involved.[136] This means that although a judiciary could always declare a behavior prohibited or permitted, this does not automatically mean that it should always do so. Instead, the question of whether an issue would more properly be dealt with through judicial or political process becomes in itself a way of making claims concerning the desirability of judicial empowerment.

An important aspect of the critique is also that the more expert knowledge is emphasized, the more it creates obstacles for political participation. In this way judicialization may become an exclusionary device. Especially in an absence of representative organs for providing non-expert input, judicialization becomes a device whereby those who are subject to the regimes can be excluded from any deliberative processes.[137] This is a critique that is familiar for example from the context of human rights bodies.[138] Pildes has made a similar point in respect of the ICC:

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[132] See Hutchinson and Monahan (1987), at 111.

[133] Alvarez (1999), at 481–482. Notably the same argument can also be made concerning political bodies: "In a system where primary allegiances remain firmly rooted at the national level, national ties may prove to be more important than the supranational logic of parliamentary democracy", Dehousse (2003), at 149–150.

[134] Fatouros (1980), at 26–30. Fatouros also attaches similar concerns to the ILO, at 31.

[135] Ferejohn and Pasquino (2003), at 250, and for examples in US constitutional law, at 257–258. Also see Hutchinson and Monahan (1987), at 98.

[136] While the legal argument can be used to make the case, if the legal argument becomes the decisive argument, then the moral dimension can be lost. The problem becomes especially acute when the question is riddled with uncertainty, exceptions, qualifications, and contextual judgment. Koskenniemi (1999), at 501 and 509.

[137] See Tully (2002), at 211, and Coleman and Porter (2000), at 381.

[138] For general remarks, see Bellamy (2001), at 27 and at 31–32 also demonstrating how the Charter of Fundamental Rights of the European Union problematically downplays

> Perhaps with respect to a small core of the most horrific acts, there will be wide consensus … [b]ut as soon as we move out of that core, we quickly get to the point where judgments of "war crimes" inevitably blend into judgments that are at least partly political and moral, in addition to legal. The ICC is an effort to draw on conventional legal virtues of independence, impartiality, accountability to law, and the like. But this desire cannot eliminate the political dimensions of these issues; the creation of an institution like the ICC can only transfer control of the resolution of such issues away from politically accountable actors to less accountable, judicial ones.[139]

The subsequent critique against an empowerment of the ICC therefore underlines that it is only through engagement with the states and populations most affected by the decisions that a court can be properly informed by diverse perspectives (this way making decisions that are acceptable to local populations). Ultimately the claim is that such acceptance is needed in order to achieve compliance and internalization of international norms.[140] A critique of judicial empowerment expressed in these terms is basically a way of arguing that the effectiveness of organizations is not dependent on judicialization at all. Such a critique may even be turned into a call for strengthening political cooperation (and a corresponding disempowerment of judiciaries).[141]

6.3 Substantive Constitutionalism as Empowerment and Restraint

6.3.1. *Democratization as a Precondition for Effectiveness*

In contrast to an emphasis on judicialization, substantive constitutionalism is often presented as the preservation (or the introduction) of a system of democratic politics. The question of how to strike the balance between the two is also the question at the heart of the countermajoritarian critique. In such a use the two conceptions of constitutionalism represent different visions of the source of the legitimacy of acts of

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disagreement. For general remarks on the interrelationship of a politicization of the judiciary and a judicialization of the political process, also see e.g. Loughlin (2001), esp. at 58.

[139] Pildes (2003), at 159.

[140] See Turner (2004), at 1–2 and 16–19.

[141] Posner and Yoo claim that to grant international tribunals independence before political unification has been achieved is likely to weaken them and prevent them from accomplishing the modest good that they can otherwise do. Posner and Yoo (2005), at 73. For suggestions to abandon any judicialization of the Human Rights Committee and instead focus on avenues for expressing and taking the consent of ICCPR state parties into account, see Hessler (2005), at 50–51. Also see Steiner (2000).

organizations.[142] This difference stands out visibly for example in the development of constitutionalism in the EU. Maduro famously characterized early formal constitutionalization of EU law as a failure to discuss the soul of the constitutional body created. In being mainly based on treaty revisions and authoritative interpretations by the ECJ, early constitutionalism did not purport to reflect a "social or political contract" which organizes and resolves conflicts in the pursuit of the "common good".[143] This inadequacy of formal constitutionalism was also to be capitalized upon in a critique of European integration. The pace of integration and the level of empowerment could only be upheld, the claim was, by becoming more mindful of issues of democratic legitimacy.

The EU example suggests that a judicialization of an organization will result in a parallel need of democratization. As the influence of the judiciary increases, also the role of judges in governing the organization increases. In this logic, if no proper organ for political deliberation exist, the potential problems with a judicialization of an organization become accentuated. Von Bogdandy argues that although the democratic deficiencies of the WTO such as the absence of open discussion, a powerful bureaucracy, and poor information flows are similar to the concerns of other organizations, they become particularly serious for the WTO due to the existence of the adjudicatory function.[144] Phrased in this way, substantive constitutionalism becomes a call for the empowerment of political organs of an organization.

At the same time an image of judicialization and democratization as counterparts to one another is not completely accurate. Instead, democratic concerns can also be invoked in favor of a judicialization of an organization.[145] A common defense of judicial review emphasizes that such review in fact advances democracy. By protecting (either past or future) core values in the heat of the moment, a judiciary will serve to uphold the values of the majority. A similar claim emphasizes the role of the judiciary in safeguarding participation and upholding the democratic process.[146] Courts and only courts, the claim is, should uphold the constraints that specify the legitimate scope of political action. In this view courts stand

[142] For a collection of articles on the theme, see Bellamy (2006).
[143] Maduro (2005), at 341.
[144] von Bogdandy (2001), at 625. Also see Howse and Nicolaïdis (2001), at 228.
[145] The following brief remarks build largely on Croley (1995).
[146] See Croley (1995), at 769–772.

out as having a significant role in upholding the conditions of democratic governance.[147] An argument can also be made to the effect that the judiciary should not only uphold democratic processes, but also review the substance of democratic decisions. The assumption is hereby that courts are in fact better placed for safeguarding core values than political bodies.[148] A similar argument has been used in defense of the role of the ECJ: it is the ECJ who, through its case law, has preserved democratic processes by promoting enhanced transparency, accountability, and the democratic nature of the EU. Even an expansion of judicial review has been suggested by arguing that direct action against the institutions, by the ECJ, is capable of making valuable contributions to democracy.[149]

In contrast to the critique of (formal) constitutionalization outlined above, which questioned the nature of legal expertise, an emphasis of the democratic role of the judiciary openly builds on the capacity of the judiciary to be representative of (democratic) values. Election of judges has been presented as a way of ensuring that the decisions of judges conform with those values.[150] Following this same logic, counter-majoritarian concerns of the ICJ have been downplayed (since ICJ judges are elected by the UN Security Council and General Assembly).[151]

Naturally there are counterarguments to be made to such contentions. Critics of the idea of judicial empowerment as a safeguard of democratic politics question what there is to guarantee that judges/courts will remedy (instead of reinforce) an abuse of rights.[152] Substituting popular control with judicial adjudication is no automatic guarantee for the promotion of justice and equality (for example in the sense of protecting minorities). As public values cannot be abstractly manufactured and administered to the population, but are instead the product of politics, the legislator and the judiciary are both subject to the values of the society in which they operate.[153]

Waldron makes a more principled case in claiming that whatever justifications are given for the disabling of representative institutions, this

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[147] Freeman (1990–1991), at 353 and 360, and Føllesdal (2007).

[148] Perry (1982), at 100–101. Also see Croley (1995), at 776, and Zurn (2007), at 163–184.

[149] Lenaerts and Corthaut (2004), at 43 and 64.

[150] Croley (1995), at 761–769.

[151] See ICJ Statute, Article 4, and Watson (1993), at 28–31.

[152] Troper (2003), at 115.

[153] Hutchinson and Monahan (1987), at 118 even accuse such a faith in courts of being ahistorical as advances in social justice have been achieved through legislative rather than judicial action.

should not be done in the name of democracy. Even if there is popular support for adjudication, the adjudication does not become democratic:

> There *is* something lost, from a democratic point of view, when an unelected and unaccountable individual or institution makes a binding decision about what democracy requires. If it makes the right decision, then – sure – there is something democratic to set against that loss, but that is not the same as there being no loss in the first place.[154]

In this form claims to substantive constitutionalization become another argument for disempowering the judiciary (in favor of elected and politically accountable bodies).

6.3.2 *Questioning the Idea of Democratic Legitimation*

6.3.2.1. *Looking for Representativity*

Historically, the development of liberal democracy is inseparable from the nation-state, where the people is conceived as the nation. A congruent relationship is presumed to exist between those experiencing outcomes, and those taking decisions.[155] With this point of departure, the very processes of internationalization of decision-making and the idea of democratic governance can be in contrast with one another. Internationalization of decision-making can even entail a loss of democracy as citizens are removed further from the arenas where actual decisions are made, and parliamentary control over the executive becomes less effective. The more supranational characteristics the international cooperation displays, the more severe this tension becomes.[156] Yet, at the same time cooperation through international institutions also becomes an ever more important way for governments (and hence, peoples) to have an input in international decision-making.[157]

One way to meet this challenge would be to ensure the democratic character of international decision-making.[158] In this respect the all-important question is whether that decision-making can be representative of the

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[154] Waldron (1998), at 346 (emphasis in original). However, for an overview and critique of Waldron, see Føllesdal (2007).

[155] Marks (2000), at 80–83.

[156] Rubenfeld (2004), at 2017–2018 even makes a claim that international law is anti-democratic. Also see Stein (2001), at 490–493 discussing the WHO, WTO, NAFTA, and EU, and at 531–533 presenting suggestions for democratic improvement. Discussions on the democratic deficit also take place within organizations. See e.g. the resolution of the European Parliament on the Democratic Deficit in the EC of 17 June 1988, OJ C 187/229 (1988).

[157] Gerhart (2003), at 11.

[158] Marks (2000), at 95–96.

values and preferences of the members of the organization. If members perceive that decisions of an organization do not properly reflect their preferences, the critique of those decisions can be phrased as a question of democratic legitimacy.[159] Expressing dissatisfaction towards the activities of an organization by invoking the question of democratic legitimacy can take different forms. As already seen, it can be expressed as a question of preferring one body before another. Such a critique can also focus on the lack of proper democratic procedures of an individual organ.

Organizations suffer from flaws which make them poor substitutes for national democratic governance. These shortcomings include, for example, inadequate participation, poor representativity of decision-making organs, lack of transparency, and usually also absence of adequate accountability mechanisms. As it is not clear how preconditions of a democratic polity can be realized in organizations, the deliberative process is bound to be defective.[160] From this emanates a criticism which many international organizations face: that the flaws in their democratic procedures renders their decision-making (socially) illegitimate.[161]

Whereas in a domestic context democratic legitimacy is all about the acceptance of a government and its decisions by the (majority of) citizens, in organizations different conceptions of the constituency can be assumed. Depending on the image of the constituency, proposals for how to improve the legitimacy of organizations take different shapes. Emphasizing the role of individuals results in such proposals as the creation and strengthening of the role of parliaments (in organizations), and the introduction of referenda. In this way the aim would be to add accountability of organizations not only to member governments, but directly to electorates.[162]

Since organizations usually consist of representatives of state governments, the more common claim is that the legitimacy of an organization must primarily flow from these representatives.[163] A focus on individuals as subjects of an international legal order is criticized for being utopian. Kymlicka identifies the lack of a common language as too big an obstacle to be overcome already at the EU level, gearing governance towards

[159] This paraphrases Lagerspetz (1998), at 130.

[160] On deliberation, its preconditions, and realizability, see e.g. Neyer (2001).

[161] Nye (2001), at 2.

[162] In general, see Bodansky (1999), at 614–615. In respect of the UN, see Bienen et al. (1998), at 294 *et seq*. on proposals for democratization with both states and individuals as subjects. Also see Howse (2007), who envisages use of referendum in the WTO, at 71.

[163] See e.g. Heiskanen (2001), at 2 and 6.

domination by the elite and the media.[164] As a consequence it has been suggested that if the concept of democracy is to be carried beyond the nation state, the more proper constituents would be states.[165] When the role of state representatives as the source of the democratic legitimacy of organizations is emphasized, proposals for improvement concentrate for example on increasing the representativity and responsiveness of organizations to its member states, increasing the openness and transparency of decision-making processes, and improving on the accountability of organizations.[166]

While the discussion in the previous chapter suggested that democratization claims can be made in order to empower both deliberative and judicial bodies, as well as to disempower judicial bodies, the discussion here adds to the picture by demonstrating how different images of representation translate into an emphasis of different institutional actors.[167] By way of an example, the more the UN Security Council engages in legislative activities, the more there will be calls for improving the representativity of the Council. However, a different proposal for coping with the constitutional flaws of UN governance has been to emphasize the role of the General Assembly in the legislative process.[168] Yet, since the General Assembly consists of government representatives, it can also be targeted for being undemocratic. As an alternative, proposals have been made for the creation (and empowerment) of a UN Parliamentary Assembly.[169]

Eventually it should also be noted that not all authors agree that democratic governance is possible beyond the state context to begin with.

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[164] Kymlicka (1999), at 123–125.

[165] Wendt (1999), at 127–129.

[166] For an account of these aspects in relation to the WTO, WHO, NAFTA and EU, see Stein (2001), esp. at 532–533. Also see von Bogdandy (2004), at 902–903, and Zürn (2000), at 204–210. As to transparency in particular, see Dyrberg (2002).

[167] As Hurd has demonstrated in respect of the UN Security Council, 'legitimacy talk' has become a way of dressing interests of individual member states as reform proposals. There are naturally also many other alternatives in this debate. Emphasizing e.g. an enlargement of Security Council membership, or widening the sphere of participants in deliberations through inclusion of non-members can both be claimed to increase the representativity of the Council. Yet they represent very different images of the Security Council. Hurd (2008).

[168] The UN itself seems to embrace both paths, see Report of the Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc. A/59/2005 (21 March 2005), at paras 158–170.

[169] See e.g. Peters (2009), at 322–326. On the idea of a Parliamentary Assembly also see e.g. Petersmann (1996–1997), at 443, and Macdonald (2005), at 896–901.

The fundamental lack of common ground, critics argue, leads to the failure of any attempts at bestowing democratic legitimacy upon international organizations. This critique can eventually even be turned into a claim for the disempowerment of political organs of organizations.

6.3.2.2. *Looking for Commonality*

Democracy has been said to owe much of its moral authority to a grander vision: "… a vision of a community coming together, on terms of equality, to forge a common interest and pursue the common good".[170] The quote contains two elements. First of all, democracy is premised on the existence of a community. This community must be characterized by a shared collective identity and loyalty (or, a *demos*). If there were no sense of commonness, then the pursuits and concerns of the community (or organization) would stand out as completely alien to the participants.[171] If there is no *demos* by whom and for whom democratic discourse takes place, then there can be no operating democracy.[172] Yet in other words, in order to make deliberation within organizations possible to begin with, the very justification of that organization as an expression of a community cannot be in dispute.[173]

This does not mean that there needs to be agreement between members on the political issues that the organization is concerned with. This leads to the second aspect of the quote: democratic legitimacy follows from that there is in decision-making an input that makes that decision-making considerate of and sensitive to that *demos*, including the disagreements within it. It is through this process that public political discourse is created. It is also as a result of such discourse that true agreement (on contentious matters) can be reached.[174]

Emphasizing the importance of a *demos* in this way has some consequences for the idea of democratizing organizations. Even if it could be

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[170] Roth (2000), at 500.

[171] See Lagerspetz (1998), at 130. Hutchinson puts this in the following way: what needs to develop is a set of shared ends and values as "a precondition to the emergence of a genuine populist democratic practice". This way society could develop a modus vivendi that encourages caring and sharing and actualizes meaningful connections. Hutchinson and Monahan (1987), at 114.

[172] Weiler (1998), at 381, and Archibugi (2004), at 461.

[173] Although admittedly, even if there was such a dispute, the alienation would still be only relative, as that actor (disputing the community) would still be voicing its concerns in terms that are familiar to the other actors, hereby demonstrating the existence of *some* kind of a community. See Lagerspetz (1998), at 130.

[174] Lagerspetz (1998), at 107 and 110.

argued that democratic processes are in place which ensure clear, transparent, and effective decision-making, it is uncertain whether this suffices to render decision-making legitimate. A familiar claim from the EU context is that tracing the democratic deficit of the EU to the flaws in the character and role of the legislature or the weakness of the European Parliament, does not manage to get to the heart of the problem, as long as the deficit is rooted in the absence of a common identity.[175] To the contrary, when the true problem is located not on the level of democratic procedures, but is instead identified as a matter of common identity, a strengthening of the Parliament not only does not solve the legitimacy problem, but may in fact aggravate it. This is the end result if the construction and interpretation by the European Parliament of the needs and values of European member states and their citizens turn out superficial.[176]

The relationship of the *demos* question to the exercise of powers of an organization can be constructed in different ways. In defense of a further empowerment of organizations (or at least in order to safeguard the status quo), the problem is sometimes downplayed by emphasizing that although a *demos* may not exist as of yet, such a thing may come into being in the future.[177] This idea of the gradual creation of a *demos* builds on experiences from nation states. The history of states such as Great Britain, France, Spain, Portugal, Canada and the United States is pictured as one in which the establishment of a constitution and democratic institutions is antecedent to a feeling of belonging to a community. These examples, it is argued, provide evidence of the role that constitutionalization may have in creating a *demos*. This idea is by analogy also applied to international organizations.[178]

Habermas positions himself within this approach in discussing the EU. In Habermas' mind there will be no cure to the legitimacy deficit without a public sphere, which in its absence, has to be created. A requirement of mutual belonging is deemed artificial as a precondition. Instead a sense of belonging together can "grow out", just like it does in heterogeneous nation-states.[179] By improving on the democratic features of international organizations through increased representativity, openness, use

[175] For critical remarks, see Wincott (1999), at 116 *et seq*., and Estella (2002), at 46–47.

[176] As Estella points out, a focus on formal legitimacy often denies the existence of the problem by neglecting its importance. Estella (2002), at 46. Also see Weiler (1999), at 81–86, and Cass (2005), at 234–235.

[177] See Archibugi (2004), at 461.

[178] Schmitter (2000), at 118. Also see references in Stein (2001), at 526.

[179] Habermas (2002), at 152. Also see Dahl (1999), recognizing a need for a common identity, but admitting that such a thing might take generations to grow, at 30–32.

of referendums, and active deliberation, a democratic multilevel politics is predicted to come into being, which can "create an orientation towards a public interest beyond the nation-state".[180]

Not all are convinced by the idea of creating a *demos*. Tuori puts this in terms of a dilemma. On the one hand the idea is that a European *demos* can arise from common democratic practices. A constitution based on the principles of a democratic *Rechtstaat* provides the legal means for such practices. However, on the other hand the acceptance of such a constitution already requires "rudiments of a receptive trans-national constitutional culture", which, Tuori claims, is something that we do not have.[181] In a similar way Haltern has claimed that without a shared sense of commonness, all efforts of creating a *demos* (in the EU) will constitute mere "consumer aesthetics".[182]

Also Habermas seems to admit that there is a need for some sense of commonness among members. In fact, he identifies such a thing as already in existence in Europe. The common core of European identity is "the character of the painful learning process it has gone through, as much as its results", and the fact that today European states unite in face of common challenges such as globalization.[183] The crucial question becomes whether this is enough; whether the shared identity is substantive enough to bridge differences between members and to enable a conferral and a possible expansion of legal powers.[184] Concerning the WTO critical voices question whether the ideology of free trade is shared widely enough to sustain a strengthening of the organization.[185] The rudiments of a European identity have also been targeted for being rather thin.[186] This way of criticizing the possibility of a common sense of identification, belonging and participation becomes a way emphasizing the limited nature of organizations.[187]

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[180] Zürn (2000), at 212.
[181] Tuori (2007), at 47.
[182] Haltern (2003), at 33 *et seq*.
[183] Habermas (2001), at 19–21 (quote at 21). Also see Habermas (2002), at 153.
[184] Stein (2001), at 527.
[185] See Howse and Nicolaïdis (2001), e.g. at 241–243.
[186] This is especially true when a European *demos* is located in the very absence of a common identity, a commitment to live together to combat nationalism, or in order to face the challenge of globalization. See Weiler (1999), at 344–345. Weiler's basic argument is however that a *demos* can exist beyond the state context. This *demos* is best built around the idea that "there will not be a drive towards, or an acceptance of, an over-arching organic-cultural national identity displacing those of the member States", Weiler (1998), at 386. Also see Weiler (1999), at 324–357.
[187] Coicaud (2001), at 260–261.

A skepticism towards empowerment of international organizations can however be expressed even more strongly, through claiming that a *demos* is in fact an impossibility.[188] One of the classical claims in the EU context to this effect is put forward by Grimm. Grimm does not doubt the fact that the Union meets many characteristics of modern constitutionalism. At the same time, the lack of collective identity between the European peoples means that the European democratic deficit is structurally determined.[189] Also the prerequisites for a mediating process essential to democracy are absent and cannot simply be created. The reason for this is that there is an absence of a "European communication system" (mainly meaning the lack of a common language) which impedes the creation of such prerequisites (and with it, a European public).[190] In the absence of mediatory structures "from which the democratic process lives", Grimm claims, an emphasis on popular legitimacy can only serve to remove the EU "farther from its base than ever".[191] Howse and Nicolaïdis have expressed a similar critique in respect of the WTO: the divergence of values among WTO members may eventually be too great to enable a bridging of cultural differences, hence making constitutionalization of doubtful value.[192]

Such a skepticism not only translates into an emphasis of the status quo in terms of powers of organizations, but presents the solution to legitimacy problems as the decrease of the demand for legitimacy. For the EU the only path to a more reliable foundation for its claim to legitimacy would hereby be a reemphasis of the common market and a general scaling down of the ambitions of policy-makers.[193] Similarly, in respect of the WTO, as it is uncertain how the legitimacy gap can be closed, some authors see no other choice but to reduce the demand of legitimacy by limiting the agenda, and loosen the effect of decisions.[194] This demonstrates that also the *demos* question can be put to various use in a

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[188] See Zürn (2000), at 191 *et seq*.

[189] Grimm (1995), at 297. Offe even claims that trust and solidarity (and with it the potential for creating a community) will wither away as economic integration deepens. This is especially of concern for all attempts at extending demands of redistribution beyond the state context. Offe (2000), at 84–85.

[190] Grimm (1995), at 296. The function of a communicational infrastructure is to raise issues of concern for public debate. In such a debate, over time, different attitudes "coagulate to constitute public opinion", Habermas (2001), at 17–18.

[191] Grimm (1995), at 298–299.

[192] Howse and Nicolaïdis (2001), esp. at 241–243.

[193] Haltern (2003), at 44, and Eriksen and Fossum (2002).

[194] As to the WTO, see Krajewski (2001), at 168, 175–177, and 186. For a more general argument, see Bodansky (1999), at 600.

discourse on whether or not to develop the powers of an organization. Whereas the possibility of creating a *demos* can be invoked to defend the value of ongoing cooperation and further empowerment of an organization, a skepticism towards the idea of a *demos* serves as an argument for disempowerment. Paradoxically, since loosening the impact of an organization on its members (and especially any powers to make binding decisions) means that the constitutional image of the organization becomes weaker, this could be described as a process of deconstitutionalization.[195]

6.4. Speaking Constitutionalism

There is no reason to assume that a common identity is exclusively a geographic or an ethnic phenomenon (and hence impossible beyond the nation-state context). A claim that acceptance of and confidence in cooperation at the international level cannot be achieved due to the pluralism and variety of values to be taken into account, can be met by an argument that also nation states may be very pluralistic, but nevertheless share a sense of commonness.[196] Nor is there any reason to assume that practical obstacles for democratizing organizations could not be solved. The point made above is rather that a discussion on the possibility and usefulness of a constitutionalization of organizations, is in essence also a discussion on the nature and extent of the activities of organizations.

Whether advocating the judicialization or democratization of an organization, an argument in favor of a particular kind of governance is made. Judicialization and democratization claims can hereby become reproductions of a dispute over the extent of powers in different terms.[197] As judicialization and democratization become tools in a political struggle over enhanced influence, constitutionalism itself turns into a means of "hegemonic preservation".[198]

This struggle need not only take the form of a dichotomy between a judicialization and political democratization, but can also be played out within these constitutional themes. Increasing the effectiveness of an

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[195] Further, a lack of *demos* will not only be of concern for a democratization of organizations but also for successful judicialization. Zurn (2007), at 271–272.

[196] Cf. Dahl (1999), at 25–26, with Howse (2001 'The Legitimacy'), at 376.

[197] Eriksen and Fossum (2002), at 3 (discussing the EU). Frankenberg (2000 'The Return'), at 258 puts this in terms of a balance between subsidiarity and centrality.

[198] The term is used by Hirschl (2004 'Hegemonic'), at 9. Also see Hirschl (2004 'The Political'), at 90, and Sarooshi (2005), at 98 *et seq*. who applies Hirschl's reasoning in order to explain the emergence of the WTO Dispute Settlement Body.

international organization often takes the form of judicialization claims. A critique of judicialization on its part questions the nature of this effectiveness. This critique can even turn into calls for disempowering the judiciary. Such a critique is often coupled with an emphasis on developing political organs instead. In fact, a democratization of an organization can also be defended with efficiency gains. An emphasis on the benefits of political representation and calls for strengthening political bodies, can however be met by underlining the role of the judiciary in upholding democracy. In fact, a critique of the idea of democratic legitimacy beyond the state context can also be turned into claims for disempowering organizations altogether (including both political and judicial bodies).

In translating a discourse on powers into the language of constitutionalism a number of argumentative possibilities become possible. Constitutionalism therefore does not transcend or structure the question of powers, but rather reproduces that discussion on another level. In this respect, more than being a statement on empirical facts, a critique of the possibility of a *demos* is a way of expressing a skepticism towards attributing further powers to an organization. Nor is an emphasis on the judicialization of an organization an inevitable step in order achieve effectiveness, but a claim to empower a particular body of that organization.

In reality, judicial and political elements of an organization will constitute themselves in a balance. In a democratic system judicial review is needed as a protection of institutional rights and the rule of law against 'bad' majority decisions. As Franck puts it, if the political majority is wise and fair, no problem necessarily needs to arise. This, however, cannot always be relied upon to be the case.[199] Instead, a majority may encroach upon the rights of individuals and minorities. In such a case protection by a judiciary becomes desirable. The definition of those rights and their legitimacy must on its part derive from the political process. Effective adjudication (whether for the protection of member rights or for the enforcement of decisions of organizations) also requires a political culture where the decisions of the judiciary are accepted as legitimate.[200] The question of which organ to empower (or disempower) is at the heart

[199] Franck (1995), at 625.

[200] For this point in different contexts, see e.g. Grimm (2000), at 109–111, Bellamy (2001), at 22, Bienen et al. (1998), at 302–303, Rosenfeld (2001), at 1314, and Alvarez (1996), at 39.

of the debate over governance in organizations. Any way the balance is struck, it can be presented as a constitutionalization of the organization.

Although this suggests that constitutionalization claims are nothing but another way of making claims to powers, constitutionalism *can* also bring with it a shift of level upon which to deal with the scope of activities of an organization. In contrast to dealing with activities of organizations through their legality (and the attributed and implied powers doctrines), a constitutional vocabulary explicitly raises the question of "who decides who decides".[201] Constitutionalism also promises continuous scrutiny of that question.[202] By turning a discussion on powers into a question of constitutionalization, differences between members on the preferable form of cooperation are no longer dealt with through a formal discussion on constructing and interpreting provisions of the constituent instrument. Instead, raising concerns of identity, democracy, legitimacy, and the rule of law, brings with it new opportunities for asserting as well as challenging acts of organizations.[203] This way a transformation of claims to powers into the language of constitutionalism can politicize what otherwise appears as just an act of interpreting the constituent instrument.[204] A legal debate on whether to prefer textual or teleological interpretation, how to read the object and purpose of the constituent instrument, or on how to define functional necessity, *can* instead be turned into a question of who stands to gain and who to lose in the empowerment of a particular body. Whether a space is opened up for that broader question is eventually in itself a matter of preferred way of approaching the question of powers of organizations. Choosing to deal with the scope of activities through the vocabulary of the attributed and implied powers doctrines, or to frame that question in the language of constitutionalism, is a way of communicating a particular image of an organization.

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[201] The paradox itself is also one of the guarantees of limited power. If this balance was struck once and for all, then the mechanisms of checks and balances would easily be undermined. It is therefore artificial to think that constitutionalism could allocate final authority to either the judiciary or a political organ, since constitutionalism is all about dividing authority. See Maduro (2003 'Europe'), at 96–101.

[202] Walker (2001), at 54.

[203] As Koskenniemi puts it, constitutional vocabularies contest and politicize the structural biases of present institutions, Koskenniemi (2007), at 34.

[204] In this sense constitutionalism has been characterized as a "programme of moral and political regeneration", Koskenniemi (2007), at 18. More concretely on the WTO, see Dunoff (2006), at 669 and 673 claiming that constitutionalism provides a way towards a new ontology and opens up new spaces for political dialogue and contestation.

CHAPTER SEVEN

CONCLUDING REMARKS

The question of what an organization can and cannot do is in legal terms expressed as a question of the extent of powers. For most organizations and for most of the time, there is agreement between members on the proper interpretation and scope of the available legal means. However, new institutions can come into existence, organizations can develop new ways of reacting to common problems, or members may turn hostile towards the institutional development of a particular organization. In such instances, the doctrines of attributed/conferred powers and implied powers serve as tools by which to present claims concerning the proper role of an organization. In a disagreement over whether to restrict an organization or enhance its independence and capacity to act, both sides can rely on the doctrines in order to make their case.

In a historical outline, an emphasis on the limits of organizations has commonly been expressed through underlining the attributed nature of powers, whereas the autonomy of organizations is often embodied in their capacity for functional development. As expressions of conflicting preferences the doctrines hereby become opposites to one another. The image of the two doctrines as opposites to one another is appealing. After all, international organizations appear to be dichotomous features; consisting of members yet somehow transcending that membership.

The fact that decision-making by (organs of) organizations can be seen as an expression of the autonomous identity of organizations, does not however mean that organizations could free themselves from their members. Any interpretation of the powers of an organization, whether expressed by a member or by an organ of an organization, has its source in (at least some) members of the organization. A disagreement concerning the extent of powers will therefore, at heart, be a disagreement between members.

A dispute on the extent of powers can take different forms. Questions of powers need not turn on balancing between member sovereignty concerns with the effectivity of an organization, but can be a question for example of preferring one organ or organization before another. In fact, a denial of powers can be defended with efficiency gains, while an

expansion of powers can claimed as essential for the better protection of the sovereign interests of members. This highlights that the doctrines are open to more varied use than the classical image of the attributed and implied powers doctrine as opposites to one another manages to convey.

On the one hand, as far as there is agreement on the extent of powers, all such powers (whether express or implied) can be characterized as attributed. In this respect an emphasis on the attributed character of a power becomes a way of arguing that there is consent to the exercise of that power. A disagreement on the extent of powers is hereby turned into a search for the limits of that consent. On the other hand, not only an expansion of powers, but also remaining within the expressly conferred powers can be claimed to be functionally necessary. The functional necessity claim at the heart of the implied powers doctrine is hereby not exclusively geared towards expanding the legal means of organizations.

As the two doctrines can actually be used to defend any position in a discourse on powers, they become conflated. Claims to implied powers can be objected to by arguing that an organization is functionally effective already due to its explicitly attributed powers. Calls for limiting an organization to the exercise of its attributed powers only can be met by claiming that that attribution already entails non-express powers. This conflation not only highlights the political nature of legal reasoning on powers of organizations, but also questions the usefulness of the attributed and implied powers doctrines as abstract guides on the extent of powers.

Given the nature of reasoning through the doctrines, it comes as no surprise that the entire question of powers is often approached with some unease. As a result, external structuring mechanisms are often brought into the picture. Interest is turned for example to the express wording of the constituent instrument, domestic jurisdiction clauses, and principles of interpretation in order to diminish the uncertainty attached to the scope of powers. But just like the doctrines fail to define the scope of powers in the abstract, so do these parameters. Instead they become means for rephrasing the substantive dispute in different terms. The same is true of the idea of constitutionalizing organizations.

Turning to a constitutional vocabulary in dealing with organizations can be seen to contain a promise of transcending and structuring dichotomies at the heart of organizations. A move from discussing whether an organization should exercise attributed or implied powers to discussing what that attribution contains and what is meant by functional effectiveness, opens up new avenues for reasoning on the activities of

organizations. In a similar way, by turning claims to powers for example into a discussion on the merits and demerits of judicialization, new opportunities for debating organizations present themselves. Every shift of level upon which to discuss powers of organizations hereby also introduces new tools for contestation. Expanding the judicial powers of an organization is never solely a question of constructing a proper nexus between an implied power and the object and purpose of the organization. It is also simultaneously the expression of an ideological conviction on the beneficiality of judicialization. Phrasing a discourse on powers in the language of constitutionalism can highlight this nexus.

However, while every change of frame through which to debate the extent of powers *can* bring with it new insights into the political and ideological differences at the heart of the disagreement, they can all also serve to merely reproduce that disagreement in different terms. In translating claims to powers into the language of constitutionalism a number of argumentative possibilities present themselves. Both expanding and restricting powers, of both judicial and political organs, can be claimed as constitutionalization. For this reason a transformation of a struggle on the extent of activities of an organization into the language of constitutionalism does not necessarily bring resolution any closer. Instead, constitutionalization claims can be powers-claims in disguise. In such a case the very choice of whether to deal with the extent of powers of an organization as a question of interpretation of the constituent instrument or as a question of the constitutionalization of the organization, becomes a part of the struggle between competing values and preferences.

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