

Viljam Engström

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

UN WTO
AO UNES
WHO EC



Viljam Engström

Born 1973

Lic.Soc.Sc. (2002, Åbo Akademi University)

LL.M. (2001, University of Helsinki)

Cover: Matias Engström

Åbo Akademi University Press

Biskopsgatan 13, FI-20500 ÅBO, Finland

Tel. int. +358-20 786 1468

Fax int. +358-20 786 1459

E-mail: forlaget@abo.fi

<http://www.abo.fi/stiftelsen/forlag>

Distribution: Oy Tibo-Trading Ab

P.O.Box 33, FI-21601 PARGAS, Finland

Tel. int. +358-2 454 9200

Fax int. +358-2 454 9220

E-mail: tibo@tibo.net

<http://www.tibo.net>

UNDERSTANDING POWERS OF INTERNATIONAL ORGANIZATIONS

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

Viljam Engström

ÅBO 2009

ÅBO AKADEMIS FÖRLAG - ÅBO AKADEMI UNIVERSITY PRESS

CIP Cataloguing in Publication

Engström, Viljam

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 / Viljam Engström. – Åbo : Åbo Akademi University Press, 2009.

Diss.: Åbo Akademi University.

ISBN 978-951-765-465-4

ISBN 978-951-765-465-4
ISBN 978-951-765-466-1 (digital)
UNIPRINT
Åbo 2009

Contents

<i>Acknowledgements</i>	ix
<i>Abbreviations</i>	xii

Part I Introducing the Doctrines as a Subject of Research1

1	The Three Doctrines and the Question of “Who Decides”	2
1.1	First Example: Who in the UN Should Authorize Peacekeeping? By What Means?	2
1.2	Second Example: Who Should Decide on the Extent of European Integration?	6
2	Focusing on the Human Rights Committee	8
2.1	The Human Rights Committee as an International Actor	8
2.2	The Human Rights Committee as a Legal Person	12
2.3	The Three Doctrines and Committee Powers.....	15
2.3.1	The Committee Enjoys Powers that are Functionally Necessary	15
2.3.2	The Powers of the Committee are Limited to those Attributed to It	17
2.3.3	Constitutionalism and the Human Rights Committee..	19
3	Towards a Better Understanding of Powers	20
3.1	“A Power” vis-à-vis “Power”	20
3.2	An Evergreen or Ignored Subject? Outlining the Aim of the Thesis.....	25
3.3	Sketching the Research Approach	28
3.3.1	On the Politics of Legal Reasoning.....	28
3.3.2	Avoiding Subjectivity.....	32
3.4	The Task Ahead.....	35

Part II Reasoning on Powers and the Image of Organizations40

1	An Outline of a Dichotomy	41
1.1	The Idea of Attributed Powers	41
1.1.1	Early Powers. Organizations as Standing Conferences	41
1.1.2	The Image of Independence Emerges.....	45
1.1.3	Attribution as a Viable Notion.....	49

1.2	The Idea of Implied Powers	53
1.2.1	From an Ever Increasing Enthusiasm... ..	53
1.2.1.1	The ICJ on the Role of the UN	53
1.2.1.2	The Doctrine as a Tool for European Integration.....	61
1.2.2	... to a More Restricted Account?	66
1.3	Concluding Remarks: Defining Powers and the Idea of "Trends"	70
2	Powers - An Inevitable Source of Debate.....	73
2.1	Framing the Question: On the Source of International Obligations.....	74
2.2	Powers as Constitutive of the Independence of Organizations	78
2.3	Overdoing It: Deriving Powers from the Existence of an Organization.....	82
2.4	Powers as Expressive of the Intent of Members.....	87
2.5	Overdoing it: Associating Powers with Member Views	90
2.6	Concluding Remarks: A Dual Image of Organizations.....	94
3	Structuring the Dichotomy.....	96
3.1	Internal and External Means of Guidance.....	97
3.1.1	Expressly Safeguarding Member Prerogatives.....	97
3.1.2	Principles of Interpretation as Guidance	101
3.2	The Constitutionalization of Organizations.....	109
3.2.1	From a Constitutional Character to Constitutionalism.....	109
3.2.2	Constitutionalism in Organizations	114
3.2.2.1	The Supranational Constitutionalism of Europe	114
3.2.2.2	Constitutionalism in the WTO.....	118
3.2.2.3	The UN and the Idea of a World Constitution.....	121
3.3	Concluding Remarks: The Promise of Constitutionalism...	124
Part III Three Doctrines in Search of Content		127
1	Reconciling Attributed and Implied Powers.....	128
1.1	The Elusiveness of Implied Powers	128
1.1.1	Implied Powers or Implied Functions?.....	128
1.1.2	Different Expressions of a Functional Character	131
1.1.3	The Problems with Defining Functional Necessity	138
1.1.4	Looking for Guidance in the Constituent Instrument	143

1.2	The Attributed Character of all Powers	150
1.2.1	Attribution by Treaty	151
1.2.2	Attribution by Implication	153
1.3	Concluding Remarks: On the Emptiness of the Attributed and Implied Powers Doctrines	157
2	Breaking Up the Doctrine of Constitutionalism	160
2.1	Identifying Formal and Substantive Aspects of Constitutionalism	162
2.2	Formal Constitutionalism and its Critique	166
2.2.1	Judicializing Organizations.....	166
2.2.2	Potential Problems.....	170
2.2.2.1	Separating Political and Judicial Questions	170
2.2.2.2	Politicizing the Judiciary	176
2.2.2.3	Judicializing the Political Process	181
2.3	Substantive Constitutionalism and its Critique	187
2.3.1	Democratizing Organizations.....	187
2.3.2	Different Sources of Legitimacy	188
2.3.3	Is Democratic Legitimacy in Organizations Possible?	193
2.3.3.1	Democratic Legitimacy Deficits	193
2.3.3.2	On the Possibility of a <i>Demos</i>	199
2.4	Constitutionalism as Hegemony	204
2.5	Concluding Remarks: The Virtue of Constitutionalism	210

Part IV The Powers of the Human Rights Committee213

1	Effectiveness, Consent, and the Question of Reservations.....	214
1.1	Arguing for Implied Powers.....	214
1.2	Emphasizing Attribution.....	221
1.3	Using One to Oppose the Other	224
2	Meeting the Doctrines on their Own Terms.....	231
2.1	Which Effectiveness?	232
2.2	What Consent?	237
3	Constitutionalism and the Human Rights Committee	240
3.1	Arguing in Favor of Judicialization	242
3.2	Potential Risks with Judicialization	246
3.2.1	The Committee Is Politicized	246
3.2.2	Disputes over Civil and Political Rights are Overlegalized	249

3.3	Democratic Legitimacy and the Committee	254
3.4	On the Difficulties of Democratization	257
3.4.1	Introducing Democratic Elements to the Committee .	257
3.4.2	Is There a Universal Conception of Human Rights? ...	263
4	Concluding Remarks: Three Dichotomies and the Determination of Human Rights Committee Powers	269
Part V	General Conclusion	274
1	A Recapitulation	274
2	Contributions to Understanding Powers of Organizations	281
2.1	Revealing Different Aspects of “Who Decides”	281
2.2	In Prospect	284
<i>Svensk sammanfattning</i>		xv
<i>Bibliography</i>		xxiii
<i>Index</i>		lxix

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. Now ten years later, I guess I have proven the examination committee right. Although, had I known that it would take this long and require so much work to write a PhD thesis, I might have chosen to pay less attention to those kind words.

Much has happened during those ten years, and my focus has not always been clearly set on writing a PhD. In fact, I chose to do some research on multinational corporations (for the Erik Castrén Institute of International Law and Human Rights at the University of Helsinki, and for the Institute for Human Rights at Åbo Akademi University), to take the LL.M. exam, and to write a Licentiate thesis in between. The last couple of years I have also worked as a university teacher in international law at Åbo Akademi University. All of these experiences have, however, been beneficial for the PhD project.

Fortunately, I have also had the luxury of having Martin Scheinin as a supervisor, who has been very patient in letting my thoughts materialize into a text. Although several years have passed since Martin brought me a copy of the United States Supreme Court case *McCulloch v The State of Maryland et al.* from one of his trips to New York, I always felt that Martin had confidence in my research. Nothing can be more valuable for a doctoral candidate. His comments on early drafts of the thesis, and insight into the work of the Human Rights Committee have been indispensable for completing the project. Martin has also been the mastermind behind the puzzle of funding this lengthy project. I owe him deep gratitude.

I met the opponent, Professor Jan Klabbbers, for the first time during my LL.M. year at the University of Helsinki. As there are relatively few researchers and academics working with issues of international institutional law internationally (and even fewer in Finland), it was only natural that we started sharing thoughts every now and then. Reading the work of Jan Klabbbers on organizations and especially his conceptualization of the issue of powers of organizations on which very little innovative research had been done, was both refreshing and inspirational. However, at the same time I felt that there was a bit

more to the issue than what Jan had found. During the years we have discussed issues of international institutional law on different occasions. The public defense of my thesis will be a step in this ongoing discussion.

At a very significant moment in the process of writing, Martti Koskenniemi was kind enough to provide extensive commentary on a draft version of the PhD. He managed to pull all of the threads of the thesis together at a time when it seemed I had lost them from my sight. His encouraging comments proved decisive in shaping the final work.

During the years of working on my PhD, I benefited from a number of different research environments. To have colleagues at both the Department of Law and the Institute for Human Rights at Åbo Akademi University with whom to discuss both academic and private matters on a daily basis was of immense importance. Research seminars at the Institute for Human Rights, the Department of Law, the University of Turku, and within the framework of the Nordic School in Human Rights Research were useful for exchanging ideas. The Finnish Graduate School in Human Rights Research enabled participation in a number of conferences and an important research visit to the Human Rights Committee session in Geneva in 2005. In all of these contexts I have come in contact with many kind and helpful people.

I would like to especially thank the members and staff of the Human Rights Committee who were very kind in offering me some of their valuable time as I was trying to figure out different ways of appreciating the work of the Committee. Special thanks go to Ivan Shearer for introducing me to the people there. The thesis has also benefited from the comments of the preliminary examiners Dinah Shelton and Michael O'Flaherty. Nicholas Kirkwood corrected the language and did his best to make my English a bit more fluent. Information specialists at the Institute for Human Rights have been very helpful with finding material (and extremely flexible with overdue loans). I also want to thank Matias Engström for designing the cover page.

There are naturally also a number of funders to thank for their support. Somewhat unorthodoxically perhaps, I should really extend my gratitude to something called Rectors Research School (Åbo Akademi) that gave me a research grant at the time I was writing my Licentiate thesis, as this thesis really served as an introduction to the themes of the present PhD. The main body of the current work was, however, written within the Finnish Graduate School in Human Rights Research. A short period of leave from my post as a university teacher was made possible towards the end of writing the PhD due to a grant from the Finnish Cultural Foundation and a Rector's Scholarship for the Finalization of Doctoral Studies (Åbo Akademi).

There are also some people that have been (and still are) particularly important on a more personal level. My understanding of the world, and of international law, has been greatly influenced by numerous discussions on everything imaginable with the most inspiring of thinkers – my dear friend and colleague Benedict af Hällström. Finally, the support of my wife has been constant in spite of the occasional work-related baggage I took with me on weekend trips. This support was much more important than I think I have let her know. And having two young sons always managed to put things in the proper perspective at the times when I was utterly confused and frustrated with the writing process. I can only apologize to them for too often having to play with an absent-minded father, whose mind is still stuck pondering over legal issues instead of focusing on the far more important Lego-issues.

Sometime around Valentine's Day 2009, in Turku,

Viljam Engström

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
ECtHR	European Court of Human Rights
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
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
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

Part I Introducing the Doctrines as a Subject of Research

It is the spirit and not the form of law that keeps justice alive.
Earl Warren (1891 - 1974)

The exercise of legal powers is the most tangible way by which international organizations make their presence felt. The notion “powers of organizations” 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 either case the exercise of the power constitutes an independent act by the organization.

At the same time the exact scope of the means at the disposal of organizations has proved difficult to define. The ambiguity attached to the exercise of powers has many sources, beginning with the 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 need there be agreement on the exact scope of an individual legal power. Such uncertainties can therefore manifest themselves in different interpretations on what the organization is legally entitled to do.

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 *Legality of the Use*), (emphasis added). In this thesis the notion “constituent instrument” will be used for indicating the instrument which defines the object and purpose as well as the functions of the organization, and above all, allocates powers to organs of the organization.

These interpretative differences have their source in different conceptions of what the proper degree of independence and impact of the organization on its members should be. 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. While the question concerning the proper construction of legal powers is frequently discussed in more well-established organizations such as the United Nations (UN) or the European Community (EC), it is of importance also for other institutions such as the Human Rights Committee (HRC/Committee).

1 The Three Doctrines and the Question of “Who Decides”

1.1 First Example: Who in the UN Should Authorize Peacekeeping? By What Means?

Maintenance of international peace and security, one of the main purposes of the United Nations, has never been an easy task. Conflicts that escalate into threats to international peace and security are by definition controversial and politically sensitive. Yet, the Security Council, being charged with acting in face of such threats, is expected to provide a swift and effective solution. This was the very idea behind creating the Council in the first place.² If the Council is for some reason incapable of living up to these expectations, it is criticized for not being efficient enough.

The difficulties involved in the Security Council’s decision-making are familiar. 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, as reproduced by international news agencies, is mostly of a political character, the question also has a legal dimension. Different arguments on what the UN should (or should not) do in a particular case can in legal

² Efficiency concerns, Kelsen claims, were the reason for emphasizing a strong executive branch in designing the UN. Kelsen (1945), e.g. at 46.

terms be transformed into a question of what the UN is legally entitled to do.

Like any constituent instrument of an international organization, the UN Charter is ambiguous on the question of powers. Probably one of the most well-known examples of an activity of an organization, the legal basis of which is in some doubt, concerns United Nations peacekeeping. In this respect the activities of both the UN General Assembly and the Security Council have raised some concerns. 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).³ 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 enacting peacekeeping missions, despite the absence of any explicit authorization. Through this resolution the Assembly assumed for itself a power to establish peacekeeping forces. This implied power has also been exercised by the General Assembly.⁴

The question of the General Assembly's powers was eventually also dealt with by the International Court of Justice (ICJ). The ICJ concluded that the Assembly could indeed authorize peacekeeping operations. This could be derived, the Court said, from the existing power of the Assembly for the creation of organs for the implementation of its

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

⁴ 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. The resolution has also been recalled more recently as a potential mechanism for the authorization of humanitarian intervention by the UN General Assembly, see Lepard (2002), e.g. at 364 *et seq.* However, peacekeeping is by no means the only example of an exercise of implied powers by the UN. Zemanek (1994), at 31-32, claims that decisions by the UN Security Council in respect of Iraq in 1991 (to guarantee the inviolability of an international boundary, and to decide that a state shall accept the destruction, removal, or rendering harmless of a part of its weaponry) 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 also been regarded as an exercise of implied powers. Kirgis (1995), at 522. Marschik suggests that recent legislative activities by the UN Security Council in respect of terrorism constitute exercises of implied powers. See Marschik (2005), at 463.

decisions (e.g. a power to establish subsidiary organs is explicitly expressed in Article 22 UN).⁵

While the uncertainty concerning the legality of the establishment of the peacekeeping missions by the General Assembly has its source in the absence of an express entitlement in the UN Charter for such an activity, the same is 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.⁶ Nonetheless, peacekeeping is safely confirmed as an activity falling within the object and purpose of the UN.

An additional uncertainty derives from the fact that the nature of peacekeeping missions has evolved. Nowadays many missions perform enforcement tasks (examples often mentioned as indicative of this change are the missions in Bosnia (UNPROFOR) and 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.⁷ While there may be general acceptance that peace enforcement is a means for the UN Security Council by which to deal with threats to international peace and security, the legal power

⁵ *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*). As a consequence of this judicial construction such tensions were generated within the UN that the General Assembly was not able to meet during 1964 and part of 1965. Martin Martinez (1996), at 92-93.

⁶ Suggestions have even been made to add a chapter in between chapters VI and VII. See Karl and Mützelburg (2002), at 1364-1372. Koskeniemi (1996 “Onko”), 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.

⁷ 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).

for deploying such missions is not expressly laid down in the UN Charter.

Peacekeeping has also moved into something called peace building. Peace building means engagement in activities that aim at reducing the risk of domestic problems lapsing into a conflict. The Report of the Panel on United Nations Peace Operations (also known as 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.⁸ 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 even taking over the tasks of the national police has been mentioned.⁹ 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”.¹⁰

This brief overview of UN peacekeeping demonstrates one of the most basic dilemmas with regard to the powers of organizations. The powers that have been expressly *attributed* to an organization through the drafting of its constituent instrument need not be very precise or exhaustive with regard to what an organization (or an organ) is in practice legally entitled to do.¹¹ In addition to the express means at its disposal an organization may exercise *implied* powers. However, the use of such powers can bring about uncertainty concerning what an organ or organization can do (by way of legal entitlement), and what the limits to

⁸ 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.

⁹ See Chandler (2006), at 297.

¹⁰ Mégret and Hoffman (2003), at 328-329.

¹¹ While mention of peacekeeping as such cannot be found in the UN Charter, often the decision to deploy such missions does define the authority and powers of the individual peacekeeping mission. In this respect the United Nations Transitional Administration in East Timor was granted “the overall responsibility for the administration of East Timor” and the powers “to exercise all legislative and executive authority, including the administration of justice”, United Nations Security Council Resolution 1272, 25 October 1999 (UN Doc. S/RES/1272), para. 1.

the activities of that organ or organization are.¹² Such an uncertainty manifests itself in different images of the means available for an organ of an organization, as well as in different ways of reasoning which organ is the proper actor (e.g. as the deployer of peacekeeping missions). Distinguishing between attributed powers and implied powers is hereby not just a matter of labeling the powers of organizations. Instead, different constructions of powers of an organization affect the relationship between the organization and its members.¹³

1.2 Second Example: Who Should Decide on the Extent of European Integration?

Evolutionary interpretations and use of non-express powers have also been common features of EC law.¹⁴ In European integration implied powers have in fact been utilized to the extent that the implied powers doctrine has been identified as the true *locus* of expansion of Community law.¹⁵ The apex of the discussion on the powers of the European Union (EU) at large was reached through the work of the European Convention on revising the founding treaties.¹⁶ This process was in many respects concerned with the issue of powers. The question of division of powers served as one of the most central themes of the Convention, with two

¹² There can also be very concrete consequences. As a former advisor to the UN on peacekeeping recalls: "Since peace-keeping operations are not known in the Charter, I could not have a place on the official organizational chart – nor even an office ... Because I was independent, I could not receive a salary from the permanent UN budget, either", Koho (1996), at 112.

¹³ 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. See Darrow (2003), at 171. Skogly (2001), at 76 claims that if there is political will, the IMF could easily adopt such a mandate through the use of implied powers. In fact, the IMF has relied on implied powers in other contexts, for example when adopting new policies for facilitating economic growth. See Riesenhuber (2001), at 345-349.

¹⁴ As to the distinction between the EC and the EU, the structure known as the pillar-model is by the time of writing this thesis still intact. The future of the Treaty of Lisbon, which will rename the Treaty establishing the European Community as the Treaty on the Functioning of the European Union, is uncertain. See Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (13 December 2007), OJ C 306/01 (17 December 2007) (hereinafter Treaty of Lisbon).

¹⁵ Weiler (1999), at 51 *et seq.*

¹⁶ In 2003 the work of the Convention resulted in a Draft Treaty establishing a Constitution for Europe, which was however rejected by EU members. The Treaty of Lisbon which is currently being ratified by EU members reproduces much of that Draft Treaty.

working groups being directly concerned with the topic. In the working groups on legal personality and external action the question of powers arose more indirectly, but nevertheless assumed crucial importance. Also if one looks at the driving forces behind the work of the Convention (as set down 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”, they can all in one way or another be referred back to the issue of powers.¹⁷

Definitions of the constitutional character of the EC by the Court of Justice of the European Communities (ECJ) and in literature on EC law have emphasized: the nature of the European legal order as autonomous and higher-ranking law, the existence of an institutional rule of law (e.g. through a separation of powers), and the supervisory and enforcement role of the ECJ. Maduro has consequently called these elements (along with the creation of an infrastructure with individual and fundamental rights) the body of Community *constitutionalism*.¹⁸ The ECJ, through its role of ensuring that EC law is observed in the interpretation and application of the EC Treaty by members and EC institutions, has assumed an important role in defining and upholding this body. In this way the ECJ is also empowered to decide upon issues concerning the powers of the EC.¹⁹

However, the primary concern of the European Convention was not (or at least not solely) to add to or define more precisely the body of EC/EU law. Instead, the main concern was how to organize European politics. While a proliferation of the role of the ECJ as the ultimate authority for interpreting the contents of Community 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 Community 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 Community law.²⁰

Presented in this way, it should already at this early stage be recognized that the doctrines of attributed powers, implied powers, and constitutionalism are not comparable in any oversimplified way. Whereas the doctrines of attributed powers and implied powers serve as different

¹⁷ 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>.

¹⁸ Maduro (1998), at 8. The reasoning of the ECJ will be discussed in due course.

¹⁹ See Treaty establishing the European Community (Nice consolidated version) (26 February 2001), OJ C 325/33 (24 December 2002) (hereinafter EC Treaty), Article 220.

²⁰ See Laeken Declaration, Chapter II.

ways of constructing the legal powers of an organization, constitutionalism is a broader approach, more concerned with the source of those constructions. Yet the doctrines also display similarities as all three doctrines can be used for making particular claims concerning the role and activities of organizations. This means that they all also serve as means for constructing the relationship between members and the organization.

2 Focusing on the Human Rights Committee

2.1 The Human Rights Committee as an International Actor

Practically every major work on international organizations begins with a chapter defining an international organization. The aim may sometimes be to delimit the scope of the book by omitting certain institutions from the scope of the study. Yet, when it comes to pinpointing any exact features of organizations, difficulties arise. While no comprehensive definition of an international organization seems to be available, elements which are commonly enumerated include the following: 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 from other international actors such as non-governmental organizations (NGOs) or transnational corporations.²¹

The HRC seems to fulfill some of these criteria. The Committee is created through an international agreement, the International Covenant on Civil and Political Rights (ICCPR), which is governed by international law (as opposed to domestic law).²² 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 of these criteria, the far more common characterization of the HRC is that it is something of a borderline case between an expert organ and a

²¹ See Schermers and Blokker (2003), at 26-39, and Klabbers (2002 “An Introduction”), at 7-13.

²² 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).

judicial body (sometimes even unhelpfully labeled a *sui generis* entity).²³ An uncertainty concerning whether the ICCPR could properly be characterized as a constituent instrument for the HRC affect a characterization of the Committee as an international actor.²⁴ The question is whether this should be of concern for a study which deals with doctrines that (in their international application) are part of international institutional law?

Notably a comparison with “traditional” intergovernmental organizations is not the only possible way of characterizing the HRC. It has been argued that the range of international actors has been 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 Organization for Security and Co-operation in Europe, the G7/G8, or the International Jute Study Group), which display less fixed institutionalized structures than traditional international organizations, are increasingly utilized. Many multilateral agreements also provide for institutional arrangements without nevertheless explicitly establishing an international organization. This means that a host of institutions have emerged which fulfill most of the criteria of international organizations, but not necessarily all. In some cases these institutions may even impose compliance mechanisms on states. Importantly, whereas such institutions have always exercised political power, their institutionalization means that they have also come to possess legal powers (the distinction between “power” and “powers” is picked up later on). 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).²⁵

Even the HRC can be seen against this background. Being established in 1966 to monitor compliance with the International Covenant on Civil and Political Rights, the HRC performs functions vis-à-vis the members of the ICCPR. The HRC is composed of 18 members,

²³ See Ghandhi (1998), at 40-41, and McGoldrick (1991), at 53-55.

²⁴ 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.

²⁵ Nijman (2004), at 354, Churchill and Ulfstein (2000), and Klabbers (2002 “An Introduction”), at 338-339. Of course these institutions may also turn into more traditional international organizations, as has recently been 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.

elected by the state parties of the ICCPR to serve in their individual capacity as impartial experts.²⁶ The Committee has three main functions. First, it receives and considers reports from the state parties to the Covenant concerning their compliance with the ICCPR. Secondly, the Committee “transmits” General Comments, which may relate to implementation of the reporting obligation, to questions relating to the application and content of individual ICCPR rights, or to the cooperation between state parties in applying and developing the Covenant.²⁷ Thirdly, the Committee receives communications from states and individuals alleging a violation of their civil and political rights (by a state party of the ICCPR). Out of these, the inter-state complaint procedure established by Article 41 of the ICCPR has never been resorted to. The procedure of individual complaints is on its part based on the Optional Protocol to the ICCPR (also called the first Optional Protocol).²⁸ The Optional Protocol is hereby an additional implementation instrument to the ICCPR. Despite its optional character it has (as of June 2008) 111 state parties.

The Committee works to fulfill its goal of monitoring compliance with the ICCPR through the exercise of its powers. This exercise of powers has also established the Committee as an international actor in the human rights sphere. The Human Rights Committee is often regarded as the most significant body created by a human rights treaty.²⁹ This status can be traced to the function of considering individual communications under the Optional Protocol. The communications mechanism which the Optional Protocol establishes, permits victims of a violation of Covenant rights (by a state party to the Optional Protocol) to submit the matter to the Committee for consideration.³⁰ Communications can address any failure to fulfill the obligations of the Covenant, or any violation of the rights enumerated therein. The Committee, after making sure that a communication fulfills the prerequisites for admissibility, examines it in private sessions, finally resulting in the adoption by the Committee of views, which basically constitute its findings.³¹

²⁶ See ICCPR, Article 28 and Article 38.

²⁷ See ICCPR, Article 40, and Nowak (2005), at 746-752, esp. at 748. For a general overview also see McGoldrick (1991), at 92-96.

²⁸ 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 (hereinafter Optional Protocol).

²⁹ Such a claim is for example made by Steiner (2000), at 16.

³⁰ Optional Protocol, Article 2.

³¹ Article 5(4) of the Optional Protocol asserts that: “The Committee shall forward its views to the State Party concerned and to the individual”. For a detailed account of the mechanism, see Nowak (2007), at 829-897.

The existence of a right of individual petition, while not unique among treaty organs, has attracted a large amount of communications, hereby positing the Committee with factual jurisdiction that overshadows any other universal treaty organ. While it is often emphasized that the HRC is not a court of law, tribunal or any other kind of formal judicial body, it is commonly acknowledged that its work under the individual complaint mechanism in particular, in many respects resembles the way in which a court of law operates.³² It is also due to its judicial features that the HRC has been characterized as a “quasi-judicial organ”, or “quasi-judicial dispute resolution mechanism”, the qualification “quasi” deriving from the formal non-bindingness upon state parties of the HRC views.³³ The views can also be regarded as the closest thing that there currently is to truly universal human rights jurisprudence. Some authors consequently envisage a strengthening of the international human rights regime through further development of the individual complaint mechanism towards bindingness and legal enforcement.³⁴

Although the current consensus is that views are formally non-binding, there is no definition of the status of views in the Optional Protocol. The communications procedure must already have appeared as the most extensive (and therefore controversial) of the functions of the Committee by the time of drafting the ICCPR. Perhaps because of this also the language of the Optional Protocol was left vague. This vagueness of the Optional Protocol has later enabled for example a debate on the legal status of views.³⁵

Eventually, although the exact character of the Committee may be difficult to pinpoint, the doctrines of attributed powers, implied powers, and constitutionalism can be used for addressing the powers of the Committee. Whether the label “quasi-judicial organ” or “treaty body” is used, it would be (as Young puts it) disingenuous not to subject the HRC to the same legal standards and doctrines that govern the operation of international organizations, since the Committee is operating at the international level and applies international (human rights) norms.³⁶ As the general principles and doctrines of international institutional law by which to construct and govern the use of powers are also used for discussing the powers of other “institutional arrangements”, there is no

³² See Ghandhi (1998), at 40-41, and McGoldrick (1991), at 53-55.

³³ For these characterizations, see Sands and Klein (2001), at 370-371, and Buergenthal (2001), at 367.

³⁴ See Schmidt (2001), at 201, and de Zayas (2001), at 73. Steiner (2000), at 23-24 suggests that the authority of the views of the HRC among ICCPR state parties could indicate a readiness for the establishment of a world human rights court.

³⁵ Nowak (2007), at 894-895, and Ghandhi (1998), at 329-335.

³⁶ See Young (2002), at 29.

reason why they could not be used for discussing the powers of the HRC as well.³⁷ Furthermore, in cases of uncertainty on whether the Committee possesses a particular power or not, both attributed and implied powers reasoning has in fact been relied upon in debating the proper construction of Committee powers.

2.2 The Human Rights Committee as a Legal Person

Given that the exact characterization of the HRC as an international actor seems somewhat uncertain, a brief note should also be made on the one criterion that has sometimes been considered a threshold for acting at the international level: possession of international legal personality.³⁸ How the question of legal personality is sometimes claimed to affect the capacity to act is demonstrated by the example of the EU. In the case of the EU, the lack of express provisions on legal personality has been perceived as an obstacle to the performance of independent acts. The lack of personality has also served to uphold a distinction between the EU and the EC.³⁹ For this very reason, including a provision on international legal personality has for a long time been at the top of the list of treaty-revisions needed.⁴⁰

As a more theoretical matter, when considering legal personality as a threshold for acting, there have basically been two ways of explaining how legal personality may arise. A traditional dividing line runs between an “objective” and “inductive” (or “will”) approach to legal personality.⁴¹ The objective approach ascertains that an entity

³⁷ 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.

³⁸ 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.

³⁹ On the complex relationship and for an overview of discussions around the time of the so-called Amsterdam agreement, see Curtin and Dekker (1999), at 111-112, and Cremona (1999), at 166-174.

⁴⁰ In this respect, see the Treaty on European Union (Lisbon consolidated version) (30 April 2008), OJ C 115/01 (9 May 2008), Article 47.

⁴¹ The notions are used by Rama-Montaldo (1970), 111-155.

automatically possesses legal personality when it fulfils certain conditions. The inductive approach links the question of personality to the will of the founders of the organization. However, neither the objective nor the inductive approach seems entirely satisfactory. In addition, neither theory gets exclusive support from the *Reparation for Injuries* opinion in which the ICJ dealt with the personality question.⁴²

The one crucial precondition that the objective theory on personality relies on is the existence of a distinct “will” of the organization. Otherwise, so the argument goes, every association of states would qualify as an international legal person.⁴³ However, identifying such a “will” (based upon an enumeration of objective criteria) is a problem that the approach has difficulties in solving. Often attempts have ended up reconciling the issue of personality with the definition of an international organization.⁴⁴

The inductive theory on personality takes the opposite approach. As states cannot be bound by rules they have not themselves created, the “will” of the founders is treated as decisive.⁴⁵ One problem that this approach runs into is how to identify state “will” in the absence of express provisions establishing international personality (which is common for international organizations).⁴⁶ Another problem is that a mere agreement would not suffice to endow personality vis-à-vis third parties (if state “will” is to be decisive). Recognition would be needed. However, just as regular treaties between states do not require recognition by third parties in order to be valid, nor is recognition needed for an organization to possess legal personality. To this extent the will of the founders and recognition exclude each other. If one of them (“will” of the founders) is to be decisive, the other (“will” of third parties) cannot enter the picture.⁴⁷

⁴² Notably, both of these theories build on *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion, 11 April 1949), ICJ Reports 1949 (hereinafter *Reparation for Injuries*). For an overview, see Klabbers (2002 “An Introduction”), at 52-57.

⁴³ For Seyersted this means that an organization should perform sovereign and/or international acts in their own name. See Seyersted (1963), at 47.

⁴⁴ See Rama-Montaldo (1970), at 144, and Muller (1995), at 75-77. On flaws with the objective theory, see Klabbers (1998), at 240-242.

⁴⁵ The approach has early support in the *Lotus* case: “The rules of law binding upon States ... emanates from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims”, *The Case of the S.S. “Lotus”* (Judgment, 7 September 1927), PCIJ Publications, Series A, no. 10 (hereinafter *Lotus*), at 18.

⁴⁶ On the inductive theory, see Klabbers (1998), at 234-238.

⁴⁷ See Frid (1995), at 16-18, and Klabbers (1998), at 235.

By approaching the question of personality in a different way, Klabbers has turned the relationship around. As the characterization of an actor as an international organization implies a capacity to act, that actor is also presumptively a legal person. This presumption can either be confirmed or rebutted. Once the organization does perform acts which can only be explained on the basis of legal personality, then the presumption is confirmed. However, an absence of legal personality can not in itself have an impact on whether the organization can act or not.⁴⁸ Similar ideas have been presented in respect to privileges and immunities of organizations. Where the possession of privileges and immunities are necessary for the performance by the organization of its functions, personality becomes of secondary importance.⁴⁹ The EU exemplifies the point as there is some evidence that the EU has performed independent international acts in spite of the absence of express legal personality.⁵⁰ In asserting the personality of an organization, the presumptive approach hereby builds on the evidence it can find. Instead of personality being a precondition for powers, the actual exercise of powers may instead prove the legal personality of an organization.⁵¹ While the commonality of some institutional features among organizations would tempt to deduce at least some general capacities from the personality notion (such as treaty-making capacity and capacity to bring claims), the commonality of such powers is still more correctly located in the practice of organizations.⁵²

⁴⁸ See Klabbers (1998), at 243 *et seq.* This is also the approach of Schermers and Blokker (2003), at 989.

⁴⁹ Bekker (1994), at 96.

⁵⁰ Common examples in the literature are: 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. There are in fact no indications that other legal persons would not accept the personality of the EU. Curtin and Dekker (1999), at 109-111. Other arguments used in the personality discussion aim 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 have been considered incompatible with the idea that the union "borrows" the personality of the Community. See Treaty on European Union (Nice consolidated version) (26 February 2001), OJ C 325/5 (24 December 2002) (hereinafter TEU), Article 1 and Article 3. The TEU also frequently uses the notion "member states" instead of "contracting parties". Klabbers (1998), at 232-233, and Curtin and Dekker (1999), at 97-98.

⁵¹ Klabbers (1998), at 248-252. Eaton (1994), at 224 considers non-usage of functions as proof for lack of personality.

⁵² Such a conclusion is made by Rama-Montaldo (1970), at 139-140 and Amerasinghe (2005), at 101-104.

The questionmarks attached to the concept of legal personality have eventually even given rise to a critique of its usefulness.⁵³ At any rate, if any merits are attached to the concept, these would lie at the conceptual level. Possession of legal personality may indicate that international law has identified an actor as a legitimate participant, hereby making the actor “visible”. This can be important for example when determining a question of liability for the activities of an organization.⁵⁴ However, following the presumptive approach, the question of whether and to what extent an actor can perform certain functions is a question that rather depends on the possession of express and implied powers. In searching for capacity to act it seems futile to ask whether an organization has legal personality. The more useful question is: What rights, duties and powers can the organization exercise?⁵⁵

One consequence of following the logic of presumptive personality is that the attributed and implied powers doctrines can be used to discuss the powers of any international institution. Since the exercise of powers can serve to prove the existence of legal personality, that legal personality can not at the same time be a precondition for using the doctrines to construct and discuss the powers of the actor. This also means that use of these doctrines can not be reserved for international organizations that are already established international legal persons. Put differently, a discussion on the proper extent of the powers of the HRC (or any other institution) is simultaneously a discussion on the very nature and existence of that institution as an independent legal actor (or even as an international organization in the conventional sense of the notion).

2.3 The Three Doctrines and Committee Powers

2.3.1 The Committee Enjoys Powers that are Functionally Necessary

While there are many examples of uses of implied powers by the Committee, the one particular question that will be returned to

⁵³ See Nijman (2004), at 387-388. A more general argument for rejecting the subject-object dichotomy is presented by Higgins (1994), at 49-50.

⁵⁴ Nijman (2004), at 406, and 456. In the words of Cheng: “... from the legal point of view, the ‘players’ in the legal arena are only those that the legal system recognizes as capable of playing a direct role in the legal system, to whom it can directly address its rules. It is in this sense that legal personality is defined as the capacity to bear rights and duties under a legal system”, see Cheng (1991), at 24. So also Klabbbers (2002 “An Introduction”), at 56-57.

⁵⁵ Malanczuk (1997), at 92-93.

repeatedly when discussing the Committee, concerns 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.

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.⁵⁶ The ICCPR and the first Optional Protocol are on their part silent on the question of reservations. At the same time the Committee has for a long time faced an enforcement problem. One of the ways in which this expresses itself, is through the practice by many states of not agreeing to the whole text of the Covenant or the Protocol through submitting reservations to them. Such reservations indicate that the reserving state does not consent to the reserved parts of the instrument. In other words, the reserving state hereby considers itself bound by the Covenant or the Optional Protocol with the qualification expressed in the reservation.

Among human rights lawyers 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 even fear that reservations could eventually ruin the entire monitoring system.⁵⁷ The response by the HRC came through the adoption of General Comment 24 in 1994, named *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*.⁵⁸ 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.⁵⁹

⁵⁶ Vienna Convention on the Law of Treaties (23 May 1969), 1155 *United Nations Treaty Series* 331 (hereinafter 1969 Vienna Convention).

⁵⁷ Consider in this respect Lijnzaad (1995), and Higgins (1989).

⁵⁸ 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).

⁵⁹ Human Rights Committee, General Comment 24, para. 1.

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.⁶⁰ 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.⁶¹

2.3.2 The Powers of the Committee are Limited to those Attributed to It

The reasoning by the Committee in General Comment 24 has not passed without objections. In fact, Tyagi argues that a majority of states do not like an “assertive” reservations regime, and do not want to equip the HRC with the power to determine the compatibility of reservations.⁶² General Comment 24 was immediately challenged 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).⁶³ 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

⁶⁰ Human Rights Committee, General Comment 24, para. 18.

⁶¹ Examples will be provided in Part IV.

⁶² Tyagi (2000), at 257.

⁶³ 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.*

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.⁶⁴

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.⁶⁵

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.⁶⁶ However, according to the Preliminary Conclusions this cannot affect the traditional modalities of control by the contracting parties. In the future, any such powers should be expressly conferred by specific clauses. The ILC stated that in the absence of such express attribution, the legal force of the monitoring bodies' findings cannot exceed that which the bodies have for their general monitoring role.⁶⁷ 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), can not by itself serve as a ground for making an alternative system (to the Vienna Convention regime) legally acceptable. The reason for this is the consensual nature of international law. Only through the expression of consent by ICCPR state parties can additional obligations be created.⁶⁸

⁶⁴ Observations of States parties (UK), (Official Records) at 133, para. 12(a).

⁶⁵ Observations of States parties (US), (Official Records) at 126.

⁶⁶ 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, Suppl. No. 10, UN Doc. A/52/10 (1997) (hereinafter Report of the International Law Commission, Forty-ninth Session), at 57, para. 5.

⁶⁷ Report of the International Law Commission, Forty-ninth Session, paras 7-8.

⁶⁸ 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.

2.3.3 Constitutionalism and the Human Rights Committee

Whereas for well-established organizations such as the UN, the WTO, and the EU constitutionalism has become a highly popular context within which to discuss the problems and possibilities of these organizations, there is no comparable discussion on constitutionalism and the HRC. However, despite such an absence, there is nevertheless an ongoing discussion on where the strengths of the Committee are, and how (and whether) the Committee should be developed. This discussion is concerned with the very same issues that for other organizations are disguised behind a discussion on their constitutionalization.

On a general level, the creation of “World Order Treaties” in the human rights sphere, which are increasingly enforced by international courts and tribunals, has been identified as one aspect of the constitutionalization of international law.⁶⁹ Within this development the HRC has assumed a role of increasingly “... airing a wider range of competing arguments; being more willing to take a position contrary to that of state parties in high-profile cases; targeting an audience of individuals and their representatives as well as national courts; and increasing dialogue with those courts and with supranational tribunals”, in this way becoming more court-like and enhancing its effectiveness.⁷⁰ The approach can be called “constitutional” as it promotes an international rule of law and the enforcement of human rights obligations through judicial means.⁷¹

As a consequence of the proliferation of human rights treaty-bodies, these bodies are increasingly elucidating human rights standards by defining the contents of rights and the scope of state obligations. This has met with different critiques. It has, for example, been emphasized that it is mainly through the UN Charter-based bodies (the Human Rights Council and the General Assembly) that states retain control over the definition and nature of human rights standards and the mode of their enforcement.⁷² The more this task is transmitted to treaty-bodies, the more states lose their control over these issues. The UK on its part in its observation to General Comment 24 objected in particular to the fragmentation of the law of treaties that such a development may bring with it.⁷³

⁶⁹ See Peters (2005), at 51-52. Also see Scheinin (2002). Many other references will be provided in due course.

⁷⁰ Helfer and Slaughter (1997), at 388-389.

⁷¹ For an example of such reasoning, see Petersmann (1996-1997), at 457 *et seq.*

⁷² Mutua (2007), at 614-615.

⁷³ Observations of States parties (UK), (Official Records) at 130, para. 3.

In other words, there seems to be no consensus that treaty-bodies, in a more adjudicative role, can legitimately elucidate human rights standards. As a result a different approach to the future development of the HRC has emerged. This approach emphasizes the role of the Committee as a facilitator of dialogue, with the aim of confronting and discussing ambiguities and indeterminacies of the ICCPR. In contrast to arguing in favor of further judicialization, this line of reasoning emphasizes that any efficient protection of human rights is dependent upon political unification. Sociological, ideological and institutional convergence towards common norms is seen as a necessary prerequisite for effective institutionalization of the protection of human rights. Such unification, the claim is, need not necessarily be best achieved through judicial enforcement, but through a deliberation on the contents of civil and political rights.⁷⁴

3 Towards a Better Understanding of Powers

3.1 “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” denotes the legal means available for an organization, the “power of an organization” is more concerned with characterizing the influence and impact of the activities of organizations (on its members and international relations at large).⁷⁵ While the interest in this thesis is on the legal powers of organizations, the relationship to the concept of “power” is nevertheless of some interest.

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

⁷⁴ See Steiner (2000), e.g. at 48-49. For a more general argument, see Moravcsik (1995), at 178.

⁷⁵ 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 notion “power”, whereas Scandinavian and continental European writers often use the notion “competence”. The two are commonly used interchangeably. Spaak (1994), at 2. In the following the concepts will be used synonymously.

not lend themselves to formal definition.⁷⁶ 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 from some “superadded fact”, the nearest synonym being “(legal) ‘ability’”.⁷⁷ In this characterization the concept of a legal power refers to the authority of the power-holder to engage in an activity and decide an issue, the decision in its turn having legal repercussions upon the position of someone.⁷⁸ In the context of organizations this impact mainly concerns the members of the organization (although any exercise of a legal power can also have an impact e.g. on other organs of the organization and even on third parties).

Another central element of a legal power is that it is exercised through the performance of a special kind of act. The element of a decision has even been called a paramount feature of a legal power in that it will always be present.⁷⁹ 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 that particular 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.⁸⁰

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, as the examples in the previous chapters demonstrate, the

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

⁷⁷ Hohfeld (1919), at 50-51.

⁷⁸ This is not, however, synonymous to “capacity”. Instead, “capacity” can be defined as those circumstances that are needed as preconditions for changing legal relations. In order to create contractual obligations, one has to be a human being, of certain age, etc. Hohfeld (1919), at 51-52. Defined in this way “capacity” indicates an ability to take charge of legal affairs, whereas the more precise nature of the legal relations is dependent on the competence of the actor. Spaak (1994), at 12. For a review of the use by the ILC of the concepts on the question of relations between states and international organizations, see Bekker (1994), esp. at 85-93. As Spaak points out, the distinction between “capacity” and “competence” can sometimes be superfluous. One who has capacity to perform legal acts (is sane, of certain age, etc.), has the possibility for example to make a will. He does not need any additional competence in this respect. See Spaak (1994), at 13-14. However, this is not necessarily true in all cases. An international organization, once established, has a capacity to perform legal acts. However, as will be seen below, the powers are defined in the constituent instrument of the individual organization. While it can be presumed that all organizations have treaty-making capacity, only some organizations have a legal power for example to conclude treaties with non-members.

⁷⁹ Halpin (1996), at 140-144.

⁸⁰ See Spaak (1994), at 9-10.

question need not always be as simple as it first appears. Instead, it need not be clear as to what powers an organization possesses. 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. And further, some organizations assert their influence by means of binding regulation, whereas others exercise a more subtle impact. In a comparative perspective it is still far more common for international organizations to exercise binding decision-making in institutional and budgetary matters only. Having authority to adopt binding acts beyond such matters is exceptional, and unanimous or consensual decision-making is often required.⁸¹

Authority to make binding decisions beyond institutional issues is what characterizes the UN Security Council (when acting under Chapter VII of the Charter), and even more so the European Parliament and the Council of the European Union (when adopting regulations or directives).⁸² However, 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 an headquarters agreement by the World Intellectual Property Organization, are no less examples of the exercise of powers.⁸³

⁸¹ Unanimity and subsequent conduct may however provide even 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.

⁸² Charter of the United Nations (26 June 1945), 1 *United Nations Treaty Series* xvi (hereinafter UN Charter), Chapter VII, and EC Treaty, Article 249, 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 ...".

⁸³ 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).

“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.⁸⁴ Turned around, an exercise of legal powers will also result in an exercise of power. One of the main features of the supranational character of EC law is that the Community legislation adopted (as a result of the exercise of legal powers) can have a fundamental impact on national legal orders. The power of the EC 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. As to the UN, through membership in the UN, states have given up their right to use of force in their inter-state relations. Instead, use of force can only be authorized by the Security Council (or be used in self-defense). The Security Council can provide such authorization 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.⁸⁵ 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 power for the authorization of humanitarian intervention, the Council (and hereby also the UN at large) meets a critique for being powerless.

As to the World Trade Organization (WTO), the Agreement Establishing the World Trade Organization does not confer powers upon the WTO comparable to those of the UN Security Council or the EC.⁸⁶ 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.⁸⁷ The WTO dispute settlement system is basically a mechanism for dealing with member complaints (against another WTO member), and not for

⁸⁴ Beetham (1991), at 43. For the definition, see above (in the same chapter), note 75.

⁸⁵ Although recently this traditional assumption has been challenged in discussions on a right to humanitarian intervention without Security Council authorization.

⁸⁶ 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).

⁸⁷ 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).

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 the WTO with an opportunity to develop and express its conception of human rights. The DSB would also become a powerful source of interpretation of international human rights law.⁸⁸

Picturing the notions of “legal powers” and “power” in such a relationship, demonstrates how the question of legal powers is also an issue of proliferation of the role of an organization in international cooperation. By seeking to add to its legal powers, an organization seeks to grow more powerful in relation to its members (but also potentially in relation to other organizations). As such, an increase in powers of an organization can even become a competition between different actors for the legal authority to have the final word on a certain issue. In this sense the question of extent of legal powers is also related to the discussion on fragmentation of international law.⁸⁹

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 (i.e. a rule conferring competence on the organization), is a matter of the design of the individual constituent instrument. If this is the case, then it seems clear that the more extensive the legal powers of an organization are, the more far-reaching its exercise of power will be. It should be noted, however, that the question of how powerful an organization is, is not exhausted by its legal powers.⁹⁰

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 sanctions, these examples fail to address the fact that it may be hard to think of an activity that is not in one way or another the concern of an international organization. Performing daily routines such as the making of a phone call, surfing between channels on the television, and filling up the gas-tank of a car, all engage the work of one or several international

⁸⁸ See Petersmann (2001). For a critique, see Alston (2002).

⁸⁹ On fragmentation, see Koskenniemi and Leino (2002).

⁹⁰ Power can for example “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.

organizations in various ways.⁹¹ Focusing on the legal powers of organizations does not necessarily capture this impact.

All structuring and facilitation of cooperation between states does not take place through imposing legal obligations upon members. Instead, organizations also exercise power for example through classifying and organizing information and knowledge, fixing meanings (of concepts such as development and security), and transmitting norms and models of good behavior. No extensive legal power is needed in order for an organization to discuss the content and meaning 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.⁹²

This should also be recognized as a limitation of this thesis. As the totality of the political power of an organization need not be summed up in its legal powers, this work is not an attempt at explaining what organizations do, or how they assert their influence at large. Having said that, it is interesting to note that although all disputes on the activities 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.⁹³ This makes it all the more important to understand legal reasoning on the powers of organizations.

3.2 An Evergreen or Ignored Subject? Outlining the Aim of the Thesis

The first academic writings and case law on the 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 make the first general characterizations of organizations as independent actors in the 1920s. However, the debate on the attributed and implied character of the legal powers (of government) finds its roots

⁹¹ The point is made by Klabbers (2002 "An Introduction"), at 1.

⁹² On ways of how organizations assert and exercise power, see Barnett and Finnemore (1999). For a more general discussion, see Halpin (1996), at 144.

⁹³ See Johnstone (2003), at 438. The same point is made by Klabbers (2002 "Restraints"), at 155, arguing that the language of powers often substitutes that of rights, liberties, or entitlements.

in the Federalist Papers and the drafting of the US Constitution in the late 18th century. The idea of constitutionalism (in the sense that government should be legally limited in its powers) is on its part often traced back to John Locke, which makes it even a decade older.⁹⁴ Against this background, none of the three doctrines that are the interest of this thesis stand out as being new. As will be exemplified later on, the three doctrines are also safely established in international law.

The most common way of discussing the question of powers is to focus on a specific organization and explore its competence in a specific field. The question of UN Security Council powers under Chapter VII and the external relations of the EC are good examples of such a focus, as both issues have been explored in an endless amount of literature.⁹⁵ However, with regard to the attributed and implied powers doctrines, in spite of the fact that the doctrines have been put to use in arguing for or against a particular substantive power of an organization, any attempts at general conceptualization have been rare. While it is not uncommon that the legal basis of a decision of the UN or the EC are located in an implied power, the nature of implied powers reasoning has evaded any closer analysis. The same goes for the doctrine of attributed powers, which has only recently attracted analytical attention.⁹⁶ In a way the same is true for constitutionalism. Although the idea of constitutionalism has for a long time been at the heart of nation states, it has only more recently become a catchword in organization contexts.

The absence of a more comprehensive discussion on the doctrines is perhaps not surprising, given that it is 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 trying to critically analyze and come to terms with 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.⁹⁷

The absence of general characterizations of the doctrines has not however been the only impetus behind writing this thesis. Instead, an

⁹⁴ The standard work is considered to be his *Two Treatises of Government* from 1690. See Locke (2000).

⁹⁵ On the UN, see de Wet (2004), and Schweigman (2001). As to the EC, one classic is Mcleod, Hendry, and Hyett (1996). For a more recent contribution, see Eeckhout (2004).

⁹⁶ For earlier contributions to a conceptualization of the implied powers doctrine, see Rama-Montaldo (1970), and Skubiszewski (1989). A precursor to the present work was Engström (2003). In EC law a recent contribution is Schütze (2003). As to the doctrine of attributed powers see Sarooshi (2005) and in respect of EC law, Soares (2001).

⁹⁷ On this development, see Klabbers (2001 "The Life").

even greater incentive for exploring the legal reasoning on powers of organizations has been the disappointment with the way in which the doctrines are often used. Some authors have even 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 the function of those principles. As one author put it, "The IMF, like others, has relied on them as substitutes for hard thought".⁹⁸ This expresses a frustration with the reasoning on powers, a frustration that earlier attempts at conceptualization have not managed to reconcile.

This is where the present thesis taps in. The first aim is to explore what kind of an image of powers of organizations these doctrines produce. After all, as the examples on the UN, EU, and the HRC already briefly suggested, all of the doctrines seem to approach the question differently. This possibility of constructing the powers of organizations differently also makes the entire powers-issue look indeterminate. The second task of the thesis is hereby to explore what is concealed behind such a perception. As will become clear, all of the doctrines lend themselves to various uses. As a consequence they fail to produce definitive answers on the question of the "right" construction of powers in the abstract. This thesis will demonstrate in the context of the three doctrines, how the doctrines enable the making of different claims through them, or differently, how different approaches to organizations can be expressed through their use.

In fact, the three doctrines serve to express differences not only regarding the powers of international organizations, but also concerning the role of organizations in international relations more generally. This means that widening or limiting the powers of an organization is never solely a question about how to read and interpret the constituent instrument, but is also a question about the preferred nature of cooperation. An overly formal reliance on the doctrines can fail to appreciate this fact. In this respect the task that lays ahead amounts to something to the effect of "cracking the code of legislation", or at any rate, paraphrasing Unger, to shed some light on the shaping power of what we ordinarily take for granted.⁹⁹

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. It is already assumed as a starting point that these legal doctrines do not produce fixed outcomes in

⁹⁸ Gold (1996), at 46-47.

⁹⁹ "Cracking the code of legislation" means 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. Also see Unger (2001), at xvii.

the abstract. Instead, a disagreement over the powers of an organization is pictured as a discourse through which different actors seek to assert their influence. Different arguments in this debate make use of different doctrines to make their point. At the same time it should also be emphasized that this does not mean that the powers of organizations are in the eyes of the beholder only. Despite the possibility of presenting competing legal constructions of the powers of an organization, this does not mean that there would always be complete uncertainty with regard to the scope of the legal means available to an organization. This deserves some further clarification.

3.3 Sketching the Research Approach

3.3.1 On the Politics of Legal Reasoning

As mentioned above, one of the original driving forces behind exploring legal reasoning through the three doctrines was that the formal use to which the doctrines are often put, seems uninformative and overly abstract as a way of understanding how the doctrines produce different images of powers of organizations.¹⁰⁰ 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.¹⁰¹ Closely resembling such an argument is a claim that an interpretation is a *departure* from earlier interpretative practice (and for that reason unacceptable).¹⁰² An increased use of implied powers has also been seen to result in an *erosion* of the attribution principle.¹⁰³ A not uncommon claim is also that teleological interpretation (and hence, use of implied powers in order to develop the organization) 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).¹⁰⁴

¹⁰⁰ For a more general critique, targeting lawyers involved with international institutions for having an overly formal conception of law, see Kennedy (1994), at 352.

¹⁰¹ 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, *Legality of the Use*, ICJ Reports 1996, at 149.

¹⁰² White criticizes the *Legality of the Use* opinion in such terms. White (2001), e.g. at 100, and at 108 calling the interpretation by the ICJ a “regression”.

¹⁰³ See Martin Martinez (1996), at 105, and Soares (2001), at 63.

¹⁰⁴ 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

Implied powers are also commonly regarded as more politicized than attributed powers. This follows from the perceived political character of the functional necessity reasoning at the heart of any construction of implied powers. Correspondingly restrictions upon the use of implied powers would result in an objectification of the issue of powers, the argument goes.¹⁰⁵ In a similar way, attributed powers are also often perceived as more unambiguous than implied powers.¹⁰⁶ This can also take the form of placing faith in 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.¹⁰⁷ In this respect constitutionalism is also put to similar use. When constitutionalism is used as another word for judicialization, the merits of such judicialization are often explicitly located in the capacity of a judiciary to solve the complexities of powers-issues without entanglement in political considerations.¹⁰⁸

The argument made here is not that such claims are somehow wrong, or constitute a misunderstanding of legal reasoning. On the contrary, they are completely plausible legal arguments. However, as a way of coming to terms with how the doctrines work as means for constructing powers of organizations, such statements are not very revealing. If anything, reasoning on powers of organizations on such an abstract level can serve to hide the actual substantive controversy from sight.¹⁰⁹ As the aim of this thesis is to demonstrate how the doctrines serve to express substantive claims, part of this task will be to demonstrate why such uses of the doctrines should not be understood as objective characterizations of their true nature, but rather as a way of dressing up the preferred construction of the powers of an organization in formal legal reasoning. Further light on the approach can be shed through a brief note on the theoretical approach of the thesis.

been an important preoccupation ... that collective organisms could *only* be legally regulated by giving their *inherent dynamism* an appropriate place" (emphasis in original). Further references will be provided in due course, e.g. in Part II, Chapter 3.2.1.

¹⁰⁵ See Frid (1995), at 79-80.

¹⁰⁶ See the Dissenting Opinion by Judge Hackworth in *Reparation for Injuries*, ICJ Reports 1949, at 204.

¹⁰⁷ As does Morawiecki (1986), at 100-101.

¹⁰⁸ This will be discussed below in Part III, Chapter 2.2.2.1.

¹⁰⁹ Klabbers makes 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. In another context Nollkaemper considers it disconcerting that the International Criminal Tribunal for the Former Yugoslavia attempts at wrapping the moral conceptions of judges in terms of procedural criteria. Nollkaemper (2001), e.g. at 18.

Legal formalism could be defined as a belief in the possibility of a method of legal justification which is impersonal and apolitical. In its most strict form, such formalism regards law as a self-contained system of norms, consisting of determinate legal rules. Upholding the image of the objective character of law also builds on an assumption of the autonomy of law, which means that a clear separation with politics has to be upheld. All value judgments are considered arbitrary and need to be excluded from the ambit of law. Questions concerning the validity of a norm are to be solved by reference to formal legal constructions. This also means that the validity of a rule is determined by a standard of correctness that is independent from the application of that rule.¹¹⁰

Whether anyone actually holds a formal approach to law in this extreme form is uncertain.¹¹¹ To add some nuance to such a formal conception of law, H.L.A. Hart admits that there is some discretion in judicial decision-making. Law does not always automatically provide a determinate decision. The ineliminable open-texture of natural language, for example, brings with it indeterminacy to the meaning of legal terms. Hence, for Hart, formalism and rule-skepticism are the “Scylla and Charybdis of juristic theory”, which are exaggerations, while the truth lies somewhere in between.¹¹² Nevertheless, for Hart the indeterminacy of law is only a peripheral phenomenon. The system of rules does by and large provide determinate outcomes, and does not require “a fresh judgment from case to case”.¹¹³ In a case of uncertainty concerning the meaning of a rule, canons of interpretation can serve as a mechanism for diminishing (although not eliminating) such uncertainty.¹¹⁴

Koskenniemi is probably correct in stating that few international lawyers today think of their craft as the application of pre-existing formal rules only.¹¹⁵ Yet, lawyers or judges do not commonly admit that they are acting out of ideological motives either. The outcome of the activity of the judge is always presented as the result of following impersonal interpretative procedures.¹¹⁶ This means that legal formalism is present in different ways in international legal reasoning, such as when

¹¹⁰ The definition is made by Unger (1983), at 564-565.

¹¹¹ Koskenniemi considers it unlikely, see Koskenniemi (2005), at 36. However, also see Pildes who claims that a classical formalism which pictures law as a scientific system of rules and institutions that is in itself complete and sufficient for solving legal issues, is rarely heard of in American legal debates, but is still present in European legal discourse. On different forms of formalism, see Pildes (1999), at 608-609.

¹¹² Hart (1994), in general at 124-136 (quote at 147).

¹¹³ Hart (1994), at 135.

¹¹⁴ Hart (1994), at 126.

¹¹⁵ Koskenniemi (2003 “What”), at 100. A claim that legal norms do not determine judicial behavior has even been called a truism. See Grimm (2000), at 113.

¹¹⁶ See Kennedy (1998), at 55.

emphasizing the benefits of adjudication and the capacity of the judiciary to settle disputes objectively.¹¹⁷ Also Hart's approach displays elements of formalism. Hart can be criticized for not recognizing that all rules can allow for interpretative discretion, and for overestimating the capacity of abstract legal norms to limit the subrules. Although Hart admits that canons of interpretation cannot provide for their own interpretation, it can also be questioned in what sense such canons really can serve to diminish discretion.¹¹⁸

A so-called "realist" approach to the question of legal determinacy seemingly makes the opposite claim to that of the formalist.¹¹⁹ Law, and especially international law, is from a realist point of view riddled with indeterminate notions (such as "self-defense" and "territorial integrity"), all of which can be invoked to support different positions. Furthermore, the choice of which rules to apply in the first place is not dictated by the law. Case law and international practice is of no necessary help in choosing between competing rules, as lawyers and judges can choose precedents as they wish when supporting a particular rule and its particular interpretation. This results in an indeterminacy concerning the use of rules, the realist claims.¹²⁰

As neutral application of law is impossible, politics (meaning power-politics) gains priority over legal rules. The world is characterized as a struggle for power in pursuit of different interests. Behavior of states is the basic target of inquiry, and the observation of this struggle provides an insight into what the law actually is and how it operates in society. Often this also takes the form of functional analyses. In this form the approach is also a common way of characterizing organizations.¹²¹ However, while the realist account of law constitutes a forceful critique of the formal approach, realism itself can be criticized for building upon a problematic objectivism.¹²² As Carty has noted, "One cannot simply study the practice of states as evidence of law because it is logically inconceivable to examine any evidence without *a priori* criteria of

¹¹⁷ For an illustration, see Koskeniemi (2005), at 28-36.

¹¹⁸ For an overview and critique, see Goodrich (1987), at 44-62. On principles of interpretation, see below, Part II, Chapter 3.1.2.

¹¹⁹ For an account of different uses to which the notion "realism" can be put, see Escorihuela (2003), esp. at 753.

¹²⁰ See Altman (1986), at 208-210. For a discussion in the context of international law, see Koskeniemi (1996 "The Place").

¹²¹ For an explicit characterization of realist jurisprudence as functional, see Morgenthau (1940), at 274.

¹²² Legal objectivism, which can be defined as the belief that authoritative legal materials embody a particular moral order, is connected to legal formalism. See Unger (1983), at 565-566.

relevance and significance – in this case, a prior conception of law”.¹²³ This means that there are no abstract criteria by which the realist could assume a position of an external observer in identifying the norms of international law. Building on observable decision-making, authority, effectiveness, or the enhancement of goal values, does not make the identification of norms scientific or objective.¹²⁴ As for organizations this is illustrated nowhere more clearly than in the difficulties with pinpointing any exact meaning of the functional necessity concept. As will be seen, even opposite constructions of the legal order of organizations can be characterized as functionally necessary.

The point of this brief overview is to demonstrate that formalistic and objectifying assumptions are present in different ways in legal reasoning. The critique of such assumptions emphasizes that it is impossible to make legal claims, whether through semantically ambivalent or nonambivalent rules, which would not also express substantive values or preferences. The distinction between “right” and “wrong” uses of law, whether as a question of interpretation of a rule or as a question of choice between competing rules, is in essence dictated by non-legal elements. 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). 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.¹²⁵

3.3.2 Avoiding Subjectivity

An emphasis on the political character of legal reasoning has been labeled legal skepticism. Such skepticism is accused for doing away with the objectivity of legal notions, and therefore also denying the possibility of “right” interpretations beyond the subjective decisions of a judge.¹²⁶ The fear of Fiss is telling. In his mind (in a national context) such an approach would ultimately drain the constitution of all meaning, call into question the point of adjudication, threaten the social existence and the nature of

¹²³ Carty (1986), at 95-96.

¹²⁴ Instead, what one will call “security” another perceives as “domination”, Koskeniemi (1996 “The Place”), at 465, and Koskeniemi (2005), at 201-209.

¹²⁵ See Koskeniemi (2005), at 590-596, and Hertzberg (1994).

¹²⁶ Hart defines skepticism in this way, Hart (1994), at 136-137. A critique of skepticism also targets reliance on the “hermeneutic circle” by claiming that meaning hereby becomes unstable. See Patterson (2001), at 336-337.

public life, and ultimately even demean people's lives.¹²⁷ A critique of formalism is understood as a claim that rules are indeterminate, and as meaning that legal rules enable a judge to justify any possible result in any given case.¹²⁸

Such a counter-critique however misses its target. An emphasis on the politics of legal reasoning is not concerned with presenting law as useless as a means for justifying or criticizing international behavior, despite its lack of abstract contents. Nor is the claim that no fixed positions on the meaning of legal concepts could emerge. In other words, the subjectivity of law is not the point made to begin with. Fixed meanings of legal rules do emerge, just like the doctrines that are the interest of this thesis are constantly used for justifying and challenging activities of organizations. Instead, in emphasizing that the source of the contents of legal rules (or doctrines) is not the legal rules themselves, the aim is rather to open up the formal appearance of law to debate beyond the internal logic of legal texts, and to shift focus to whether there is a consensus on a particular matter of international law or not, and how this expresses itself in legal reasoning.¹²⁹ When applied to the task of this thesis, this way of approaching the doctrines can help to reveal how the doctrines serve to express "hegemonic and counter-hegemonic narratives".¹³⁰ The debate over HRC powers, a discussion that has been characterized as legalistic, arcane, and academic, will serve to demonstrate through concrete examples how such hegemonic claims are dressed up as formal legal arguments.¹³¹

To claim that legal arguments always make a substantive (political) claim, does also give rise to the question of how, then, this substance enters into the reasoning. In other words, how is it possible that we can distinguish between "right" and "wrong" uses of legal concepts? While a full treatment of this question is beyond the scope of this thesis, some indications could be made, if only because the question on whether there exists a "right" meaning and construction of the doctrines, and what such a "rightness" would consist of, will underlie many of the discussions that are engaged in later on.

Two authors who have devoted much of their work to building an "anti-foundationalist" image of law while at the same time guarding against legal skepticism are Ronald Dworkin and Stanley Fish. However,

¹²⁷ Fiss (1982), at 763.

¹²⁸ See Solum (1987), at 474.

¹²⁹ Koskeniemi (2005), at 590 and 600-607. Also see Endicott (1996).

¹³⁰ "Hegemony" as used in this context meaning the presentation of a particular substantive position as universal. See Koskeniemi (2005), at 607.

¹³¹ For the characterization, see McGoldrick (2003), at 240.

the paths they take are somewhat different.¹³² Dworkin departs from the idea that legal rules are infused with ethical principles and ideals. For Dworkin, legal practice is always an exercise in interpretation, thus making law thoroughly political. Every use of a legal rule builds on an assumption about “which interpretation proposes the most value for the practice – which one shows it in the better light, all things considered”.¹³³ This assumption need not however be shared by all judges (whom Dworkin mainly focuses on). This follows from the assumption that judges have different background theories about how law links to the protection of values and rights. Nevertheless, Dworkin believes that a single right solution to hard cases can still be found through preferring that solution which provides “the best constructive interpretation of the community’s legal practice”.¹³⁴ To use an example of Bix, while a Dworkinian judge may not be able to decide as a matter of linguistic meaning or legislative intent whether the word “vehicles” includes “skateboards”, the judge may instead be able to include or exclude skateboards on the basis of which interpretation creates a better social order or better serves the value of integrity.¹³⁵ While Dworkin builds on the idea that legal interpretation must appeal to a community, his reasoning has however been criticized for not providing a convincing account of such a community, but merely personifies it in the individual moral opinions of judges.¹³⁶

Stanley Fish on his part has capitalized on the role of a community. According to Fish, meaning arises from a convergence of opinion within a community of interpreters. This “interpretive community” denotes:

... not so much a group of individuals who share a point of view, but a point of view or a way of organizing experience that share individuals in the sense that its assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance were the content of the consciousness of community members...¹³⁷

The concept of interpretive community is hereby meant to describe the nature of interpretation, and not an actual collection of people.¹³⁸ Also for Fish the driving force is to show that interpretation is inevitable, that law

¹³² For an overview and critique of both, see Cornell (1988), at 1139-1140.

¹³³ Dworkin (1986), at 52-53.

¹³⁴ Dworkin (1986), at 225. For an overview and critique, see Koskeniemi (2005), 53-58.

¹³⁵ Bix (1993), at 78.

¹³⁶ Cornell (1988), at 1141.

¹³⁷ Fish (1989), at 141.

¹³⁸ Johnstone (2003) at 450. Curiously, however, Johnstone goes on to identify concrete interpretive communities in the context of the UN Security Council.

will always be political in the sense that it expresses certain “assumed distinctions” and “categories of understanding”, but that these understandings are never individual. Although there may exist various and overlapping interpretive communities, at the heart of such a community is a shared general sense of “purpose and purview”.¹³⁹ It is this shared general sense which makes certain interpretations make sense and rational discourse possible.¹⁴⁰ Bix has put this in slightly different words, by arguing that while there are both easy cases and hard cases in interpreting legal provisions, easy cases only stand out as easy because there is a shared “form of life” (meaning social contexts, cultures, practices, etc.) within which that interpretation is made. Hard cases on their part turn out as controversial because there is no such shared “form of life”, thus giving rise to a divergence of reactions. There are also hard cases where divergent reactions cannot be explained by different “forms of life”, but because individuals might simply prefer to “go on” differently.¹⁴¹

As an overview of the question of how legal notions get their content and how meaningful legal reasoning is possible, this outline is no doubt an oversimplification. Nevertheless, it serves to sketch a background to keep in mind in the upcoming discussions. Discussing the doctrines of attributed powers, implied powers, and constitutionalism with a critique of legal formalism in mind is not an attempt at depriving the doctrines of all meaning. Instead, the very existence of diverging interpretations of powers of an organization is an expression of different values and preferences of the actors involved. Demonstrating how the doctrines can be put to a variety of uses at the same time demonstrates how they express such values and preferences. In fact, an openness of international legal reasoning has even been characterized as an essential aspect of international law’s acceptability. Only by remaining open to different constructions can international legal rules fulfill the different (and changing) purposes for which they were adopted.¹⁴²

3.4 The Task Ahead

The aspirations of this thesis are not on a theoretical level. The aim is not to construct the ultimate theory (or critique) of any of the doctrines, nor of legal reasoning more generally. Instead, by assuming as a starting point

¹³⁹ Fish (1989), at 149.

¹⁴⁰ Fish (1989), at 136.

¹⁴¹ Bix (1993), at 55.

¹⁴² Koskenniemi (2005), at 591.

that legal notions do not determine substantive outcomes, the aim is to show what this means in practice in the context of the three doctrines. The interest with exploring how the doctrines work is in trying to understand what it is that lawyers, judges and academics do when they invoke any of the doctrines as the “right” (or at least proper) approach to an organization. This discussion will acquire its most concrete form when discussing the powers of the HRC. However, before interest can be turned to the HRC, it is necessary to develop a more general understanding of reasoning through the three doctrines.

Part II of the thesis hereby begins by identifying the three doctrines in international case law and academic literature. In these discussions the concern is not with evaluating the correctness (or incorrectness) of the uses to which the doctrines have been put, but in revealing the structure of the reasoning through them. In order to underline the fundamental importance of the issue of powers for the nature of organizations, a dual image of powers will be presented. On the one hand, powers are pictured as constitutive of the independence of organizations. On the other hand, powers express the intent of members. This creates a potential tension for organizations which also manifests itself in the contrasting use of the attributed and implied powers doctrines in international case law. There are a number of tools by which to try to come to terms with the tension that the dichotomy between members and the organization gives rise to. Even constitutionalism can be seen to contain a promise of structuring life in organizations.

Part III will take a closer look at the doctrines individually. While the attributed powers and implied powers doctrines are in Part II identified as counterarguments to one another, this image is challenged in Part III. The dichotomy between member consent and the independence of organizations not only expresses itself between the two doctrines. Instead, as all powers (upon which there is agreement) can be described as attributed, and as several constructions of powers can be characterized as functionally necessary, the distinguishing features of the two doctrines begin to disappear. Eventually the two doctrines appear to be empty of guidance on the extent of powers of organizations. Contradictory constructions of the powers of an organization can not only be expressed through contrasting attributed and implied powers reasoning, but also through contrasting different conceptions of what has been attributed to an organization, and what is meant by functional effectiveness.

Constitutionalism, which is in Part II pictured as a way of structuring dichotomies at the heart of organizations, will in Part III be broken up into formal and substantive constitutionalism. In this way it appears that constitutionalism promises to deliver on this structuring task

in two different (and potentially conflicting) ways. As to its formal side constitutionalism entails the idea of upholding the rule of law. In the context of organizations this often translates into a call for judicializing organizations. As to its substantive side constitutionalism emphasizes the importance of democratic legitimacy.

These two aspects of constitutionalism can reproduce the dichotomy between attributed powers (as an emphasis on safeguarding member prerogatives), and implied powers (as an emphasis on the effectiveness of an organization). By critically discussing both formal and substantive constitutionalism, the aim is first of all to demonstrate how a similar tension that manifests itself between the attributed and implied powers doctrines, can express itself within constitutionalism as well, albeit in slightly different terms. This does not however mean that all three doctrines could be reconciled. Part III will therefore end by discussing what the possible virtues may be with a shift of focus from discussing, for example, the possibility of deriving implied (judicial) powers from the object and purpose of an organization, to discussing the merits and demerits of a judicialization of that organization.

As a result of this conceptualization of the doctrines, the understanding of legal reasoning on powers of organizations will be improved in various ways. The more detailed conclusions that are made at the end of the main chapters of the various parts of the thesis cannot be anticipated here. By the risk of repetition some words can however be said already at this stage about the more general utility of the approach of the thesis. First of all, a more nuanced image will be provided of reasoning through the doctrines than the conventional use of them conveys. Secondly, in demonstrating how the doctrines are open in various ways for use as substantive arguments in a dispute on how to construct the powers of an organization, this openness at the same time demonstrates why the doctrines cannot be turned to for abstract settlement of issues of powers. If the doctrines are relied upon in an overly abstract manner, the political aspects of the dispute run the risk of escaping attention. As a third result of the approach, it will be seen how dealing with powers of organizations on different levels also reveals new aspects in a disagreement on how to construct and interpret the powers of an organization. Every such move also takes the reasoning on powers of organizations closer to the political source of the legal debate.

This is most clearly demonstrated in Part IV of the thesis, which will apply the approach of Parts II and III to the Human Rights Committee and demonstrate the function of the three doctrines in the Committee context. Anyone looking for an answer in this discussion to the question of which attributed or implied powers the Committee has, or

to whether judicialization or democratization of the Committee should be preferred, will be disappointed. Regarding the latter question in particular, neither alternative seems unproblematic. The overall aim is however different: to demonstrate on a more practical level how reasoning through the doctrines takes different shapes and how, in making different claims concerning HRC powers, assumptions are made not only regarding the interpretation of the ICCPR, but also concerning issues such as the character of human rights law, its relationship to international law, what constitutes an effective human rights regime, and eventually also concerning how human rights obligations of states should be defined.

Part IV on HRC powers is structured so as to present three different levels upon which to discuss powers of the HRC (through the doctrines). On the face of it attributed powers and implied powers can be contrasted with each other. At a second level issues of consent and effectiveness are raised individually. Constitutionalism will eventually not offer any easy escape from the dichotomy between calls for HRC effectiveness and for respecting the explicit consent of ICCPR state parties. What every shift of level does bring with it, however, is a new dimension to the debate on the powers of the HRC. In this respect, by avoiding becoming just a reproduction of either the attributed powers or implied powers claim, constitutionalism can bring with it yet another perspective to the discussion on powers (and hereby become a third level upon which to deal with powers of organizations). The critical discussion of constitutionalism will demonstrate through examples how such a shift reveals new points of political disagreement at the heart of what may appear as merely a question of constructing and interpreting the ICCPR.

A note should also be made concerning the generalizing approach of the thesis. Apart from the discussion on the HRC, no one organization will be focused on in particular. 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 limit 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.¹⁴³ This means that all the assumptions that are built upon in the thesis need not hold true for each and every organization. It also affects the applicability of the conclusions made. In, for example, demonstrating the problems with a judicialization of organizations, the claim is hereby not that such problems could never

¹⁴³ On the nature of international institutional law, see Schermers & Blokker (2003), at 15-19, and Amerasinghe (2005), at 15-20.

be overcome in any organization. Instead, the aim is merely to exemplify what issues are bound to arise in any development of the judicial capacity. Eventually, while the questions dealt with in this thesis are relevant for any exercise of legal powers, every organization also needs to respond to and solve the question of extent of its powers individually. This thesis can only contribute by showing how the doctrines of attributed powers, implied powers, and constitutionalism work in that process.

Still in respect of the generalizing approach of the thesis, it is perhaps needless to emphasize how different the EU and the HRC are from one another. While the HRC struggles to display all the characteristics commonly identified with international organizations, the EU is on its part sometimes said to transcend a characterization as an international organization. Yet, for the purpose of discussing the three doctrines, 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 a conventional definition of international organizations, the legal language by which to construct their powers remain the same (as will be seen).¹⁴⁴

Finally a brief note on an omission should be made. In addition to the doctrines of attributed powers, implied powers, and constitutionalism, a doctrine of inherent powers (or inherent jurisdiction) is sometimes identified as an additional mechanism by which to construct powers of organizations. While the doctrine of inherent powers will be discussed briefly later on, a systematic study of the doctrine will not be conducted. The brief treatment of the doctrine of inherent powers is warranted first of all by the fact that the application of that doctrine beyond the ambit of judicial bodies has been fairly limited. Secondly, as the discussion in Part II, Chapter 2.3 will demonstrate, even in the context of judicial bodies the logic of the inherent powers doctrine seems very similar to that of the implied powers doctrine.

¹⁴⁴ For the conventional definition, see above, Part I, Chapter 2.1. Whether or not the EC is properly characterized as an international organization is much debated, see Meyring (1997) and more recently Maduro (2004). For a claim that although the EC may in some respects be *sui generis*, it can still at heart be characterized as an international organization, see Klabbers (2002 "An Introduction"), at 14.

Part II Reasoning on Powers and the Image of Organizations

So divinely is the world organized that every one of us,
in our place and time,
is in balance with everything else.
Johann Wolfgang von Goethe (1749 - 1832)

In this second part of the thesis the aim is firstly to outline the distinguishing features of the three doctrines and also sketch how the doctrines are used as arguments in a discussion on the powers of an organization. As far as the attributed and implied powers doctrines are concerned, this is done mainly through discussing international case law. For an overview of different ideas on what constitutionalism in organizations means, use is also made of the work of legal scholars. As the goal at this stage is to understand the nature of legal reasoning through the doctrines, discussions on the substance of the cases at hand or the plausibility of the constitutional ideas for individual organizations will not be engaged in.

Secondly, the different roles of powers in organizations will be discussed. On the one hand powers constitute an expression of the independence and effectiveness of an organization. On the other hand powers have their source in (and are limited by) the consent of member states. If the express powers of an organization are considered the embodiment of member consent, these two features establish themselves in opposition to each other. Yet, at the same time both seem necessary. It is especially with this dichotomy in mind that the international case law on the attributed and implied powers doctrines makes sense. Constitutionalism, however, seems to relate somewhat differently to that dichotomy (and the uncertainty concerning the extent of powers of an organization). Some remarks will therefore be made, by way of examples, on efforts to structure that dichotomy. As later discussions will demonstrate, also the idea of constitutionalism in organizations entails such a promise.

1 An Outline of a Dichotomy

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 is the claim that state sovereignty is under change, to the benefit of organizations.¹⁴⁵ 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 how these doctrines emerged, what the structure of the legal argument made through them is, and what kind of claims are made through them concerning the activities of the organization.

1.1 The Idea of Attributed Powers

1.1.1 Early Powers. Organizations as Standing Conferences

To some extent it is a matter of definition as to 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. Since the Congress of Vienna (1815), a series of developments took place which generated a conference system without precedent in the world (most notably the so-called Concert of Europe).¹⁴⁶ However, the precursors to modern organizations worked in a climate of absolute state sovereignty. Obligations upon states could only come about through voluntary consent. Hence, treaties became the prime instruments of

¹⁴⁵ See in this respect Martin Martinez (1996), e.g. Chapter 2, at 63-98, also see Rosas (1994-1995).

¹⁴⁶ Archer (1995), at 4. For an account of the Congress of Vienna, see Simpson (2004), at 96-115.

collaboration and legal development.¹⁴⁷ 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 were marked by a permanence (mainly through their possession of standing organs) that distinguished them from periodic conferences. However, as an expression of the strong emphasis on the role of states, scholars of the time were not convinced that there was anything about these organizations that would warrant distinguishing them from “ordinary” multilateral treaties. This reflected a political and legal mode of thinking that was not familiar with other international entities than states.¹⁴⁸

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.¹⁴⁹ By 1899 it had transformed into a series of meetings called the Hague system. What distinguished the Hague system from the Concert of Europe was its marked ambition to universality. The Hague system was more clearly divorced from a focus on specific problems, and addressed international questions in the abstract. This contributed to the establishment of standing procedures.¹⁵⁰ Another difference was that a strict view of state sovereignty began to be questioned in favor of sovereign equality. This was also reflected in a transformation of the hegemonic character of the Concert of Europe to a more representative model of the Hague system. Faith was also increasingly put in the civilizing effect of law. This sowed the seeds for providing institutions with executive powers.¹⁵¹

The UTU and the UPU emerged mainly as responses to technical developments and the unprecedented international flow of goods, services, people, and the development of communications. The institutional design of these unions did not however systematically challenge the sovereignty of their members. Instead, their foremost contribution to the development of intergovernmental cooperation was the establishment of standing procedures. The UTU and the UPU of the time were best characterized as administrative unions, with a permanent secretariat for arranging periodic conferences. In general, international institutions could not produce independent decisions without the consent of all member states. Further, with the exception of some river

¹⁴⁷ See de Visscher (1968), at 46, and Brölmann (2007), at 38.

¹⁴⁸ See Klabbers (2001 “The Life”), at 292. For a brief history also see Amerasinghe (2005), at 1-6.

¹⁴⁹ Simpson (2004), at 114.

¹⁵⁰ Claude (1964), at 24-29.

¹⁵¹ See Simpson (2004), chapters 4 and 5, and at 126-131 in particular.

commissions, when organizations did possess legally binding powers, these usually only concerned the internal order of the organization.¹⁵²

It has been argued that even late into the 19th century treaties were not regarded as legally binding instruments in any present-day sense of the notion. The effects of treaties were rather of a diplomatic, moral, or strategic nature. Discussions on a true international *legal* system only emerged towards the end of the 19th century. It was also only as part of this discussion that ideas about a separate legal entity for organizations could gradually emerge. Eventually a more firm conceptualization of international organizations as distinct legal actors began to take shape in the first decades of the 20th century.¹⁵³

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 was competent to deal with questions of agricultural labor.¹⁵⁴ 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.¹⁵⁵

The construction of the Treaty of Versailles (establishing the ILO) convinced the PCIJ that agricultural labor was indeed within the competence of the ILO.¹⁵⁶

¹⁵² 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.

¹⁵³ See Brölmann (2007), at 44-48. Also see Carty (1986), at 15, and 65 *et seq.*

¹⁵⁴ *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*).

¹⁵⁵ *Agricultural Productions*, PCIJ Publications 1922, at 23.

¹⁵⁶ 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

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.¹⁵⁷ In the mind of the PCIJ there was indeed an 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.¹⁵⁸

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 theories¹⁵⁹

The indication was that 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

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.

¹⁵⁷ *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.

¹⁵⁸ *Personal Work of Employers*, PCIJ Publications 1926, at 18.

¹⁵⁹ *Personal Work of Employers*, PCIJ Publications 1926, at 23.

embody in a proposed Convention provisions destined to secure its full execution” was to be determined by the Labour Conference.¹⁶⁰

Considering that the League of Nations had already been established in 1919, marking in the minds of some authors a clear move to modern international organizations, the Court still seemed to have some trouble with addressing the question of powers.¹⁶¹ One reason may lie in the fact that all of these cases concerned the ILO, which was regarded as a semi-private institution.¹⁶² Be that as it may, the fact remains that although the PCIJ recognized that there is a link to the issue 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.

Nevertheless, the legal image of organizations was 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 independent legal actors.¹⁶³ There was hereby an increasing need for a firm articulation of the source of the independence (i.e. the exercise of powers) of organizations. Only one year after the *Personal Work of Employers* opinion this was crystallized in the form of the doctrine of attributed powers.

1.1.2 The Image of Independence Emerges

Up until 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

¹⁶⁰ *Personal Work of Employers*, PCIJ Publications 1926, at 23.

¹⁶¹ See Kennedy (1987), e.g. at 841-842.

¹⁶² See Reinsch (1907), at 601.

¹⁶³ 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.

stake” and the legal status of organizations was a major part of this debate.¹⁶⁴

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”.¹⁶⁵ 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 as a central international actor. The need for a general legal definition of the League (and other organizations) became urgent.¹⁶⁶ The task of lawyers became to explain and justify how organizations could possess similar capacities to states. After all, this seemed to challenge the traditional idea of absolute state sovereignty. Or, as Kennedy puts it, a new polemic was needed for the new-born international cosmopolitanism.¹⁶⁷

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.¹⁶⁸ 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 was however that no longer did this mean that states exclusively exercise legal powers. Instead the PCIJ recognized the existence of different international authorities.¹⁶⁹

As to the reasoning of the Court, the question put before it 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. 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

¹⁶⁴ Bederman (1996), at 333-335 (quote at 333).

¹⁶⁵ *Case of the S.S. “Wimbledon”* (Judgment, 17 August 1923), PCIJ Publications 1923, Series A, no. 1, at 25.

¹⁶⁶ Brölmann (2007), at 56-62.

¹⁶⁷ See Kennedy (1996), at 404-420. Also see Kennedy (1987), at 893-899.

¹⁶⁸ *Lotus*, PCIJ Publications 1927, at 18. Also see Kennedy (1996), at 402-403.

¹⁶⁹ *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*).

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.¹⁷⁰ 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.¹⁷¹

The Court hereby formulated the doctrine of attributed powers (or principle of conferral).¹⁷² This meant that the Commission can only work on the basis of powers specifically attributed to it (or as the PCIJ put it in the quote above, “functions bestowed upon it”).¹⁷³

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. However, by anchoring the independent capacity of the Commission in the attribution by members, the PCIJ seemed to remain 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 (the Commission also had a power to exercise its powers to their full extent). Further, the reasoning not only indicated that there was an independence to the Commission, but also that international law allowed other 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.¹⁷⁴

¹⁷⁰ *Danube*, PCIJ Publications 1927, at 63-64.

¹⁷¹ *Danube*, PCIJ Publications 1927, at 64.

¹⁷² While some authors prefer to talk about the attributed powers doctrine, others prefer the use of “principle of conferral”. Although the word “principle” is hereby substituted for “doctrine”, a lexical definition reconciles the two as “doctrine” is defined as a principle that is widely adhered to. See Garner (2004). As to the notions of “attribution” and “conferral”, these are in the following used synonymously.

¹⁷³ “Functions” here meaning “powers”, Klabbers (2002 “An Introduction”), at 63.

¹⁷⁴ Spiermann (2005), at 267. Also see Brölmann (2007), at 62.

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.¹⁷⁵ 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”.¹⁷⁶

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.¹⁷⁷ 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.¹⁷⁸

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 questions to which it may give rise (paragraph 3)”.¹⁷⁹ 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.¹⁸⁰ A body possessing

¹⁷⁵ *Danube*, PCIJ Publications 1927, at 65-66.

¹⁷⁶ *Danube*, PCIJ Publications 1927, at 67.

¹⁷⁷ *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*).

¹⁷⁸ *Greco-Turkish Agreement*, PCIJ Publications 1928, at 20.

¹⁷⁹ *Greco-Turkish Agreement*, PCIJ Publications 1928, at 18.

¹⁸⁰ *Greco-Turkish Agreement*, PCIJ Publications 1928, at 18-19.

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.¹⁸¹

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.¹⁸² It would however take another twenty years before the idea of implied powers of organizations was established as a principle of international law.

1.1.3 Attribution as a Viable Notion

The doctrine of attributed powers was to be forgotten for almost 60 years. Born as it was out of an effort to explain the independent character of the legal competence of international organizations (while simultaneously being respectful of state sovereignty), it soon proved too rigid for reflecting the functional approach to organizations that was gaining ground. However, the doctrine was to make a resurrection. In EC law it was incorporated as what was to become known as the “principle of conferred powers” into the so-called Maastricht Treaty of 1992, Article 3b (now Article 5) of which stated that: “The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein”. Article 4 (now Article 7) reasserted this for the institutions of the EC.¹⁸³

The ICJ was to put the doctrine to practical use in 1996 when dealing with the competence of the World Health Organization (WHO) to address questions of the legality of use of nuclear weapons.¹⁸⁴ 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:

¹⁸¹ *Greco-Turkish Agreement*, PCIJ Publications 1928, at 20-21.

¹⁸² Klabbers (2002 “An Introduction”), at 67.

¹⁸³ Treaty establishing the European Community (Maastricht consolidated version) (7 February 1992), OJ C 224/1 (31 August 1992).

¹⁸⁴ *Legality of the Use*, ICJ Reports 1996.

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 weapons¹⁸⁵

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....¹⁸⁶

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

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.¹⁸⁷

Judges Weeramantry and Koroma, dissenters to the majority opinion, considered the refusal of a power to request an advisory opinion on the

¹⁸⁵ *Legality of the Use*, ICJ Reports 1996, para. 21.

¹⁸⁶ *Legality of the Use*, ICJ Reports 1996, para. 25.

¹⁸⁷ *Legality of the Use*, ICJ Reports 1996, para. 25.

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.¹⁸⁸

Although the attributed powers doctrine had been introduced into EC law already in 1992, it had not yet been enforced by the ECJ. For this reason it was the *Legality of the Use* opinion and the denial of a power by reference to the principle of speciality which 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 *Legality of the Use* opinion was regarded by many as an outright departure from earlier jurisprudence.¹⁸⁹

The case law of the ECJ was soon to follow. In the so-called *ECHR* opinion in 1996 concerning the competence of the Community 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 doctrine of attributed powers, and emphasized the need of an internal power as the basis for an implied power.¹⁹⁰ As such a general power (to enact legislation in the field of human rights) did not exist internally (although respect for human rights is recognized as a basic principle of the EU at large in the Treaty on European Union), the Court found no implied legal basis for such external Community action either. This emphasized the importance of specific attribution as a prerequisite for the external competence.¹⁹¹

In order to demonstrate that there are limits to the use of Article 308 as well (which is the second source of EC implied powers), the ECJ also made use of the principle of conferred powers:

Article 235 [308] 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.

¹⁸⁸ Dissenting Opinion of Judge Weeramantry, *Legality of the Use*, ICJ Reports 1996, at 150.

¹⁸⁹ See Akande (1998), e.g. at 439.

¹⁹⁰ 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*).

¹⁹¹ For an overview, see Cremona (1999), at 149-151, and Dashwood (1998), at 115.

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 [308] 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.¹⁹²

In the so-called *Tobacco Advertising* case (2000) the ECJ relied even more explicitly on the principle of conferred powers and annulled a directive because of a lack of legal competence:

To construe that article [Article 95] 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 if the provisions ... but would also be incompatible with the principle embodied in Article 3b of the EC Treaty (now Article 5 EC) that the powers of the Community are limited to those specifically conferred on it.¹⁹³

In all, this renewed emphasis on the attributed powers doctrine was perceived as a turn of tide and a sign of reaching the limits of powers of organizations.¹⁹⁴ The principle is expressed even more elaborately in Article 5 of the Treaty on European Union 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 Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.¹⁹⁵

This has been regarded as the return to a Union of limited competence.¹⁹⁶

¹⁹² ECHR, [1996] European Court Reports I-1759, paras 29-30.

¹⁹³ 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*).

¹⁹⁴ Klabbers (2002 "An Introduction"), at 78-80.

¹⁹⁵ Treaty on European Union (Lisbon consolidated version) (30 April 2008), OJ C 115/01 (9 May 2008), Article 5, paras 1 and 2.

¹⁹⁶ 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.

1.2 The Idea of Implied Powers

1.2.1 From an Ever Increasing Enthusiasm...

In the timeframe in between the *Danube* (1927) and the *Legality of the Use* (1996) opinions, the image of independence of organizations had its heyday. Although the *Danube* and *Greco-Turkish Agreement* opinions can be seen as forerunners to the idea of implied powers that was to be established in the case law of the ICJ, there are also marked differences in how attributed powers and implied powers are constructed. While the doctrine of attributed powers initially served to explain the independence of activities of organizations in legal terms, that doctrine nevertheless fell far short of the idea of implied powers. The transition that took place when moving on to the implied powers doctrine was that the independence of organizations not only meant that organizations could exercise existing powers to their full extent, but also that they could create new powers in order to fulfill their purpose.¹⁹⁷

1.2.1.1 The ICJ on the Role of the UN

As noted above, a changing international climate paved the way for organizations to be appreciated as actors in their own right. The possession and exercise of independent powers by organizations (as established in PCIJ case law, but also in practice), became an expression of their status as subjects of international law. By the next time 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 rejecting international organizations as futile, this collapse of world order was met with a determination for further institutional improvements. Many of the features of the United Nations can in fact be seen as direct responses to the deficiencies of the League.¹⁹⁸ The establishment of a host of organizations after the Second World War testifies that the enthusiasm towards institutions did not fade, but in fact became stronger through the experience.¹⁹⁹

¹⁹⁷ For practical examples of uses of implied powers, see Part I, Chapter 1.1.

¹⁹⁸ Claude (1964), at 51-73.

¹⁹⁹ See Klabbers (2001 "The Life"), at 298-299.

This enthusiasm was also reflected in political theory of the time. Morgenthau, who himself characterized his approach as “functional”, foresaw what was to become the ideological mindset from the mid 20th century onwards.²⁰⁰ 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.²⁰¹

In the functionalism of David Mitrany the solution to how to weld together the common interests of states, without interfering unduly with the particular ways of any one state also built on an emphasis on centralized planning and control. However, the problem anticipated was that the line between public and private action, as well as the need for public action, is constantly shifting (at the national level as well as at the international level). Mitrany’s solution was to allow for as much liberty to move along with such changes as possible, instead of overly rigid constitutional drafting.²⁰² 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).²⁰³ 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”.²⁰⁴

As a consequence, organizations should not be defined by reference to a predetermined status of a particular text or the form of particular action, but rather through their tasks. A functional approach to organizations hereby embraces 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 (neo-functionalism being identified as integration theory). Among other

²⁰⁰ Morgenthau (1940), at 274.

²⁰¹ See Morgenthau (1967), at 483-516.

²⁰² See Mitrany (1975), at 115-116.

²⁰³ Mitrany (1975), at 126.

²⁰⁴ Mitrany (1975), at 132 on the UN and world order. For a critique at the time, see Carr who characterized internationalism as just another word for imperialism, and international order as a slogan for “those who feel strong enough to impose them on others”. Carr (1966), at 85 and 87.

things, this meant that a dynamic approach to interpretation of constituent instruments was encouraged.²⁰⁵

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). In the case law of the ICJ the dynamic approach to organizations took the shape of an emphasis on teleological interpretation. As part of that teleological approach the Court also defined the doctrine of implied powers. 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 or not.²⁰⁶ 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.

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. 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.

The ICJ first proceeded to examine whether the UN has a power to bring claims in the particular case at hand 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.²⁰⁷

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

²⁰⁵ For overviews, see Groom and Taylor (1975), Johnston (1988), and Efraim (2000), at 27-39.

²⁰⁶ Bederman (1996), at 367-368.

²⁰⁷ *Reparation for Injuries*, ICJ Reports 1949, at 180-181.

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.²⁰⁸

The reference to PCIJ case law can be criticized as incorrect since in the *Personal Work of Employers* no powers were found to arise only out of "necessary implication".²⁰⁹ The passage is nevertheless remarkable in its own terms. The Court thought that the national states of the 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".²¹⁰ This led 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.²¹¹

No conflict was found between this power and the right to bring a claim by the state of which the agent is a national.²¹² A functional approach 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 dissents. 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 this 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

²⁰⁸ *Reparation for Injuries*, ICJ Reports 1949, at 182-183.

²⁰⁹ See Dissenting Opinion by Judge Badawi Pacha, *Reparation for Injuries*, ICJ Reports 1949, at 214, and Klabbers (2002 "An Introduction"), at 69.

²¹⁰ *Reparation for Injuries*, ICJ Reports 1949, at 183.

²¹¹ *Reparation for Injuries*, ICJ Reports 1949, at 184.

²¹² *Reparation for Injuries*, ICJ Reports 1949, at 185-186.

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.²¹³

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 point of some importance.²¹⁴

As part of his reasoning, Hackworth argued for 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.²¹⁵

Hackworth clearly relies on a more restrictive reading 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.²¹⁶

²¹³ Dissenting Opinion by Judge Hackworth, *Reparation for Injuries*, ICJ Reports 1949, at 196.

²¹⁴ Dissenting Opinion by Judge Hackworth, *Reparation for Injuries*, ICJ Reports 1949, at 198-202.

²¹⁵ Dissenting Opinion by Judge Hackworth, *Reparation for Injuries*, ICJ Reports 1949, at 198-199.

²¹⁶ Dissenting Opinion by Judge Hackworth, *Reparation for Injuries*, ICJ Reports 1949, at 204.

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.²¹⁷ 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 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.²¹⁸

The critique against this assumption claimed 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].²¹⁹

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.²²⁰

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

²¹⁷ *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, (Advisory Opinion, 13 July 1954), ICJ Reports 1954 (hereinafter *Effect of Awards*).

²¹⁸ *Effect of Awards*, ICJ Reports 1954, at 57.

²¹⁹ Dissenting Opinion by Judge Hackworth, *Effect of Awards*, ICJ Reports 1954, at 80-81.

²²⁰ Dissenting Opinion by Judge Hackworth, *Effect of Awards*, ICJ Reports 1954, at 81.

for the entire UN. 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. In this way it became possible to identify a functional necessity of a power to establish a tribunal which eventually may bind even the Assembly itself.²²¹ The ICJ did admit that the Tribunal could have been vested with non-binding powers as well. However, it indicated that there was no need to assume that implied powers would need to be restricted to those only “absolutely essential”.²²²

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.²²³ 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 developed the implied powers doctrine itself. The ICJ first of all indicated that the enumeration of certain procedures of financing 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 have not been concluded.²²⁴

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”).²²⁵ The UN purposes therefore constituted the true 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

²²¹ *Effect of Awards*, ICJ Reports 1954, at 58-62. Reference to this case was for example made by the Appeals Chamber of the ICTY in *Prosecutor v Duško Tadić* in establishing that the ICTY had the competence to examine a plea against its jurisdiction. See *Prosecutor v Duško 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.

²²² *Effect of Awards*, ICJ Reports 1954, at 58.

²²³ “The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly”, UN Charter, Article 17(2).

²²⁴ *Certain Expenses*, ICJ Reports 1962, at 167.

²²⁵ *Certain Expenses*, ICJ Reports 1962, at 167.

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.²²⁶

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 in order to 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.²²⁷ 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.²²⁸

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.²²⁹

²²⁶ *Certain Expenses*, ICJ Reports 1962, at 168.

²²⁷ The ICJ also used similar reasoning in the so-called *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.

²²⁸ Dissenting Opinion of President Winiarski, *Certain Expenses*, ICJ Reports 1962, at 230.

²²⁹ Dissenting Opinion of President Winiarski, *Certain Expenses*, ICJ Reports 1962, at 230.

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 provisions which govern the functioning of the organs ... and not on those provisions laying down its general purposes.²³⁰

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.²³¹ 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.²³² Nevertheless, these were but lone objections in a generally functionally oriented institutional environment.

1.2.1.2 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.²³³ However, the development of implied EC powers is remarkable on its own terms, not only because of the express provision on implied powers that exists in the EC Treaty, but also because of the twists and turns that the interpretation of implied powers in Community law has taken.

There are two main mechanisms for developing the legal powers of the EC: the so called parallelism mechanism and Article 308 of the EC

²³⁰ Dissenting Opinion of Judge Moreno Quintana, *Certain Expenses*, ICJ Reports 1962, at 245-246.

²³¹ 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.

²³² Tunkin (1975), at 187.

²³³ In 1951 France, Luxembourg, the Netherlands, Belgium, Italy, and Germany created the European Coal and Steel Community (ECSC), which was followed in 1957 by the European Economic Community (EEC), and the European Atomic Energy Community (EURATOM). The treaties establishing the ECSC, the EEC, and the EURATOM are commonly called the Treaties of Rome.

Treaty. The classical example in ECJ case law of the first of these can be found in the *ERTA* case. The issue at stake in that case was whether the authority conferred on the Community 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.²³⁴

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.²³⁵ What the Court did in the *ERTA* case was to enable the Community, within that field, to also conclude international agreements.²³⁶

²³⁴ 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 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.

²³⁵ *ERTA*, [1971] European Court Reports 263, paras 20-30.

²³⁶ 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. Be that as it may, the end result was the construction of an implied power.

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.²³⁷

The line of reasoning of the ECJ was repeated in the *Kramer* judgment²³⁸, 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 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....²³⁹

Through the *ERTA*, *Kramer*, and *Laying-up Fund* cases, the nature and extent of external Community competence was outlined by the creation of the so-called doctrine of parallelism (*in foro interno, in foro externo*).²⁴⁰

²³⁷ *ERTA*, [1971] European Court Reports 263 (Opinion of Mr. Advocate-General Dutheillet de Lamothe, 10 March 1971), at 291 and 293.

²³⁸ Case C-3, 4 and 6/76, *Cornelis Kramer and others*, [1976] European Court Reports 1279, at 1308.

²³⁹ 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.

While parallelism provides one tool for expansion of Community competence, there is also a second mechanism - Article 308 EC - which provides that:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.²⁴¹

Up until 1973, Article 308 (then Article 235) 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.²⁴² From 1973 until 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.²⁴³

There are several ways to look at the reasons for this change. On a more general level it may be that there were no political ambitions for urgently expanding the legislative program in the early days of integration. The basic structure of the Community treaties was perceived as unambiguous and sufficient. However, this was gradually changing. The 1972 Paris summit included newly elected EC members (Denmark,

²⁴⁰ 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 EC. 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 EC (and a critique of Dashwood), see Schütze (2004), at 234-240.

²⁴¹ EC Treaty, Article 308.

²⁴² See Declaration of the Paris Summit (19-20 October 1972), in EC Bulletin 10-1972.

²⁴³ Weiler (1999), at 54. Several organs and funds have been created through reliance on Article 308, 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 308. 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 Community until the conclusion of the Single European Act. However, several international environmental agreements had already before this been concluded on the basis of Article 308. See Nollkaemper (1987). 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 308 or by referring in part to it, see Usher (1998), at 72-87. More recently Schütze has counted the legislative acts based upon Article 308 as an average of 27 acts per year since its inception, and an average of 17 per year since 2000, see Schütze (2003), at 82 and 110, note 140.

Ireland, and the United Kingdom) and aimed at providing the Community a fresh start through a reinforcement of Community institutions. Article 235 was to be a key in this revival.²⁴⁴

The ECJ was also to confirm the changed interpretation of the article. In the *Massey Ferguson* case (1973) a Council regulation (based on Article 235) was contested with the argument that Article 235 could only apply in the absence of a specific provision. The Court however found that the “necessity test” of Article 235 was satisfied and that this sufficed for its use. The existence of alternative legal bases did not prevent recourse to Article 235.

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 [308] was justified²⁴⁵

Apart from the powerful tool of developing Community competence that Article 308 provides for developing Community competence, it should be noted that Article 308 requires unanimity. Thus, in utilizing it as a tool for widening Community competence, the creation of powers is subject to the consent of all EC members. This results in something of a dilemmatic picture: Was it decided that Article 308 was to be more frequently used because of its expansive nature, or was it decided that expansion was to utilize that article in order to better take member consent into account (and hence, to provide a possibility for member states to have a say on the increase of Community powers)? Notably the two possibilities do not exclude each other. In fact, a dual function of the article was also recently emphasized (albeit in a slightly different way) in the joint *Kadi and Al-Barakaat* cases by the ECJ. By relying on Article 308 the Community 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 articles 60 and 301 of the EC Treaty), hereby enabling an input of EU citizens into the decision.²⁴⁶

²⁴⁴ See Declaration of the Paris Summit (19-20 October 1972), in EC Bulletin 10-1972, para. 15.

²⁴⁵ Case 8/73 *Hauptzollamt Bremerhaven v Massey-Ferguson GmbH* [1973] European Court Reports 897, para. 4. In general on the revival of Article 308, see Weiler (1999), at 51-60 and Martin Martinez (1996), at 117 *et seq.*

²⁴⁶ 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.

Compared with parallelism, Article 308 has been called the “true locus” of expansion of EC law.²⁴⁷ 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 308.²⁴⁸ There are certainly some differences between the two mechanisms, although the effect of the exercise of either is the expansion of Community competence. Whereas parallel powers arise from internal powers, Article 308 relates to the objectives of the Community at large. A parallel power exists in an area in which the Community is already permitted to act. The new power enables more effective (external) action in a field where the Community already has competence to act.²⁴⁹ 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.²⁵⁰ Article 308 on its part builds on the absence of a power and the implied power is derived so as to fulfill a Community objective. In short, parallelism entails deriving external powers from internal competence while Article 308 serves primarily to create internal competence.²⁵¹

1.2.2 ... to a More Restricted Account?

Looking back at the evolution of the implied powers argument up to the *Certain Expenses* opinion in the ICJ and the developments of the 1970s in EC law, the functional approach to organizations can be seen to have

²⁴⁷ Weiler (1999), at 52.

²⁴⁸ See Usher (1998), at 72 and McGoldrick (1997), at 62. For a practical example, see Cremona (1999), at 151, note 59.

²⁴⁹ Weiler (1999), at 52.

²⁵⁰ This is the characterization of Hartley (1999), at 156-157.

²⁵¹ 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, 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 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 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 Luxembourg, Republic of Austria, and Federal Republic of Germany*, European Court Reports [2002], I-9427, para. 48.

been flourishing. The attributed powers doctrine that was outlined by the PCIJ in its early cases seemed 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 defends the preferability of the inherent powers approach with the absence of any necessity test.²⁵² 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.²⁵³ As another expression of this general mood, doubts began to be raised whether acts of organizations could be *ultra vires* to begin with, that is, whether there are any limits to the competence of organizations.²⁵⁴

This is not to say that criticism was altogether absent. Nor does it mean that only functional interpretations of constituent instruments would have been made. In EC law there were some refusals of powers that the High Authority of the ECSC claimed to possess.²⁵⁵ The ICJ on its part in the *IMCO* opinion (1960) indicated that there was no automatic connection between constituent instruments and teleological interpretation, and that strictly textual interpretations of constituent instruments are also possible.²⁵⁶ 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 the emphasis on

²⁵² 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 Part II, Chapter 2.3.

²⁵³ 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.

²⁵⁴ Weiler describes especially the period from the mid 1970s to the 1980s as one of erosion of the limits to Community 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.

²⁵⁵ 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.

²⁵⁶ 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*).

attributed powers of the WHO in the *Legality of the Use* opinion. What the ICJ in the *Legality of the Use* opinion suggested was that UN agencies should confine themselves to technical tasks. Providing full functional effectiveness to the object and purpose was no longer a paramount consideration.²⁵⁷ The *IMCO* opinion was also reinvoked in academic literature as an example of a forgotten alternative way of interpreting constituent instruments of organizations.²⁵⁸

A similar development can be found in the reasoning of the ECJ. The logic of the *Laying-up Fund* opinion (1977) had been that since it was not possible to fully realize the objectives of the Community without the conclusion of an international agreement, it was necessary to derive a (parallel) power to enter into that agreement.²⁵⁹ When the European Commission defended such a construction in respect of the WTO Agreement on Trade in Services, the 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....²⁶⁰

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”.²⁶¹

As to Article 308, the *ECHR* opinion in particular has been seen to emphasize the limits of the implied powers doctrine. In its reasoning on whether the Community has 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

²⁵⁷ See Akande (1998), at 445-447. Efraim makes a similar claim, see Efraim (2000), at 141.

²⁵⁸ 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.

²⁵⁹ See Opinion 1/76, [1977] European Court Reports 741, para. 3.

²⁶⁰ 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 (emphasis added). 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.

²⁶¹ 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.

Community powers.²⁶² The Constitutional Convention on its part emphasized that “a flexibility clause must never give the impression that the Union defines its own competence”.²⁶³ The Treaty of Lisbon, if and when it enters into force, will also modify Article 308 somewhat, by explicitly making a link to the subsidiarity principle and by enumerating more in detail the scope of the application of the article.²⁶⁴ These examples, along with the re-emergence of the attributed powers doctrine, have been seen to represent a changing trend and as an indication that the expansion of the powers of at least more well-established organizations has reached a limit, and that interest should instead be turned to effectively performing the existing functions.²⁶⁵

²⁶² *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.

²⁶³ The European Convention, Final Report of the Working Group V, CONV 375/01/02 (4 November 2002), at 14.

²⁶⁴ The article is also renumbered. See Article 352 of the Treaty on the Functioning of the European Union (Lisbon consolidated version) (30 April 2008), OJ C 115/47 (9 May 2008): “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 this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union”. In addition, a declaration attached to the treaty adds: “The Conference underlines that, in accordance with the settled case law of the Court of Justice of the European Union, Article 352 of the Treaty on the Functioning of the European Union, 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 Union powers beyond the general framework created by the provisions of the Treaties as a whole and, in particular, by those that define the tasks and the activities of the Union. In any event, this Article cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaties without following the procedure which they provide for that purpose.”, See Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon (13 December 2007), 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.

²⁶⁵ Klabbers (2002 “An Introduction”), at 80 speculates along lines.

1.3 Concluding Remarks: Defining Powers and the Idea of “Trends”

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 have taken in terms of general trends. Some concluding remarks need to be made on this question, as it serves as a first opportunity to start outlining the nature of the doctrines.

In a most general sense there may be some merit to the idea of an evolution or trends in 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 *Legality of the Use* 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 of a power, this represents a quite different image of organizations than the first attempts of characterizing the powers of the ILO by the PCIJ. 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* opinion even called the implied powers doctrine a “principle of law”.²⁶⁶ In the sense that the emergence of the idea of implied powers as a principle of law historically succeeds that of attributed powers, an evolution of the legal construction of powers of organizations can be identified.

Similarly, as far as the construction of the implied powers argument is concerned, the development of the doctrine displays a certain pattern. From a recognition of organizations as autonomous actors, possessing powers to exercise the attributed powers to their full extent (*effet utile*), the doctrine has gradually been widened to potentially allow for the use of powers that serve to further the object and purpose of an organization. Compared with early PCIJ definitions of the principle of *effet utile*, the functional image of organizations presented by the ICJ seems remarkably different.

No wonder then that the sudden return of the attribution idea through references in the *ECHR* opinion of the ECJ as well as in the *Legality of the Use* opinion of the ICJ was met with some astonishment. For a long time a wide construction of implied powers was seen to entail a steady erosion of the attributed powers doctrine. And luckily so, the logic was. After all, limiting an organization to its expressly attributed powers

²⁶⁶ *Reparation for Injuries*, ICJ Reports 1949, at 183.

emphasizes the maintenance of the status quo as expressed in the wording of the constituent instrument. As such it serves to safeguard member sovereignty against a development of the organization. However, 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.²⁶⁷ The need for ever more effective organizations had become such a dominant concern that the reemergence of the doctrine of attributed powers has even been feared to entail a displacement of the “principle of effectiveness” (which lies at the heart of the implied powers doctrine).²⁶⁸

The development of international institutional law on the issue of powers of organizations should however also be separated from the interpretation of powers in the particular case. Whereas the creation of international institutional law doctrines itself can be seen to have been the result of a general ideology favoring organizations and international cooperation, 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 implied powers reasoning in ECJ cases against the background of other instances of limiting the competence of the Community (such as the inclusion into Community law of the principle of subsidiarity).²⁶⁹ However, when turning to the individual case the *ECHR* opinion of the ECJ, for example, is a somewhat ambiguous expression of a turn to more limited Community powers. Assuming that accession to the ECHR would have had an impact on member jurisdiction through giving the EC legislative powers in the human rights sphere, the *ECHR* opinion serves to mark the limits of Community competence. If, however, the impact of an accession on the role of the ECJ as ultimate arbiter of EC law is emphasized, the conclusion could be the opposite (meaning that the opinion in fact safeguards the prerogatives of Community law).²⁷⁰ Similarly, had the WHO request to the ICJ (in the *Legality of the Use* opinion) not dealt with the legality of use of nuclear

²⁶⁷ Writing just before the *Legality of the Use* 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. “Member sovereignty” as used in this thesis embraces what international courts deal with as both the “sovereign rights” and “domestic jurisdiction” of members.

²⁶⁸ Darrow (2003), at 140-141.

²⁶⁹ Subsidiarity was introduced through the so-called Maastricht Treaty in 1992. Also see Weiler (1999), e.g. at 209.

²⁷⁰ For the former view, see Toth (1997), at 502-512. See Leino (2004) on various ways of reading the opinion and a critique of the formal legal reasoning of the ECJ. The ECJ itself largely refrained from arguing on the substantive aspects of the case.

weapons which is probably one of the most controversial questions of international politics, the outcome could have been different. Hence, the only conclusion that can be made from the *Legality of the Use* opinion is that for the WHO its functional character does not include a power to request an advisory opinion in this respect.

Turning to the individual organization, the interpretation of the powers of any organization (and with it the choice of doctrine through which to characterize those powers) will serve to express the governing political approach to the proper role of the organization. This must also have been in the minds of the ICJ judges in the *Legality of the Use* opinion when proclaiming that the limits of the powers of an organization, "... are a *function of the common interests* whose promotion those States entrust to [international organizations] ...".²⁷¹ The point is that 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 even wider emerging focus on issues of legality and legitimacy of organizations), 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.²⁷² To come to terms with the underlying reason in the individual case for adopting a certain interpretation, interest should be turned to the "common interests" (or lack of such) of that organization and its members.

Eventually the case law discussed demonstrates how the attributed and implied powers doctrines can serve to emphasize different aspects of organizations. Whereas in a discourse on the extent of powers of an organization the idea of attributed powers is 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 constructing implied powers is to increase the functional effectiveness of the organization beyond those express means. Both in EC law and ICJ case

²⁷¹ See *Legality of the Use*, ICJ Reports 1996, para. 25 (emphasis added). In the *Reparation for Injuries* opinion the idea was put as follows: "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", *Reparation for Injuries*, ICJ Reports 1949, at 178.

²⁷² 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 misleading. See Edgeworth (2003), e.g. at 239.

law the doctrines are literally established as opposites to one another.²⁷³ It is to this dichotomous relationship that interest is turned next.

2 Powers - An Inevitable Source of Debate

An international organization consists of its creators and participants (i.e. 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 international organizations. The powers of an organization are granted to it by its members. At the same time, once an organization exercises its powers it will stand out as an independent actor. In this way the organization becomes distinguishable from mere treaty relations between states. This independent character is often captured in the notion of the separate “will” of organizations.

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.²⁷⁴ Organizations are on the one hand dependent on their membership, while on the other hand they are separate from that membership. This dualism establishes itself in all organizations and in various ways. As many authors have noted, the two contrasting images exist simultaneously, express themselves through all of institutional law, and carry with them “the seeds of conflict” in their eternal search for balance.²⁷⁵ The relationship has even been described as one of competing sovereignties.²⁷⁶

As for the UN, a decision of the Security Council can be characterized as the corporate will of the Security Council, rather than an aggregation of the wills of the members of that body.²⁷⁷ Yet, the Security Council can only act when its members reach agreement. The so-called

²⁷³ In such a composition of the two doctrines, the attractions of the one can be explained through what is disliked in the other. See Klabbers (2002 “An Introduction”), at 73.

²⁷⁴ M. Virally, “La notion de fonction dans la théorie de l’organisation internationale”, in S. Bastid *et al.*, *Mélanges offerts à Charles Rousseau – La communauté internationale*, 1974, Pedone, 277-300. The thoughts of Virally are reproduced in Schermers and Blokker (2003), at 10 *et seq.*

²⁷⁵ Claude (1964), at 8-11. Klabbers (2002 “An Introduction”) uses this dichotomy to explore practically all of international institutional law. Also see Brölmann (2007), at 259-260 and more elaborately Brölmann (2001), at 320-324.

²⁷⁶ Maduro (2003 “Contrapunctual”), at 505 and Búrca (2003), at 451-455.

²⁷⁷ This is the approach of White (2004), at 648.

Laeken Declaration on the Future of the European Union also 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, while at the same time avoiding expansion of EU competence.²⁷⁸ 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).²⁷⁹

Organizations can display a separate will in different ways, such as through institutional design (European Commission), the scope of their powers (bindingness), or through the performance of certain functions (such as authoritative settlement of interpretative disputes).²⁸⁰ The following chapters will take a closer look at this dual image of organizations especially with a view to the doctrines of attributed and implied powers. Discussing the strengths and weaknesses of both images not only reveals their attractions, but also their problems, which in turn helps explain why neither doctrine has managed to prevail over the other.

2.1 Framing the Question: On the Source of International Obligations

In trying to identify the character and contents of international legal obligations, interest is often turned to sources of international law. The attention given by international legal scholars to the question of sources of international law expresses a need for defining and delimiting the norms that regulate state behavior. Commonly this discussion departs from Article 38 of the ICJ Statute, and focuses on questions of the establishment of a hierarchy and the particular application of the

²⁷⁸ Weatherill (2003), at 45.

²⁷⁹ For several examples, see Cass (2005), at 127-128.

²⁸⁰ As to the last point, see Article 234 of the EC Treaty. As to the WTO, although 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. While the exclusive authority provided for the political bodies grants the possibility to adopt interpretations that are of general validity for all WTO Members, interpretations by the dispute settlement mechanism are binding for the parties to the dispute.

different parts of the definition provided in that article.²⁸¹ In the words of Alvarez: “lawyers ... remain in the grip of a positivistic preoccupation with an ostensibly sacrosanct doctrine of sources, ... codified in Article 38 of the Statute of the International Court of Justice, which originated before most modern IOs were established and which, not surprisingly, does not mention them”.²⁸² Correspondingly, when discussing 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. The traditional image of sources as such has only recently become seriously challenged.²⁸³

However, the issue of sources can also be carried beyond the question of hierarchies and doctrinal boundaries, and is in essence also concerned with 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.²⁸⁴ This latter aspect is useful also for characterizing the notion of powers of organizations. Locating the source of powers in the constituent instrument of an organization and situating that instrument among other sources of international law might be helpful for identifying and structuring the range of obligations of members.²⁸⁵ Yet such a focus is uninformative as a means of exploring the nature of the powers of organizations (as well as the question of why members obey those decisions).²⁸⁶

²⁸¹ 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”.

²⁸² Alvarez (2005), at x.

²⁸³ See Alvarez (2005), who emphasizes the role of treaty-making and dispute settlement by organizations as a challenge to this traditional conception of sources.

²⁸⁴ 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), at 11-29, with extensive references. The nature of international obligation has by Bederman been described as the Rorschach test for international lawyers in that different images of why international actors obey international rules also result in different conclusions concerning sources, processes and doctrines of international law. Bederman (2002), at 3.

²⁸⁵ This is a common approach. See Amerasinghe (2005), at 161-163.

²⁸⁶ See Alvarez (2005), at xvii.

Historically, what has been characterized as the great epistemological break, entailed a move from the divine natural law of medieval thought into the 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.²⁸⁷ 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.²⁸⁸ 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. While such conceptual pairs constitute the antithesis to each other, as Koskenniemi has demonstrated, they fail to explain the binding character of international law on their own, but are instead forced to build on each other.²⁸⁹

An emphasis on the role of state will as the source of international legal obligations is often captured in the concept of consensualism, meaning that obligations can arise for states only through voluntary consent.²⁹⁰ 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.²⁹¹

However, such consensualist logic has often been forced 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 from historical developments or the requirements of the “nature of the system”.²⁹² In order to reach closure, recourse will ultimately have to be made to both:

²⁸⁷ 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.

²⁸⁸ Spiermann (2005), at 43-44.

²⁸⁹ This is the main point of Koskenniemi (2005), see e.g. at 307-309. The conflict is consequently also visible in competing understandings of why treaties bind. See Koskenniemi (2005), at 333 *et seq.*

²⁹⁰ For the definition and an overview of different meanings of consensualism, see Koskenniemi (2005), at 309, note 14.

²⁹¹ Oppenheim (1908), at 334.

²⁹² See Koskenniemi (2005), at 143 *et seq.* on the former, and on the latter at 313 *et seq.* (quote is from note 26).

“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?’”.²⁹³ Neither is hereby completely independent of the other. 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.²⁹⁴

This tension is present in different ways also within international organizations, such as in dichotomies between characterizing constituent instruments of organizations as treaties or constitutions (which will be discussed later), or in contrasting the attributed powers and implied powers doctrines to each other.²⁹⁵ Organizations can on the one hand be seen to represent a community interest and as independent actors charged with the (functional) task of restraining the acts of sovereign states. On the other hand this can be contrasted with an approach to organizations as a web of inter-state relations. Organizations can therefore be thought of both as organs of the collective and as mere reproductions of national antagonisms.²⁹⁶

As to the United Nations, the organization has been characterized as simultaneously intergovernmental and transnational, the former taking hold of the UN as 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 the 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.²⁹⁷

²⁹³ Koskeniemi (2005), at 308.

²⁹⁴ Kennedy (1987), at 30-32.

²⁹⁵ Brölmann (2007), at 259.

²⁹⁶ 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.

²⁹⁷ UN Charter, Article 24(1).

Whereas for some authors this article emphasizes the link to UN members, for others this means that Security Council powers derive from the UN Charter itself and that the Council acts on behalf of the UN (and even acts as something resembling a world legislature). This demonstrates that instead of providing normative closure, constitutional provisions have a tendency to become the subject of foundational debates themselves.²⁹⁸

Eventually, while few organizations can adopt decisions that are directly legally binding upon members, this does not necessarily affect the existence of the dichotomy. The transnational image of the UN, for example, can be said to be present even beyond a focus on the powers of the UN 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.²⁹⁹ As will be seen when discussing the Human Rights Committee towards the end of this work, this dichotomy also expresses itself as a question of whether an organization possesses binding powers or not.

2.2 Powers as Constitutive of the Independence of Organizations

In demonstrating the importance of powers for organizations interest must be turned to the basic question: What is an organization? As has already been concluded, 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.³⁰⁰ 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.³⁰¹ Assuming this as a starting point, organizations can be analyzed from different perspectives.

²⁹⁸ Compare Werner (2007), at 358 and 361, with Delbrück (2002), at 449.

²⁹⁹ For one account, see Cronin (2002).

³⁰⁰ Klabbers (2002 "An Introduction"), at 7-8 suspects that international organizations as social creations defy comprehensive definitions.

³⁰¹ 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).

First of all the logical follow-up question to ask would be: Why do states cooperate? On a general level realist theory, regime theory, functionalism, and institutionalism all provide important insights into possible driving forces for cooperation through organizations. Power-politics, selfishness, common problems, altruism, or domestic reasons may all serve as plausible explanations.³⁰² However, the reason for cooperation will hardly allow for a general answer, as the motives of states may not only vary in time, but also between states, and most certainly varies between different organizations. 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 or when joining the UN.³⁰³ Although the theoretical approaches to international organizations aim at explaining the relationship between the organization and its members, none of the theories manage to exhaust the matter.³⁰⁴ As states cooperate for different reasons, they will also have different perceptions of what activities the organization should be engaged with (and what powers it should exercise).

In institutional law core features of international organizations are often captured through enumerating common elements that organizations display. These elements have already been mentioned, but could be repeated: an organization should be created through an international agreement which serves as its constituent document, 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.³⁰⁵ It should be noted that none of these criteria are absolute. Organizations can be established by resolutions of other organizations. Organizations may have other organizations as members. Even the criteria of being established under international law, which is usually used to distinguish intergovernmental organizations from non-governmental organizations, need not reflect the true tasks of the organization.³⁰⁶ The one characteristic out of these that could be of help in shedding light on why powers are crucial for organizations is the display by organizations of an autonomous will.

³⁰² For a brief overview of theoretical stances, see Klabbers (2002 "An Introduction"), at 28-34, and Abbott and Snidal (1998).

³⁰³ Claude (1964), at 4.

³⁰⁴ Klabbers (2002 "An Introduction"), at 34.

³⁰⁵ See above, Part I, Chapter 2.1, note 21 for references.

³⁰⁶ The Red Cross, for example, has several international tasks. For a demonstration of how these criteria break down in practice, see Klabbers (2002 "An Introduction"), at 7-13.

When focusing on the differences between constituent instruments of organizations and “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 also (and perhaps primarily) to provide the means for cooperation concerning that issue for an undefined period of time. While an “ordinary” treaty hereby typically serves to settle through prohibitions or allowances a particular question *among parties*, 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.³⁰⁷

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. 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 becomes difficult to distinguish from other treaty arrangements, but instead appears as a mere web of inter-state relations between its members.³⁰⁸

A good example of the role of powers in establishing an organization as an independent actor is the difficulty of characterizing the EU. In the absence of an express recognition of its legal personality many authors denied the character of the EU as an autonomous legal actor. On the other hand, examples of the EU in practice performing certain tasks (such as representation by the presidency, and conclusion of agreements) made it plausible to nevertheless think of the EU as able to express an independent “will”. A display of a capacity to conclude treaties proved,

³⁰⁷ 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.

³⁰⁸ 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. Klabbers emphasizes an independent “will” of organizations as the “quintessential” characteristic, distinguishing the organization from a mere aggregate opinion of members, Klabbers (2002 “An Introduction”), at 12-13.

in the minds of many, the legal personality of the EU (and hence its existence as an independent actor).³⁰⁹

The example of the EU demonstrates how the will or independence of organizations is often approached as an issue of legal personality. In fact, Brölmann concludes that no institutions have been qualified as organizations while lacking legal personality. However, autonomy and legal personality can also be separated in terms of source and normative force. As discussed earlier, no powers flow from legal personality as such. Instead the relationship is reverse: it is the independence of an actor that can prove its legal personality. The independence of an organization vis-à-vis members is on its part based on the rules of the organization.³¹⁰ The ICJ put this, in outlining the source of the autonomy of the UN in the *Reparation for Injuries* opinion, in the following terms:

It must be acknowledged that its members by entrusting certain functions to it, 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.³¹¹

Organizations exist to perform a task. For this reason they have been entrusted with functions. In order to perform those functions organizations possess powers. Powers are the means by which organizations display an autonomy in discharging functions (to use the vocabulary of the ICJ).

Eventually, 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.³¹² In other cases the impact on members of the acts of the organization may be of a more subtle character, as when an organization adopts recommendations (most notably perhaps when the UN General

³⁰⁹ See Schermers and Blokker (2003), at 987 and 992, Curtin and Dekker (1999), at 109-112, and Koskeniemi (1998), at 28-29 and 42.

³¹⁰ Brölmann (2007), at 76-77. On legal personality, see above, Part I, Chapter 2.2.

³¹¹ *Reparation for Injuries*, ICJ Reports 1949, at 179-180.

³¹² These examples are used by Sarooshi as instances of full transfers of powers by states to organizations. See Sarooshi (2005), at 65 *et seq.*

Assembly acts under Article 10 of the UN Charter). Yet, even in the case of the General Assembly an element of functional independence 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 can still not be reduced to a declaration adopted between members. Instead, the end result (the recommendation) constitutes an expression of an organ of the organization performing its functions and tasks.³¹³

2.3 Overdoing It: Deriving Powers from the Existence of an Organization

Given that the exercise of powers is central for establishing an organization as an independent legal actor, it comes as no surprise that organizations 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).³¹⁴ The commonality of certain powers has tempted some authors to deduce powers from the possession of legal personality itself. Legal personality is in such a logic regarded as the container of a number of automatic legal consequences.³¹⁵ Maybe the best known proponent of this approach is 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.³¹⁶

Although this approach has never become the dominant characterization of powers of international organizations, the idea of inherent powers (or inherent jurisdiction) has been prominent in the

³¹³ 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.

³¹⁴ 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).

³¹⁵ The exact contents of which vary according to different theorists. For a brief overview, see Rama-Montaldo (1970), at 116-122.

³¹⁶ For early accounts, see Seyersted (1963), and Seyersted (1961), at 485-489.

context of judicial bodies.³¹⁷ Inherent powers reasoning departs from an idea that there is a bulk of powers of organizations (and courts) that are established in general customary law.³¹⁸ As soon as an organization (or a court) comes into existence, it will enjoy all of these inherent powers. As to its basic point of departure, 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.³¹⁹ The claimed advantages of the approach would be that an organization could fulfill its aims independently of individual provisions, and that inherent powers would enable accurate review of the actions 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. Therefore the necessity test which lies at the heart of the idea of the implied powers doctrine would be overcome.³²⁰ 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.³²¹

If traces of such extreme functional 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.³²² As mentioned above, it was in the aftermath of the opinion that many authors in fact did start doubting whether, in face of the broad formulation of the doctrine of implied powers by the ICJ, there actually were any limits to powers of organizations.³²³ 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. The idea of inherent powers simultaneously serves to illustrate the potential problems with

³¹⁷ For an overview of the practice of multiple courts, see Brown (2005), at 211-222. As to the ECJ, see Arnulf (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.

³¹⁸ Seyersted (2008), at 35.

³¹⁹ Seyersted (2008), at 393.

³²⁰ Seyersted considers the occasional occurrence of a critique of insufficient necessity as an indication that the necessity criteria is too rigid to be useful. Seyersted (1961), at 455-456. The decisive difference between implied powers and inherent powers reasoning is whether powers are to be regarded as "derived from the constitution" or "inherent in the organization". See Seyersted (2008), e.g. at 391-396, and White (1996), at 132-133.

³²¹ Seyersted (1961), at 154-155.

³²² See White (1996), at 131-132.

³²³ See above, Part II, Chapter 1.2.1.1.

disconnecting the construction of powers of an organization from the consent of members.

A number of problems attach to 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 "crucial" criteria for legal personality is the performance of sovereign acts.³²⁴ In the absence of express provisions on personality, one needs to look at the powers of organizations in order to determine whether or not such sovereign acts are performed. However, as a consequence it becomes completely 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 inherent powers theory 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.³²⁵

Most importantly for present purposes, the assumption that powers inhere in the legal personality of organizations aims at excluding the members of the organization from the assessment of the extent of powers. Seyersted himself expresses this quite clearly in claiming 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".³²⁶

In making this move, the inherent powers approach runs into a host of problems. Seyersted departs from the idea that the object and purpose of an organization may limit the general freedom of exercising inherent powers.³²⁷ However, in relating the 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

³²⁴ Seyersted (1963), at 47-48.

³²⁵ Klabbers (2002 "An Introduction"), at 77.

³²⁶ Seyersted (1966), at 160, and at 143-144 explicitly arguing that an assumption that powers are delegated to organizations is false.

³²⁷ Seyersted (2008), at 393-394.

organization. This assumption builds on the existence of an objective meaning of the object and purpose of the organization (as well as of the link between the object and purpose and the inherent power). However, the object and purpose of an organization cannot be defined in the abstract. Such an assumption (explicitly) overlooks that members are likely to have different and even conflicting perceptions of the object and purpose, and consequently on the limiting impact of that object and purpose.

Put differently, if all members of an organization sees a link between the purpose of an organization and a certain power (or refuses to see that link), then there is no point in insisting otherwise. Hence, even if one was to follow Seyersted's reasoning that organizations enjoy inherent powers, for the individual organization the exercise of those powers is still qualified by how members perceive that object and purpose (and its limiting impact).³²⁸ In this way even a characterization of certain powers as inherent will have its source in the consent of the membership of the organization.

In fact, the few instances where inherent powers reasoning has been used by international courts illustrate the same point. 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 the courts.³²⁹

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, that the Appeals Chamber had a hard time separating the two. Interestingly, the Court even explicitly quoted (albeit in a footnote) the

³²⁸ Or, as Rama-Montaldo puts it, the exercise of powers follows from the sovereign decision of states. See Rama-Montaldo (1970), at 121, and Klabbers (2002 "An Introduction"), at 77-78.

³²⁹ *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*).

reasoning of the ICJ in the *Nuclear Tests* case. In that case the ICJ had emphasized that:³³⁰

... [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.*³³¹

The logic behind identifying inherent powers of judicial bodies seems to be that there inheres in the nature of judicial bodies 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.³³² 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.³³³ In emphasizing the conferred nature, any identification of the powers that inhere in the exercise of a judicial function do not seem able to escape the fact that there may be disagreement as to what powers the conferral has entailed.³³⁴

Both implied powers and inherent powers reasoning serves to strengthen the image of the independence of an organization. However, emphasizing the functional side of an organization simultaneously challenges the image of members as the source of the activities of organizations. The inherent powers approach is arguably an extreme

³³⁰ *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).

³³¹ *Nuclear Tests*, ICJ Reports 1974, para. 23 (emphasis added).

³³² 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). For such a claim in respect of courts, see Amerasinghe (2003), at 80-82.

³³³ See Lauterpacht (1996), at 477-478.

³³⁴ See Amerasinghe (2003), at 95-96 curiously claiming that the jurisdiction of tribunals may be characterized as inherent, but that the jurisdiction can be limited by the parties. Also see Brown (2005), at 223.

example of this challenge. At the same time the examples provided here suggest that a construction of powers of an organization (or a judicial body) cannot escape taking member consent into account in order to justify the existence of non-express powers: even characterizing powers as inherent does not hereby result in a *carte blanche* for the organization to act.

Locating the source of inherent powers in a necessity for the fulfillment of the functions of an organ or organization is synonymous to the logic of implied powers.³³⁵ Powers also remain limited by purposes and functions. This means that the extent to which an organization can conclude treaties, for example, will still need to be defined in respect of the individual constituent instrument.³³⁶ As there is no abstract way of interpreting that constituent instrument, the form of the institutional cooperation will be defined by the members of the organization. However attractive and important the image of international organizations (and judicial bodies) as independent actors is, organizations still cannot free themselves in the exercise of powers from their membership.³³⁷

2.4 Powers as Expressive of the Intent of Members

Apart from the fact that powers are at the heart of the independent existence of organizations, there is then also another aspect to powers. On the one hand organizations differ from treaties and conferences through a capacity for acting autonomously from the members. Organizations may even have organs where members are not directly represented (e.g. the European Commission).³³⁸ However, on the other hand organizations are fora in which states participate and cooperate in different forms. Organizations are based on international agreements that contain rights and obligations for the contracting parties.³³⁹ In organizations with few

³³⁵ For this definition of the source of inherent powers, see Brown (2005), at 228-229.

³³⁶ Amerasinghe (2005), at 100-104, and Bekker (1994), at 65-66. So also Brownlie (2003), at 651. In respect of judicial bodies, see Brown (2005), at 238.

³³⁷ This may be something that international relations scholars are keener to emphasize than international lawyers, Bederman (1996), at 371. This conclusion can even be said to hold true for judicial bodies as state parties draft their constituent instruments. Brown (2005), at 229.

³³⁸ Any 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.

³³⁹ Detter (1965), at 24-25.

concrete tasks and where even the existence of independent organs is in some doubt (perhaps better labeled “institutions”), any autonomy can seem practically indistinguishable from the aggregate opinion of the membership. In such a case it is hard not to regard the common will formulated as an aggregate of the will of the members.³⁴⁰ However, even in organizations where the independent character of the organization is clearer, members are the ones who vote for the adoption of those decisions. Behind the decision-making by an organization there are always members in one form or another.

The importance of identifying members at the heart of organizations stands out in different contexts. Through a distinction between “treaty” and “constituent instrument”, it was noted in the making of the 1969 Vienna Convention. Although the drafting process of present Article 5 considered the possibility of distinguishing between these two types of instruments, the ILC decided to make all articles applicable even to treaties constituting international organizations.³⁴¹ 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.³⁴²

Although the latter part of the provision (emphasizing “relevant rules of the organization”) qualifies the scope of the Vienna Convention in favor of the constituent instrument of organizations, constituent instruments are basically defined as treaties.³⁴³ The dual character of constituent instruments has also been recognized by the ICJ, more recently in the *Legality of the Use* opinion:

... the constituent instrument 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

³⁴⁰ Schermers and Blokker (2003), at 35-36 mention GATT as an example. Also see Klabbbers (2002 “An Introduction”), at 12-13.

³⁴¹ For a summary of the discussions and the work of the Special Rapporteurs, see Rosenne (1989), at 200-211.

³⁴² Article 5, 1969 Vienna Convention.

³⁴³ 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.

of realizing common goals. ... [T]heir character ... is conventional and at the same time institutional; ...³⁴⁴

The tension can also be identified in an emphasis on different institutional features of organizations, such as in a choice between majority rule and unanimous decision-making. The former emphasizes the functional effectivity of the organization at the expense of taking the consent of all members into account. For this reason members are often reluctant to subject especially binding decision-making powers to majority voting.³⁴⁵

Even in EC law, despite the supranational impact upon members, a claim can be made that members are still in one form or another behind the decisions of the organization (to use a popular German notion, members are *Herren der Verträge*). This follows mainly from 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.³⁴⁶ The competence of the ECJ to determine the limits of Community powers has on the other hand been perceived as a particularly strong challenge to the image of members as *Herren der Verträge*.³⁴⁷

Often it would seem outright strange *not* to trace the activities of organizations back to its members. Klabbers emphasizes that a discussion of the problematic bombing of Belgrade cannot only focus on the role of the North Atlantic Treaty Organization (NATO), but must also be traced back to the fact that the member states of NATO gave their support to the activity. Similarly, the problem is not only that the WTO's rules on intellectual property may deprive many people of affordable medication, it is also that "the member states of the WTO thought the rules of TRIPs were, if not great, at least acceptable".³⁴⁸ In other words, blaming NATO for the bombing of Belgrade overlooks the fact that it was the consent of members that underlay NATO action. It is also the acts of NATO members which are at the heart of discussions on the legality of humanitarian intervention. The question is whether *states* have a right (or even an obligation) to humanitarian intervention, individually or collectively.³⁴⁹

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

³⁴⁴ *Legality of the Use*, ICJ Reports 1996, para. 19.

³⁴⁵ Klabbers (2002 "An Introduction"), at 227 *et seq.* Also see Bederman (1996), at 359.

³⁴⁶ See Hartley (1999), at 127-128, and de Witte (2000), at 304.

³⁴⁷ For a classical debate, see Schilling (1996), and Weiler and Haltern (2000).

³⁴⁸ Klabbers (2002 "An Introduction"), at 18-19.

³⁴⁹ See Morton (2002).

members, 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.³⁵⁰ This means that although a decision of an organization may seem unitary, it is arrived at only through a deliberation, sometimes even between competing views. And 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 expresses itself through differing interpretations of the wording of the constituent instrument, and also as a question of what powers an organization can possess implicitly.

White has claimed that an emphasis on the treaty side of constituent instruments will “always tend to favor the state members ... in issues of whether the organization has the competence to take a particular course of action”.³⁵¹ However, the image of organizations as an interplay of relations between states further 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 interpretation by the organ of its powers. This makes the dichotomy between members and the organization, at heart, a dispute between members.

2.5 Overdoing it: Associating Powers with Member Views

However logical it would seem to locate members at the heart of organizations, this image cannot be pushed too far either without losing some essential characteristics of organizations from sight. While a strong functional emphasis seemed to ignore the impact of the membership on defining the powers of organizations, an overly strong emphasis on member consent has the effect of making constituent instruments look practically indistinguishable from “ordinary” multilateral treaties. The more the character of the constituent instrument as a treaty expressing the consensual relations between states is emphasized, the less there is room for any independent legislative activities of the organization.

³⁵⁰ Bederman (1996), at 371-372.

³⁵¹ White (2001), at 96.

At the heart of the emphasis on the treaty character is the idea that international legal obligations can only emerge through the consent of states. As Schwarzenberger puts it:

Any international constitutional law worthy of the name ... rests of necessity on self-denying ordinances of a consensual character. The whole of the international public order or, more accurately, the precarious quasi-order that, so far, contemporary world society has been able to create is embodied in treaties and institutions founded on treaties.³⁵²

Even when obligations for states are seen to result from acts of organizations, any binding character still needs to be traced back to the membership. Exactly how consent underlies such obligations can be approached in different ways. The so-called “treaty analogy” claims that consent is needed in respect of every single instrument adopted, unanimous decisions of organizations being analogous to multilateral treaties.³⁵³

However, here the problem that no independent character is left for the organization enters. The question may be asked that if unanimous consent by members is all there is to decision-making in organizations, what is the use of creating an organization? In a way this was exactly what was at stake in the early PCIJ cases on the competence of the ILO.³⁵⁴ As the PCIJ treated organizations similar to “ordinary” multilateral treaties, no image of an independent character emerged. However, if all that is desired is a coordination of member “wills”, then it could be argued that a series of conferences or the appointment of a public relations officer would suffice. For this reason the treaty analogy has been accused of failing to appreciate that cooperation through organizations results in something more than the sum of its parts.³⁵⁵

³⁵² Schwarzenberger (1967), at 108 (footnote omitted).

³⁵³ 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.

³⁵⁴ The shift in the reasoning has been discussed above, Part II, chapters 1.1.1 and 1.1.2.

³⁵⁵ 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 Duško 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

Another way in which the treaty analogy runs into problems is that the image is not easily reconcilable with the actual characterization of organizations as actors (and legal persons) in their own right.³⁵⁶ A theory in which all decisions (and exercises of powers) are seen to flow from member consent would also, if strictly followed, require unanimity procedures. This, however, does not seem to fit with reality. While it is true that in many organizations binding decisions require unanimous decisions, there are also more than enough counterexamples, one of the most apparent being the UN Security Council. The approach can also run into problems in that it results in too rigid a construction of organizations. Maintaining that decisions can only be based on consent as expressed unanimously has difficulties in explaining, for example, the use of implied powers by the UN Security Council (or any other organ not acting on the basis of unanimity of the entire membership).³⁵⁷ Yet, in order to remain viable an organization may have to adapt itself to changing circumstances and challenges. 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 use of implied powers.³⁵⁸ Amendment of the constituent instrument cannot hereby be a functional alternative to the interpretation of competence that organs of organizations make as part of their everyday work.

The presently far more common way of explaining how consent underlies decisions of organizations is therefore instead to emphasize the delegated or conferred nature of those powers. In this respect Detter explicitly rejects the treaty analogy and the likening of decisions of organizations with treaties between states. Instead she argues that the binding nature of acts of organizations follows from the abstract consent that members have given for the exercise of powers. The difference to the treaty analogy lies in that it is not necessary to express consent in every single case, since:

mercy", *Prosecutor v Duško Tadić*, ICTY, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72 (2 October 1995).

³⁵⁶ For the classical characterization of the UN in the *Reparation for Injuries* case, see below, Part III, Chapter 1.1.2, note 528.

³⁵⁷ See Macdonald (1983), at 895.

³⁵⁸ Although all amendments of the constituent instruments of 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.

... 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. This principle appears to be one particular aspect of the rule *pacta sunt servanda* which governs the underlying Constitution.³⁵⁹

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 all unilateral rules. By signing the constituent instrument, members have given their consent "to all 'necessary' primary acts".³⁶⁰

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 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".³⁶¹ Sometimes a provision providing such abstract consent can even be explicitly included in the constituent instrument. Reuter claims that since the EC Treaty provides that all treaties concluded by the EC shall be binding on member states, this constitutes an expression of consent being given by member states in advance to any such treaties.³⁶²

In both the treaty analogy and the theory of abstract consent, consent of members is needed for the creation of obligations on states. Whereas the treaty analogy fails to recognize an independent character of organizations, the latter entrusts upon the organization to carry out the tasks assigned to it by its members. Members have attributed to the organization an authority to act, and have promised to accept valid decisions as binding. It is only when understood in this way, that the idea of attributed powers expresses a degree of autonomy of organizations (in relation to its members). This does not mean that all attributions would

³⁵⁹ Detter (1965), at 322.

³⁶⁰ Detter (1965), at 322.

³⁶¹ 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).

³⁶² See Reuter (1995), at 118, and Article 300(7) of the EC Treaty.

be similar. Sarooshi distinguishes between agency relationships, delegations, and transfer of powers. In Sarooshi's typology, the further the move towards a transfer of powers, the lesser is the degree of direct control that a state has over the use of that power by the organization.³⁶³

As a move away from the strict consensualism of the treaty analogy is needed in order to provide an organization with a separate and independent character, a consequent question becomes how far an organization may push the consent provided. It is perhaps to state the obvious to say that there is a point where development of subsequent practice of the organization ceases to reflect the consent given, and instead begins to modify the treaty.³⁶⁴ This discussion is yet another reflection of how it is the theory of abstract consent which provides the organization with its independent character. It is this independence that provides the organization with the possibility for functional development, and with it also the possibility of transcending the consent of members.³⁶⁵

2.6 Concluding Remarks: A Dual Image of Organizations

In legal terms, different perceptions on what an organization can and cannot do turn on the question of extent of powers. Attributed powers reasoning stands out as a way of emphasizing the limited character of organizations. Implied powers reasoning on its part emphasizes the functional independence of the organization. By way of an example, the ICJ in the *Legality of the Use* opinion did not say simply that the WHO does not possess the implied power it claimed, but had recourse to the principle of speciality to make its point. It did this, as these doctrines carry with them certain associations, and are hence useful for expressing a particular emphasis. Once the attribution principle re-emerged in the *Legality of the Use* opinion (after a long absence of use in international case law), it was immediately clear that it reemerged because the Court wanted to express a restrictive stand on the powers of the WTO, and to

³⁶³ Yet, despite these differences, member states all the time serve as the source of the attributed powers of organizations. See Sarooshi (2005), at 28 *et seq.*

³⁶⁴ Simma claims that although development of an organization through practice does not per se lose its connection to the consent of members, it might be "unacceptably divorced" from the consent if the practice transcends the object and purpose of the organization. Simma (1983), at 494-496.

³⁶⁵ Whether the theory of abstract consent manages to explain the legal effect of all acts of organizations such as that of (non-binding) UN General Assembly decisions is a different matter. See Klabbers (2002 "An Introduction"), at 205-206.

emphasize that a use of implied powers would transcend the consent of members (at least as interpreted by the ICJ).

As the two doctrines lay their emphasis differently, they can constitute themselves in a dichotomy. The source of this dichotomy can be located in the very nature of organizations as dual creatures. On the one hand organizations are independent actors, while on the other hand they serve to express the intentions of their members. This duality of dependence and independence which characterizes organizations is reflected in the concept of powers. On the one hand powers are the tool by which an organization acts and establishes (or even increases) its independence. On the other hand powers need to have a firm basis among members as the constituents of the organization.

At the same time, as either image fails to convince on its own, a definitive choice between consensualism and non-consensualism (to reinvoké the conceptual pairs mentioned earlier) is impossible to make. Instead, as both positions alone fail to capture something crucial about organizations, they are hereby forced to move towards each other.³⁶⁶ If consensualism is pushed to the extreme, the organization loses its distinctive characteristics as an independent actor, working for the realization of common interests. If a functional image of powers is overemphasized, then there is a risk that members of the organization are overlooked as the source of obligations is not located in member consent.

Blokker has expressed the relationship rather crudely in stating that either the organization becomes redundant because it does not respond effectively, or it becomes redundant because it responds so effectively that it loses the support of too many members.³⁶⁷ While Blokker's image of the challenges arising from the dual nature of organizations is rather grim, the basic point is firm: every construction of the powers of an organization will constitute a balance between the two positions.

To put this in the terms of legal powers, every construction of the legal powers of an organization will constitute a balance between the attributed and implied powers doctrines. Both the functional and the consensual aspects of powers are necessary. Neither the attributed character of powers, nor the functionality of the organization can be denied without losing a central feature of the organization at the same time. This is not to say that questions of powers (as the *Legality of the Use* case demonstrates) would always turn on the issue of balancing member

³⁶⁶ This builds loosely on Koskenniemi (2005), at 309-325. For another general account, see Bederman (2002), at 1-17. For a discussion of the dichotomy in terms of universality and bilateralism, see Simma (1994), e.g. at 249.

³⁶⁷ For examples, see Blokker (2002), at 300.

sovereignty concerns with the effectivity of an organization. Nevertheless, any interpretation of the powers of an organization will inevitably have a bearing upon how the balance between the two is struck.

The dual image of organizations that has been outlined also eventually explains the persistence of the attributed and implied powers doctrines in time. As the nature of organizations can neither be reduced to member consent, nor fully freed of it, this manifests itself (as a question of powers) in a balancing act between the powers that members have expressly attributed to the organization, and the implied powers that the organization would need for more efficient performance. As to the expressly attributed powers, members have consented to the impact of those powers upon their sovereignty. As to an exercise of implied powers, the question will arise whether there is consent to the additional impact upon member sovereignty that follows from the exercise of such powers.

3 Structuring the Dichotomy

As neither the attributed powers doctrine nor the implied powers doctrine has been rendered obsolete, this can make it difficult to know what exactly an organization can and cannot do. The independence of organizations and concerns about safeguarding member sovereignty need not constitute themselves in opposition to one another to begin with. Instead, there may be (and often is) agreement both between members, and between members and the organization (as an autonomous actor), on the extent of powers of an organization. Nevertheless, there is always an uncertainty in respect of the future powers of the organization. This is what gives the organization its “living” character. 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.*³⁶⁸

³⁶⁸ Pollux (1946), at 54.

In order to structure and come to terms with the uncertainty that this “living” character results in, faith is often put in various legal mechanisms.

3.1 Internal and External Means of Guidance

3.1.1 Expressly Safeguarding Member Prerogatives

Ever since the PCIJ in the *S.S. Lotus* case established consent of states as the sole source of obligations, the principle of state sovereignty has served as a valid argument by which to challenge acts of organizations.³⁶⁹ The “Lotus principle” has even been held to entail an assumption that state sovereignty must be given the most extensive interpretation possible.³⁷⁰ The preservation of the components of statehood is sometimes referred to as an even more elementary limit upon the activities of organizations than peremptory norms.³⁷¹ However, the “Lotus principle” does not imply that state sovereignty could never be restricted. In discussing the powers of the European Commission of the Danube in the *Danube* opinion (delivered the same year as the *Lotus* case), 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.³⁷²

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 e.g. the authorization to use force in the case of the UN), the performance by members of sovereign acts is restricted.³⁷³ 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. In this vein the ECJ in *Costa v ENEL* described the “transfer of power from the States to the

³⁶⁹ *Lotus*, PCIJ Publications 1927, quoted above in Part I, Chapter 2.2, note 45.

³⁷⁰ Frowein (1999), at 99 invokes the “Lotus principle” as the “objective principle” which in unclear cases should settle interpretations.

³⁷¹ See Herdegen (1994), at 156.

³⁷² *Danube*, PCIJ Publications 1927, at 36.

³⁷³ White (1996), at 57.

Community” as a permanent limit to the sovereign rights of members.³⁷⁴ Yet, following the logic established in the *Danube* opinion by the PCIJ, as long as members have agreed to this impact, the sovereignty of states has not been infringed upon.

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 however only accurate for a certain moment in time. As was demonstrated on a general level by the introduction of the subsidiarity principle into EC law through the Maastricht treaty, and more specifically by the assertion of state sovereignty vis-à-vis Community law at the national level in cases such as the *Brunner* (or *Maastricht*) judgment of the German Constitutional Court, more effective co-operation need not be among the future desires of all members, but can instead be perceived as unduly interfering with their sovereignty.³⁷⁵ While it could be argued that members should anticipate that the 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.

In order to meet with possible future challenges to member jurisdiction, a domestic jurisdiction clause is often explicitly included in the constituent instrument of organizations. Such clauses anticipate that organizations evolve and change and provide a counterforce to that change by safeguarding the *domaine réservé* of member states. By way of an example, Article 2(7) of the UN Charter provides that:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state³⁷⁶

The effect and impact of the clause as a counterforce to widened competence apparently depends upon the interpretation of the sphere of domestic jurisdiction of member states. Article 5 of the EC Treaty displays an even more complex balancing mechanism:

³⁷⁴ 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.

³⁷⁵ *Brunner et al. v The European Union Treaty*, German Constitutional Court, Judgment of 12 October 1993, BVerfGE 89, 155 (reproduced e.g. in 31 *Common Market Law Review* 1994, 251-262). There is a lot of literature on the case. For an overview, see de Witte (2000), esp. at 297 *et seq.*

³⁷⁶ 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.

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.³⁷⁷

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 Community 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 Community (than by members).³⁷⁸ Notably, neither of these tests is unambiguous.³⁷⁹

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 measure adopted must be suitable for attaining the objective and remain within the proportions of that end.³⁸⁰ 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 definition of what measures go “beyond what is necessary” is bound to

³⁷⁷ EC Treaty, 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.

³⁷⁸ Estella (2002) calls these the “sufficiency” and “value-added” criteria, at 93-95.

³⁷⁹ See Estella who 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.

³⁸⁰ Furthermore, the principle entails the requirement that the measure must be chosen that least affects individuals. In this respect, see Jacobs (1999).

be as contentious as an assessment of who would be better equipped to attain objectives.³⁸¹

The tension between independent and effective action by the organization and safeguarding member sovereignty reproduces itself in the opposing driving forces behind a use of implied powers and reliance on domestic jurisdiction clauses.³⁸² In fact, the notion of “appropriate measures” of Article 308 EC has been understood to mean that the requirements of proportionality and subsidiarity are explicitly included in the assessment of the existence of implied Community powers.³⁸³ This means that the proportionality and subsidiarity tests are internal to the assessment of the proper reach of Community powers. The underlying assumption of any implied power is that the jurisdiction of the organization is insufficient. In making such a claim, it is presumed as a point of departure that the activity is both proportionate and in accordance with the principle of subsidiarity. The same also works the other way around. A denial of an expansion of powers will make its case by building on a violation of the subsidiarity and proportionality principles (hereby claiming that the domestic jurisdiction of members is infringed upon).³⁸⁴

By using domestic jurisdiction clauses for making a counterclaim to any implied powers which an organization claims to possess, the dichotomy between whether the organization should remain within its expressly attributed powers only, or whether it may utilize implied powers is reproduced, albeit as an issue of safeguarding the domestic jurisdiction of member states. This means that turning to domestic jurisdiction clauses for guidance on what an organization is legally entitled to do does not manage to resolve the ambiguity at the heart of a determination of the scope of powers. Instead, domestic jurisdiction clauses are compatible with a state living in “hermetic isolation” from other states, as well as with a state having surrendered its decision-making to a supranational organization.³⁸⁵ The PCIJ took hold of this

³⁸¹ Hartley (2007), at 151-152. However also see Dehousse who curiously characterizes the proportionality principle as more justiciable. Dehousse (1994), at 114-115.

³⁸² Seidl-Hohenveldern goes as far as to argue that any raising of domestic jurisdiction claims against an organization will impair the independence of the organization and prevent it from fulfilling its functions, Seidl-Hohenveldern (1965), at 50-51.

³⁸³ Hartley (2007), at 106-110.

³⁸⁴ As was the case in *Tobacco Advertising*, [2000] European Court Reports I-8419, para. 83 (although the reasoning did not explicitly concern Article 308 EC).

³⁸⁵ See Koskeniemi (2005), at 240 *et seq.*, 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.

already in the *Nationality Decrees* opinion (1923) in identifying domestic jurisdiction issues as “essentially relative”.³⁸⁶

In the heydays of internationalism an absence of challenges to the exercise of powers of organizations (on the basis of safeguarding domestic jurisdiction) actually made some authors characterize domestic jurisdiction clauses as of symbolic interest only, unsuitable as legal arguments for limiting activities of organizations. However, given that domestic jurisdiction clauses seem but another vocabulary by which to deal with the proper reach of the powers of an organization, such characterizations do not appear to be accurate.³⁸⁷

3.1.2 Principles of Interpretation as Guidance

Another source to which interest is often turned to in order to find guidance on what an organization is legally entitled to do, are principles of interpretation. As constituent instruments of organizations, at least in their basic form, constitute treaties, the starting point for interpretative guidance would therefore be the 1969 Vienna Convention on the Law of Treaties. However, there is no automacy in the act of interpretation. 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 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.*³⁸⁸

³⁸⁶ *Nationality Decrees issued in Tunis and Morocco (French zone)* (Advisory Opinion, 7 February 1923), PCIJ Publications 1923, Series B, no. 4, at 24.

³⁸⁷ For an example, see Schermers and Blokker (2003), at 161-162. In EC law the absence of precedents on the use of subsidiarity as a challenge to legislation even lead some authors to consider such challenges impossible. For an example, see Usher (1998), at 99-100.

³⁸⁸ 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 (emphasis added). Also see Sato (1996), at 20-21.

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. This “artistic” nature of the act of interpretation is only aggravated by the constitutional character of constituent instruments of organizations.³⁸⁹ 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; 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.³⁹⁰

However, despite this nature of the principles, interpretation is often seen as a rational search of control, and the reliance on firmly established principles of interpretation is expected to depoliticize the interpretation and lead to discovering the true meaning of a provision.³⁹¹ In other words, the 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.³⁹²

Such a faith in principles of interpretation takes different shapes. 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 an attempt to depoliticize its decisions. The ICJ has on its part been accused of reaching interpretations by relying on abstract principles instead of really explaining how those interpretations were arrived at.³⁹³ Similarly, in organizations more generally, different interpretations of 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 differences).³⁹⁴

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

³⁸⁹ Rosenne (1989), at 232-233.

³⁹⁰ *Legality of the Use*, ICJ Reports 1996, para. 19. See even Rosenne (1989), at 195, and note 23 for extensive references to earlier cases.

³⁹¹ Klabbers notes such a tendency in the WTO and in EC law. Klabbers (2005 “On Rationalism”), at 408-411, and note 15.

³⁹² See Hart (1994), at 126.

³⁹³ See Klabbers (2005 “On Rationalism”), at 416 and 421-426.

³⁹⁴ This seems to be what Byers (2004) does, at 179-180.

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 preamble and annexes), and agreements and instruments relating to the treaty (accepted by all parties to the treaty). In addition, together with the context, subsequent agreement between the parties regarding the interpretation of the treaty, subsequent practice in the application of the treaty (which 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.³⁹⁵

When drafting these articles the ILC aimed at codifying and combining a number of principles into one single rule of interpretation. Hence the use of the singular form in the title of Article 31.³⁹⁶ 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.³⁹⁷ This is also how international courts take on a search for the meaning of the provisions of a treaty. In EC 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.³⁹⁸

Similarly in the *Legality of the Use* opinion, the ICJ held that:

³⁹⁵ 1969 Vienna Convention, Article 31 and 32.

³⁹⁶ McDougal, Lasswell, and Miller (1994), at lxiii.

³⁹⁷ Amerasinghe (2005), at 41.

³⁹⁸ Case C-6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, [1973] European Court Reports 215, para. 22.

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 as³⁹⁹

This is not to say that the different principles could not be assessed and contrasted against each other. In fact the very history of treaty interpretation has been described as reflective of the dichotomy between consensualism and non-consensualism, resulting in contrasting uses of principles of interpretation.⁴⁰⁰

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 defines the object and purpose of the instrument and works so as to fulfill these.⁴⁰¹

Contentious questions that arise in between these approaches concern issues such as 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, interpreters differ also on whether the 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.⁴⁰² Out of these, it is the textual and teleological principles of interpretation that are of particular interest for present purposes. However, a brief note should also be made on why historical interpretation can be problematic in the context of organizations.

As to historical interpretation, the design of the constituent instrument of an organization, as well as subsequent decisions adopted

³⁹⁹ *Legality of the Use*, ICJ Reports 1996, para. 21.

⁴⁰⁰ Koskenniemi (2005), at 333 with further references. In a similar way Peczenik (1989), at 31 describes interpretation of law as a search for a compromise between predictability and moral acceptability.

⁴⁰¹ 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. Although the principles used in both international law and EC law are similar, this does not mean that there would not exist differences in priority or degree. For a general discussion in this regard, see Peters (1997), esp. at 24-26. For the special case of the law governing employment relations. See Amerasinghe (2005), at 61-65.

⁴⁰² Amerasinghe (2005), at 33.

by the organization, often constitute a compromise between parties. An unambiguous intention can hereby be difficult to establish. A look at public statements of states made during the preparatory process can hereby be of little help in discovering any true meaning of legal provisions, as such statements express the standpoint of the individual state. If an emphasis on the intentions of the drafters means looking at the very founding process of the organization, a further difficulty becomes how to relate this original intent to the views of subsequent members (a group which may even be larger than the original membership). After all, while preparatory work does express state consent, the original consent of members can be opposed to the current intent of members. In such a case an emphasis on preparatory work stands out as non-consensual.⁴⁰³ An emphasis on intentions can also fail to take the functional character of organizations into account. As Judge Alvarez put it in the *Second Admission* case:

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.⁴⁰⁴

Finally, a more practical problem is that the preparatory material may be confidential. For all of these reasons the merely supplementary role of preparatory work as ascribed in the 1969 Vienna Convention is preferable. Even 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.⁴⁰⁵

As to textual and teleological interpretation, the textual method builds on prioritizing the clear, natural, plain, or ordinary meaning of the words that are subject to interpretation. The driving force is to reach an objective meaning of legal notions. The supposed advantage of textual interpretation is reduced ambiguity and increased coherence.⁴⁰⁶ Textual

⁴⁰³ Koskeniemi (2005), at 342-343.

⁴⁰⁴ *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.

⁴⁰⁵ 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, such a recognition of the historical context of constituent instruments (and decisions of organizations) is quite different from relying on preparatory work as authoritative guidance for interpretation.

⁴⁰⁶ See McDougal, Lasswell, and Miller (1994), at 7.

interpretation is often thought of as the starting point of interpretation, which, if successful, renders any further inquiries into teleological constructions unnecessary.⁴⁰⁷

On the other hand, for an organization to operate independently it should work to effectively fulfill its object and purpose. It is this dynamic image of organizations that teleological interpretation emphasizes. Teleological reasoning (especially in organizations) is often accused for importing vagueness to the interpretation of a treaty and the proper meaning of its terms that otherwise would not exist.⁴⁰⁸ 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).⁴⁰⁹ In the South West Africa cases (second phase) the ICJ stated 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

⁴⁰⁷ 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 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.

⁴⁰⁸ In this respect Gordon considers that implied powers reasoning injects “unidentified criteria” into the determination of proper meanings to a greater extent than happens in interpreting non-constitutive treaties. Gordon (1965), at 821.

⁴⁰⁹ Hartley (2007), at 74.

of rectification or revision. Rights cannot be presumed to exist merely because it might seem desirable that they should.⁴¹⁰

Judge Gros reasoned along the same lines in the Namibia opinion:

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.⁴¹¹

Given the different emphasis of the textual and teleological principles of interpretation, they may even constitute themselves as opposites to one another.⁴¹² An emphasis on the different qualities of the textual and teleological methods was also the underlying idea of dissenting Judge Hackworth in the *Reparation for Injuries* opinion in objecting to the teleological construction of the UN Charter. In his mind a more textually oriented interpretation (the principle of *effet utile*), would have rendered the interpretation more conventional and unambiguous.⁴¹³ In such a construction the *effet utile* principle stands out as subsumed under the principle of ordinary meaning.⁴¹⁴

The dichotomy between the textual and teleological principles of interpretation can also stand out more indirectly. During the work of the European Convention (charged with the task of drafting a Constitutional Treaty for Europe), a discussion was conducted on whether teleological interpretations of the competence of the EU could be restricted through a high degree of enumeration and detail. In this vein an idea was even presented for introducing a catalog of powers as a way of reducing ambiguity in the interpretation of powers of the EU.⁴¹⁵

Relying on principles of interpretation as a way to structure the debate on the extent of powers of an organization does not however manage to escape the ambiguities at the heart of defining powers of organizations. First of all, a search for an ordinary meaning of a text cannot really explain why one meaning of the text should be

⁴¹⁰ *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.

⁴¹¹ Dissenting Opinion of Judge Gros, *Namibia*, ICJ Reports 1971, at 339.

⁴¹² Or as Bederman puts it, they can “carry with them strikingly different values”, Bederman, (2002), at 131.

⁴¹³ Dissenting Opinion by Judge Hackworth, *Reparation for Injuries*, ICJ Reports 1949, at 204. Even if the substantive point of Judge Hackworth was that it would suffice for agents of the UN to rely on the customary methods for handling claims, avoiding the ambiguity of implied powers reasoning seems also to have been of some concern.

⁴¹⁴ Also see Amerasinghe (2005), at 46.

⁴¹⁵ 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).

characterized as ordinary instead of another. Even in textual interpretation a selection or choice will be made (consciously or unconsciously) to prefer a certain meaning of a provision. Put differently, the ordinary or normal meaning cannot be ascertained without choosing between different conceptions of what is ordinary (and normal). In this respect a finding of an ordinary meaning constitutes an interpretation in itself.⁴¹⁶ This means that the ordinary meaning can entail both a restrictive as well as an expansive reading of the constituent instrument. As a consequence it is not even unthinkable that two parties may present conflicting interpretations by referring to the ordinary or normal meaning of a text.⁴¹⁷

The same is also true vice versa. Although often claimed, a teleological interpretation is not somehow abstractly more suitable (than a textual approach) for interpreting constituent instruments (due to the characteristics of organizations).⁴¹⁸ Above all, there is no abstract way of determining what is required for the fulfillment of the object and purpose of an organization. In order to settle this question the intent of parties must be taken into account.⁴¹⁹ As a consequence, despite the differences in emphasis of the textual and teleological principles of interpretation, they are also intertwined. No interpretation of the constituent instrument of an organization (however textual) can avoid simultaneously expressing itself on the teleology of that instrument. Although an ordinary meaning of the text is often invoked as a counterargument to teleological interpretation, any construction of the ordinary meaning will simultaneously make a claim on how the object and purpose of the organization should be interpreted. Judge Weeramantry had something to this effect in mind in dissenting to the ICJ majority conclusions in the *Legality of the Use* opinion:

With much respect, I must therefore disagree with the Court's conclusion that "WHO is not empowered to seek an opinion on the interpretation of its Constitution in relation to matters outside the scope of its functions" (Advisory Opinion, para. 28). The finding that the matter is "outside the scope of its functions" is itself an interpretation of WHO's Constitution

⁴¹⁶ Koskeniemi (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.

⁴¹⁷ For a more general argument in this respect, see Klabbers (2005 "On Rationalism"), at 414.

⁴¹⁸ See above, Part I, Chapter 3.3.1, and references in note 104.

⁴¹⁹ In general see Koskeniemi (2005), at 336-337. In the words of one author, in teleological interpretation "The interpreter is usually confronted not with a choice of giving either no effect or unlimited effect to a treaty, but rather with the problem of deciding how effective the treaty should be made", Gordon (1965), at 797.

and, in reaching this conclusion, the Court is in effect interpreting WHO's Constitution in response to WHO's request.⁴²⁰

While textual and teleological interpretations do serve as tools for expressing different constructions of constituent instruments, there is no abstract way of determining which method leads to the more correct understanding of the provisions of that instrument. For this reason, when the ICJ in its early practice in the *Peace Treaties* opinion held that dynamic interpretations cannot contradict the text itself, while in the *Certain Expenses* opinion claiming that the text of the UN Charter can be qualified implicitly, none of the cases misuse principles of interpretation. Instead, if misuse is claimed, this rather expresses a diverging interpretation of the legal issue at stake.⁴²¹ As textual and teleological interpretation are used to emphasize different aspects of the constituent instrument, no a priori hierarchy can be established between them. As a result, reliance on principles of interpretation in order to structure the uncertainty that attaches to determining the scope of powers of organizations, can reproduce the ambiguity, albeit in different terms.

3.2 The Constitutionalization of Organizations

3.2.1 From a Constitutional Character to Constitutionalism

Discussions of the proper characterization of founding instruments of organizations commonly emphasize that whatever label is used for such founding instruments (constitution, charter, treaty, agreement, etc.), the

⁴²⁰ See Dissenting Opinion of Judge Weeramantry, *Legality of the Use*, ICJ Reports 1996, at 128.

⁴²¹ 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", and *Certain Expenses*, ICJ Reports 1962, at 159: "It is perhaps the simple identification of 'expenses' with the items included in a budget, which has led certain arguments to link the interpretation of the word 'expenses' in paragraph 2 of Article 17, with the word 'budget' in paragraph 1 of that article; in both cases, it is contended, the qualifying adjective 'regular' or 'administrative' should be understood to be implied. Since no such qualification is expressed in the text of the Charter, it could be read in, only if such qualification must necessarily be implied from the provisions of the Charter considered as a whole, or from some particular provision thereof which makes it unavoidable to do so in order to give effect to the Charter".

basic character of these instruments is an agreement.⁴²² 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 is governed by international law.⁴²³ Constituent instruments of organizations are also international conventions in the meaning of Article 38 ICJ.⁴²⁴ However, already 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.⁴²⁵

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.⁴²⁶ The constitution concept has hereby become a generic notion through which to capture all constituent instruments, whatever their label.⁴²⁷ The constitution concept was also used as a common denominator for indicating the basic law of organizations by the ICJ in the *Legality of the Use* opinion.⁴²⁸

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 of law, the establishment of a complex of norms, and the creation of a legal order.⁴²⁹ Such elements can be present to varying degrees, which means that constitutions come in a variety of forms.

⁴²² 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" (emphasis added). For a more recent account see Rama-Montaldo (2005), at 504-506.

⁴²³ Article 2, 1969 Vienna Convention. 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 Article 2(1)(a), 1969 Vienna Convention, and Voitovich (1994), at 21.

⁴²⁴ Rosenne (1989), at 251. For the text of Article 38 of the ICJ Statute, see above, Part II, Chapter 2.1, note 281.

⁴²⁵ Fassbender (1998), at 531.

⁴²⁶ 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.

⁴²⁷ For denominations of constituent instruments of UN Specialized Agencies, see Part I, Chapter 1, note 1.

⁴²⁸ *Legality of the Use*, ICJ Reports 1996, para. 19.

⁴²⁹ These are identified by Frankenberg (2000), at 2.

In a most basic definition, a 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.⁴³⁰

The constitutional character of constituent instruments has also served to explain the use of teleological principles of interpretation. A constitutional character is seen to both enable teleological interpretation, and also more strongly, to make it especially appropriate or even required.⁴³¹ Even the ICJ in the *Legality of the Use* opinion enumerated as one of the institutional elements of constituent instruments “the imperatives associated with the effective performance of ... functions”.⁴³² 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.⁴³³

The dual characterization of constituent instruments as both constitutions and treaties has already been characterized as a reproduction of the dichotomous image of organizations. It is present in ICJ characterizations of constituent instruments as “treaties of a particular type”, and in an oxymoron such as the “Draft Treaty establishing a Constitution for Europe”.⁴³⁴ In this dichotomy the constitution notion becomes another way of emphasizing those features of the legal order whereby the organization asserts its independence. As an expression of this, for example the “constitutional law of the EU” is commonly seen to cover

⁴³⁰ Schermers and Blokker (2003), at 724-731.

⁴³¹ See Alvarez (2001), at 104-105, Skubiszewski (1989), at 855, Sloan (1989), at 113-120, and Morawiecki (1986) at 98.

⁴³² *Legality of the Use*, ICJ Reports 1996, para. 19.

⁴³³ Sato (2001), at 325 (footnote omitted).

⁴³⁴ See *Legality of the Use*, 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).

issues such as: the form and extent of jurisdiction, the competence and relations between actors, the decision-making processes, and the sources of law.⁴³⁵ When adding to this features such as: judicial review, separation of powers, teleological interpretation, and a system of checks and balances, at least traces of a constitutional law can be found at the heart of most international organizations.⁴³⁶

The constitutionalization concept is often used as shorthand for the emergence of constitutional law within a given legal order. This is also commonly connected with increased judicial empowerment as a means for enforcing that constitutional law.⁴³⁷ Such a characterization of the development of the constitutional law of an organization has been labeled a formal approach to constitutionalization.⁴³⁸ When used in this sense the constitutionalization concept could be contrasted to constitutionalism. In such a contrasting use, constitutionalism entails a wider focus and refers not only to the possession of a constitution, but is also a question of safeguarding the values which underlie the provisions of a constitution.⁴³⁹ Such a conceptual distinction is not however maintained by all writers. Instead, constitutionalization is also used to describe an increase of constitutionalism in organizations.⁴⁴⁰

In a historical setting 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 is increasingly put in a proliferation of dispute resolution. This proliferation can be characterized as a constitutionalization of international law.⁴⁴¹ Kennedy has regarded this interest on international dispute resolution as the emergence of a new internationalism. This new internationalism is however different from earlier intergovernmentalism.

⁴³⁵ This is the general layout, for example, of Lenaerts, van Nuffel, and Brady (1999).

⁴³⁶ Alvarez (2003), at 431-432. Also see Cass (2005), at 52-54.

⁴³⁷ See Peters (2006), at 582, and Hirschl (2004 "The Political"), at 71.

⁴³⁸ See Wiener (2003), at 6.

⁴³⁹ See Weiler and Wind (2003), at 3, and Peters (2006), at 582.

⁴⁴⁰ See Wiener (2003), at 6, and Walker (2003 "Constitutionalising"), at 368.

⁴⁴¹ Kennedy (1994), esp. at 367.

It represents a brake with the past and is an attempt at developing “internationalist sensibility” itself.⁴⁴²

There are some signs that suggest that international cooperation is indeed undergoing change. Issues of international governance are increasingly escaping the dichotomy between organizations and states altogether. Concepts such as infranationalism and transgovernmentalism are used to describe the emergence of informal networks and the increasing use of soft standard setting, both of which challenge decision-making through traditional organizations.⁴⁴³ This process is in itself an expression of the fact that not only states, but also actors within the state, are increasingly compelled to cooperate globally. There is also an increase of non-state actor influence. All of this has the effect that governance escapes state constitutionalism. This has even been called the “de-constitutionalization of the domestic level”.⁴⁴⁴ Given that the traditional image of organizations as arenas upon which to deal with international issues also seems to be on the losing end of this development, a need is identified for “compensatory constitutionalism”.⁴⁴⁵

At the same time the growing body of international rules and decisions (created by the growing body of international institutions) results in regulatory competition, and a corresponding concern for upholding a coherent international legal system.⁴⁴⁶ For this reason constitutionalism is also pictured as a promise “... that there is some system in all the madness, some way in which the whole system hangs together and is not merely the aggregate of isolated and often contradictory movements”.⁴⁴⁷

Given these various developments it is no surprise that constitutionalization/constitutionalism has come to mean different things in different organizations. On the one hand, constitutionalism represents a hope of limiting the political power of organizations (which they may or may not assert through the exercise of legal powers) and subjecting them to the rule of law.⁴⁴⁸ On the other hand, a process of constitutionalization is also pictured as a revitalization of international organizations. Such a revitalization may even entail a hope that organizations would exercise a stronger regulative role in respect of

⁴⁴² Kennedy (1994), at 332-335.

⁴⁴³ Klabbers (2002 “An Introduction”), at 334-344. As to the concepts, see Weiler (1999), esp. at 96-101, and Slaughter (1997).

⁴⁴⁴ Peters (2005), at 40.

⁴⁴⁵ Peters (2005), at 41.

⁴⁴⁶ See Koskeniemi and Leino (2002).

⁴⁴⁷ Klabbers (2004 “Constitutionalism”), at 49.

⁴⁴⁸ Peters (2006), at 594. On the relationship between “power” and “powers”, see above, Part I, Chapter 3.1.

members (e.g. through the establishment of legal hierarchies and integration).⁴⁴⁹ Further, constitutionalism is also concerned with the creation of legal and political unity, and with it, gears interest towards issues of legitimacy.⁴⁵⁰ As a result constitutionalism appears to be a generic notion through which to express different changes in the international legal order at large, as well as developments of the legal order of international organizations more specifically.⁴⁵¹

Despite all of the different uses to which the concept has been put, the possibility of constitutionalism beyond the nation state is increasingly accepted. Although there is an ongoing discussion on how to translate constitutionalism to the international level, constitutionalism has come to serve as a notion through which to discuss different aspects of governance in organizations.⁴⁵² This means that constitutionalism has increasingly become the context within which to raise the question of how to structure the relationship between members and the organization, and with it, the question of the proper reach of powers of organizations.

3.2.2 Constitutionalism in Organizations

3.2.2.1 The Supranational Constitutionalism of Europe

Community 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 Community law is remarkable (although the founding instruments still bear the treaty-label).⁴⁵³ However, already from the early days of European integration, some special features of EC treaties have been identified. The ECJ ruling in *van Gend en Loos* constituted an early break with a simple treaty characterization of the EC:

⁴⁴⁹ 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.

⁴⁵⁰ In general, see Craig (2001), at 127-128. Cass (2005), at 29-30 identifies as core elements of constitutionalism a set of rules and institutions that regulate relationships between actors, the emergence of a higher order basic norm, the existence of a constitutional community, a process of deliberation, a realignment of relationships between states and the constitutional entity, and legitimacy in the sense of social acceptance.

⁴⁵¹ Fassbender (2005), at 840.

⁴⁵² In general, see Walker (2003 "Postnational").

⁴⁵³ Interest will in the following be on providing an overview of constitutional characteristics commonly associated with the EC, whereas the question of whether the Community is "truly" constitutional will not be dealt with. For two different views on the latter question, see Maduro (1998), e.g. at 8, and Schilling (1996).

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.⁴⁵⁴

What sets Community law apart from public international law, is that whereas public international law typically allows the state to determine the method and extent to which international obligations may produce effects for individuals, the domestic impact of Community law is determined by Community law itself, which moreover may prevail over conflicting national law, and which national courts may be required to apply directly.⁴⁵⁵ 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.⁴⁵⁶

What was new about the legal order, was the direct effect of the rights and obligations that are imposed upon citizens.⁴⁵⁷

Through the concept of self-executing treaties, a similar idea has sometimes been invoked in public international law as well. A provision is self-executing when it is full and complete in itself and no supporting legal action is necessary for its enforcement or implementation.⁴⁵⁸ However, even binding decisions of international organizations are commonly not self-executing, but leave the means of implementation of the decision to be settled by member states.⁴⁵⁹ This is where EC law is different as the function of direct effect is that EC law is to be considered by national courts as a source of law. The direct effect of EC law has for this reason also been regarded as a first step in a progressive movement

⁴⁵⁴ 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.

⁴⁵⁵ *Van Gend en Loos*, [1963] European Court Reports 1, at 7.

⁴⁵⁶ *Van Gend en Loos*, [1963] European Court Reports 1, at 12.

⁴⁵⁷ 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).

⁴⁵⁸ de Aréchaga (1989), at 412. For examples in human rights law, see Scheinin (1994).

⁴⁵⁹ As to decisions made by the UN Security Council under Article 41 of the UN Charter, see Martin Martinez (1996), esp. at 230-235.

towards quasi-federal law, at least in terms of impact on individual citizens.⁴⁶⁰

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 Community 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.⁴⁶¹

While direct effect can be defined as the capacity of a Community norm to be applied in domestic court proceedings, supremacy denotes the capacity of that norm to overrule inconsistent national laws.⁴⁶² The combination of direct effect and supremacy means that the directly effective Community 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.⁴⁶³

When pre-emption is added (meaning that members may not take concurrent action in the sphere of exclusive Community powers), these three principles are commonly described as the three hallmarks of normative supranationalism.⁴⁶⁴ This supranationalism has also become the paramount feature of the constitutional character of Community law. Against this background, early constitutional characterizations of

⁴⁶⁰ Stein (1981), at 24. However, such an effect can also arise in general 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.

⁴⁶¹ *Costa v ENEL*, [1964] European Court Reports 585, at 593-594.

⁴⁶² See de Witte (1999), at 177-179 and 189-193.

⁴⁶³ Simultaneously the idea of a hierarchy of laws is one of the most notable challenges for the idea of an international constitution. See Peters (2006), at 597-599.

⁴⁶⁴ Exclusive Community competence can be laid down in both primary and secondary Community law. The current practice is that member action is only excluded if such action would jeopardize Community objectives (and not merely because the EC has the express competence, or has acted in the area). On pre-emption, see Weiler (1999), at 172-174, and Cremona (1999), at 153-155.

Community law seem focused mainly on questions of legal status and empowerment. What made Community law distinguishable from mere treaty law was the supranational legal hierarchy it created. In the 1980s the ECJ further defined the constitutional features of the EC by adding that the Community is based upon the rule of law and subject to the supervision of the ECJ.⁴⁶⁵ 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 EC.⁴⁶⁶

The role of the ECJ as the ultimate arbiter of Community law distinguishes EC law from other international organizations. Adding to this the fact that both the acts of Community organs and member states are subject to review, and that member governments can even be held responsible by individuals (before national courts) for violating EC law, the extent and availability of judicial remedies stands out as truly exceptional.⁴⁶⁷ In all, the empowering features of the legal order combined with the role of the ECJ in upholding the rule of law have been called the body of Community constitutionalism.⁴⁶⁸

However, the discourse on Community constitutionalism also transcends discussions of empowerment and judicial review. The ever deepening integration and the corresponding widening of Community competence, along with developments such as the increasing use of majority voting, have given rise to new issues which today assume central stage in debates on constitutionalism. EC constitutionalism has hereby not been static, but has increasingly become concerned with questions about who is ultimately in control of Community law, how to ensure a proper source for Community legislation, and how to reinstitute the faith of the public in the Community. In short, interest has been turned to issues of democracy and legitimacy. With this move, the constitutionalism discussion has also transcended Community law as such and is instead often discussed as constitutionalism in the EU. In fact, this shift of focus has become so dominant that the EU has been described as the paramount example of the modern obsession with legitimacy and identity.⁴⁶⁹

⁴⁶⁵ 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.*

⁴⁶⁶ 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 Búrca (1999), at 58.

⁴⁶⁷ Sweet (2000), at 306.

⁴⁶⁸ Maduro (1998), at 8.

⁴⁶⁹ Habermas (1998), at 491-515. Also see Weiler (1999), at 226-233, and for an account of the period of mutation since the Single European Act, at 63 *et seq.*

In the *van Gend en Loos* and *Costa v ENEL* cases the EC Treaty needed to be distinguished from ordinary treaties in order to explain the reach of Community law and its impact on member sovereignty. Eventually this resulted in a characterization of the Community legal order as constitutional. While such a characterization can still be maintained, the rule of law and judicial review no longer suffice for bestowing authority in Community law. The critique of such a formal image of Community constitutionalism commonly takes the form of calls for democratization (e.g. through an emphasis on further empowerment of the European Parliament). Whereas at heart the debate is still concerned with the exercise of independent powers by the EC, it is no longer the hierarchy that this established, nor the supervision and enforcement of EC law that is the most pressing concern (or at least not the sole concern) in the debate on constitutionalism. Instead, behind a concern for the democratic character of the EC, lies a need for ensuring that common values (shared by members) underlie Community law.

3.2.2.2 Constitutionalism in the WTO

Whereas some features of the debate on the constitutional character of EC law date back almost half a decade (when locating the origins of that debate in the *van Gend en Loos* case), 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. As the GATT system was perhaps better characterized as an agreement between states and a structure for negotiation on a reciprocal basis, it was questionable as to whether GATT could be characterized as an organization to begin with. This was to change with the transformation of GATT into the WTO. This move was coupled with a number of more general developments that would eventually also result in discussions on the nature of the WTO. These developments included: the emergence of an idea of a unified trade system, a more general emphasis on issues of authority, a consensus on trade liberalization, a focus on regulation, and a perceived need to further define the WTO regime.⁴⁷⁰

It should be emphasized to begin with, that some uncertainty seems to surround whether the WTO actually displays constitutional features. Cass claims that what distinguishes the WTO from a treaty (and thus warrants the characterization as constitutional) is that the content of WTO law builds on constitutional doctrines (such as proportionality and

⁴⁷⁰ See Cass (2005), at 58-93.

jurisdictional competence), 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.⁴⁷¹ On the more critical side Dunoff has emphasized 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.⁴⁷² At any rate, there clearly seems to be a difference to the constitutional character of EC law. These differences however only make the question of why a constitutionalization of the WTO is insisted on 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. Frequently these build on EC constitutionalism. Three different paths for constitutionalizing the WTO have been identified.⁴⁷³ The first focuses on the role of the WTO in managing trade disputes. It builds 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. The approach emphasizes the use of management techniques (instead of diplomacy and politics) as a means for efficient governance in the WTO.⁴⁷⁴

A second approach equals constitutionalization with establishment of market access rights - 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 way all about rationalizing such struggles into questions of legal hierarchies (economic rights assuming priority).⁴⁷⁵

Thirdly there is an understanding of WTO constitutionalization as a process of judicial norm-generation. This builds on the fact that dispute settlement in the WTO utilizes rules and principles of a constitutional character, and through this creates constitutional structures for international trade. Three processes have been identified as central for this development: 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 system making, and 3) there is incorporation of matters that have traditionally been viewed as national concerns into the agenda of international trade law. The claim is that the

⁴⁷¹ Cass (2005), at 52-54.

⁴⁷² See Dunoff (2006), at 651.

⁴⁷³ Cass (2005) provides an overview and discusses these in chapters 4-6. Also see Dunoff (2006), for an overview with numerous references.

⁴⁷⁴ This is the argument of Jackson (1998).

⁴⁷⁵ This is the argument of Petersmann (2002).

fact that we recognize in these practices and values a constitutional architecture, makes the WTO system constitutional.⁴⁷⁶

Notably, all of these models of WTO constitutionalism place the dispute settlement mechanism at the heart of the constitutional development. 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).⁴⁷⁷ Faith is put in the dispute settlement mechanism and the creation of legal hierarchies to avoid cumbersome acts of balancing policies. In fact, all of the three approaches emphasize WTO constitutionalism as a turn away from politics.⁴⁷⁸ The claim 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 would entail a move away from diplomatic negotiations to more exact, principled and authoritative settlement.⁴⁷⁹

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 authority upon the WTO. While a constitutionalization of the WTO has on the one hand served as an argument for strengthening the legal system by developing the institutional structure and deepening the impact on national legal systems, on the other hand such constitutionalization is accused for neglecting issues of legitimacy.⁴⁸⁰ The question is raised whether judicial settlement manages to balance conflicting interests properly, or whether interest should be more closely geared towards the political side of the

⁴⁷⁶ See Cass (2005), at 177-203.

⁴⁷⁷ Petersmann (1996-1997), at 457.

⁴⁷⁸ Dunoff calls this "constitutionalism as antidote to trade politics", Dunoff (2006), at 661-664. Also see Howse and Nicolaïdis (2001).

⁴⁷⁹ For the former point, see McGinnis and Movsesian (2000), at 572 *et seq.* For the latter, see Petersmann (1996-1997), at 468.

⁴⁸⁰ This is the main point of Howse and Nicolaïdis (2001). For an overview of critical arguments and for further references, see Cass (2005), at 177-186.

organization. In such a critical approach to a judicialization of the WTO, a development is instead preferred which is concerned with transparency, democratic representativity, accountability, and deliberation (practical suggestions for improvement ranging from NGO participation to the creation of a Parliamentary Assembly).⁴⁸¹ The logic is that since the WTO has not managed to anchor its authority to act in shared values, constitutionalism should open up spaces for political dialogue and contestation rather than pre-empt such discourse in the name of judicial effectiveness.⁴⁸²

3.2.2.3 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. This interconnection is demonstrated by Crawford's classical distinction of strong and weak constitutions. A constitution in the weak sense denotes a document that constitutes an entity, meaning that it defines a body with a continuing and independent existence. A constitution in the strong sense means a constitution which constitutes a society.

Due to the universality of the UN, the society referred to would mean international society at large. Hence, the universality of the UN membership turns any more farreaching definitions of the constitutional character of the UN into concerns about the character of the Charter as a constitution of the international community.⁴⁸³ It is no surprise, therefore, that ideas about developing a cosmopolitan model of democracy also build on the UN.⁴⁸⁴ However, such world constitutionalism presupposes the existence of a constitutional law (of the UN) in a weak sense. It is only through a confirmation and strengthening of this constitutional law that an image of a politically constituted world society can emerge.⁴⁸⁵

A number of elements have been enumerated in order to demonstrate the constitutional character of the UN Charter. Fassbender identifies some of these as: the establishment of a system of governance, a

⁴⁸¹ See Krajewski (2001), at 180-183, von Bogdandy (2001), and Dunoff (2006), at 664.

⁴⁸² Gerhart (2003), at 1-2 and 73-75, and Dunoff (2006), at 673.

⁴⁸³ Crawford (1997), at 8 and 15. Also see Fassbender (2005), at 846-847.

⁴⁸⁴ As does David Held, see Held (1995), esp. at 270 *et seq.* However, also see already Gordon (1965).

⁴⁸⁵ Fassbender (2005), at 847, and Dupuy (1997), at 3. Also see Held (1995), at 279.

defined membership, and the creation of a hierarchy of norms.⁴⁸⁶ The last of these taps into a common emphasis on the impact of decisions of international organizations on their members as an expression of a constitutional character. There are many ways in which membership in the UN has an impact upon states. These include the use of majority voting, recourse to implied powers, the absence of the possibility of withdrawal, the restrictive effect on member foreign policies of the prohibition on the use of force, and the fact that decisions by the UN Security Council under Chapter VII of the UN Charter are binding for the addressees of the decision.⁴⁸⁷

Two traditional arguments used in order to claim a constitutional character for the UN Charter have also been to emphasize Articles 2(6) and 103 of the 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.⁴⁸⁸ Because of this hierarchy the UN Charter is claimed to set the framework for any permissible governmental activities.⁴⁸⁹ 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.⁴⁹⁰ In fact, the idea of world constitutionalism is claimed to be the only image in which these articles of the UN Charter make sense.⁴⁹¹

Also the recent law-making activities of the Security Council have been emphasized. Through activities such as the establishment of war crimes tribunals and compensation commissions, imposing disarmament obligations on Iraq, and by determining the Kuwait-Iraq border, the label “world legislature” has been attached to the Council.⁴⁹² Interest has also been turned to activities of the Security Council in respect of terrorism,

⁴⁸⁶ Other criteria that Fassbender mentions are the use of the word “Charter” and the existence of a “constitutional moment”. Fassbender (1998), at 573-584.

⁴⁸⁷ In general, see Nolte (2002), at 152-156, Martin Martinez (1996), at 70-78, and Tunkin (1988), at 262.

⁴⁸⁸ 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, 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 essential if the UN Charter is to be recognized as the constitution of the international community.

⁴⁸⁹ In general, see Dupuy (1997). For the last point, see Fassbender (1998), at 578.

⁴⁹⁰ 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.

⁴⁹¹ The claim is made by Fassbender (1998), at 593-594.

⁴⁹² See Talmon (2005), at 176 with further examples and references.

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.⁴⁹³ These far-reaching legislative acts have even been seen to resemble directives of EC law.⁴⁹⁴ It is therefore not surprising that these decisions have become a strong argument in demonstrating the constitutional nature of the UN Charter.⁴⁹⁵

However, not all authors consider the UN suitable for upholding world constitutionalism. For the UN to establish a constitutional system of governance, the UN Charter would need to embrace:

... 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.⁴⁹⁶

The criticism that UN constitutionalism meets 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.⁴⁹⁷

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.⁴⁹⁸ Yet, while there is a rudimentary separation of powers in the institutional structure of the UN, it is by no means flawless. The

⁴⁹³ 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.*

⁴⁹⁴ Talmon (2005), at 193.

⁴⁹⁵ Werner (2007), at 357.

⁴⁹⁶ Fassbender (1998), at 569-570.

⁴⁹⁷ 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".

⁴⁹⁸ For such a characterization of the relationship, see Koskeniemi (1995), at 337-339.

decisions of the undemocratic Security Council are badly compensated by a weak General Assembly. A political check of decisions may therefore fail 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 proof of the “unconstitutionality” of the organization.⁴⁹⁹ 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.⁵⁰⁰ This absence of judicial protection of members, combined with a lack of capacity to impose decisions on UN members, are in Macdonald’s words “almost universally seen as serious problems of the constitutional perspective”.⁵⁰¹

3.3 Concluding Remarks: The Promise of Constitutionalism

To begin with, the overview of constitutionalism in the EU, WTO, and the UN indicates some interesting similarities to the attributed and implied powers doctrines. On the one hand, both the “return” of the idea of attributed powers and the rise of constitutional reasoning could be seen to express a desire to limit the competence of organizations. One aspect of the constitutionalization of organizations emphasizes the importance of providing institutional safeguards against the activities of organizations. A shift from a functional to a constitutional approach to organizations seems to suggest that instead of turning organizations into mechanisms for never-ending expansion (which was the fear expressed e.g. by critics of the *Reparation for Injuries* opinion), interest has shifted towards stabilizing the relationship between organizations and members.⁵⁰² This development is especially visible in EC law where a more “hostile constitutional landscape” towards integration has emerged, with a

⁴⁹⁹ 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.

⁵⁰⁰ 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.

⁵⁰¹ Macdonald (2000), at 292.

⁵⁰² Klabbers 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.

corresponding shift of emphasis from further integration to the internal processes of Community law.⁵⁰³

On the other hand there also seems to be something of a relationship between the exercise of legal powers and the identification of a constitutional law at the heart of organizations. The fact that an organization performs independent acts, which affect the members of the organization has been a core feature in characterizing legal orders of organizations as constitutional. For this reason also implied powers have served to demonstrate a constitutional nature (e.g. of EC law).

In addition, a desire to expand organizations can be expressed not only through implied powers reasoning, but also by arguing for a constitutionalization of an organization (and for the constitutionalization of the international legal order at large). Just like implied powers claims are used to increase the functional effectiveness of organizations, also a constitutionalization is commonly invoked as an attempt at strengthening the legal order (e.g. of the WTO). For this reason a judicialization of organizations has also been characterized as a particular form of institutionalization.⁵⁰⁴ As will be discussed more in detail later on, in this sense a functionalist and constitutionalist mindset also display similarities through the way in which they put faith in (legal) expertise.⁵⁰⁵

What distinguishes the doctrine of constitutionalism from the doctrines of attributed and implied powers is that constitutionalism does not make a claim on how to construct the powers of an organization as such, but rather attempts to find closure on the question of powers (among other questions) through a broader focus on governance. It is because of its broader focus that constitutionalism also stands out as a way of structuring the question of how to define the proper extent of powers of organizations.⁵⁰⁶

Constitutionalism is not the only means through which to structure the question of powers. Both elements of the constituent instrument (domestic jurisdiction clauses), and external sources (principles of interpretation) are often relied upon with similar hopes. 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, such as: What is a

⁵⁰³ See Weiler (1998), at 366 *et seq.* with further references.

⁵⁰⁴ Goldstein *et al.* (2001 "Introduction"), at 2.

⁵⁰⁵ On functionalism and expertise, see Fatouros (1980), at 17, and Johnston (1988), at 21, note 68.

⁵⁰⁶ 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), at 258.

proper impact on domestic jurisdiction? What is a proportional measure? How is the effectiveness of member action to be compared to that of the organization? What is the ordinary meaning of a provision?

To deal with activities of organizations through the concept of constitutionalism does a similar thing. In turning interest from a discussion on the reach of powers of an organization into discussing the constitutional character of organizations, a new set of issues arise through which to reflect upon how the organization should perform its tasks. As the examples above demonstrated, constitutionalism can also serve to emphasize different images of an organization. In between these images, the dichotomy between a narrow and an expansive way of constructing powers can be reproduced.

In the context of domestic jurisdiction clauses the dichotomy between organization effectiveness and safeguarding member sovereignty may take the form, for example, of balancing the unity of the legal order and subsidiarity with each other. In the context of principles of interpretation it may be displayed as a question of whether precedence should be given to effective fulfillment of the object and purpose (teleology), and whether such an interpretation is compatible with the ordinary meaning of the terms of the treaty (textual interpretation). In a discussion on constitutionalism the divide runs between enhanced capacities for enforcement and introducing judicial review on the one hand, and a focus on issues of democratic legitimacy on the other.

The discussion of the three doctrines will not however stop here. Instead, to complicate issues further, the next step will be to turn the question on its head. So far the attributed powers and implied powers doctrines have been pictured as counterarguments and as means for making different claims on the proper activities of organizations. However, looking closer it seems that a dichotomy can be located also within the attributed powers and implied powers doctrines themselves.

As for constitutionalism the next step will be to follow through on how constitutionalism produces different images of organizations. A critical discussion of the tensions within constitutionalism will reveal in more detail what a turn from the language of attributed and implied powers doctrines to discussing a constitutionalization of organizations brings with it.

Part III Three Doctrines in Search of Content

What's in a name? that which we call a rose
By any other name would smell as sweet.
Shakespeare, Romeo and Juliet, Act 2, scene II

The three doctrines of interest have so far been taken at face value and have been outlined as they commonly appear in both academic and court reasoning. By presenting a dual image of organizations the aim has been to demonstrate how the attributed and implied powers doctrines serve as tools through which to make different constructions of the powers of international organizations. Organizations are more than inter-state relationships. Yet, they consist of members. In the use to which the attributed powers and implied powers doctrines are commonly put, they emphasize different aspects of this dichotomy.

The purpose of the following chapters is to discuss the doctrines more in detail. The aim will be to take a closer look at the assumptions at the heart of each doctrine. For the implied powers doctrine this means discussing whether functional necessity reasoning really automatically means providing organizations with additional powers. For the attributed powers doctrine focus is on how consent underlies all constructions of powers of organizations. This discussion will add an additional dimension to how these doctrines are open for substantive dispute, and with that, for making different claims regarding the powers of an organization.

As for the doctrine of constitutionalism the notion will be broken up into an emphasis on judicialization on the one hand, and democratic legitimacy on the other. By critically discussing both aspects, the aim is to demonstrate how also constitutionalism can serve to express competing claims on institutional governance. This discussion will also reveal how constitutionalism displays elements of the member - organization dichotomy.

1 Reconciling Attributed and Implied Powers

In the historical overview on the attributed and implied powers doctrines, some characteristics of the reasoning through them could be identified. In general terms, an emphasis on attribution serves as a way of demonstrating the limited character of powers of organizations. An emphasis on implied powers on its part serves to provide the organization with the functional means by which to effectively fulfill its object and purpose. Any simple definition of the doctrines has however 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.

The aim in the following is to provide a closer look at the distinction between attributed powers and implied powers. The critique of the idea of “trends” in reasoning on powers of organizations (discussed in Part II, Chapter 1.3) already indicated that there might be more to the relationship than first meets the eye. While an overview of the history of reasoning on powers of organizations suggests that the attributed and implied powers are commonly used as counterarguments to each other, as will be seen below, when the doctrines are discussed independently it becomes clear that both doctrines may also individually be used to present different (and even contradictory) constructions of powers.

1.1 The Elusiveness of Implied Powers

1.1.1 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? Some light can be shed on the question 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.⁵⁰⁷ In

⁵⁰⁷ Preamble, 1986 Vienna Convention.

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 ways of describing 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.⁵⁰⁸

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 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.⁵⁰⁹ 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.⁵¹⁰

However, it is not always possible to make such a clear distinction. Rama-Montaldo therefore criticizes 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 indiscriminately.⁵¹¹ As has been seen earlier, functions and powers may also become next to indistinguishable. This is the case when implied powers are derived for the effective performance of existing powers (*effet utile*). In this case the existing power becomes something of a function or a goal that the implied power serves to fulfill.⁵¹²

Above all, 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

⁵⁰⁸ Magliveras (1999), at 256-257.

⁵⁰⁹ The example is from Bekker (1994), at 75.

⁵¹⁰ *Reparation for Injuries*, ICJ Reports 1949, at 149.

⁵¹¹ Rama-Montaldo (1970), at 149-151. On the distinction between purposes and functions, see Bekker (1994), at 45-47.

⁵¹² Also see Ducat and Chase (1992), at 144, who discuss the US Supreme Court case *McCulloch v The State of Maryland* which is often considered the first establishment of the implied powers doctrine.

(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. In the post-September 11th world 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 types of measures that the Security Council has imposed on states.⁵¹³

However, such a widening of measures 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. An example of such a move could be the characterization of not only inter-state, but also intra-state conflicts, as a “threat to the peace”.⁵¹⁴ If no powers are added, then the change would 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 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 considered today as one of the most important security organizations. The actions that NATO has undertaken in recent years in respect of former Yugoslavia, both with and without a UN mandate attest (in different ways) to such a conclusion.⁵¹⁵ 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.⁵¹⁶ This has been described as a “‘creeping’ reform of the functions of NATO”.⁵¹⁷

⁵¹³ Rosand (2005), at 555.

⁵¹⁴ 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), at 150-175.

⁵¹⁵ For an overview of the mandate issues, see Morton (2002).

⁵¹⁶ 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 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).

⁵¹⁷ Dekker and Myjer (1996), at 416.

Although this reform of the functions has not entailed a reform of the legal powers of NATO, the development has nevertheless also been characterized as one of the most significant recent constitutional debates.⁵¹⁸

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 réservé*. Thirdly, the character of a power may change (as in the case of the move from UN peacekeeping to peace enforcement). Nevertheless, the end result of all of these changes is an implicit modification of the scope of powers of an organization.⁵¹⁹ However, there is also an important difference between these which separates especially the first of these changes from the latter two: 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 in the case of the latter two alternatives where the body of legal powers itself of an organization expands.

1.1.2 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 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. As has been discussed earlier, functionalism builds on the proposition that the development of international cooperation is a major prerequisite for solving political conflicts (and achieving world peace).⁵²⁰ The state in its pursuit of power and domination is regarded as harmful to the evolution of a peaceful coexistence. In the words of Mitrany: “... if

⁵¹⁸ For the characterization, see Alvarez (2001), at 125-136. As to the question of legal powers, see Gazzini (2001), at 413. Dekker and Myjer (1996), at 415 even claim that the activities of NATO in the case of former Yugoslavia lack basis in the North Atlantic Treaty.

⁵¹⁹ 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.

⁵²⁰ For this characterization, see Claude (1964), at 345. Also see Fatouros (1980), at 15.

a new world authority is to come into being by consent and not by conquest, its status will depend on how far the transfer of sovereignty from national groups is both willing and continuous".⁵²¹ Perhaps most clearly this is reflected in neo-functionalism which has come to emphasize supranationalism as the ultimate form of international co-operation.⁵²²

The classic formulation of functionalism is that form follows function. For organizations this means that their structures should be dynamic and that the best means for achieving the purpose of an organization is to be found through experiment.⁵²³ However, a functional approach to organizations comes in a variety of forms, from embracing the ideal of a global legal order, to merely offering a sharper focus on the interdependencies of states and other actors. Functional necessity could also be distinguished from functionalism by the fact that the latter is a macro theory about what instrumental value organizations in general should have, whereas functional necessity is more closely related to the identifiable purpose and functions of the individual organization and a device whereby that purpose and functions acquire effectiveness.⁵²⁴

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, clearly expresses a functional logic in stating 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".⁵²⁵ 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 needs.⁵²⁶

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 means prove insufficient that functional necessity is invoked, most notably through claiming the existence of implied powers. As was seen in discussing the case law on reasoning on powers of organizations, at some point it may have been that an expansion of the range of activities of organizations even seemed a foregone conclusion. Nevertheless, organizations are not free to perform every act they wish. Instead, their

⁵²¹ Mitrany (1975), at 128.

⁵²² For a neo-functional account, see Haas (1964). For an overview, see Harrison (1978).

⁵²³ See above, Part II, Chapter 1.2.1.1.

⁵²⁴ Bekker (1994), at 44.

⁵²⁵ Article 105, UN Charter.

⁵²⁶ Singer (1995), at 65-66.

functional character is limited in that every act they perform must have a relationship to the object and purpose of the organization. This means that implied powers cannot exist if they are not found necessary for the fulfillment of the purpose of an organization.⁵²⁷

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.⁵²⁸ This restrictive side is also inherent in Article 308 EC in that the implied powers arrived at shall be “appropriate measures”, and so invoking their proportionality. This means that the implied power adopted must be suitable for attaining an objective of the EC and remain within the proportions of that objective.⁵²⁹

In a similar vein, provisions of other organizations that provide for a functional approach to powers of organizations, also contain elements that emphasize the limits to the functional character. 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.⁵³⁰

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

⁵²⁷ See above, Part II, Chapter 1.2.

⁵²⁸ In *Reparation for Injuries* the ICJ concluded that: “[The United Nations] is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is a ‘super-State’, whatever that expression might mean. ... 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.”, *Reparation for Injuries*, ICJ Reports 1949, at 179-180. In general, see Menon (1992), at 61-63, and Schermers and Blokker (2003), at 992-993.

⁵²⁹ See Article 308, EC Treaty, and above, Part II, Chapter 3.1.1.

⁵³⁰ 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).

... to the extent authorized, may adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Bank.⁵³¹

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.⁵³²

In the same fashion the Agreement Establishing 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.⁵³³

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

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.⁵³⁴

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.⁵³⁵

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 ...⁵³⁶

⁵³¹ 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).

⁵³² Articles of Agreement of the International Development Association (26 January 1960), 439 *United Nations Treaty Series* 249, Article V, Section 5.

⁵³³ Agreement establishing the International Fund for Agricultural Development (13 June 1976), 1059 *United Nations Treaty Series* 191, Article 7, Section 3.

⁵³⁴ Articles of Agreement of the International Finance Corporation (11 April 1955), 264 *United Nations Treaty Series* 117, Article III, Section 6.

⁵³⁵ Agreement establishing the Common Fund for Commodities (27 June 1980), 1538 *United Nations Treaty Series* 3, Article 16(D).

⁵³⁶ Convention establishing the Multilateral Investment Guarantee Agency (11 October 1985), 1508 *United Nations Treaty Series* 99, Article 2.

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

... to take such action as it may deem appropriate ...⁵³⁷

The Convention establishing 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.⁵³⁸

The General Assembly on its part is empowered to:

... (x) exercise such other functions as are appropriate under this convention.⁵³⁹

The Food and Agricultural Organization (FAO) functions include that:

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.⁵⁴⁰

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.⁵⁴¹

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.⁵⁴²

⁵³⁷ Convention on the International Maritime Organization (6 March 1948), 289 *United Nations Treaty Series* 48, Article 15(k).

⁵³⁸ Convention establishing the World Intellectual Property Organization (14 July 1967), 828 *United Nations Treaty Series* 3, Article 4.

⁵³⁹ Convention establishing the World Intellectual Property Organization (14 July 1967), 828 *United Nations Treaty Series* 3, Article 6(2).

⁵⁴⁰ 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).

⁵⁴¹ 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)).

⁵⁴² 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).

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.⁵⁴³

Further, the functions of the Health Assembly shall be:

... (m) to take appropriate action to further the objective...⁵⁴⁴

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.⁵⁴⁵

Although these formulations are similar at first sight, they do show some variation in design. Some of them 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”, and the tool that Article 308 EC constitutes in the hands of the Council of the European Union. 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 (especially for the organization at large) of even more farreaching powers than it originally possessed itself.⁵⁴⁶

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 Duško Tadić* case have used the notion “incidental” 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

⁵⁴³ Constitution of the World Health Organization (22 July 1946), 14 *United Nations Treaty Series* 185, Article 2.

⁵⁴⁴ Constitution of the World Health Organization (22 July 1946), 14 *United Nations Treaty Series* 185, Article 18.

⁵⁴⁵ Convention of the World Meteorological Organization (11 October 1947), 77 *United Nations Treaty Series* 143, Article 8.

⁵⁴⁶ On the *Effect of Awards* opinion, see above, Part II, Chapter 1.2.1.1.

the judicial function”).⁵⁴⁷ Against this background it would seem that the impact of a characterization of non-express powers as incidental is somewhat uncertain.

What all of the articles 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 308 of the EC Treaty. 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 the examples above expressly recognize a functional character of these organizations and provide them with a degree of discretion in performing their tasks. Subsequently, the provisions could also potentially be used as a source for implied powers of these organizations. Judge Weeramantry, dissenter to the majority in the *Legality of the Use* opinion of the ICJ in fact relied on Article 2(v) of the WHO Constitution in claiming that the WHO is not prevented from dealing with issues of peace and security.⁵⁴⁸ At the same time these articles contain within them the elements for restricting that functional character by ensuring that the activities of the organization remain within the object and purpose of the organization (either through explicit reference to the object and purpose, or through reference to the appropriateness of the additional measure).

⁵⁴⁷ See *McCulloch v The State of Maryland et al.*, 1819, 17 US (4 Wheat.) 316, at 388, 406, and 421, and *Prosecutor v Duško 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 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, Part II, Chapter 2.3.

⁵⁴⁸ “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 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”, see Dissenting Opinion by Judge Weeramantry, *Legality of the Use*, ICJ Reports 1996, at 133.

1.1.3 The Problems with Defining Functional Necessity

That the functional necessity concept has several qualities has been identified from the early days of analysis. Virally recognized a triple quality to the concept. Functional necessity is a tool for authorization and setting a standard of measure. This means that functional necessity determines and constitutes the justification of activities. This function differs in design between organizations, and in time for the single organization. The third quality is that of obligation. This works in two directions. Functions create obligations for states (not to hamper 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 for which it was created. Whereas the first two emphasize the enabling function of the concept, the third quality emphasizes the restricting effect that the functional character of organizations entails.⁵⁴⁹

This two-fold quality has also been dealt with by the ILC in its work on Relations between States and International Organizations. In the course of this work, Al-Baharna recognized in the formulation by the ICJ of the powers of the UN in *Reparation for Injuries* both positive and negative implications, the positive implications being that organizations transcend its constituent instrument, the negative being that these powers are limited by functional necessity.⁵⁵⁰ The functional necessity concept hereby seems quite ingenious in that it provides an organization with the means needed for making full use of its independent capacities (be it through powers or immunities), while at the same time limiting its functions to those that serve its purposes. The apparent problem, however, is to know how to strike the balance between the enabling and the limiting side.⁵⁵¹

⁵⁴⁹ This builds on M. Virally, "La notion de fonction dans la théorie de l'organisation internationale", in S. Bastid *et al.*, *Mélanges offerts à Charles Rousseau – La communauté internationale*, 1974, Pedone, as reproduced in Bekker (1994), at 48-51.

⁵⁵⁰ 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.

⁵⁵¹ In fact, the implied powers reasoning of the ICJ does display 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 do appear different from one another. See Amerasinghe (2005), at 97, and Campbell (1983), at 532-533. However, any abstract general definitions of the notions are rarely useful. Consider the fairly uninformative attempt by Lauterpacht to define the necessity concept as: "Something more than 'important', but less than 'indispensably requisite'", Lauterpacht (1976), at 430-431.

A common presumption is that there inheres in the functional necessity concept some guidance regarding its contents in that the concept is automatically geared towards increasing the functionality (or, effectiveness) of organizations. In a very basic sense there might be some merit to such a presumption. As Singer claims, 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, which is to “collaborate 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”, is seemingly narrow and unsuitable for functionalist reasoning.⁵⁵² However, these purposes nowadays concern issues such as the use of Chlorofluorocarbons (or 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.⁵⁵³

A claim that no organization resists a functional reading of its constituent instrument is really to demonstrate the political character of all organizations. There is good reason for accepting this argument. Turned the other way around, a claim that some organizations would be more politicized than others is highly problematic. 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 difficult distinction to be made.⁵⁵⁴ 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, even the most specific technical issue can be argued to be politicized by the fact that it raises a question of distribution and allocation of finite resources.⁵⁵⁵

⁵⁵² International Agreement concerning the International Institute of Refrigeration (1 December 1954), 826 *United Nations Treaty Series* 191, Article 1(1).

⁵⁵³ Singer (1995), at 105.

⁵⁵⁴ Klabbers (2002 “An Introduction”), at 26.

⁵⁵⁵ 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 this distinction, and consequently “render virtually meaningless the notion of a specialized agency”, *Legality of the Use*, ICJ Reports 1996, para. 26.

However, by emphasizing the political character of organizations no guidance follows as to which way this tilts the interpretation of the powers of an organization. If a claim is made that functional necessity reasoning is somehow automatically geared towards making organizations more effective, then that concept serves as a subterfuge for closer analysis of the member – organization relationship (or rather, as a one-sided image of it).⁵⁵⁶ As the case law discussed earlier revealed, it is indeed often the case that functional necessity is used in order to argue in favor of the effectiveness of organizations. This is the fundamental drive of a functional approach to organizations. However, this does not do away with the fact that there is a limiting aspect to functional necessity reasoning as well. Instead of being inherently tilted either expansively or restrictively to organizations, it would seem more correct to regard functional necessity reasoning as an embodiment of this balancing act, allowing a range of different constructions of powers.

To illustrate the point, functional necessity reasoning has also been used to deny the existence of additional powers. In this vein 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 a capacity to deal with human rights issues.⁵⁵⁷ Bederman consequently 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”.⁵⁵⁸

Further, 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 even opposing arguments can be put forward 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”.⁵⁵⁹ 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, 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.⁵⁶⁰

⁵⁵⁶ See Klabbers (2002 “An Introduction”), at 36-39 and 152.

⁵⁵⁷ Darrow (2003), at 170-171.

⁵⁵⁸ Bederman (2002), at 126.

⁵⁵⁹ Dissenting Opinion by Judge Hackworth, *Reparation for Injuries*, ICJ Reports 1949, at 198.

⁵⁶⁰ For the reasoning of Judge Hackworth, see above, Part II, Chapter 1.2.1.1.

This ambiguous character of functional necessity reasoning was something that Mitrany pointed out 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; ...".⁵⁶¹ More specifically with regard to necessity reasoning, this character was clearly spelled out in US constitutional law already in 1819. In the *McCulloch v Maryland* case the US Supreme Court did not accept the 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 ...⁵⁶²

The fact that functional necessity can mean different things to different people is often perceived as a problem with the concept.⁵⁶³ In the context of immunities the vagueness of the functional necessity notion (in failing to say anything about the material contents of immunities) has been characterized as a disadvantage.⁵⁶⁴ The absence of fixed contents is also considered a weakness, as it renders the definition of functional necessity dependent on the eye of the beholder.⁵⁶⁵ The claim made here is that an absence of fixed contents need not be given such a grim face. To the contrary, as the absence of fixed contents enables the concept to be used both expansively and restrictively, this also ensures the usefulness of the functional necessity concept as a tool for capturing and describing the character of any organization.

Disagreement on the correct reading of legal notions can be said to characterize constitutional interpretation in general. There are rarely

⁵⁶¹ Mitrany (1975), at 258.

⁵⁶² *McCulloch v The State of Maryland et al.*, 1819, 17 US (4 Wheat.) 316, at 414.

⁵⁶³ For one such explicit characterization, see Reinisch (2000), at 206.

⁵⁶⁴ J.-F. Lalive, "L'immunité de juridiction des états et des organisations internationales", in 84 *Recueil des Cours* 1953, at 304, referred to in Bekker (1994), at 113.

⁵⁶⁵ In respect of privileges and immunities, see Klabbers (2002 "An Introduction"), at 149-151. Klabbers does not however discard the theory altogether, but considers it as a useful means for reaching fair solutions, at 39.

provisions in constituent instruments for solving individual practical issues (and at least not for all possible issues arising). 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 highest possible degree of effectivity would always be among the desires of members (or even that agreement could be reached on what that degree would be), different “necessities” will emphasize different constructions of the constituent instrument.

At some point in the history of international organizations, the potential for functional expansion of organizations was considered limitless. This raised concerns that a possibility of *ultra vires* may not exist at all in a functional approach to organizations.⁵⁶⁶ However, such a claim can only be true under the assumption that functional necessity is automatically geared towards ever increasing the effectiveness of organizations. As a general characterization of the functional necessity concept this does not seem to be an accurate description of it. While there can be many sources as to why the proper activities of an organization are perceived differently between members (or between members and the organization), the end result is that there are several competing constructions of the functional character of the organization. In this sense there can be no inherent meaning to functional necessity which is detached from a particular conception of the proper range of activities of an organization.⁵⁶⁷

While this does not render the meaning of functional necessity a merely subjective exercise, it does indicate that any “right” meaning of the concept is present only as a result of a pre-existing shared view on what is functionally necessary.⁵⁶⁸ As was concluded when discussing the

⁵⁶⁶ This will be discussed more in detail in the next chapter.

⁵⁶⁷ For an interesting account of the discussion between Luhman and Habermas in this respect, see McCarthy (1978), at 213-232.

⁵⁶⁸ 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

idea of “trends” in reasoning on powers, it is only when there is a common view on the activities of an organization that the existence of implied powers seems to constitute a foregone conclusion. When there is no such agreement, then any functional necessity reasoning will stand out as controversial.⁵⁶⁹

1.1.4 Looking for Guidance in the Constituent Instrument

Although the discussion above is already indicative of the nature of implied powers reasoning, some remarks should also be made on the elements that are commonly enumerated as limits to the use of implied powers. This discussion will serve to add further depth to the characterization of the functional necessity concept. It will also shed some light on what it means to claim that an implied power is *ultra vires*.

The need of parameters for determining the legality of implied powers derives from a fear that such powers may otherwise turn into illegal revision of the statute. In looking for such parameters interest is turned to the constituent instrument as the prime source of the internal law governing the activities of an organization.⁵⁷⁰ 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 (its *raison d'être*) and hereby constitutes the goal that all powers of an organization work to achieve. To repeat, this also means 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 reference in Article 308 EC: 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 activities of organizations is affected by the vagueness of that object and purpose. For this reason also the interpretation of the object and purpose of the EC in applying Article 308 EC has been perceived as very generous, even to the degree that it has been doubted whether there is any activity which could

overview see Bix (1993), at 53-62. The idea of “contested concepts” has in political and legal writings been used in a variety of contexts, see Waldron (2002) on the rule of law, Sarooshi (2005), at 3-5 on sovereignty, and Bogdandy (2004), at 889-890 on democracy.

⁵⁶⁹ Also see the discussion above, Part I, Chapter 3.3. Out of authors writing on international institutional law, see Singer (1995), at 108.

⁵⁷⁰ See 1986 Vienna Convention, Article 2(1)(j), and Sands and Klein (2001), at 442.

not be included within the objectives of the Community.⁵⁷¹ If this is true, then no domestic area of member states could be seen as immune to Community law (as no sphere of society would be excluded from the legislative competence of the Community). Whatever activity would be regarded by members as politically desirable could be realized through use of Article 308.⁵⁷²

If the object and purpose of the EC has been characterized as vague, the same is certainly true of the object and purpose of the UN.⁵⁷³ There is simply no way of exhaustively defining what maintenance of international peace and security, or the development of friendly relations might mean. The fulfillment of the object and purpose is also an ongoing task, assuming new dimensions as expectations of international cooperation change. This means that the contents of notions such as “friendly relations” and “international peace and security” will change in time. As a result, the object and purpose cannot be defined in the abstract.⁵⁷⁴ More specifically this means that 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.⁵⁷⁵

As for using other elements of constituent instruments of organizations as limits on implied powers, in the *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* opinion was that an implied power incompatible

⁵⁷¹ Weiler (1999), at 54. The objectives of the EC are: to promote harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States. See EC Treaty, Article 2.

⁵⁷² Hartley (1999), at 57-58.

⁵⁷³ 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 centre for harmonizing the actions of nations. UN Charter, Article 1.

⁵⁷⁴ In this vein European integration has been characterized as an “expression of a political unity, of which the form and shape are to a large extent open”. Everling (1992), at 1060. The object and purpose of treaties has also been called an “enigma”. See Buffard and Zemanek (1998). In general, see Klabbers (1997).

⁵⁷⁵ For the example of the International Institute of Refrigeration, see above, Part III, Chapter 1.1.3.

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".⁵⁷⁶

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.⁵⁷⁷ 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.⁵⁷⁸

Similarly, in respect of the division of competence between organs, both the ICJ and the ECJ have emphasized respect for 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.⁵⁷⁹

Would there be no such respect, then the entire idea of different organs performing different functions would be lost. In EC law the principle is established explicitly in Article 7(1): "... Each institution shall act within the limits of the powers conferred upon it by this Treaty".⁵⁸⁰

⁵⁷⁶ *Effect of Awards*, ICJ Reports 1954, at 59. Also see Campbell (1983), at 526-527.

⁵⁷⁷ *Effect of Awards*, ICJ Reports 1954, at 56-59.

⁵⁷⁸ Martenczuk (1999), at 537.

⁵⁷⁹ *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 *Legality of the Use* 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 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", *Legality of the Use*, ICJ Reports 1996, para. 26.

⁵⁸⁰ EC Treaty, Article 7(1). In general, see Prechal (1998), at 273-277.

To regard the safeguarding of both express powers and a division of competence as a limit upon the use of implied powers fits nicely with the general assumption that the *raison d'être* of an organization must have a certain permanence. After all, these are the provisions upon which states reflect 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, the restrictive effect of express powers or a division of competence need not be as absolute as it first appears. As the *Certain Expenses* opinion of the ICJ demonstrates, an organ may have primary responsibility but insufficient or ineffective means at its disposal. Responsibilities may also be concurrent or shared, and, as in the case of the UN, allow for simultaneous treatment of matters.⁵⁸¹ The conclusion of the ICJ in the *Certain Expenses* opinion could also be recalled, which was that even 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.⁵⁸² Any implied power may under this presumption produce its effects even if it would be contrary to 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. As a result there are different dimensions to a determination of the legality of a power. In spite of the fact that an act is *ultra vires* the division of competence, this need not affect the obligations of members.⁵⁸³

Eventually the principle that the express wording of the constituent instrument should be respected, would also suggest that implied powers can be used only to the degree that the constituent instrument does not exhaustively define or explicitly exclude certain means. A common claim is hereby that if members have denied powers or the constituent instrument enumerates powers to a high degree (and

⁵⁸¹ 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.

⁵⁸² *Certain Expenses*, ICJ Reports 1962, at 168. For an overview of ECJ case law, see Cremona (1999), at 149-150.

⁵⁸³ Amerasinghe (2005), at 208-216, and Osieke (1983), at 240-246. Also see Gowlland-Debbas (1994), at 672.

that enumeration is unambiguous), there is little room for implied powers.⁵⁸⁴ However, not even an explicit denial of implied powers manages to introduce unambiguous criteria for settling the *vires* issue once and for all.

The Charter of the Organization of American States (OAS) is an interesting example of such a denial of non-express powers. The OAS Charter provides that: "The Organization of American States has no powers other than those expressly conferred upon it by this charter..."⁵⁸⁵ 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 a way not explicitly envisaged in the Charter.⁵⁸⁶ Assuming that every organization aims to persist in time, the underlying idea behind the reference of the OAS article to "express provisions" should perhaps then not be seen as excluding effective fulfillment of those powers (*effet utile*). However, such a move at the same time implicates that the OAS after all enjoys other powers than those "expressly conferred".

Eventually, never mind however plausible the 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. By way of yet another example, 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"

⁵⁸⁴ This is a common conclusion in the literature on organizations. See Amerasinghe (2005), at 98, Sato (1996), at 261, and Campbell (1983), at 524.

⁵⁸⁵ Charter of the Organization of American States (30 April 1948), 119 *United Nations Treaty Series* 4, Article 1.

⁵⁸⁶ See Caminos and Lavalley (1989), at 396.

(within the meaning of the Reparation case) to enable the organization effectively to discharge the functions laid upon it by its organic text.⁵⁸⁷

The passage was part of his 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.⁵⁸⁸ Undoubtedly the majority would have agreed on the quoted part of his argument. What is decisive is the view on *when* a power contradicts the constituent instrument, and what actually the “essential nature” is of the organization.⁵⁸⁹

While it would make 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 contention that an implied power will have a fundamental impact upon the character of the organization (thus rendering an implied power impermissible), will build on a particular view on what the relevant “fundamentals” are, why they are relevant, and how the “fundamentality” is affected. This means that an assumption that express provisions restrict the use of implied powers of organs will in the subsequent practice of the organization only be meaningful as part of the general assessment of the extent of powers of the organization. As the tasks of organs (and thus also how the tasks relate to each other) will evolve during the life of the organization (e.g. through the use of implied powers), so too will the limiting effect of the constituent instrument.⁵⁹⁰

It does not follow from this 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

⁵⁸⁷ 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.

⁵⁸⁸ Dissenting Opinion of Judge Shahabuddeen, *Land, Island and Maritime Frontier Dispute*, ICJ Reports 1990, at 40-41.

⁵⁸⁹ 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 provision/decision in different ways. See in this respect Byers (2004), at 166, on UN Security Council Resolution 1441.

⁵⁹⁰ As to EC law, see Prechal (1998), e.g. at 276 on Article 308 EC.

to know the character of an organization when considering membership in it. If this was the case it is easy to see that organizations could have a hard time attracting members.

However, the question of when an implied power contradicts other elements of the constituent instrument cannot be separated from the question of how the express wording is interpreted. An expansive teleological interpretation will not only arrive at an implied power, but will also stretch that teleology to affect the limiting impact of the constituent instrument. This means that although more detailed drafting *can* provide for more exact and detailed counterarguments when assessing the legality of implied powers, it cannot however exclude the use of implied powers. However detailed a constituent instrument may seem, a teleological interpretation of its provisions will affect both those provisions enabling expansion, and those that aim at restricting it.⁵⁹¹

As a result an ambiguity is always present in a determination of the *vires* of the activities of an organization. As an extension of powers will simultaneously interpret restrictions restrictively and vice versa, the balancing of restrictions and (necessary) powers can therefore render the implied powers and *ultra vires* doctrines intertwined. It is also for this reason that the implied powers and *ultra vires* doctrines have been referred to as different sides of the same coin and as different interpretations of the scope of powers.⁵⁹²

Finally it could be added that any exercise of powers (including implied powers) is also subject to the rules of international law.⁵⁹³ In fact, peremptory norms are by some authors considered the only true limits when transforming organizations.⁵⁹⁴ 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

⁵⁹¹ 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). Compare this with Morawiecki (1986), at 100-101, arguing that precise, detailed and exhaustive formulation of statutory rules dealing with powers is an effective way of decreasing the risk of excessive functional interpretation.

⁵⁹² White (1996), at 128.

⁵⁹³ 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.

⁵⁹⁴ See Simma (1999). Also see Orakhelashvili (2006), at 416-422.

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 striking a balance between the interests of international public order and the right to self-determination.⁵⁹⁵

Eventually this makes the *ultra vires* doctrine appear as a rather ambiguous limit on activities of organizations. Nevertheless, *vires* considerations do not disappear however extreme the teleology between members of an organization is. As soon as there is no unanimity among members on a teleological interpretation of the powers of an organization (or on the degree of teleology), 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 construction of the powers of an organization.

In the two courts where judicial review of powers of organizations has been made, both the ICJ and the ECJ have indeed found that the *vires* of powers is determinable.⁵⁹⁶ In general terms, then, it seems that functional necessity reasoning can be subject to a legality check. However, to say that an organ must follow its legal order is a truism. To state that an implied power should respect the purpose, express powers, and division of competence, only begs the question of how those purposes, powers, or that division is interpreted.

1.2 The Attributed Character of all Powers

The discussion on the function of express elements of constituent instruments as parameters by which to determine the scope (and ultimately the legality) of powers suggested that both the express elements of the constituent instrument and implied powers are part of the same definition of the powers of an organization. This means that both the expansion of the powers of an organization, as well as the limiting

⁵⁹⁵ Wheatley (2006), at 542 *et seq.* 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.

⁵⁹⁶ "The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment", *First Admission*, ICJ Reports 1948, at 64. On the ECHR case of the ECJ, see above Part II, Chapter 1.1.3. However, more commonly a machinery for reviewing the legality of acts of organizations is nonexistent. In an absence of review, or if there is no compulsory element in the review (either by the organ itself or a supervising organ), then the decision-making organ may simply refuse to reconsider its decision when facing a challenge by members. The situation is something of an impasse. Amerasinghe (2005), at 207-208. In general, see Osieke (1983).

effect of the provisions of constituent instruments, are subject to the same necessity assessment. As a result the concept of functional necessity cannot be looked to for guidance on whether it is the limiting or expanding side of the concept that is to prevail. As functional necessity can serve both to restrict and to widen the powers of an organization, this means that constructions of a constituent instrument can be described as functionally necessary. Hence, even keeping within the expressly attributed powers only can be considered functionally effective.

Eventually the close relationship between attributed powers and implied powers reasoning can also be approached in another way. Not only are the express provisions of constituent instruments and claims to implied powers intertwined in the determination of the functional necessity of those powers, eventually implied powers themselves can also be characterized as attributed. This underlines the role of consent as the source of all powers of organizations.

1.2.1 Attribution by Treaty

On the face of it, 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.⁵⁹⁷ Out of these the constituent instrument is the more permanent source for the powers of an organization, whereas nothing precludes states from conferring additional powers on an *ad hoc* basis upon organizations.⁵⁹⁸

The element of attribution indicates that something is given or transferred from one entity to another. The powers conferred by states on international organizations can be described as public powers of government in that they derive from the sovereignty of states.⁵⁹⁹ Sometimes this is provided for expressly in national constitutional law. The Belgian constitution, for example, states that: “The exercising of specific powers can be assigned by a treaty or by a law to institutions of

⁵⁹⁷ For examples, see Sarooshi (2005), at 19.

⁵⁹⁸ 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.

⁵⁹⁹ 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.

public international law”.⁶⁰⁰ The fact that powers of organizations as expressed in the constituent instrument are conferred upon them 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...”.⁶⁰¹ In EC law a different construction is used. The EC Treaty states in a more general fashion that: “The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein”.⁶⁰² While Article 2 of the EC Treaty identifies the purposes of the EC by reference to “a common market”, “an economic and monetary union”, and “the raising of the standard of living and quality of life”, Article 3 specifies what activities the achievement of these purposes shall include (such as common policies in areas of transport, fisheries and agriculture). For each of these policy areas powers are then conferred separately.⁶⁰³

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.⁶⁰⁴ 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 the state retains control over the exercise of the power, and whether the organization possesses an exclusive right of exercise of the power (or whether the state has a concurring right).⁶⁰⁵ However, 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

⁶⁰⁰ 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.

⁶⁰¹ UN Charter, Article 24(1).

⁶⁰² EC Treaty, Article 5.

⁶⁰³ EC Treaty, Article 2 and Article 3. Also see Bermann and Nicolaïdis (2001), at 487-490.

⁶⁰⁴ Sarooshi (2005), at 28.

⁶⁰⁵ 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).

in the sovereignty of the Union the principle of conferral still lies at the heart of Community competence.⁶⁰⁶ 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.⁶⁰⁷ A violation of the attributed powers doctrine in the *Legality of the Use* opinion basically meant that in the mind of the ICJ, the power claimed by the World Health Assembly had not been conferred upon the organization by the WHO members.⁶⁰⁸

1.2.2 Attribution by Implication

Differences in degree of liberality with which to construct powers of organizations has in the case law discussed been expressed in different terms. The more restrictive the interpretation that was proposed, the more the attributed or conferred character was emphasized. The idea behind an emphasis on the attributed character of powers is that organizations (and their organs) can only do what they are empowered to. In its most narrow definition, competences would be restricted to express powers only, as this is the empowerment that stands out explicitly from the constituent instrument. For this reason the dissent in the *Reparation for Injuries* and *Effect of Awards* opinions to the finding of implied powers built upon the intentions of the drafters to make their case.⁶⁰⁹ Similarly the ICJ in the *Legality of the Use* 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”.⁶¹⁰

However tempting it would be to think of the attributed character of powers as the opposite to implied powers, this is not all there is to the relationship. What makes the idea of attributed powers more complex is that eventually also implied powers can be characterized as attributed. In fact, the ICJ itself in the *Reparation for Injuries* opinion not only derived an implied power (for the UN to bring claims in respect of damage caused to

⁶⁰⁶ See Bermann and Nicolaïdis (2001), at 485-486, and Martin Martinez (1996), at 101 *et seq.*

⁶⁰⁷ See *Legality of the Use*, ICJ Reports 1996, para. 25, “International organizations ... are invested by the States which create them with powers...”.

⁶⁰⁸ See above, Part II, Chapter 1.1.3.

⁶⁰⁹ See especially the dissent by Judge Hackworth in both opinions, above, Part II, Chapter 1.2.1.1.

⁶¹⁰ *Legality of the Use*, ICJ Reports 1996, para. 25.

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 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.⁶¹¹

Apart from the reference to conferral it is also interesting to note the intended character of the implied powers. The reference to “necessary intendment” was repeated by the ICJ in the *Effect of Awards* opinion.⁶¹² The references 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”.⁶¹³ Or as Judge Shahabuddeen put it: “In the last analysis, all the powers of a body must be conferred by its constituent instrument, whether expressly or impliedly...”.⁶¹⁴

When characterizing the powers of organizations in general in the *Legality of the Use* 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.⁶¹⁵

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”.⁶¹⁶ Read in this way, the ICJ in effect seemed to be saying that attributed powers come in two forms: as express provisions and as implied powers. 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.

⁶¹¹ *Reparation for Injuries*, ICJ Reports 1949, at 184, emphasis added.

⁶¹² *Effect of Awards*, ICJ Reports 1954, at 57.

⁶¹³ *Reparation for Injuries*, ICJ Reports 1949, at 184.

⁶¹⁴ See Dissenting Opinion of Judge Shahabuddeen, *Land, Island and Maritime Frontier Dispute*, ICJ Reports 1990, at 41 (emphasis added).

⁶¹⁵ *Legality of the Use*, ICJ Reports 1996, para. 25.

⁶¹⁶ *Legality of the Use*, ICJ Reports 1996, para. 25.

In EC law the connection is even clearer. As Article 308 EC is an express provision that provides for the use of implied powers, the possibility for implicit expansion of Community competence is undoubtedly intended by the members. Perhaps something to this effect was also in the mind of the ECJ in the *ECHR* opinion, when characterizing Article 308 as: "... being an integral part of an institutional system based on the principle of conferred powers".⁶¹⁷

These contentions seem to reconcile the two doctrines. Klabbers suggests 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 undoubtedly have expressly attributed them to the organization.⁶¹⁸ 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 *Legality of the Use* 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] ...".⁶¹⁹ If that common interest includes the use of implied powers, then such implied powers can be described as conferred upon the organization.

Against this background an image of reasoning on powers where the attributed powers doctrine and the implied powers doctrine emphasize consensual and non-consensual elements differently from one another seems inaccurate. To restrict an organization to expressly conferred powers only, could hamper the functional character of the organization. In order to underline its independent nature and ensure a degree of functional effectiveness a development of powers may be needed. However, as soon as this results in the exercise of implied powers, the conferred character of those implied powers needs to be emphasized in order to firmly ground those powers (and the possible impact of the use of them) in member consent. Blokker warns that: "the 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", or, it could be added, where

⁶¹⁷ *ECHR*, [1996] European Court Reports I-1759, para. 30.

⁶¹⁸ The expression "reconciliation" is used by Klabbers (2002 "An Introduction"), at 73. His reconciliation is however somewhat different.

⁶¹⁹ See *Legality of the Use*, 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".

there is no agreement among members on that role.⁶²⁰ The emphasis on 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 serve to emphasize that there are no powers that an organization can possess without a basis in member consent.⁶²¹

There are some consequences to a characterization of all powers of organizations as conferred. If all powers are conferred, then an emphasis on the conferred character of organizations no longer manages to capture any specific features of the powers of that organization. An emphasis on the attributed character of powers does not consequently entail an emphasis on the status quo or a restrictive image of organizations. Nor does a lack of conferral in this use of the notion indicate the absence of express provisions, but a lack of powers altogether (both express and implied). Conferral/attribution becomes a notion by which to describe the proper reach of the totality of the powers of an organization.

As a connected issue, if all powers can be characterized as conferred, it would seem to make no sense to use attributed powers and implied powers as counterparts to each other. After all, if members decide to confer implied powers upon an organization, this means that they do not perceive that the exercise of those implied powers raise sovereignty concerns. In such a case the distinguishing force of the two doctrines, as different ways of constructing powers of organizations, is lost.

This does not mean that the two doctrines become useless. There is still an important difference between expressly attributed powers and implied powers. In a most basic sense this means that the scope of express powers is determined in the constituent instrument (albeit subject to interpretation). As to implied powers, the constituent instrument only serves as a guideline and point of reference for assessing their existence and defining their extent. Members, when founding an organization,

⁶²⁰ Blokker (2002), at 314.

⁶²¹ 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.

expressly provide it with those functions and powers they believe necessary for the fulfillment of the assigned object and purpose. Members can also assume that the organization will evolve over time. If and when such a time comes, the powers of the organization can be developed through reliance on the implied powers doctrine.

In a strict and limited 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 an organization. However, as soon as there is a possibility that an organization possesses implied powers, then the attributed powers notion can also be used in a wider sense so as to indicate whether or not there is consent among members to the use of implied powers. If there is agreement among members on the existence and use of implied powers, then those implied powers can be described as attributed. However, if there is disagreement, then a claim that the organization should remain within its attributed powers once again establishes itself as the opposite to an implied powers argument. In this way the sense in which the attributed powers doctrine is used (with its equivalents “principle of conferral” and “principle of speciality”) can also serve to express the approval (or disapproval) of the use of implied powers. On the one hand implied powers can be objected to by claiming that an organization has all the necessary means among its explicitly attributed powers. On the other hand an approval of implied powers can be expressed by referring to the conferred character of those powers.

1.3 Concluding Remarks: On the Emptiness 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 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 different positions on a dichotomy between the independence of the organization and concerns of member sovereignty. A focus on these doctrines individually has served to show how this dichotomy can also be repeated within the doctrines. The image of the two doctrines as competing is therefore not always accurate. Put differently, both doctrines can be put to various uses. As both doctrines are devoid of abstract contents, they can serve to emphasize a number of positions in the dichotomy.

In respect of implied powers and more specifically the functional necessity concept at the heart of that doctrine, the ideological heritage of the functional necessity concept suggests that it is tilted towards increasing the effectiveness of organizations. However, when looking closer it seems that even contradictory claims can be presented as functionally necessary. After all, that concept also has a restrictive effect upon organizations. Such 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 a characterization of the implied powers doctrine. While it is hard to see how the implied powers doctrine as such could serve to outright restrict powers of an organization, the demonstration of contrasting uses of functional necessity reasoning suggests that opposite constructions of powers could also be presented through the implied powers doctrine.

This deserves further explanation. The point of departure is that the functional necessity concept lies at the heart of the implied powers doctrine. It is in order to enhance the functionality of the organization that the implied powers doctrine serves to add to the powers of the organization. In this sense the implied powers doctrine is geared towards increasing the effectiveness of organizations. However, while the very essence of the implied powers doctrine is to add to the body of powers of an organization, the discussion of the functional necessity concept suggested that this concept can be used in a more varied sense. An emphasis on the functional efficiency of an organization need not hereby automatically lead to a search for widened competence. Restricting the organization to its express powers only can also be claimed to be functionally necessary.

Further, once the possibility of using implied powers is emphasized, the multiple uses to which functional necessity reasoning can be put can manifest itself in a disagreement on which implied powers are functionally necessary. In such a case different constructions of implied powers will appear more and less expansive of the activities of the organization, hereby again potentially reproducing the dichotomy between safeguarding member sovereignty and enhancing the effectiveness of the organization.

Turning to the attributed powers doctrine, an emphasis on the limited character of organizations and on a restrictive construction of powers, is often backed up by the claim that this takes member consent more properly into account. Indeed, this is also how the attributed powers doctrine stands out when used to oppose the use of implied powers. In such a use of the doctrines, an emphasis on attributed powers serves to safeguard member prerogatives against an expansion of the

activities of the organization. However, any such conclusion is put into doubt as even implied powers can be characterized as attributed. In such a use an emphasis on the attributed character of powers no longer serves to express a restrictive approach to powers of an organization, but is rather concerned with whether there is consent by members to the exercise of such a power.

As a result, the differences between the two doctrines begin to disappear. Simply put, a reference to the attributed powers of an organization can entail implied powers, whereas the logic of functional necessity can serve both to derive implied powers from the object and purpose of an organization as well as to safeguard the status quo. This insight also questions some of the assumptions commonly attached to the doctrines. As attributed powers reasoning (in its traditional sense) emphasizes the status quo, it is only natural that an emphasis on attributed powers 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 have been considered to import an element of politicization and uncertainty into the definition of powers of an organization. However, any such conclusions are questioned by the discussions in the preceding chapters. The fact that each doctrine is capable of expressing different constructions of powers only underlines the political nature of any use of the doctrines.

Another basic assumption that is affected by this characterization of the doctrines is the claim that the doctrines bear with them some inherent guidance on how to construct powers of organizations. The attributed and implied powers doctrines *can* be used to present different constructions of powers of organizations. An emphasis on the attributed character *can* serve to safeguard member prerogatives through the preservation of the status quo, whereas the emphasis on functional effectiveness *can* serve to provide additional means for the organization (which were previously the domain of members).⁶²² It could even be claimed that the doctrines acquire their contents out of this contrasting use of them. In other words, the uses to which these doctrines have been put become understandable with this dichotomy in mind.

⁶²² As was seen in the *Legality of the Use* 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. On the case, see above, Part II, Chapter 1.1.3.

However, this is only one way of using the doctrines. The difficulties with attaching any concrete normative content to the doctrines leads to the suggestion that there need not eventually be a whole lot separating the two from one another. As the discussion on limits and settling the *vires* of powers demonstrated, all constructions of powers of organizations are in a sense assessments of the necessity of certain action. If there is agreement on the necessity of the exercise of a power, then the limiting effect of the express wording of the constituent instrument is nonexistent. It is in such a case that the implied power can be characterized as attributed or conferred. Locating the dichotomy between members and the organization not only between, but also within the attributed and implied powers doctrines, hereby brings with it a useful insight. Although the two doctrines may be used (and have been used) to express different images of the independence of the organization, the members of the organization always loom in the background of both constructions of powers.

2 Breaking Up the Doctrine of Constitutionalism

The doctrine 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. In between these constitutional traditions some differences have been noted. In rough terms, European constitutionalism (especially the British and German traditions) has been seen to emphasize a judicialization of governmental decision-making more strongly than American constitutionalism, which on its part has been seen to gear its primary interest towards political participation of citizens.⁶²³

The national origin does not however mean that constitutionalism could only be discussed in state contexts. As was indicated in Part II, a number of discussions on constitutionalism beyond the state can be identified. However, because of its national origin, constitutionalism carries with it the national constitutional traditions to the international level.⁶²⁴ In accordance with the different national constitutional traditions, this means that constitutionalism can be seen both to entail an idea of limiting powers (of both organizations and of governments of member states), but it can also be seen to emphasize a pursuit of the common good, and above all the creation of a political framework for enabling

⁶²³ See Möllers (2004), esp. at 129-134, and in general Rubenfeld (2004).

⁶²⁴ Möllers (2004), at 129, and Walker (2003 "Constitutionalising"), esp. at 29-35.

deliberation on that common good.⁶²⁵ Another consequence is that discussions over the exact contents of constitutionalism (and how to reconcile these different aspects of constitutionalism) will build on discussions that have emerged as national debates.⁶²⁶

It should also be made clear at the outset that any constituent instrument of an organization will fail in comparison with national constitutions on accounts such as: the degree of delegated authority (especially to a judiciary), the creation of a community or union, accountability of institutions 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 comparable instruments for governance.⁶²⁷ For this reason some authors object to using the constitutionalism concept beyond a domestic context.⁶²⁸ Others recognize that while constitutionalism in organizations cannot carry with it all the dimensions that it has in the state context, some elements can nevertheless be useful. The consequent question is: What are those elements?

A constitutionalization of organizations was earlier found to express a number of ideas such as: limiting the political power of organizations and subjecting organizations to the rule of law, revitalizing international organizations and a more efficient exercise of legal means in respect of members, and a focus on the legitimacy of decision-making in organizations. In a very general sense, a constitutionalization of organizations was also characterized as an attempt to structure and come to terms with issues of governance in organizations (and with it, the issue of powers). The difficulty with pinpointing any exact contents of constitutionalism is surely also one of the main reasons for why it is perceived as controversial in the context of organizations.⁶²⁹

In the following the concepts “constitutionalization” and “constitutionalism” will not serve to indicate any particular emphasis among these different ideas, but will serve as generic terms through which to capture different approaches to organizations. When discussing the contents of the constitutionalism concept more closely below, interest will first be turned to the idea of a judicialization of organizations. The second main theme will be to explore the emphasis of constitutionalism on democratic legitimacy. In focusing on these two aspects of constitutionalism the aim is first of all to demonstrate how these aspects

⁶²⁵ In the EU context, see Maduro (2004).

⁶²⁶ Craig (2001), at 126.

⁶²⁷ Alvarez (2003), at 431-432.

⁶²⁸ See Walker (2008), at 519-522 for examples of arguments.

⁶²⁹ See above, Part II, Chapter 3.2. 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.

of constitutionalism take on the task of structuring the work of international organizations, and to critically assess some of the problems that the framing of activities of organizations in terms of constitutionalism might run into. This critical discussion will reveal some of the tensions that inhere in constitutionalism. As will be seen, these tensions can also echo the member-organization dichotomy at the heart of organizations. Whether there may be some merit to dealing with organizations in terms of constitutionalism in spite of this, is a question that will be returned to towards the end of the discussion.

2.1 Identifying Formal and Substantive Aspects of Constitutionalism

Although the constitutionalism concept 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,⁶³⁰ formal and substantive conceptions of constitutionalism (and the rule of law),⁶³¹ thick and thin versions of the rule of law,⁶³² and between liberal and republican democracy,⁶³³ are just some examples of conceptual pairs through which the dichotomy is expressed.⁶³⁴ In the following the formal/substantive vocabulary will be used in order to distinguish between the judicial and democratic aspects of constitutionalism.⁶³⁵

To begin with the first of these, the modern notion of the rule of law “reflects 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”.⁶³⁶ As to its formal side, constitutionalism is in

⁶³⁰ Bellamy (2001), at 22.

⁶³¹ Craig (1997). The dichotomy is also used by Wiener (2003), e.g. table 1, at 5.

⁶³² Hutchinson (1999), at 198. Also see Tamanaha (2004), at 91.

⁶³³ Bellamy and Castiglione (1999).

⁶³⁴ 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.*

⁶³⁵ Although this vocabulary is commonly used, this does not mean that there would be complete agreement on the contents of either. While a focus on democracy is in the following addressed as substantive constitutionalism, Tamanaha includes it as an aspect of formal constitutionalism. See Tamanaha (2004), at 92, and esp. note 2.

⁶³⁶ Loughlin (2000), at 79.

essence about placing legal limits. At the international level this takes the form of structuring the international legal system and organizations through legal standards. The driving force of formal constitutionalism is the maintenance of the cohesion and effectiveness of the legal system, while trying to avoid entanglement in political debates.⁶³⁷

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.⁶³⁸ Defined in this way, formal constitutionalism corresponds closely with the rule of law idea.⁶³⁹ The underlying ideology of the rule of law on its part can be captured through the slogan: a government of laws, not of men. This jurisprudential ideal at the heart of the rule of law emphasizes rule-oriented behavior as the safeguard against arbitrariness and discretionary authority.⁶⁴⁰

From the expectation that law is to constitute the limit of permissible action certain things follow. First of all there must be law. General rules that are binding on all (including officials and the legislature), is a precondition for limiting government by law. These rules must also be justiciable, meaning that the judicial procedure should serve to implement the superiority of constitutional law and to assess the compatibility of legal acts with the constituent instrument.⁶⁴¹ Furthermore, a division of powers is needed in order to distinguish the exercise of governmental powers from their supervision. An independent judiciary constitutes a fundamental part of this idea of a separation of powers.⁶⁴² As to its vision of judging, formal constitutionalism emphasizes 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.⁶⁴³

All of these aspects of formal constitutionalism can be found in discussions on organizations.⁶⁴⁴ Expanding the body of laws and improving the law-making capacities of international organizations is one way of presenting the need for a constitutionalization of the WTO. An

⁶³⁷ See Craig (1997), at 479, and Fassbender (1998), at 551.

⁶³⁸ Hirschl (2004 "Hegemonic"), at 9.

⁶³⁹ Allan (Trevor) (2001) expresses this as the "rule of law ... as a principle of constitutionalism", at 31.

⁶⁴⁰ 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.

⁶⁴¹ See Raz (2001), at 153.

⁶⁴² Allan (Trevor) (2001), at 31-32.

⁶⁴³ In general, see Hutchinson (1999), at 198-199. Also see Tamanaha (2004), at 114-126.

⁶⁴⁴ The following builds on the examples discussed above in Part II, Chapter 3.2.

emphasis on the existing hierarchies of laws is on its part a central element of EU and UN constitutionalism. A principle of separation of powers is perhaps most clearly present in EC law through the principle of institutional balance. That the idea of separation of powers finds its clearest formulation in EC law is of course no coincidence. The more supranational features an organization displays, the stronger the need for a clear division of powers will presumably be. As the main idea behind that principle is to limit and balance the discretion of governing bodies, from a member perspective this becomes all the more important the greater the powers of an organization are.⁶⁴⁵ 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.⁶⁴⁶ The importance of judicial mechanisms is on its part commonly emphasized as an important means for avoiding the politicization of cooperation in organizations.

Notably, although the rule of law is often discussed in order to emphasize the existence of legal 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.⁶⁴⁷ With this in mind also the many forms of judicial input that are advocated as elements of the constitutionalization of organizations begin to make some sense. Review of the political organs of the organization (lack of which has been considered a flaw with constitutionalism in 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) have all been presented as core features of constitutionalism in organizations. Although there are differences between these in respect of who is the target of the judicial review, all of these can be (and are) seen as crucial elements of a formal constitutionalization of the legal order of organizations. The issue can also be put in the following way: upholding the rule of law can mean subjecting the activities of organizations to judicial review, it can mean building an international or global rule of law, and it can mean strengthening the rule of law in the member states of an international organization (through judicial enforcement of the obligations of members). This last aspect is particularly prominent as the

⁶⁴⁵ The principle of institutional balance has even been considered one of the most important principles of EC law. See Prechal (1998), at 280-281, and Schermers and Blokker (2003), at 165.

⁶⁴⁶ See White (2001), at 99, and Cass (2005), at 109-110.

⁶⁴⁷ Or differently, that law (and not the arbitrary will of persons) should govern society at large, Hutchinson (1999), at 196.

approach of human rights institutions such as the Human Rights Committee.⁶⁴⁸

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 system of political rule.⁶⁴⁹ 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 source for collective decision-making.⁶⁵⁰ Instead of emphasizing the existence and establishment of legal procedures, hierarchies, and mechanisms for judicial supervision, this means that interest is geared towards the nature of the polity itself and especially the establishment of a link between governmental institutions and societies.⁶⁵¹ 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.⁶⁵² It is this nexus that substantive constitutionalism is concerned with. In modern constitutionalism this idea of the “constituent power” (of the people) is typically expressed through an emphasis on democratic governance.⁶⁵³

In European constitutional debates, a classical discussion took place in the 1920s on the relationship between constitutional adjudication and democracy in the Weimar Constitution.⁶⁵⁴ The question of how to balance judicial and democratic elements of constitutionalism has been even more vigorous in US constitutional debates.⁶⁵⁵ This tension has assumed central stage in debates on constitutionalism (in states) to this date. In the following chapters some of the classical themes of the debate on how to balance formal and substantive aspects of constitutionalism will be discussed with a view to international organizations.

⁶⁴⁸ In the following, these different aspects of judicialization will not be systematically distinguished. Instead, the merits and demerits of judicialization will be discussed on a general level, as a question of developing the judicial capacity of organizations.

⁶⁴⁹ 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.

⁶⁵⁰ Walker (2008), at 528-529.

⁶⁵¹ In the WTO context, see Howse and Nicolaïdis (2001), e.g. at 228.

⁶⁵² Allott (2001), at 91-92.

⁶⁵³ Walker (2008), at 530-531.

⁶⁵⁴ For a brief overview of the discussion between Hans Kelsen and Carl Schmitt, see Grimm (2000), at 103-105.

⁶⁵⁵ For one overview of the discussion in US constitutional law, see Zurn (2007).

2.2 Formal Constitutionalism and its Critique

2.2.1 Judicializing Organizations

In discussions on the constitutionalization of organizations, the need of mechanisms for judicial review is a common claim, often also regarded as intrinsically linked to the rule of law. In other words, the fundamental flaw with realizing the rule of law on the international plane is commonly located in the voluntary nature of adjudication.⁶⁵⁶ An emphasis on the judicialization of international organizations hereby fits nicely with the more general trend towards a judicialization of international law that many authors identify.⁶⁵⁷ In this vein Teubner argues that it is the phenomenon of global judicialization that implies the possibility that constitutionalization processes may be usable even outside the state context.⁶⁵⁸ However, 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.⁶⁵⁹

As indicated, there are many different aspects of organizations that are addressed through calls for their judicialization. One of these is an emphasis on dispute settlement. The current main policy of 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.⁶⁶⁰ Many organizations in fact explicitly confer interpretative and dispute settlement tasks upon political organs.⁶⁶¹ Although some organizations authorize judicial organs such as the ICJ or arbitral tribunals to settle

⁶⁵⁶ Allain (2000), at 4-7.

⁶⁵⁷ 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.

⁶⁵⁸ Teubner (2004), at 15-17.

⁶⁵⁹ For such a claim in respect of the US and France, see Ferejohn and Pasquino (2003), at 247-248.

⁶⁶⁰ Klabbers (2002 “An Introduction”), at 253. Schermers and Blokker (2003), at 853 suggest as possible reasons that external organs do not always possess the necessary expertise, or that they are too formalistic.

⁶⁶¹ Among UN specialized agencies organizations 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).

interpretative disputes, practice indicates that those organizations rarely make use of the possibility and favor a political process instead. Settlement of disputes by political organs has been especially apparent among economic organizations.⁶⁶²

Out of this general pattern EC law stands out as the supreme exception, as the ECJ has exclusive powers of judicial review. Whereas the ICJ only possesses a power of incidental judicial review of UN decisions, the ECJ is charged (and much utilized) with the task of ensuring that the law is observed in the interpretation and application of the EC Treaty.⁶⁶³ As to the question of why judicial settlement is utilized in only a limited number of organizations, two interrelated explanations have been proposed. Firstly, it is argued that states wish to control policy-making in international organizations. They therefore do not want to create organs that escape their control and transfer the right of interpreting the constituent instrument beyond their reach. Secondly, in most cases states have attributed only limited powers to an organization, which means that state consent is needed for binding decisions (through treaty-ratification). Consequently, the argument goes, there is no need for judicial settlement. By converse reasoning, the exercise of substantive powers serve as an explanation for why such review exists in EC law.⁶⁶⁴

Arguments in favor of a judicialization of organizations also take hold of 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 even by bureaucrats. This potentially creates a need for judicial review.⁶⁶⁵ Moreover, an absence of parliaments and

⁶⁶² 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. As to economic organizations, see Voitovich (1994), at 127-138.

⁶⁶³ Article 220 of the EC Treaty reads: "The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed". For a discussion on ICJ review of Security Council decisions in contentious cases and advisory opinions, see Schweigman (2001), at 267-285.

⁶⁶⁴ For these conclusions, see Schermers and Blokker (2003), at 485 and 858, and van Themaat (1996), at 254. In a way this logic is also followed *within* EC law, as the powers of review of the ECJ only concern binding acts and excludes opinions and recommendations. See Article 230, EC Treaty.

⁶⁶⁵ See Klabbers (2005 "Straddling"), at 817-818 for the example of the UN Sanctions Committee.

democratic control of executive powers underlines the need for judicial supervision of the exercise of authority.⁶⁶⁶ 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.⁶⁶⁷ Furthermore, the more substantive the powers of the organization are, the more acute the question of review becomes. In this vein any development in the powers of the UN Security Council have always also led to a discussion on the possibility of legal control of the Council.⁶⁶⁸

Whether as a question of dispute settlement or supervision, political organs are regarded as ill-suited for playing an impartial role. In particular, political organs of organizations are accused of seeking to increase their relative power, hereby making them especially poor adjudicators of issues of powers.⁶⁶⁹ Also an improvement of the 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.⁶⁷⁰

A judicialization of organizations is also defended on grounds of effectiveness. Efficiency arguments build both on increasing the compulsory elements of the legal order and the enforcement capacities of organizations, as well as on remedying internal flaws with upholding the rule of law.⁶⁷¹ In the case of the latter, the increased efficiency of the implementation of the rules of the organization is seen to follow from the avoidance of politicization. In the case of the former it is the improvement in the binding nature of the legal order itself that is described as a process of constitutionalization. This was also one of the central features of EC

⁶⁶⁶ Petersmann (1999), at 141-142.

⁶⁶⁷ See Rosenne (1989), at 224-225.

⁶⁶⁸ For a recent discussion, see Cronin-Furman (2006).

⁶⁶⁹ Sarooshi (2005), at 119, and de Wet (2004), at 120 (both with further references).

⁶⁷⁰ On constitutionalism and the WTO, see above, Part II, Chapter 3.2.2.2. Also see Franck (1995), at 630-631, Akande (1997), at 336, and de Wet (2004), at 116 *et seq.*

⁶⁷¹ Petersmann (1999) discusses both of these as processes of constitutionalization of organizations, at 140-143. 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”. 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 international law. See Allain (2000), at 180-186.

constitutionalism as defined by the ECJ.⁶⁷² Constitutional rights and freedoms (in the context of organizations, the sovereign rights of states) that limit the exercise of both legislative and executive power are also commonly claimed to be in need of judicial enforcement in order to be of practical value.⁶⁷³ In picturing the WTO dispute settlement body as a potential engine behind constitutionalization, arguments seem to go both ways: such judicialization is pictured as both capable of generating constitutional law by amalgamating doctrines such as division of power, and by expanding and constructing the legal system itself.⁶⁷⁴ However, the dispute settlement function also has a monitoring and supervisory aspect to it.⁶⁷⁵

An emphasis on the role of the judiciary also builds on certain assumptions regarding the characteristics of courts. It is 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). The key goal of the rule of law is eradication of the arbitrariness of power. In this respect it is interesting to note that in discussing the best way to constitutionalize the EC legal system during the work of the Constitutional Convention, the argument did arise whether such constitutionalization would require outright abolishment of evolutionary powers. A proposal for the elimination of EC implied powers (Article 308 EC) 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 Community than anything else. Be that as it may, at any rate the proposals themselves serve to demonstrate a strong faith in the judiciary as a source of increased legal certainty.⁶⁷⁶

Whether the aim is to limit powers of organizations or to widen them through use of implied powers, what the rule of law promises is an impersonal and general assessment of the question.⁶⁷⁷ Such impersonality

⁶⁷² See above, Part II, Chapter 3.2.2.1.

⁶⁷³ Allan (Trevor) (2001), at 161. As to organizations and the sovereign rights of members, see Sarooshi (2005), at 118-120.

⁶⁷⁴ Cass (2005), summarizing at 178.

⁶⁷⁵ Iwasawa (2002).

⁶⁷⁶ 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". On the issue, see Bermann (2004), at 69-70. Also see de Búrca and de Witte (2002), at 213 *et seq.*

⁶⁷⁷ Weinrib (1987), at 59-60, and Steinberg (2004), at 250 *et seq.*

and generalizability can only be achieved through objective verification by judges. Only in this way, the argument goes, can discretion be overcome and a predictable legal system be achieved. 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.⁶⁷⁸

Eventually, the fact that a judicialization of organizations is defined both as the supervision of the organs of the organization, and as the supervision and enforcement of obligations of members corresponds to the idea that all subjects, both ruled and ruler, should be governed by the rule of law. The judiciary serves both to supervise unaccountable and undemocratic political organs of organizations, and to enforce those decisions vis-à-vis the members of the organization. At the same time, irrespective of which of these functions the review performs, the judicialization can also be at odds with the political side of organizations.

2.2.2 Potential Problems

2.2.2.1 Separating Political and Judicial Questions

An emphasis on judicial settlement builds on the capacity of judicial organs to avoid engagement in the political side of decision-making in organizations. Constitutionalism in this form is viewed as “the means of placing law, or the rule of law, above politics”.⁶⁷⁹ In this view also the legitimacy of courts derives from their capacity to keep political and judicial issues separated. Judicial review can also be claimed to add legitimacy to decisions of political organs. This follows from that the review brings upon the decision “the prestige which derives from principled impartiality”.⁶⁸⁰ Turned around, this 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).⁶⁸¹ 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

⁶⁷⁸ See Fernandez Esteban (1999), at 91-94, and Behboodi (1998), at 57-62.

⁶⁷⁹ Howse and Nicolaïdis (2001), at 229. Also see Klabbers (2004 “Constitutionalism”), at 45-49.

⁶⁸⁰ Franck (1995), at 630-631.

⁶⁸¹ For a brief overview on the “political questions” and “non-justiciability” doctrines, see Reinisch (2000), at 92-99.

characterized as "... an essential requirement of the rule of law, enabling us to maintain a genuine distinction between law and politics".⁶⁸²

In all, the distinction between political and legal issues expresses itself through a number of conceptual distinctions, such as between: adjudication/legislation, courts/legislatures, applying the law/making the law, law/politics, objective/subjective questions, and professionally/electorally accountable officials.⁶⁸³ 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.⁶⁸⁴ Such express clauses do not however serve to determine which issues are to be characterized as political and which issues are of a judicial nature. Instead, this determination is 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 the ICJ contended that interpretation is an essentially judicial task. While Judge Koretsky argued that the question put to the Court was too political to be dealt with by the ICJ, the Court recognized 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".⁶⁸⁵

The underlying question on what makes interpretation 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).⁶⁸⁶

⁶⁸² Allan (Trevor) (2001), at 198. Also see Alvarez (2005), at 521 *et seq.* for a discussion of the preconditions for legitimate international adjudication.

⁶⁸³ Kennedy (1998), at 26.

⁶⁸⁴ 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.

⁶⁸⁵ See Dissenting Opinion of Judge Koretsky, *Certain Expenses*, ICJ Reports 1962, at 254, and the Advisory Opinion at 155. In general, see Sugihara (1997), Martenczuk (1999), at 528, Gordon (1965), at 800, and note 37, and Szafarz (1993), at 10-12.

⁶⁸⁶ *Legality of the Threat or Use of Nuclear Weapons*, (Advisory Opinion, 8 July 1996), ICJ Reports 1996, para. 13 (hereinafter *Nuclear Weapons*).

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:

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.⁶⁸⁷

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.⁶⁸⁸

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.⁶⁸⁹ In the *Prosecutor v Duško 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

⁶⁸⁷ *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 *Legality of the Use* 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.

⁶⁸⁸ *Nuclear Weapons*, ICJ Reports 1996, para. 18.

⁶⁸⁹ 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), at 144.

only for it; it is certainly not a justiciable issue but one involving considerations of high policy and of a political nature.⁶⁹⁰

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.⁶⁹¹

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.⁶⁹² However, for many authors the example of the *Prosecutor v Duško Tadić* case (along with other examples) suggest that the dichotomy between political and legal issues (as a matter of justiciability) may be an artificial one.⁶⁹³

However, there is eventually an even more fundamental point to be made. Whereas the justiciability issue explores whether a question is capable of being solved by reference to legal rules, it still falls far short of taking into account the inherently political character of any legal

⁶⁹⁰ *Prosecutor v Duško 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, 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”.

⁶⁹¹ *Prosecutor v Duško 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.

⁶⁹² *Nuclear Weapons*, ICJ Reports 1996, para. 18.

⁶⁹³ Schweigman (2001), at 264 with further references.

dispute.⁶⁹⁴ In separating political and legal issues, the assumption is that there can be an application of rules which does not simultaneously constitute an expression of values. However, international law is not only about rules, but is also an intellectual, political and cultural tradition. This means that the issue of justiciability is also a question about the possibility of translating the values and priorities of the parties to a dispute, into the language of international law.⁶⁹⁵ When 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”.⁶⁹⁶ However, as the law itself is a result of political agreement, the judicial review of any legal question cannot escape making a political claim.⁶⁹⁷

This point about the nature of adjudication is not of concern only for judicial review as such, but affects all efforts to put faith in expertise (judicial or other) as a safeguard against politicization of disputes. Fatouros demonstrates the same point in respect of the World Bank where the assumption of a technical, apolitical approach to problems of economic development results in an emphasis on technical agencies as administrators of World Bank projects.⁶⁹⁸

A similar faith in the apolitical nature of legal rules often also underlies an emphasis on procedural rules as an attempt at removing ambiguity from decision-making. The idea can 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 in ensuring predictability and avoiding politicization of trade issues. Adjudicative bodies assume a central role within this approach as they are ultimately charged with the task of applying the (apolitical) procedural rules.⁶⁹⁹ In this way also a

⁶⁹⁴ This definition of justiciable disputes is made by Gowlland-Debbas (1994), at 652.

⁶⁹⁵ Koskenniemi (1999), at 507.

⁶⁹⁶ 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).

⁶⁹⁷ Hutchinson (1999), at 216-217.

⁶⁹⁸ Fatouros (1980), at 23.

⁶⁹⁹ See overview in Cass (2005), at 99-117, and 143.

faith in the apolitical nature of procedural rules and an emphasis on judicialization often become intertwined.⁷⁰⁰

The question is not whether procedural criteria are useful or not. There is no reason to doubt the importance of procedural criteria as means for structuring political debate.⁷⁰¹ It is rather when faith is put in procedural rules as a way to escape political questions that doubts can be expressed. By way of an example, adding to the procedural requirements of Article 308 EC (as the plan is through the Treaty of Lisbon) does indeed add to the points through which to challenge the use of implied powers by the EC. A strengthening of the role of the European Parliament in decision making under Article 308 will undoubtedly be a welcomed development from a democratic point of view.⁷⁰² However, such a change does not affect the fact that the article can still be used expansively or restrictively. With this in mind a claim that a procedural emphasis would remove the political dimension from that decision becomes quite uncertain. Instead, any distinction between procedure and substance is bound to be controversial as they lapse into each other.

Article 39 of the UN Charter can also 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.⁷⁰³ Thus, determinations of “threats to the peace”, “breaches of peace”, and “acts of aggression” can be considered procedural criteria. 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”. Again any 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

⁷⁰⁰ For Allan (Trevor) (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.

⁷⁰¹ 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.

⁷⁰² On the wording of the consolidated article see above, Part II, Chapter 1.2.2, note 264.

⁷⁰³ See Schweigman (2001), at 184-189.

what constitutes a procedural rule to begin with, and that the characterization itself may be part of the (political) debate.⁷⁰⁴

Eventually an emphasis on the political nature of legal reasoning seems diametrically opposed to the very premise of formal constitutionalism. 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.⁷⁰⁵ A judiciary can indeed strike such balances. However, because of its (perceived) apolitical nature, a judiciary is drawn towards avoiding reasoning on the substantive side of the dispute. The risk is that if, as part of that adjudication, this means that the political implications of the balancing act are overlooked altogether (or the adjudicator is not mindful of those implications), formal constitutionalism may, at worst, serve as a legitimating mask for inequalities.⁷⁰⁶

2.2.2.2 Politicizing the Judiciary

The reverse 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.⁷⁰⁷ As noted, the general tendency among international organizations is that they are dependent on political supervision of their activities.⁷⁰⁸ In fact, it is not rare that organizations either expressly or implicitly charge their policy-making organs with interpretative and dispute settlement tasks.⁷⁰⁹ Even irrespective of whether 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. This is an indispensable aspect of their operation. This was established at the international level by the PCIJ already in 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

⁷⁰⁴ 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 230, EC Treaty) would be any less political (these are enumerated as procedural criteria by Klabbers (2005 "Straddling"), at 829).

⁷⁰⁵ Cass (2005), at 120-132.

⁷⁰⁶ See Unger (1976), at 176-181. Also see Hutchinson (1999), at 201 *et seq.*

⁷⁰⁷ Allan (Trevor) (2001), at 189 and 198-199.

⁷⁰⁸ See White (1996), at 117-118.

⁷⁰⁹ See references above, Part III, Chapter 2.2.1, and esp. note 661.

extent of its jurisdiction".⁷¹⁰ 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.⁷¹¹

This has later been the approach also by the ICJ in the *Certain Expenses* case.⁷¹²

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. 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.⁷¹³

On the face of it there is nothing wrong with political organs assessing their competence. After all, political organs consist of members of the organization. As Waldron puts it: "if 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?"⁷¹⁴ However, interpretations of constituent instruments are likely to vary between members, between members and organs of the organization, and even between organs of the organization. At the same time there is no element of finality to the

⁷¹⁰ *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.

⁷¹¹ 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).

⁷¹² "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.

⁷¹³ See Osieke (1983), at 240-242, and Angelet (1998), at 279.

⁷¹⁴ Waldron (2001), at 281.

interpretation by a political organ of its own powers.⁷¹⁵ The interpretation by the political organ can be challenged by members. In fact, in the situation where no review mechanism exists, *only* members can challenge an act of the organization. Nevertheless the political organ may refuse to review its interpretation.⁷¹⁶

To avoid a divergence of interpretations (and hence to achieve finality), some organizations withhold interpretative competence for the organization. The “beacon for those who advocate the consolidation of the rule of law on the international plane” is the ECJ.⁷¹⁷ For many authors the EC is the only example of an international legal order based on a true rule of law.⁷¹⁸ One of the foremost mechanisms for achieving coherence in interpretations in EC law is the mechanism of preliminary rulings which all national courts of EU member states can (and sometimes must) request on any question of Community law.⁷¹⁹ The underlying rationale of this mechanism is that if national courts were to interpret Community legislation differently from one another, this would do away with any uniformity in the application of EC law. The monopoly of interpretative control is not however only established through the mechanism of preliminary rulings, but also follows from the review of the legality of acts (of both members and Community organs) that the Court

⁷¹⁵ 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.

⁷¹⁶ 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.

⁷¹⁷ Allain (2000), at 156. Also see Arnulf (2006), at 257-258.

⁷¹⁸ Allain (2000), at 177-179 advocating supranationalism as the model for all organizations.

⁷¹⁹ Article 234 of the EC Treaty states that: “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”.

exercises.⁷²⁰ Through these mechanisms the determination of the validity of an act by a political organ is in EC 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.

As already stated above, the role of judicial review as a constraint and legality check upon political organs is a central feature that is capitalized upon in arguing for a judicialization of organizations. The authority and legitimacy of courts is commonly derived from that the decision-making builds on legal reasoning and (seemingly) avoids politicization. This has been a common claim also in defense of the authority of the ECJ.⁷²¹ However, in a diametrically different way the ECJ has also been characterized as one of the most politically influential courts in the world. It has been described as the most proactive element in the EU, these accusations originally arising from the inventions in the case law of the ECJ of direct effect and supremacy.⁷²² The role of the ECJ as one of the chief architects and upholders of integration has been regarded as being of crucial importance in defending and upholding the *acquis communautaire*.⁷²³ The preliminary rulings procedure has even been called the principal vehicle for ECJ law-making.⁷²⁴

This is exactly what a critique of the role of the ECJ takes hold of in targeting the ECJ for strengthening the Community, increasing the scope and effectiveness of Community law, and enlarging the powers of Community institutions: in sum, for actively promoting a deepening of European integration. The ECJ has also been accused of overengagement 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 Community law.⁷²⁵ Such a critique cannot be explained away (at least not always) as an effort by an unsatisfied party (whom the court has ruled against or who dislikes the its interpretation of EC law), to restate its case as an institutional critique.

Out of this at least two points deserve to be made. First of all, the characterization of the ECJ as politicized serves to illustrate the political nature of adjudication. Secondly, this also demonstrates that the making

⁷²⁰ The grounds for invoking the jurisdiction of the ECJ are lack of competence, infringement of essential procedural requirement, infringement of the EC Treaty or any rule of law relating to its application, and misuse of powers. EC Treaty, Article 230.

⁷²¹ Albeit not the only explanation. See Alter (2000).

⁷²² See Goldstein (1997), at 27. Also see Rasmussen (1986).

⁷²³ Rasmussen (1986), at 8-9.

⁷²⁴ For a recent account, see Arnulf (2006), at 95-104.

⁷²⁵ See Ferejohn and Pasquino (2003), at 249, and Hartley (2007), at 77-78.

of politically controversial decisions (however legally sound), can have a detrimental impact on the authority of a court. 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.⁷²⁶ In a similar vein Rasmussen argues that the politicized role of the ECJ may turn into a problem if it is not “prescribed in nicely calculated doses”.⁷²⁷

While constitutionalism in organizations is defended with efficiency gains, it is exactly for the most (politically) controversial issues that judicial settlement would also be most desirable. At the same time, if the adjudicator engages in judicial activism (that is perceived as unacceptable), then it runs the risk of eroding its apolitical authority. This is a risk that has been noted also in respect of ICJ review of UN Security Council decisions.⁷²⁸ A desire to avoid a loss of authority has also been seen to underlie the turn by the ECJ from being the engine of integration towards protecting the prerogatives of the member states.⁷²⁹ Eventually, even if there would be sources of law available upon which to make a decision (i.e. the issue is justiciable), without agreement among members, for example on how to balance organization effectiveness with concerns of member sovereignty in the particular case, any decision of the adjudicator is bound to be controversial. This way a judicialization of an organization may end up delegitimizing the adjudicator.⁷³⁰

⁷²⁶ Holmes (2001), at 72.

⁷²⁷ Rasmussen (1986), at 9.

⁷²⁸ Alvarez (1996), at 37.

⁷²⁹ Weiler regards the *Brunner* (or *Maastricht*) 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 Arnulf (2006), at 255 *et seq.*, and 654-655. Also the exclusion of ECJ jurisdiction from the two “Maastricht pillars” may have been an early illustration of the role of the ECJ being under reconsideration. Weiler (1999), at 217.

⁷³⁰ In respect of the ECJ, see Rasmussen (1986), at 508. 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.

2.2.2.3 Judicializing the Political Process

Apart from the problem of politicizing the judiciary that a strong reliance on judicial settlement may bring with it, there is also another risk involved. The more the role of courts for solving politically controversial questions is emphasized, the more vulnerable they become for a critique that this leads to government by judges (or *gouvernement des juges*).⁷³¹ 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”.⁷³²

There are different aspects to the counter-majoritarian problem. Several issues that arise from the judicialization of governance can be subsumed under that notion, all of which are interconnected. In a very general sense 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 the counter-majoritarian problem is also concerned with the conflict between formal and substantive aspects of constitutionalism (in the sense that these notions are used in this thesis).⁷³³

The classical form of 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 (US Supreme) Court declares unconstitutional a legislative act or the action of an elected executive.⁷³⁴ Two elements 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, since when declaring a legislative act unconstitutional, the judiciary does this without being placed in office by the majority. 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

⁷³¹ 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.

⁷³² The notion “counter-majoritarian problem” was launched by Bickel (1962), at 16. As for the characterization and an overview of the problem, see Friedman (2002).

⁷³³ This is done by Ferejohn and Pasquino (2003), and Croley (1995).

⁷³⁴ Bickel (1962), at 16-17.

for life, and not elected following a general, direct and secret balloting".⁷³⁵ A second aspect to the emphasis on consent, is that a judiciary is not accountable to the people, which on its part is a central characteristic of the legislature.⁷³⁶

In the context of the constitutionalization of organizations any systematic counter-majoritarian discussion has been remarkably absent. Clearly, as the ECJ has the power to overturn a decision by more representative organs, the role of the ECJ may give rise to counter-majoritarian concerns. Individual ECJ judges themselves have in fact made public pronouncements about the dangers of going against popular opinion.⁷³⁷ However, discussions on the democratic deficit of Community law have traditionally been concerned with the non-accountability of the Council of the European Union to the European Parliament. If anything, the ECJ has been viewed as a safeguard for protecting and upholding democratic principles through limiting the powers of the Council and the European Commission.⁷³⁸ Hence Mattli and Slaughter could as late as 1998 still prophesize that the role of the court in a democratic order would become increasingly a major issue in EU legal debates.⁷³⁹ Weiler has similarly foreseen that a changing conception of democracy and a reevaluation of the ability of non-elected institutions to serve the values of democratic process will challenge the ability of legal formalism to uphold an authoritative role of the ECJ.⁷⁴⁰

⁷³⁵ 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.

⁷³⁶ 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.

⁷³⁷ See Douglas-Scott (2002), at 215.

⁷³⁸ Weiler (1999), at 203-206.

⁷³⁹ Mattli and Slaughter (1998), at 205.

⁷⁴⁰ Weiler (1999), at 209.

The same is true also in respect of the relationship between the ICJ and the UN Security Council. Although the *Lockerbie* and *Application of the Genocide Convention* cases did raise discussions (among academics) on whether the ICJ could review Security Council decisions, this discussion has mostly focused on whether there is a legal entitlement to this effect. Only rarely has the relationship between the ICJ and the UN Security Council been approached as a tension between political and judicial elements of UN governance (perhaps due to the undemocratic character of the Security Council itself).⁷⁴¹

One context in which the critique was presented, was in the (American) opposition to the International Criminal Court. 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.⁷⁴²

In this critique towards the ICC and, as will be seen later in the context of the Human Rights Committee, a counter-majoritarian critique would capitalize on the absence altogether of a mechanism of political input. Similar fears have also been present concerning a judicialization of the WTO. 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.⁷⁴³

The lack of representativity and accountability are not however the only detrimental consequences identified with an emphasis on judicialization. Judicialization is also targeted for placing unwarranted faith in a “doctrine of expertise” (in respect of courts, judicial expertise).⁷⁴⁴

⁷⁴¹ For some brief indications, see Alvarez (1996), at 7 (although Alvarez himself argues that a counter-majoritarian critique of the ICJ does not seem plausible), Watson (1993), and Shaw (1997), at 256 arguing that there is good reason to believe that judicial review of Security Council decisions cannot be introduced without seriously threatening the fragile institutional arrangements within the UN structure.

⁷⁴² 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.

⁷⁴³ Holmes (2001), at 70. Judicialization also potentially has an impact upon domestic governance. Especially in EC law (due to the supranational character) the balance between political and judicial organs is also “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.

⁷⁴⁴ See Hutchinson and Monahan (1987), at 111.

However, the question can be raised whether there is in reality any “special moral goodness or acute ethical perspicacity inhering in judges that the rest of us lack”, which would make judges especially suitable for settling international interpretative disputes.⁷⁴⁵ As an expression of this Alvarez has expressed concern over ethnic neutrality in the ICC, and whether it is desirable or even possible for international organs to second guess national engagements and compromises.⁷⁴⁶ In a similar vein (albeit not concerning judges) Fatouros demonstrates in the World Bank context how replacing political debate with technocratic decisions adds an hegemonous aspect to the member – organization relationship, resulting in an imposition of certain ways of thinking under the veil of apolitical decision-making.⁷⁴⁷

This is closely connected with yet another issue that has its source in the counter-majoritarian critique. This critique targets judicialization for casting politically controversial issues in technical (judicial) terms instead of keeping them open to public debate.⁷⁴⁸ Since legal reasoning may not always be best suited for dealing with politically controversial issues, it may fail to deal with the political and moral dilemmas involved.⁷⁴⁹ While there may be some merit with abstracting substantive claims into rights and principles, at the same time something is lost and only a “torso of the dispute” remains.⁷⁵⁰ However preferable judicial settlement may seem from the perspective of efficiency of international law, or in terms of the protection of the rights of members, it may be that an issue does not benefit from being phrased in judicial terms to begin with. This means that although an international tribunal can always declare a behavior prohibited or permitted, this does not automatically mean that it should always do so. Instead, emphasizing judicial

⁷⁴⁵ Allan (James) (2001), at 389.

⁷⁴⁶ 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.

⁷⁴⁷ Hegemony for Fatouros meaning “the political predominance of one state over another, or policies aimed at such predominance”. For the definition see Fatouros (1980), at 11, and for the discussion of the World Bank, at 26-30. Fatouros also attaches similar concerns to the ILO, at 31.

⁷⁴⁸ Ferejohn and Pasquino (2003), at 250, and for examples in US constitutional law, at 257-258. Also see Hutchinson and Monahan (1987), at 98.

⁷⁴⁹ Koskeniemi (1999), at 489 discussing the impact of rational reasoning in the context of nuclear weapons.

⁷⁵⁰ 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. Koskeniemi (1999), at 501 and 509.

proceedings may remove an issue from the ambit of political discourse within which it would more properly belong.⁷⁵¹

Another side to this critique is that the more expert knowledge is emphasized, the more it creates obstacles for political participation. In this way judicialization may also become an exclusionary device: only those who have the requisite credentials are allowed to participate. In an absence of representative organs for providing non-expert input, judicialization becomes a device whereby those who are subject to the regimes are excluded from any deliberative processes.⁷⁵²

There are of course ways of responding to the counter-majoritarian critique.⁷⁵³ A common defense of judicial review emphasizes that this 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. The assumption therefore is also that the judiciary can be representative of those values, and hence enjoys democratic legitimacy (in this way also reconciling the tension between formal and substantive constitutionalism). A more direct link between majorities and the judiciary emerges if the elected character of judges is emphasized. This has been presented as a way of ensuring that the decisions of judges conform with the values of those whom the decisions concern.⁷⁵⁴ Following this logic, the claim has been made that counter-majoritarian concerns are of minor importance in the ICJ since ICJ judges are elected (by the UN Security Council and General Assembly).⁷⁵⁵

A similar way of resolving the tension between the judiciary and the legislature is to argue that the judiciary is democratic in that it safeguards democracy itself. It does this primarily by ensuring participation and upholding the democratic process.⁷⁵⁶ Courts and only courts, the claim is, should uphold the constraints that specify the legitimate scope of political action. In this view courts stand out as having a significant role in upholding the conditions of democratic governance.⁷⁵⁷

As yet another variation, a claim has also been made to the effect that the judiciary should not only uphold democratic processes, but also review the substance of democratic decisions. This follows from that courts are in fact better placed for discovering these values than

⁷⁵¹ Hutchinson and Monahan (1987), at 117-119.

⁷⁵² See Tully (2002), at 211, and Coleman and Porter (2000), at 381.

⁷⁵³ The following brief remarks build largely on Croley (1995), who has extensive references to authors advocating different alternatives.

⁷⁵⁴ Croley (1995), at 761-769.

⁷⁵⁵ See ICJ Statute, Article 4, and Watson (1993), at 28-31.

⁷⁵⁶ See Croley (1995), at 769-772.

⁷⁵⁷ Freeman (1990-1991), at 353 and 360, and Føllesdal (2007).

democratic institutions.⁷⁵⁸ A similar argument has been used in defense of the authority 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 is defended by arguing that direct action against the institutions, by the ECJ, is capable of making valuable contributions to democracy.⁷⁵⁹

Eventually there are counterarguments to these counterarguments. The question can be raised: If the constitution protects certain fundamental rights which protect minorities and the court is charged with upholding those rights, what is there to guarantee that the perception of those rights by judges will not reinforce abuse?⁷⁶⁰ Substituting popular control with supreme judicial decision-making is no automatic guarantee for the promotion of justice and equality (e.g. in the sense of protecting minorities). As public values (such as justice and equality) cannot be abstractly manufactured and administered to the population, but are instead the product of politics, the judiciary is as much subject to the values of the society in which it operates as the legislator.⁷⁶¹

Waldron makes a more principled case in claiming that whatever justifications are given for the disabling of representative institutions, this 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.⁷⁶²

It is not the aim here to go further into the discussion on justification of judicial review. While there is no reason to deny that courts can be

⁷⁵⁸ Perry (1982), at 100-101. Also see Croley (1995), at 776, and Zurn (2007), at 163-184.

⁷⁵⁹ Lenaerts and Corthaut (2004), at 43 and 64. As to more practical suggestions on how to address deficits of judiciaries, see Zurn (2007), at 301-342 (on constitutional courts). As to the EU, Weiler proposes the establishment of a Constitutional Council for interpretation and adjudication of questions of competence. Being composed of national constitutional court judges the Constitutional Council could, in Weiler's mind, be more sensitive to national political considerations and more conversational than the ECJ. Weiler (1999), at 322-323.

⁷⁶⁰ Troper (2003), at 115.

⁷⁶¹ Hutchinson and Monahan (1987), at 118 even accuses such a faith in courts of being ahistorical as advances in social justice have been achieved through legislative rather than judicial action.

⁷⁶² Waldron (1998), at 346 (emphasis in original). For an overview and critique of Waldron, see Føllesdal (2007).

legitimate and have a crucial role in democratic governance, this does not do away with the fact that any judicialization of organizations is bound to give rise to the issues raised above. This follows from that any development of the judicial capacity of an organization will either introduce such elements for the first time (as in the case of ICJ review of UN Security Council decisions), or alter a pre-existing balance between the political and judicial elements of the legal order. However, while several problems with a judicialization of organizations can be identified, the idea of substantive constitutionalism in organizations is not unproblematic either. It is to substantive constitutionalism that interest is turned next.

2.3 Substantive Constitutionalism and its Critique

2.3.1 Democratizing Organizations

As mentioned above, a substantive conception of constitutionalism does not deny the importance of the rule of law as an element of constitutionalization. However, a focus on the rule of law is considered only a partial conception of constitutionalism which needs to be complemented with the establishment and maintenance of a system of political rule. Often the relationship between formal and substantive constitutionalism is pictured as a tension. In such an image, these different emphases at the heart of the two aspects of constitutionalism are capitalized upon. In contrast to an emphasis on judicialization, substantive constitutionalism does not aim to limit or extract the political element from governance in organizations, but instead underlines the importance of democratic politics as the means by which a nexus to the constituency is established. While the formal side of constitutionalism emphasizes judicial review as a means for solving legal issues (e.g. concerning the reach of powers of organizations), the substantive side emphasizes the importance of democratic governance as the true source of the legitimacy of acts of organizations.⁷⁶³ Exactly how to strike the balance between the two is also the question at the heart of the counter-majoritarian critique.

The balancing act between formal and substantive constitutionalism is also subject to change. This is especially visible in the development of constitutionalism in the EC/EU, where the substantive aspect has become increasingly important. Maduro has expressed this as a failure of early formal constitutionalization of Community law to

⁷⁶³ For a collection of articles on the theme, see Bellamy (2006).

discuss the soul of the constitutional body created. In being mainly based on treaty revisions and 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”.⁷⁶⁴ More recent discussions on constitutionalism in the EU at large have however increasingly become preoccupied with issues of democratic legitimacy (hence also entailing a review of the role of the ECJ as a source of legitimacy).⁷⁶⁵

Admittedly not all international organizations have an institutional structure as developed as the EC/EU. However, even an absence of discussions on substantive constitutionalism in organizations is interesting, since the formal and substantive aspects of constitutionalism are ultimately intertwined. This means that substantive constitutionalism can be crucial for a judicialization of an organization. As the influence of the judiciary increases, also the governing role of judges increases. In order to meet with this development and ensure an input of democratic legitimacy, a judicialization of organizations puts a special emphasis on substantive constitutionalism. The potential problems with a judicialization of an organization become accentuated if no proper organ for political deliberation exists in the organization to begin with. As von Bogdandy argues, although the democratic deficiencies of the WTO such as the absence of open discussion, a powerful bureaucracy, and deficiencies in 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.⁷⁶⁶

However, the idea of democratizing organizations is far from unproblematic. Not all authors agree that a democratization of organizations is possible. A critical discussion of substantive constitutionalism will first have a closer look at the concept of legitimacy and its relationship to the concept of democracy. The second question to be discussed is the idea of democratic governance beyond the state context. The crucial question to ask is whether democracy is possible in international organizations.

2.3.2 Different Sources of Legitimacy

To say that a decision, rule or institution is legitimate is to say that it should be accepted as authoritative. When looked at the other way

⁷⁶⁴ Maduro (2005), at 341.

⁷⁶⁵ See above, Part II, Chapter 3.2.2.1.

⁷⁶⁶ von Bogdandy (2001), at 625. Also see Howse and Nicolaïdis (2001), at 228.

around, the idea of justifying the authority of an institution, a rule, or a decision lies at the heart of the notion of legitimacy.⁷⁶⁷ Franck has made the claim in respect of international law at large, that compliance with international law is perhaps best explained by the legitimacy of the legal system. Nations obey rules *"Because they perceive the rule and its institutional penumbra to have a high degree of legitimacy"*.⁷⁶⁸ Hence legitimacy also induces compliance with and bestows authority upon organizations. This also suggests that there is a connection between legitimacy and effectiveness: 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.⁷⁶⁹

There are a couple of ways in which to demonstrate how legitimacy becomes of concern. Some of the more general changes that decision-making in international organizations has undergone, has contributed to making questions of legitimacy more acute. As long as decision-making is consensual there is no direct imposition of one will upon another. This could be said to moot the issue of legitimacy.⁷⁷⁰ However, with the gradual transformation from consensual decision-making to majority rule also issues of legitimacy have increasingly arisen.

Another way in which the legitimacy issue becomes emphasized is when the influence of an organization on members increases, for example through a development of the powers of the organization. The prime example of this is EC law, where the deepening integration has been paralleled by efforts for strengthening the legitimacy of Community decision-making.⁷⁷¹ As Bodansky testifies, the same relationship can be identified also in organizations with more limited decision-making powers, for example in the environmental field.⁷⁷² 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 agreement, seems to "obviate the necessity to even ask the

⁷⁶⁷ 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.

⁷⁶⁸ Franck (1990), at 25 (emphasis in original).

⁷⁶⁹ On organizations and legitimacy, see Gerhart (2003), at 6, Bodansky (1999), at 602-603, and Caron (1993), at 558.

⁷⁷⁰ See examples and multiple references in Bodansky (1999), at 597-598.

⁷⁷¹ See above, Part II, Chapter 3.2.2.1.

⁷⁷² Bodansky (1999) at large, and esp. at 597.

legitimacy question in relation to the formal rules” of the WTO agreement (the one exception being the dispute settlement mechanism).⁷⁷³

In fact, 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.⁷⁷⁴ Domestic law that appears homemade is often worked out, or at least guided by decisions in organizations (e.g. through so-called framework conventions, recommendations, or opinions).⁷⁷⁵ 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 authority of those decisions in the eyes of member states may be of some concern.⁷⁷⁶

The consequent question becomes where legitimacy derives from. In most general terms (in a national context), a focus on legitimacy is to focus on the relationship between the state or government on the one hand, and the population or citizens of civil society on the other. When defined in such a general way, there are different ways of approaching the question of how this relationship is best organized. Beetham, in his study on the concept of legitimacy, emphasizes three elements or levels of legitimacy. Legitimacy can result from the following: 1) from conformity with established rules, 2) from the fact that the rules can be justified by reference to shared beliefs, and, 3) from the existence of consent by the subordinate.⁷⁷⁷

The first of these elements could be labeled formal legitimacy.⁷⁷⁸ Franck’s definition of legitimacy 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”.⁷⁷⁹ A definition of legitimacy where

⁷⁷³ Howse (2001 “The Legitimacy”), at 358-359.

⁷⁷⁴ This is exemplified by Alvarez (2005), esp. in his Chapter 4.

⁷⁷⁵ Delbrück (2003), at 35-36.

⁷⁷⁶ Also see Efraim (2000) who discusses legitimacy concerns arising out of voting practices.

⁷⁷⁷ See Beetham (1991), at 15-25.

⁷⁷⁸ A distinction between formal and substantive legitimacy is used by Koskeniemi (2003 “Legitimacy”), at 354. Also see Hyde (1983).

⁷⁷⁹ Franck (1990), at 24. A different question altogether is whether Franck is correctly described as a proceduralist. Whereas he is so treated by Bodansky (1999), at 600, note 27, and at 612, Koskeniemi emphasizes that legitimacy for Franck is something less than moral principles, but at the same time something more than positive law. Koskeniemi calls this a “common sense of values” which emphasizes the context-dependent variety of

the legitimacy of a rule is derived from the accordance of that rule with other rules and principles (such as procedural criteria), is akin to the concept of formal validity and hence becomes closely intertwined with the lawfulness or legality of an act.⁷⁸⁰

However, a definition of legitimacy as a search for the legality of an act cannot exhaust the meaning of legitimacy.⁷⁸¹ Traces of such thinking can also be found in international legal discourse, as is exemplified by discussions on the intervention in former Yugoslavia by NATO. This intervention (or more precisely, the bombing of Serbia) has been considered illegal (under international law), but nevertheless legitimate.⁷⁸² Similarly, 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 main concern is turned to questions of democratic character and the possibility of founding EU law upon a common identity. A new legitimating discourse has emerged as the integration of Europe has proceeded. The further the process of integration has proceeded, the more insufficient a focus on the legality of Community law has proved as a source of legitimacy.⁷⁸³

The second aspect to the legitimacy concept, substantive legitimacy, takes hold of the fact that in order for those in power to enjoy moral authority there is a need for justification of the exercise of powers beyond mere validity under a system of law.⁷⁸⁴ 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 do not become substantively legitimate although they may be formally valid. 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.⁷⁸⁵ In this sense legitimacy is

legitimate actions, achievable not through juridical technique, but through the intuitive application of good sense. See Koskeniemi (2003 "Legal"), at 480-481.

⁷⁸⁰ "Lawfulness" is the definition of legitimacy of Black's Law Dictionary, see Garner (2004). As was discussed above, it is also from the capacity to formally and impartially ensure the legality of decisions that the legitimacy of courts is commonly derived. See above, Part III, Chapter 2.2.1.

⁷⁸¹ For a concrete example, see Young (2002), at xx.

⁷⁸² Koskeniemi (2003 "Legitimacy"), at 358.

⁷⁸³ See Weiler (1998), esp. at 378-379 on different meanings of legitimacy. Also 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.

⁷⁸⁴ See Beetham (1991), at 57.

⁷⁸⁵ The example is used by Habermas (1975), at 100. Procedural criteria are of no necessary avail, as procedural criteria must be legitimized, Habermas (1975), at 101. Also see Beetham (1991), at 17.

concerned with the moral authority of the exercise of powers (and the rules and acts that result from that exercise). A focus only on the legality of a power runs the risk of losing sight of issues regarding its moral authority.⁷⁸⁶ For this reason the claim is often made that legitimate governance requires that government actively guarantees certain values (or more broadly – morality).⁷⁸⁷

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 rules and some lose. In addition, aggregate global welfare may increase or decrease.⁷⁸⁸ Therefore, the substantive legitimacy of WTO rules becomes dependent on the perspective from which the impact on welfare is approached. Similar assessments concern also 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. In general, the problem is whose fairness is to serve as the guiding standard.⁷⁸⁹

As to the third element of legitimacy identified by Beetham, the element of consent, it should be emphasized that this is not the same thing as emphasizing the abstract consent of members of an organization (as a source for the exercise of powers).⁷⁹⁰ 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).⁷⁹¹ Instead, the abstract consent provided can be in need of renewal (e.g. in the case of exercise of implied powers).

⁷⁸⁶ 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.

⁷⁸⁷ 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.

⁷⁸⁸ Howse (2001 “The Legitimacy”), at 365-368.

⁷⁸⁹ Koskenniemi (2003 “Legitimacy”), at 363.

⁷⁹⁰ On abstract consent, see above, Part II, Chapter 2.5.

⁷⁹¹ Bodansky (1999), at 609-610.

Although abstract consent can legitimize the exercise of attributed powers of an organization, the more the practice of the organization evolves, the stronger the need will be for renewing the abstract consent (in order not to transcend it). In order 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 aspect of legitimacy a separate identity vis-à-vis both formal and substantive legitimacy.⁷⁹² 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.⁷⁹³ 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 ...".⁷⁹⁴ The one parameter that has become the "touchstone" of social legitimacy in the modern world (and hence also of substantive constitutionalism) is democracy.⁷⁹⁵

2.3.3 Is Democratic Legitimacy in Organizations Possible?

2.3.3.1 Democratic Legitimacy Deficits

There seems to be no easy way of pinpointing the exact contents of democratic governance. The roots of this difficulty may lie in the fact that it was only after the two world wars that democracy was established as the byword for social legitimacy. The endorsement of democracy as a principle of political organization (as we recognize it today) is therefore relatively novel. This is even truer in respect of the idea of transnational democracy.⁷⁹⁶ In debates about democracy beyond the nation state, Howse has identified a number of different conceptions of democracy at play, such as: representative democracy, deliberative democracy, corporatist or consociational democracy, republican or communitarian

⁷⁹² The term social legitimacy is used by Weiler (1999), at 80-81. Also see Koskenniemi (2003 "Legitimacy"), at 355.

⁷⁹³ Beetham (1991), at 19 and 94.

⁷⁹⁴ Koskenniemi (2003 "Legitimacy"), at 371.

⁷⁹⁵ Bodansky (1999), at 599.

⁷⁹⁶ Marks (2000), at 30.

democracy, and democracy as decentralization.⁷⁹⁷ These can also be interrelated. For example, the legitimacy that derives from representative institutions also presumes a deliberation within and between those institutions.⁷⁹⁸

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.⁷⁹⁹ When applied beyond the nation-state context, the crucial question from the point of legitimacy becomes: Are interpretations by organizations recognized as justified claims on member allegiance? From a democratic point of view the all important question is whether or not in the decision-making there is an input that makes decision-making considerate of and sensitive to the values and preferences of the membership. If an organization is not perceived (by members) to genuinely express the values shared by the members of the organization, the legitimacy of the decisions of that organization will be criticized.⁸⁰⁰ Such a failure to reflect the values of members may first of all be due to a lack of proper democratic procedures by which the decision is arrived at. However, it may also be the case that, despite existing democratic procedures, there simply is no common ground between members that could guide the organization in its decision-making. While the first of these will be discussed in this chapter, the second question will be addressed in the next chapter.

The very processes of internationalization of decision-making and the expansion of the idea of democratic governance can be said to stand in opposition to one another. This follows from that internationalization of decision-making means 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 this tension is emphasized.⁸⁰¹ There is also a paradox at play here, as on the one hand international governance moves decision-making further away from citizens, but on the other hand international

⁷⁹⁷ These are identified by Howse (2001 "Transatlantic").

⁷⁹⁸ Howse (2007), at 57.

⁷⁹⁹ Marks (2000), at 80-83.

⁸⁰⁰ This paraphrases Lagerspetz (1998), at 130.

⁸⁰¹ Rubinfeld (2004), at 2017-2018 even makes a claim that international law is antidemocratic. 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 the resolution of the European Parliament on the Democratic Deficit in the EC of 17 June 1988, OJ C 187/229 (1988).

institutions are useful in order for representatives of governments (and hence, peoples) to have an input in global decision-making.⁸⁰²

One way to meet these challenges would be to ensure a democratic character of transnational and global decision-making.⁸⁰³ However, 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 safeguards for accountability.⁸⁰⁴ As it is not clear how preconditions of a democratic polity can be realized in organizations, the deliberative process is bound to be defective.⁸⁰⁵ From this emanates a criticism which many international organizations face: that the flaws in their democratic procedures renders their decision-making (socially) illegitimate.⁸⁰⁶

In a domestic context democratic legitimacy is all about the acceptance of a government and its decisions by the (majority of) citizens. Depending on the image of the constituency, proposals for how to increase legitimacy in 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 state governments, but directly to electorates.⁸⁰⁷ Discomfortingly the one true parliament that does exist in the context of organizations, the European Parliament, is actually criticized for not being suitable to serve as the guardian of democratic legitimacy, due to being too remote from citizens and poorly representative of the polity at large.⁸⁰⁸

Since organizations usually consist of representatives of state governments, it could also be argued that the legitimacy of an organization must primarily flow from these representatives.⁸⁰⁹ A focus on individuals as subjects of an international legal order can be criticized for being utopian as requirements of democratic legitimacy are impossible to satisfy. Kymlicka identifies the lack of a common language

⁸⁰² Gerhart (2003), at 11.

⁸⁰³ Marks (2000), at 95-96.

⁸⁰⁴ See Cass (2005) for many references and an overview, at 221-224.

⁸⁰⁵ On deliberation, its preconditions, and realizability, see Neyer (2001).

⁸⁰⁶ Nye (2001), at 2.

⁸⁰⁷ 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.

⁸⁰⁸ Dehousse (2003), at 149-150.

⁸⁰⁹ Heiskanen (2001), at 2 and 6.

as too big an obstacle to be overcome already at the EU level, gearing governance towards domination by the elite and the media.⁸¹⁰ 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 than individuals.⁸¹¹

When the role of state representatives as a source of the democratic legitimacy of organizations is emphasized, proposals for improvement concentrate on increasing the representativity of and responsiveness of organizations to its member states, increasing the openness and transparency of decision-making processes, and improving on the accountability of organizations.⁸¹² In fact, Krisch and Kingsbury conclude that in many areas of global governance, mechanisms are emerging that are analogous to domestic administrative law systems with transparency, participation, and review as central elements. A global administrative law is said to be emerging which promises to solve problems of democratic accountability where electoral mechanisms are not available.⁸¹³

There are also many critical arguments that could be made, beginning with the question of whether state representatives in organizations are proper representatives of public interest, and whether the inclusion of other interest groups could be of any avail.⁸¹⁴ The point in this context is not to even try to outline the possible meanings of democratic legitimacy in international organizations, or to give more detailed examples on problems arising, or on how to improve upon that legitimacy in particular organizations (a possibility of discussing this issue in more detail presents itself in Part IV on the Human Rights Committee). Instead, as a demonstration of a question that any attempt at democratizing organizations is bound to run into, the question of *demos* will be singled out for further discussion.

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

⁸¹⁰ Kymlicka (1999), at 123-125.

⁸¹¹ So concludes Wendt (1999), at 127-129.

⁸¹² For an account of these aspects in relation to the WTO, WHO, NAFTA and EU, see Stein (2001), esp. at 532-533. Also see Bogdandy (2004), at 902-903, and Zürn (2000), at 204-210. As to transparency in particular, see Dyrberg (2002).

⁸¹³ Krisch and Kingsbury (2006), at 4. Also see Macdonald and Macdonald (2006).

⁸¹⁴ See Stein (2001), esp. at 507. Notably, while for democratic states it could be argued that at least in principle the consent of the people is channeled to the organization via the representatives of states, this is a somewhat weak connection. Furthermore, not all states are democratic to begin with. See Coicaud (2001), at 261. On problems with representation, also see Gould (2004), at 163-164. For this reason suggestions on democratic improvement also focus on processes within nation states. In this respect, see Stein (2001), at 531-532.

equality, to forge a common interest and pursue the common good”.⁸¹⁵ The quote seems to contain two elements. First of all, democracy is premised on the existence of a community, which is characterized by a sense of shared collective identity and loyalty (or, a *demos*). The existence of some sense of commonness is important, since if there were no such thing, then the pursuits and concerns of the community (or organization) would stand out as completely alien to the participants.⁸¹⁶ If there is no *demos* by whom and for whom democratic discourse takes place, then there can be no operating democracy.⁸¹⁷ Yet in other words, in order to make deliberation within organizations possible to begin with, the very justification for and legitimacy of that organization, as an expression of a community, cannot be in dispute.⁸¹⁸ In this sense the *demos* comes to serve as a precondition for democratic governance.

This does not however mean that there needs to be (nor that there could be) a consensus between members on the political issues that the organization is concerned with (if there would be such consensus, the legitimacy issue would be mooted). 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 differences 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.⁸¹⁹ Given the importance of the *demos*-issue, even if the practical problems with introducing democratic procedures into organizations would be overcome, it would still be uncertain as to whether this suffices to ensure legitimacy, as the source of a legitimacy deficit may be far deeper. At any rate such procedural flaws need not be the sole source of legitimacy deficits.⁸²⁰

⁸¹⁵ Roth (2000), at 500 (emphasis added).

⁸¹⁶ 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.

⁸¹⁷ Weiler (1998), at 381, and Archibugi (2004), at 461.

⁸¹⁸ 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.

⁸¹⁹ Lagerspetz (1998), at 107 and 110.

⁸²⁰ As Estella points out, a focus on formal legitimacy often denies the existence of the problem by neglecting its importance. Estella (2002), at 46. For a different view, see de Wet (2006 “The International”) who attempts to overcome the question by arguing that democratic legitimacy as known nationally is not needed internationally, at 71-73.

Moravcsik holds that a democratic legitimacy critique is unfounded in the EU since constitutional checks and balances, indirect democratic control by national governments, and the powers of the European Parliament “... are sufficient to assure that the EU policy-making is, in nearly all cases, clear, transparent, effective, and politically responsive to the demands of the European citizens”.⁸²¹ Such a statement can be challenged on empirical grounds. A majority of European citizens believe that the EU needs to be reformed in order to be more democratic. The image of a democratic deficit has remained imprinted in the minds of European citizens although improving the democratic character has been a central theme of every revision of the founding treaties since the 1990s.⁸²²

More importantly, even if it could be 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. Reconciling the democratic deficit of the EU with 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.⁸²³ 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.⁸²⁴

There are also other consequences. A good example is majority voting, which does not work (at least not optimally) in an absence of a *demos*. In a democratic system of governance, minorities acquiesce to the will of the majority when they identify themselves as participants in the larger community. However, if such a sense of belonging to a community does not exist, people will not identify with the political system and trust its procedures and outcomes. This means that people will not be ready to place themselves in a minority position.⁸²⁵ In all, if primary allegiances are to the state, the legitimacy of an organization is in doubt, and the nature of the polity makes majority decisions difficult to accept (by those decided against), then the very application of the representative model of

⁸²¹ Moravcsik (2004), at 349 (emphasis in original).

⁸²² This builds on Standard Eurobarometer 64: Public Opinion in the European Union, December 2005 (available at http://ec.europa.eu/public_opinion/index_en.htm).

⁸²³ For critical remarks, see Wincott (1999), at 116 *et seq.*, and Estella (2002), at 46-47.

⁸²⁴ Weiler (1999), at 81-86, and Cass (2005), at 234-235.

⁸²⁵ Bodansky (1999), at 616.

democracy itself becomes problematic.⁸²⁶ In this vein Howse and Nicolaïdis have suggested that the divergence of values among WTO members may eventually be too great to enable a bridging of cultural differences, hence making substantive constitutionalism of doubtful value.⁸²⁷

2.3.3.2 On the Possibility of a *Demos*

The question of the possibility of a common identity beyond the national context can be structured through outlining three different approaches. First of all there is a radical version which excludes any possibility of a *demos* that transcends the nation state. Secondly a softer version can be identified which accepts that such a *demos* may one day materialize (at least on a regional level). Thirdly there is an even more enthusiastic cosmopolitan vision.⁸²⁸ As the aim is to outline the potential problems that a democratization of organizations will face, this chapter will start off with a critical discussion of cosmopolitanism and then work in reverse order, to identify some of the issues that the idea of a transnational *demos* runs into.

One of the most well-know advocates of cosmopolitan democracy is David Held. Held departs from a vision of democracy in which there is a link between the *demos*, citizenship, electoral mechanisms, the nature of consent, and the nation state. A symmetry and congruence is assumed between citizen-voters (who give their consent) and national decision-makers (who pursue policies legitimately for their constituents).⁸²⁹ Held's argument is, however, that international organizations and global issues in general challenge the key ideas of democracy by introducing new dimensions to the nature of the constituency, to the meaning of representation, and to the proper form and scope of political participation. Hence, the democratic polity need re-examination. States can no longer serve as the sole centers of legitimate power. Instead, sovereignty can be "stripped away from the idea of fixed borders and territories".⁸³⁰

In Held's vision people still serve as the source of legitimacy. However, the nation-state is not the sole container of democracy. In Held's cosmopolitan model people enjoy multiple citizenships, or in other terms, they enjoy membership in multiple communities. The UN

⁸²⁶ Dehousse (2003), at 138, and Nye (2001).

⁸²⁷ Howse and Nicolaïdis (2001), esp. at 241-243.

⁸²⁸ The categorization is used by Bryde (2005), at 117.

⁸²⁹ Held (1999), at 91.

⁸³⁰ Held (1999), at 104-107 (quote at 107).

takes on a special role as it has the potential for developing into a global parliament, but also regionalization (e.g. through enhancing the EU) is encouraged. Taken together, the participatory democracy at local levels and public assemblies at the global level create a political order of associations, cities, nations, regions, and networks, in short, a cosmopolitan model of democracy. However, as a precondition for the coming into being of a cosmopolitan democratic community, a common commitment to democracy is needed.⁸³¹ In this respect, Held notes that new emerging voices of a transnational civil society (such as the Rio Conference on the Environment, the Cairo Conference on Population Control, and the Beijing Conference on Women) already represent new forms of public life.⁸³² The growth of such non-governmental initiatives express, in Held's mind, an emerging international public sphere and a feeling of belonging to a global community.⁸³³

As a starting point there is no reason to doubt that certain benefits may attach to the involvement of civil society in processes of global governance and the work of international organizations. NGOs may provide an input of information, stimulate debate and offer new political perspectives, provide a channel for stakeholders to have their voice heard, increase public understanding of the work of organizations, and even provide channels for voices that are not able to get through nationally.⁸³⁴ However, an image of NGOs (alongside with other non-governmental initiatives) as expressions of an existing or emerging global community and as a source of democratic legitimacy has also been criticized. This critique is all the more important as the creation of an international democratic civil society with NGOs as its central actors is often pictured as the first crucial step towards a cosmopolitan legal order.⁸³⁵

A critique of NGO input in international organizations takes many different forms. NGOs are usually only heard during the negotiation processes (and not in the actual decision-making process). Some organs or organizations, such as the UN Security Council and the WTO, are also explicitly beyond any such representation. NGO participation may also be limited to only a small number of representatives.⁸³⁶ Citizens' capacity to organize may be distributed unevenly. In this vein the representation may become biased, for example towards special interests or geographically. The ability of an NGO to

⁸³¹ Held (1995), at 282.

⁸³² Held (1999), at 107-108. Also see Held (1995), at 272-280.

⁸³³ See Bryde (2005), at 118-119, and Archibugi (2004), at 445.

⁸³⁴ This list of possible benefits is from Scholte *et al.* (1998), at 6-7.

⁸³⁵ Bryde (2005), at 118.

⁸³⁶ Köhler (1998), at 232-233.

participate is also likely to depend to a large extent on resources. Hereby those civil society institutions with prominent backing are more likely to be able to be actively involved in decision-making in organizations. As a result NGOs need not be representative of the range of interests involved, but may instead produce new inequalities. More generally, although NGOs may provide an input of civil society into organizations, the reliance on NGOs as a source of legitimacy (or as proof of a *demos*) can hereby provide a false sense of popular endorsement of policies.⁸³⁷

Some cosmopolitans actually recognize that a *demos* is a prerequisite for democracy, but that such a *demos* at present does not exist. When facing the accusation of being hopelessly utopian, idealistic and overstating the level of common identity beyond the national level, the argument is consequently often qualified by adding that if a *demos* does not exist as of yet, at least such a thing may come into being in the future.⁸³⁸ This idea of the gradual creation of a *demos* often makes its case by building on examples 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*. By analogy, then, the claim is made that even for international organizations there is no need to assume the preexistence of a common identity.⁸³⁹

Habermas positions himself clearly 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 demand for a 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.⁸⁴⁰ By improving on the democratic features of international organizations through increased representativity, openness, use of referendums, and improved deliberation, a democratic multilevel politics is predicted to come into being, which can "create an orientation towards a public interest beyond the nation-state".⁸⁴¹

However, even this approach cannot escape the need for at least rudimentary common ground among members. Tuori puts this in terms

⁸³⁷ For the critique in the context of different organizations, see Grande (2000), at 130, Scholte *et al.* (1998), at 7-8, and Jayakar (1998).

⁸³⁸ See Archibugi (2004), at 461.

⁸³⁹ Schmitter (2000), at 118. Also see references to different authors in Stein (2001), at 526.

⁸⁴⁰ 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.

⁸⁴¹ Zürn (2000), at 212.

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.⁸⁴² In a similar way Haltern has claimed that without a shared sense of commonness, all efforts of creating a *demos* (through the establishment of flags, anthems, citizenship) will constitute mere “consumer aesthetics”.⁸⁴³

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.⁸⁴⁴ The crucial question then becomes whether this is enough. The all important concern for every organization becomes whether the shared identity is substantive enough to bridge differences between members and hereby to enable a conferral of powers upon the organization, or even a development of organizations and a corresponding increase of their legal powers.⁸⁴⁵

As a practical example in the WTO context, the question has been posed whether the ideology of free trade is shared widely enough to sustain strengthening of the organization.⁸⁴⁶ The question has however been debated more thoroughly in the EU context. On the one hand there is no reason to assume that the common identity needs to be analogical to national identities.⁸⁴⁷ Nor is there a *demos* in that sense of the notion (building around elements such as a shared culture and history, and shared means of communication) at the EU level. On the other hand, the problem is that although a decoupling of nationality and citizenship opens up the possibility of thinking about multiple *demoi*, the rudiments

⁸⁴² Tuori (2007), at 47.

⁸⁴³ Haltern (2003), at 33 *et seq.* The Charter of Fundamental Rights of the European Union serves the same purpose, Haltern concludes: “It simply is wrong to suppose that under the Charter’s influence, the people living in Europe will turn into European subjects, coming together in solidarity as a European Community”, at 38.

⁸⁴⁴ Habermas (2001), at 19-21 (quote at 21). Also see Habermas (2002), at 153. For a different construction see de Wet (2006 “The Emergence”) deriving common values from the case law of the European Court of Human Rights.

⁸⁴⁵ Stein (2001), at 527.

⁸⁴⁶ See Howse and Nicolaïdis (2001), e.g. at 241-243.

⁸⁴⁷ In Weiler’s mind a *demos* in the national-cultural sense should not even be the goal. Weiler (1999), at 346-347.

of a European identity are still rather thin.⁸⁴⁸ 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.

Weiler claims that the vagueness of the European *demos* is demonstrated by the fact that all European states have signed the European Convention on Human Rights. Hence European states already embrace the core values that the EU is supposedly building its identity around. As a consequence it becomes difficult to see what the distinguishing feature is of the *demos* upon which the EU builds.⁸⁴⁹ As the EU example demonstrate, a difficulty of building up a common sense of identification, belonging and participation at the international level that would be strong enough to sustain trans-national constitutionalism, leads to that organizations are bound to be limited in their reach. The weaker the common identity upon which the organization builds, the sooner an exercise of powers will be challenged in terms of a legitimacy deficit. Organizations are also bound to be subject to different perceptions of what they should do.⁸⁵⁰

Finally, there is an even more skeptical approach to the idea of a common identity, claiming that a *demos* upon which to build constitutionalism in organizations is in fact an impossibility.⁸⁵¹ One of the classical arguments 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. This is however something else than saying that the EU would be a constitutional legal order in the full sense of the term, meaning that it “goes back to an act taken by or at least attributed to the people themselves, in which they attribute political capacity to themselves”.⁸⁵² As there is no collective identity between the European peoples, this means that the European democratic deficit is structurally determined.⁸⁵³ Also the prerequisites for a mediating process essential to democracy are absent and cannot simply be created. The

⁸⁴⁸ 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.

⁸⁴⁹ Weiler (1998), at 382-386.

⁸⁵⁰ Coicaud (2001), at 260-261.

⁸⁵¹ See Zürn (2000), at 191 *et seq.*

⁸⁵² Grimm (1995), at 290.

⁸⁵³ Grimm (1995), at 297. Offe even claims that trust and solidarity (and with it the potential for creating a community) will whither away as economical integration deepens. This is particularly of concern for all attempts at extending demands of redistribution beyond the state context. Offe (2000), at 84-85.

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).⁸⁵⁴ In the absence of mediatory structures “from which the democratic process lives”, an emphasis on popular legitimacy can only serve to remove the EU “farther from its base than ever”.⁸⁵⁵

2.4 Constitutionalism as Hegemony

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). An argument sometimes put forward claims that acceptance of and confidence in cooperation at the international level cannot be achieved due to the pluralism and variety of values for the interpreter to take into account. However, as such this claim is not convincing. Even the national level may be pluralistic, but nevertheless share a sense of commonness.⁸⁵⁶ However, any attempts at democratizing organizations will meet several obstacles. While many of these are of a practical kind (such as ensuring representativeness and defining proper NGO input), one of the more severe questionmarks is whether a common identity, strong enough to sustain the creation of a system of democratic governance, can emerge among members of international organizations.

Even if a claim on the impossibility of a *demos* beyond the national level is not accepted, it seems that as of yet a common identity at anything but a fairly abstract level cannot be identified. Among organizations this discussion has been most prominent in the EU context. However, the *demos*-issue is of concern also for other organizations (although the level of common identity needed may vary between organizations). The (claimed) absence of a sufficient degree of commonness in the EU to sustain continuing integration does not exclude the possibility that members of another organization may share a common identity, or that such an identity may one day materialize in the EU. The point is rather to emphasize that as long as this is not the case, even more practical initiatives for democratizing organizations will not necessarily be able to produce the intended legitimizing effect. This is of concern for the constitutionalization of any organization.

⁸⁵⁴ 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.

⁸⁵⁵ Grimm (1995), at 298-299.

⁸⁵⁶ Cf. Dahl (1999), at 25-26, with Howse (2001 “The Legitimacy”), at 376.

Whereas a constitution of a state can claim loyalty because it is perceived as shared by the citizens, this is not the case with constituent instruments of organizations in the absence of a *demos*. As a result there is nothing that convinces a minority to accept a decision that goes against it.⁸⁵⁷ As an expression of this, European citizens continue to look to their national governments for responses *against* the EC/EU institutions.⁸⁵⁸ In such a case a parliamentarization of an organization will fail to bestow legitimacy on decisions of organizations as it is the national institutions that remain the primary level of political identification and participation.⁸⁵⁹

Given the doubts surrounding the legitimizing effect of a democratization of organizations the question arises whether judicial review would be preferable after all. To use Franck's words, is it so that "the Court may have to be the last-resort defender of the system's legitimacy if the United Nations is to continue to enjoy the adherence of its members"?⁸⁶⁰ As one of the arguments in favor of a judicialization of organizations has been the importance of upholding the rule of law (by protecting sovereign rights of members, and by supervising political organs), this is considered all the more important due to the absence of a working democratic system of governance.⁸⁶¹

A central assumption of formal constitutionalism, whether as a legality check upon political organs of organizations, or as a means for increasing the enforcement capacities of organizations, does however suffer from its own set of problems. Any assumption that courts can avoid entanglement in ambiguous political issues is dubious. This stands out particularly in respect of powers of organizations, where legal arguments even for contradictory constructions of powers can easily be made. As the ultimate decision between whether to interpret the powers of an organization in a restrictive or an expansive sense is always political, the making of such decisions by a judiciary poses a number of potential risks for both the judiciary itself and the organization at large. Issues concerning the representativity and accountability of judiciaries, the role of individual judges as interpreters of common values, and the

⁸⁵⁷ Haltern (2003), at 32.

⁸⁵⁸ See Offe (2000), at 73-74.

⁸⁵⁹ It is consequently democratic governments that can legitimately speak for their populations. (Re)introducing unanimity procedures, while it may moot the legitimacy issue, is not necessarily a democratic cure, since the negotiating systems that come with such procedures often lack transparency. Axtmann (2002), at 106-109. Also see Zürn (2000), at 191-195.

⁸⁶⁰ Franck (1992), at 523.

⁸⁶¹ See above, Part II, Chapter 3.2 for examples.

relationship to democratically accountable organs, cloud any emphasis on a judicialization of organizations.

Just as the aim is not to deny that international organizations could enjoy democratic legitimacy, nor is the claim that judicial review never could be legitimate.⁸⁶² In upholding fundamental values and safeguarding democracy itself, in an impartial manner, and above all by remaining “receptive to the normative debates in civil society” the performance of a judicial role by an organization may indeed be legitimate.⁸⁶³ However, in order to maintain such legitimacy, satisfactory answers will have to be produced on the critical points made above. While a court need not be illegitimate by definition, the introduction of a judicial element into an organization where there has been none, or the further development of the judicial role of a pre-existing judicial (or quasi-judicial) organ, is bound to give rise to such concerns. Eventually, assuming that also formal constitutionalism needs to be firmly founded upon and sensitive to a common identity in order to be legitimate, a lack of such identity will not only be of concern for a democratization of organizations but also for a successful judicialization.⁸⁶⁴

All of these obstacles and demerits put the usefulness of constitutionalism in organizations in some doubt. In fact, given the many obstacles in the way of realizing both formal and substantive constitutionalism, this discussion is largely prospective. Nevertheless, the constitutionalism-theme is remarkably persistent.⁸⁶⁵ In this discussion, in criticizing one aspect of constitutionalism through the use of the other, formal and substantive constitutionalism also establish themselves in a tension. Whether advocating judicialization or democratization of an organization, an argument in favor of a particular kind of governance is made. The two aspects of constitutionalism can therefore be pictured as a dichotomy over who should be entitled to control regulatory outcomes. To use Føllesdal’s example, while a democratization and politicization of the European Commission is likely to affect its problem-solving capacity,

⁸⁶² In this respect, see Bickel, above, Part III, Chapter 2.2.2.3, note 736. However, also see Waldron who makes a more categorical critique and claims that although a judiciary may make substantively correct decisions, it can never be as respectful of the moral and political capacities of ordinary citizens as democratic organs. See Waldron (1998), and above Part III, Chapter 2.2.2.3, note 762 and accompanying text.

⁸⁶³ The expression is used by Tuori (2002), at 235.

⁸⁶⁴ Zurn (2007), at 271-272.

⁸⁶⁵ Dunoff is perplexed by the persistence of the constitutionalization discussion in respect of the WTO. As possible reasons Dunoff identifies: hopes that the trade system will come out on the winning end in conflicts with other norms, that the discussion will be self-referential and result in constitutionalization, and that the discussion serves as a response to a perceived crisis of international law. Dunoff (2006), at 667-670.

an authority to tax and redistribute may increase the problem-solving capacity of the EU, but at the expense of democratic accountability.⁸⁶⁶

As an issue of “who decides”, constitutionalism therefore potentially also echoes the member-organization dichotomy which was the general frame through which the nature of organizations was outlined earlier. This is the case when formal constitutionalism is defined as an increase of the enforcement capacities of organizations, and substantive constitutionalism is understood as an emphasis on member consent. In this way claims in favor of judicialization or democratization can also become reproductions of a dispute over the extent of powers in different terms.⁸⁶⁷ If this is the case, then constitutionalism turns into a means of “hegemonic preservation”, meaning that judicialization and democratization become byproducts in a political struggle over enhanced influence.⁸⁶⁸

Not surprisingly (and as has been indicated earlier) in this construction constitutionalism can also reproduce the problems with overemphasizing either the role of members, or the independence of the organization. Formal constitutionalism (judicialization) can emphasize the effectiveness of the legal order of the organization, but overdoes this emphasis if the decision of the judiciary becomes detached from member consent. In such a case the judicialization will meet with a legitimacy critique. Substantive constitutionalism (democratization) brings with it an emphasis on member consent. However, at the same time such a focus can affect the image of the organization as an independent actor. When interest is turned into a search for a *demos* which the organization would ideally be an expression of, the absence of it emphasizes the derived character of organizations. The stronger the common identity among members of an organization is, the more extensive the powers (and herewith the independence) of the organization can grow (as evidenced by the EU). Consequently, the more the organization will appear as an

⁸⁶⁶ Føllesdal (2005), at 452. In a slightly different context (as a question of choice of organization), a similar point is made by Krisch through the example of 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). For the EU the issue is all about values and policies that are for the European polity to determine. As a consequence Europeans insist on the tie to the European national constituency. Krisch (2006), at 256-259.

⁸⁶⁷ Eriksen and Fossum (2002), at 3 (discussing the EU). Frankenberg (2000), at 258 puts this in terms of a balance between subsidiarity and centrality.

⁸⁶⁸ 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.

independent actor, able to challenge its member states.⁸⁶⁹ Turned the other way around, the more the expectation of a common identity is emphasized as a necessary element of organization decision-making, the more limited the possibilities of legitimate exercise of powers of an organization will appear (in the face of a lack of a *demos*).

It should also be added that this is not the only way in which the member-organization dichotomy can be reproduced in a debate on constitutionalism. As a judicialization of organizations can also be advocated as a legality check upon the political bodies of an organization, and as a safeguard of fundamental values and the democratic process itself, judicialization could therefore be claimed to safeguard member concerns.⁸⁷⁰ A similar conclusion can be made concerning substantive constitutionalism. The main merit with a focus on democratic legitimacy of organizations is commonly located in the emphasis on the representation of member consent that such a focus brings with it. However, this legitimacy is a prerequisite for any development of an organization. Substantive constitutionalism can hereby also be pictured as a necessary prerequisite for the successful judicialization of an organization.

The imperfections of constitutionalism in organizations are met through relabelling the concept to more accurately describe reality. As substantive constitutionalism does not seem realizable at the international level, and as formal constitutionalism is regarded as shorthand for judicial supervision, the use of different vocabularies altogether is opted for, such as “metaconstitutionalism”, “postnational constitutionalism”, or “constitutionalism lite”.⁸⁷¹

An opposite approach maintains the constitutionalism concept intact. A recharacterization of the legal order, the argument goes, will not make the legitimacy problem disappear.⁸⁷² Given the difficulties with realizing constitutionalism in organizations, the solution to problems of legitimacy should rather be approached the other way around, by decreasing the demand for legitimacy. For the EU this would mean that a more reliable foundation for its claim to legitimacy could best be achieved through a reemphasis on the common market and a general scaling down of the ambitions of polity-makers.⁸⁷³ A similar claim has been made 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

⁸⁶⁹ See Coicaud (2001), at 260-261.

⁸⁷⁰ This has been discussed above, Part III, Chapter 2.2.2.3.

⁸⁷¹ For use of these notions, see Walker (2000), Walker (2003 “Postnational”), and Klabbers (2004 “Constitutionalism”).

⁸⁷² Weiler (1999), at 298.

⁸⁷³ Haltern (2003), at 44, and Eriksen and Fossum (2002).

legitimacy by limiting the agenda, and loosening the effect of decisions.⁸⁷⁴ Since reducing the impact of an organization on its members (and especially any capacity to generate binding norms and issue binding decisions) means that the constitutional image of the organization becomes weaker (while the treaty-image grows stronger), this could also be described as a process of deconstitutionalization.⁸⁷⁵

Yet another proposed way of meeting with issues of democratic legitimacy would be to ignore the constitutionalism-terminology altogether. On the one hand, when this is done in a negative way, organizations are treated as “bureaucratic bargaining systems” in which a certain degree of democratic deficit is to be expected.⁸⁷⁶ In this vein comitology has been proposed as an alternative to traditional democratic governance.⁸⁷⁷ If, on the other hand, an improved democratic character is emphasized, this takes the form, for example, of an emphasis on “institutional sensitivity” (to values and priorities), “political inclusiveness” (emphasizing representativity, public participation, and NGO involvement), and “top-down empowerment” (giving states the means they need for carrying out their obligations).⁸⁷⁸ Such approaches are recognized as “surrogates for democratization”, falling short of providing full democratic legitimacy, but nevertheless pictured as better than doing nothing at all.⁸⁷⁹

While such approaches capitalize upon the difficulties with realizing constitutionalism in organizations, they do it in a negative way. Not only, then, does constitutionalism run the risk of failing to solve interpretative ambiguities at the heart of organizations (which was one of the reasons for invoking constitutionalism in the first place). Constitutionalism can in fact itself turn into an extension of such ambiguities. Furthermore, both formal and substantive constitutionalism suffer from severe questionmarks. The indication of the criticism towards the idea of constitutionalism in organizations is that these questionmarks should perhaps be met by discarding constitutionalism (and settle for a different vocabulary), through reducing the need for constitutionalism, or through either accepting legitimacy deficits or approaching such deficits in a more limited manner. However, despite these problems, the

⁸⁷⁴ As to the WTO, see Krajewski (2001), at 168, 175-177, and 186. For a more general argument, see Bodansky (1999), at 600.

⁸⁷⁵ See above, Part II, Chapter 2.1 on the treaty-constitution dichotomy.

⁸⁷⁶ Dahl (1999), at 33-35.

⁸⁷⁷ For one appreciation of comitology, see Joerges (2002).

⁸⁷⁸ Howse and Nicolaidis (2001), at 243-248. Cass (2005) introduces “trading democracy” as an element of the constitutionalization of the WTO, at 242-243.

⁸⁷⁹ For the expression, see Delbrück (2003), at 40-43. Also see Steffek (2003), at 256-271. For one account of democratization, see Patomäki and Teivainen (2004).

reproduction of a dispute on the extent of legal powers of an organization in terms of judicialization and democratic legitimacy may eventually also have some merit. Some remarks on such a view will be made by way of conclusion.

2.5 Concluding Remarks: The Virtue of Constitutionalism

Although formal and substantive constitutionalism has been discussed separately from one another, it should be borne in mind that judicialization and democratization are different aspects of constitutionalism. In order for there to be a balance between the two an input of both is needed. 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.⁸⁸⁰ 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.⁸⁸¹

Exactly how to strike the balance between formal and substantive aspects of constitutionalism is part of the debate over governance in organizations. As Croley argues, no matter how the particular balance is struck between judicialization and democratization, as long as neither is obliterated “one can always argue that that balance is just right”.⁸⁸² This means that the question of balancing the different aspects of constitutionalism cannot be settled in the abstract. Instead, any way the relation between the formal and substantive aspect is put, it will constitute a particular form of constitutionalism.⁸⁸³

For present purposes the even more important point is, as Maduro points out, that the paradox of “who decides” is inherent in constitutionalism. The paradox itself is also one of the guarantees of limited power. If this balance was struck once and for all, then the

⁸⁸⁰ Franck (1995), at 625.

⁸⁸¹ See Grimm (2000), at 109-111, and Bellamy (2001), at 22. Also see Bienen *et al.* (1998), at 302-303, and Rosenfeld (2001), at 1314.

⁸⁸² Croley (1995), at 781.

⁸⁸³ In this sense the question can also be characterized as a choice between different types of democracy, see Grimm (2000), at 109. Also see Rasmussen (1986), at 45, and Hutchinson (1999), at 216-221.

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. This is as true in the EU, as it is for the relationship between the ICJ and the UN Security Council.⁸⁸⁴ As both political cooperation and integrity are needed for institutional legitimacy, both political and judicial organs have an important role to perform.⁸⁸⁵ The balance at the heart of constitutionalism also needs to be scrutinized and restructured. In this sense constitutionalism can never be finished, but is an ongoing project. If the balance is not constantly restructured, then constitutionalism runs the risk of turning into “a way of closing down debate in favor of a particular institutional balance and value cluster”.⁸⁸⁶ This scrutiny means that constitutionalism needs to constantly debate the issues outlined in the preceding chapters, and hereby balance anew its formal and substantive elements.

All of this indicates that although constitutionalism can potentially reproduce the member-organization dichotomy, constitutionalism also brings with it a shift of level upon which to deal with that dichotomy. As constitutionalism explicitly turns interest to the question “who decides”, the dichotomy between the organization and its members is not hidden behind a formal discussion on constructing and interpreting provisions of the constituent instrument. Instead, by gearing interest towards issues of identity, democracy, legitimacy, the rule of law, and the interrelation of all of these, constitutionalism can reveal new aspects of a debate on how to construct the powers of an organization.⁸⁸⁷

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, is hence turned into discussions on what the relationship of the organization to its members should be (is there e.g. proper input by members in the decision-making?), who should guarantee the rights of members (a judiciary or a political body?), how it can be best ensured that the protection of member rights is properly balanced with effectiveness of the legal order, and with them, all of the discussions on the merits and demerits of constitutionalism outlined above (including e.g. calls for reducing the demand for legitimacy, or reducing the expectations of legitimacy).

⁸⁸⁴ See Maduro (2003 “Europe”), at 96-101.

⁸⁸⁵ See Alvarez (1996), at 39 discussing the UN.

⁸⁸⁶ Walker (2001), at 54.

⁸⁸⁷ As Koskeniemi puts it, constitutional vocabularies contest and politicize the structural biases of present institutions, Koskeniemi (2007), at 34.

In turning a dispute on what powers have been attributed to an organization, or on what powers are functionally necessary, into questions on the extent of the common identity of members and the source of legitimacy of interpretations, interest is also turned to the source of the contents of the attributed power and implied powers doctrines. As far as this means that the political aspects of those doctrines are made subject to debate, a shift of focus even transcends the immediate legal dispute. In characterizing constitutionalism in this way, the merit of constitutionalism derives from the capacity to politicize what otherwise appears as just an act of interpreting the constituent instrument.⁸⁸⁸

⁸⁸⁸ 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.

Part IV The Powers of the Human Rights Committee

What you cannot enforce, do not command.
Sophocles (496 BC - 406 BC)

The best way to get a bad law repealed is to enforce it strictly.
Abraham Lincoln (1809-1865)

Like any institution, the HRC is subject to an ongoing discussion on how it can best achieve its goals. Different approaches to the Committee are expressed, for example, through different constructions of its legal powers. It comes as no surprise therefore that all of the three doctrines that have been the main focus of this thesis can be (and have been) used also for addressing the question of the powers of the Committee.

In the preceding chapters the aim has been to understand the nature of reasoning through the doctrines of attributed powers, implied powers, and constitutionalism, and especially to demonstrate how the doctrines enable the expression of different substantive claims through them. In this final part of the work the aim is to demonstrate more concretely how different constructions of the powers of the HRC build upon these doctrines. A central example in this discussion will be the question of extent of HRC competence in dealing with reservations by state parties to the ICCPR and the Optional Protocols.

The discussion on HRC powers will serve to exemplify the more conceptual discussions on powers, in particular with a view to the different levels upon which to deal with the doctrines. The following chapters will therefore first of all demonstrate how the dichotomy between an emphasis on sovereignty concerns of ICCPR state parties and Committee effectiveness is expressed in discussions on powers of the Committee as a dichotomy between attributed and implied powers reasoning. An illustration will also be provided of some of the more substantive disputes through which this dichotomy manifests itself. Secondly interest will be turned towards the attributed and implied powers doctrines themselves, demonstrating how both doctrines already embody within themselves an act of balancing.

Finally a discussion on the possibility of structuring the work of the HRC through a judicialization or a democratization of the Committee will round up the discussion. A critical discussion of the possibility of both judicialization and democratization will reveal issues concerning the institutional development of the HRC that a mere focus on the construction of powers never touches upon. These issues are only brought to the foreground by shifting focus from the attributed powers – implied powers debate, to discussing the role of the Committee in terms of its judicial and democratic character.

As a specification, the aim is not to engage in a political analysis of what the ideological or political differences might be (of ICCPR state parties and of HRC expert members) that lie at the heart of differing views on the powers of the Committee, although, as the discussion on democratization will suggest, this would of course be the crucial issue to deal with in hoping to ever arrive at the heart of the disagreement on the extent of powers of any institution.⁸⁸⁹

1 Effectiveness, Consent, and the Question of Reservations

1.1 Arguing for Implied Powers

Whenever there is a perceived need for more effective performance of an organization (be it for the fulfillment of the object and purpose of the organization, or for the exercise of express powers and functions), no further arguments are needed by way of legal reasoning for justifying that activity than its functional necessity. As has been concluded earlier, while the case law on the implied powers doctrine confirms it as a mechanism for the expansion of powers of international organizations, this does not prevent other institutions from utilizing that doctrine. As long as there is an actor, with tasks, and a purpose, there is no a priori obstacle to relying on the doctrine.⁸⁹⁰

The Human Rights Committee has on several occasions widened its competence through use of necessity reasoning. Already at the very first session of the Committee, the question arose whether the HRC had the competence to issue interim measures of protection. The majority

⁸⁸⁹ Some of the literature used does however explore such questions. See for example the articles in Bauer and Bell (1999).

⁸⁹⁰ The relationship is rather the reverse. Implied powers may establish an institution as an international organization, see above, Part I, Chapter 2.2.

built their reasoning on the spirit of the Covenant and the Optional Protocol: the entire scheme of the ICCPR and the achievement of its object and purpose were to prevail over the fact that there was no express mention of such a power. Eventually the HRC assumed, through its Rules of Procedure, a power to inform a state party of whether interim measures may be desirable.⁸⁹¹

More explicit recourse to implied powers was made in 1982 as the HRC at its 17th session discussed the usefulness of some non-express functions. These concerned mainly whether the HRC could reconsider earlier decisions on the grounds of legal or factual error, and whether the HRC was entitled to take follow-up measures with regard to its views on communications. As to the first of these, the majority built its argument specifically on enhancing the effectiveness of the Committee: the HRC “could not let its work under the Optional Protocol degenerate into an exercise of futility;”, meaning that if the HRC “believed that certain appropriate action was reasonably open to it, or was not expressly prohibited, the Committee should take it”.⁸⁹²

As to the second question the majority emphasized that the state parties had intended that the ICCPR is implemented. Building on this, while the HRC does not have “executive powers enabling it to enforce its views, it could nevertheless do something to bring redress, or end continued violations”.⁸⁹³ When this issue was raised anew at the 35th session (1989), the HRC adopted the mandate of the Special Rapporteur for Follow-up of views.⁸⁹⁴ Later, in 1993, the HRC clarified through explicit reference to the practice of the International Court of Justice that the legal mechanism whereby the mandate was created was the implied

⁸⁹¹ See the Rules of Procedure of the Human Rights Committee, UN Doc. CCPR/C/3/Rev.3 (1994), 24 May 1994, Rule 86: “The Committee may, prior to forwarding its views on the communication to the State party concerned, inform that State of its views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. In doing so, the Committee shall inform the State party concerned that such expression of its views on interim measures does not imply a determination on the merits of the communication”. Also see Young (2002), at 65-69 and note 177. For an application of that rule in practice, see *Piandiong et al. v The Philippines*, Communication No. 869/1999, Views (19 October 2000), UN Doc. CCPR/C/70/D/869/1999. Also see Harrington (2003), at 67-72 discussing the legal character of the mechanism.

⁸⁹² Seventh Annual Report of the Human Rights Committee, United Nations General Assembly Official Records, 38th session, Suppl. No. 40 (UN Doc. A/38/40) (1983) (hereinafter Seventh Annual Report of the Human Rights Committee), at 93-94, para. 393. Also see Young (2002), at 71-72, and Gandhi (1998), at 335-337.

⁸⁹³ Seventh Annual Report of the Human Rights Committee, at 94, para. 393.

⁸⁹⁴ Thirteenth Annual Report of the Human Rights Committee, United Nations General Assembly Official Records, 44th session, Suppl. No. 40 (UN Doc. A/44/40) (1989), at 138, para. 620.

powers doctrine. The Committee concluded that “... follow-up activities are not only compatible with its mandate but are indeed essential if the Committee is expected to discharge the responsibilities entrusted to it under the Optional Protocol”.⁸⁹⁵

Perhaps one of the most controversial and certainly one of the most frequently discussed claims to an implied power, concerns whether the HRC has a power to determine the compatibility of reservations by state parties with the ICCPR.⁸⁹⁶ Such a competence is not unheard of in other human rights bodies. In the *Temeltasch* case, the European Commission of Human Rights defined its competence to determine the validity of reservations by stating that the European Convention on Human Rights:

... estalish[es] a common public order of free democracies It creates over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the preamble, benefit from a collective enforcement ... the very system of the Convention confers on [the Commission] the competence to consider whether, in a specific case, a reservation or interpretive declaration has or has not been made in accordance with the Convention.⁸⁹⁷

This competence was also confirmed for the European Court of Human Rights (ECtHR) (by the Court itself) in the *Belilos* case (1988).⁸⁹⁸ The underlying logic was that the rights and freedoms of the ECHR benefit from a collective enforcement guarantee. In order to be effective, this judicial control must extend to reservations. Otherwise states could evade their responsibilities under the Convention.⁸⁹⁹ The ECtHR therefore

⁸⁹⁵ Seventeenth Annual Report of the Human Rights Committee, United Nations General Assembly Official Records, 48th session, Suppl. No. 40 (UN Doc. A/48/40) (1993), Annex X(B), at 222, para. 5. For an overview of these developments, see Young (2002), at 70-78. For a characterization of this as an exercise of implied powers, see Schmidt (2001), at 202 and 215. Also see Baylis, who considers the practice of closely scrutinizing and questioning state parties on the contents of their reports as an instance of non-express evolution of the functions of the Committee. Baylis (1999), at 299.

⁸⁹⁶ It should be noted that the expression “compatibility with the object and purpose of the Covenant” derives from General Comment 24 (for the exact quote, see Human Rights Committee, General Comment 24, para. 18). Alain Pellet in the Second Report on Reservations to Treaties prefers to use the expression “Determination by the monitoring bodies of the permissibility of reservations”, see ILC, Second Report on Reservations, title at 56. While the choice of word (compatibility/permissibility) does indicate differences in the character of that determination, in the following the wording of General Comment 24 will be used.

⁸⁹⁷ *Temeltasch v Switzerland*, Application No. 9116/80 (5 May 1982), 31 European Commission of Human Rights, Decisions and Reports 1983, paras 63-65.

⁸⁹⁸ *Belilos v Switzerland*, Judgment of 29 April 1988, European Court of Human Rights, Series A, No. 132 (1988).

⁸⁹⁹ See Polakiewicz (2004), at 107 *et seq.* and conclusions at 130-132.

claimed that its competence to consider reservations enclosed a power to determine the validity of reservations (to the Convention).⁹⁰⁰ While the case law of the ECtHR as such does not constitute a precedent for the Committee, the competence claimed by the HRC is strikingly similar.

While individual HRC members had in the 1980s expressed their support to the exercise of a similar power by the HRC, it was not until the 1990s that such a power materialized.⁹⁰¹ The Committee derived an implied power to determine the compatibility of reservations of ICCPR state parties in 1994 through the adoption of General Comment 24 on 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.⁹⁰²

The HRC has also exercised this power on a number of occasions. In the Concluding Observations on the report of the United States of America in 1995 the Committee held that it is “particularly concerned at reservations to Article 6, paragraph 5, and Article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant”.⁹⁰³ In the *Kennedy v Trinidad and Tobago* communication (1999) the Committee held that the reservation by Trinidad and Tobago “constitutes a discrimination which runs counter to some of the basic principles embodied in the Covenant and its Protocols, and for this reason the reservation cannot be deemed compatible with the object and purpose of the Optional Protocol”.⁹⁰⁴ In the Concluding Observations of the Committee on the report of Kuwait (2000) the claim was made that: “... ‘interpretative declarations’ of the State party ... as well as the

⁹⁰⁰ The logic was that since reservations are part of the treaty regime, and the Court has competence to interpret the provisions of the ECHR, hereby also all reservations fall within the competence of the Court. Further, as only valid reservations become part of the treaty, and the Court has competence to interpret the provisions of the treaty, the Court must also be able to determine whether a reservation is valid or not. For an overview, see Cameron and Horn (1990), at 89-92.

⁹⁰¹ See the Individual Opinion by Mr. Dimitrijevic, Mrs. Higgins, and Messrs. Mavrommatis, Pocar, and Wennegren concerning the admissibility of communication No. 228/1987, *C.L.D. v France*, para. 2. *C.L.D. v France*, Human Rights Committee, Communication No. 228/1987, Decision on admissibility (18 July 1988), UN Doc. CCPR/C/43/D/439/1990.

⁹⁰² For the full reference, see above, Part I, Chapter 2.3.1, note 58.

⁹⁰³ Concluding Observations of the Human Rights Committee: United States of America, UN Doc. CCPR/C/79/Add.50 (1995), para. 279.

⁹⁰⁴ *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 (hereinafter *Kennedy v. Trinidad and Tobago*), para. 6.7 (the reservation concerned the competence of the Committee to consider communications relating to prisoners sentenced to death).

‘reservations’ ... raise the serious issue of their compatibility with the object and purpose of the Covenant”.⁹⁰⁵

Although the Committee has often dealt with reservations of states in various contexts, it has only invoked a power to determine the compatibility of a reservation in exceptional cases.⁹⁰⁶ As the examples suggest, the Committee has however used this power both in respect of the ICCPR and the first Optional Protocol, and in respect of both communications and state reports. In all of these instances the Committee has also made specific reference to General Comment 24 as the source of this competence.

In General Comment 24, the necessity of the implied power was claimed to arise both from the inappropriateness for state parties to make the compatibility assessment, and for the effective performance of the existing functions of the Committee. General Comment 24 presents these two lines of reasoning as concurring justifications for the existence of the power. While both arguments are clearly functional, they are somewhat different in character. The first of these arguments emphasizes the special character of human rights.⁹⁰⁷ This special character, the HRC argued, renders the mechanism of the Vienna Convention on the Law of Treaties, which relies on state reactions in order to accept and object to reservations, ineffective in the ICCPR context.

... the Committee believes that its [The Vienna Convention] provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations.⁹⁰⁸

This argument emphasizes the flaws with a reciprocal approach for objecting to reservations in the sphere of the ICCPR. Such a claim is commonly made also concerning human rights treaties at large: human rights treaties have third party beneficiaries (individuals), and can therefore not be reduced to inter-state relationships. The fact that the Vienna Convention regime builds on state consent as decisive for the determination of the scope of obligations stands out as incompatible with

⁹⁰⁵ Concluding Observations of the Human Rights Committee: Kuwait, UN Doc. CCPR/CO/69/KWT (2000), para. 5.

⁹⁰⁶ Tyagi (2000), at 225.

⁹⁰⁷ Such a special character can also be said to be a feature of other treaties, such as the 1949 Geneva Conventions, Craven (2000), at 499.

⁹⁰⁸ Human Rights Committee, General Comment 24, para. 17.

a “human rights approach” to reservations.⁹⁰⁹ The claim is also made that since the issue of reservations to human rights treaties is not properly addressed by the Vienna Convention, the question is open to development.⁹¹⁰

As to the second argument for why the HRC should possess the power to determine the compatibility of reservations, the Committee held that:

In order to know the scope of its duty to examine a State’s compliance under article 40 or a communication under the first Optional Protocol, the Committee has *necessarily* to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law.⁹¹¹

This argument emphasizes that the competence is necessary in order for the HRC to perform its regular tasks and pre-existing functions effectively. In building on the competence to determine the limits of its own jurisdiction (or, “the scope of its duty”), the argument is in fact similar to the *Kompetenz-Kompetenz* claim that is often said to be an inherent power of judicial bodies.⁹¹²

In addition to the finding of the existence of a power to deal with the compatibility of reservations with the Covenant, the question of the impact of such an interpretation has turned out to be a source of controversy. The Committee in General Comment 24 states that: “It necessarily falls to the Committee to *determine* whether a specific reservation is compatible with the object and purpose of the Covenant”.⁹¹³ This has been interpreted as an indication that the Committee is in fact

⁹⁰⁹ Scheinin (2004), at 42-43. As to case law see *Austria v Italy*, Application No. 788/60, 4 European Yearbook of Human Rights (1961), at 138-140, and *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82 (24 September 1982), Inter-American Court of Human Rights, Series A, No. 2, paras 28-35.

⁹¹⁰ This is the logic of Seibert-Fohr (2004), at 209.

⁹¹¹ Human Rights Committee, General Comment 24, para. 18 (emphasis added). ICCPR, Article 40 establishes the duty for states to submit reports to the HRC, and the right of the HRC to consider these reports. Optional Protocol, Article 1 provides for the Committee the competence to receive and consider communications from individuals who claim to be victims of a violation by a state of a right of the Covenant.

⁹¹² Young (2002), at 77-78. Also see Commission on Human Rights, Final Working Paper on Reservations to Human Rights Treaties, by Ms. Françoise Hampson, UN Doc. E/CN.4/Sub.2/2004/42 (19 July 2004), para. 37: “A judicial or quasi-judicial body has an inherent jurisdiction to determine the scope of its jurisdiction. ... [and] therefore, have inherent authority to determine: (a) whether a statement is a reservation or not; and (b) if so, whether it is a valid reservation; and (c) to give effect to a conclusion with regard to validity”.

⁹¹³ Human Rights Committee, General Comment 24, para. 18 (emphasis added).

implying for itself a legally binding power.⁹¹⁴ This was also the indication in the *Kennedy v. Trinidad and Tobago* communication by the Counsel of Mr. Kennedy (in commenting on Trinidad and Tobago's assertion that the Human Rights Committee has exceeded its jurisdiction):

... in conformity with the general principle that the body to whose jurisdiction a purported reservation is addressed decides on the validity and effect of that reservation, it must be for the Committee, and not the State party, to determine the validity of the purported reservation. Reference is made to the Committee's General Comment No. 24, paragraph 18,⁹¹⁵

In addition to indicating a legally binding character of the determination, this also suggested that the "determination" would not only concern the compatibility with the object and purpose, but would also be concerned with the validity (i.e. the legal force and effect) of the reservation.⁹¹⁶

An acquiescence of state parties in the general evolution of the HRC towards a more judicial role, could lend some support to such a change.⁹¹⁷ Recent work by both human rights bodies and the ILC in fact suggest that as far as the determination of compatibility of reservations concerns the scope of the Committee's own authority, there may indeed be agreement on the binding character of that determination.⁹¹⁸ Apart from that internal dimension however, there seems to be no agreement on the legally binding character of such a determination. As an expression of this, human rights bodies at large have recently been found only competent to "assess" the validity of reservations.⁹¹⁹ At the heart of the critique against such binding competence lies an argument emphasizing the absence of state consent.

⁹¹⁴ The United Kingdom also explicitly objected to such binding competence, see Observations of States parties (UK), (Official Records) at 133, para. 12(b).

⁹¹⁵ *Kennedy v. Trinidad and Tobago*, Communication No. 845/1999, para. 5.

⁹¹⁶ There are several possible consequences and the issue itself is subject to debate. See Cameron and Horn (1990). For an overview of the discussion concerning General Comment 24 especially with a view to the *Kennedy v. Trinidad and Tobago* Communication, see McGoldrick (2003). The question of legal consequence of such a determination will not be discussed in this work.

⁹¹⁷ Baylis (1999), at 299 focuses on the adjudicatory style of evaluating state reports as an indication of the judicial character. However, many other aspects can also be taken hold of, see below, Part IV, Chapter 3.1.

⁹¹⁸ See Eleventh Report on Reservations to Treaties, by Mr. Alain Pellet, Special Rapporteur, International Law Commission, Fifty-eighth session, 1 May-9 June and 3 July-11 August 2006, UN Doc. A/CN.4/574 (2006) (hereinafter ILC, Eleventh Report on Reservations), at 16-17, para. 53.

⁹¹⁹ See International Law Commission, Meeting with Human Rights Bodies (15 and 17 May 2007), Fifty-ninth session, 7 May-8 June and 9 July-10 August 2007, UN Doc. ILC(LIX)/RT/CRP.1 (2007), para. 34.

1.2 Emphasizing Attribution

States are assumed to have purposively entered a treaty, which consequently expresses the values and preferences of its state parties. In fact, the idea of a non-reciprocal treaty seems something of a contradiction in terms.⁹²⁰ The use of implied powers on its part widens the activities of an organization beyond the express wording upon which those state parties have agreed. On practically every occasion when the powers of the HRC have been discussed, the counterclaim to any implied powers has been phrased through an emphasis on lack of attribution (of such powers). In the very first discussions on the functions of the Committee, in objecting to the HRC power to review a decision that contained factual or legal errors, the claim was made that neither the ICCPR nor the Optional Protocol “which were the legal basis for the Committee’s functions and limits, empowered the Committee to reconsider its views on communications ...”, and further that “the Committee could have no inherent powers that had not been given to it explicitly by States parties”.⁹²¹

Similarly, on the issue of whether the Committee was entitled to monitor the implementation of its decisions under the Optional Protocol, the absence of express powers to this effect was emphasized. The Soviet Union in particular was opposed to all measures of supervision (including reporting procedures). It considered such measures as an interference in the internal affairs of states and hence contrary to Article 2(7) of the UN Charter.⁹²² Such a development was also claimed to introduce an uncertainty as to what additional obligations and procedures the Committee could attach to the ICCPR (hence echoing the concerns of Judges Hackworth and Koretsky in the ICJ concerning the implied powers of the UN).⁹²³ At any rate, it was said, such developments should be brought about through the use of the amendment mechanism (of Article 51 ICCPR), which places the process of change in the hands of the state parties, and eventually includes such powers expressly into the text of the ICCPR.⁹²⁴

Also in the discussion on the powers of the Committee to determine the compatibility of reservations with the ICCPR, the absence

⁹²⁰ “Treaty” defined as a consensual arrangement instituting a reciprocal exchange of goods or benefits, Craven (2000), at 500.

⁹²¹ Seventh Annual Report of the Human Rights Committee, at 93, para. 392, also see Young (2002), at 71.

⁹²² See Boerefijn (1999), at 20-21. Also see Bossuyt (1987), at 617.

⁹²³ For the concerns of the judges, see above, Part II, Chapter 1.2.1.1.

⁹²⁴ Seventh Annual Report of the Human Rights Committee, at 93, para. 392, and Young (2002), at 72-73.

of attributed powers was raised as a response to the adoption of General Comment 24. This was particularly clear in the objections of the United Kingdom and the United States. More specifically, while the response of the United Kingdom to General Comment 24 concurred 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 did however emphasize that any binding competence could not arise out of the inapplicability of the law on reservations. 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 Covenant would be required.⁹²⁵ This emphasis on formal amendment of the ICCPR indicates that in the minds of the United Kingdom, express attribution on the HRC of such a power would be necessary.

Similar reasoning was also central to the observation by the United States to General Comment 24. To repeat from the introductory chapter of this thesis, 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*. The drafters of the Covenant could have given the Committee this role but deliberately chose not to do so.⁹²⁶

Apart from these immediate reactions to General Comment 24 by ICCPR state parties, an emphasis on the attributed character of powers has been at the heart of Special Rapporteur Alain Pellet's arguments in his work on reservations to treaties in the ILC. In the Preliminary Conclusions on Reservations to Normative Multilateral Treaties, Including Human Rights Treaties (from 1997), the ILC recognizes that monitoring bodies are competent, in the silence of treaties on the matter, to "comment upon and express recommendations" with regard to the admissibility of reservations.⁹²⁷ However, this cannot affect the traditional modalities of control by the contracting parties. The legal force of monitoring body findings in respect of reservations cannot exceed that which the bodies have for their general monitoring role.⁹²⁸ Above all:

The Commission suggests providing *specific clauses* in normative multilateral treaties, including in particular human rights treaties, or

⁹²⁵ Observations of States parties (UK), (Official Records) at 132-133, paras 11-12.

⁹²⁶ Observations of States parties (US), (Official Records) at 126 (emphasis added).

⁹²⁷ The conclusions are part of the Report of the International Law Commission, Forty-ninth Session, at 57, para. 5.

⁹²⁸ Report of the International Law Commission, Forty-ninth Session, at 57, para. 8.

elaborating protocols to existing treaties if States seek to *confer competence* on the monitoring body to appreciate or determine the admissibility of a reservation.⁹²⁹

The reasoning in these quoted examples corresponds nicely with ICJ case law on the attributed powers doctrine in emphasizing the wording of the constituent instrument as the expression of the consent of states.⁹³⁰

The emphasis on state consent at the heart of Pellet's reasoning leads him to emphasize the regime of the Vienna Convention on the Law of Treaties for objecting to reservations. Although human rights treaties are designed to protect individuals, they are pictured as treaties. Any special character of human rights treaties is questioned. Simma has made the same point forcefully and emphasized that from a strictly legal point of view, human rights treaties are built like other multilateral treaties in that human rights treaties too create rights and obligations between their state parties. By emphasizing that human rights treaties create a network of rights and obligations between state parties Simma does not deny that human rights law can establish something like an "objective order" which transcends in some respects an ordinary contractual architecture. However, at the same time Simma refutes that it would follow from this "objective order" that the only remedies available in case of breach of treaty obligations would be those provided by the instrument itself.⁹³¹

Another way of making the point is to emphasize that human rights treaties benefit individuals only after states have expressed their willingness to be bound by them. Reservations, on their part, are an inseparable part of that consent.⁹³² Pellet himself is not convinced that ineffectiveness (assumed that it would be the result in the first place), can serve as a ground for making an alternative system acceptable. After all, for Pellet the consensual basis of international law is its ultimate feature. As a consequence no organ can take the place of a reserving state in determining the intentions of that state regarding the scope of the treaty obligations it is prepared to assume.⁹³³ As the US observation characterized such a move as a "... significant departure from the Covenant scheme", this is just another way of making the same point: in limiting the Committee powers to those expressly attributed to it, the

⁹²⁹ Report of the International Law Commission, Forty-ninth Session, at 57, para. 7 (emphasis added).

⁹³⁰ See *Legality of the Use*, ICJ Reports 1996, as discussed above, Part II, Chapter 1.1.3.

⁹³¹ Simma (1994), at 370-372.

⁹³² ILC, Second Report on Reservations, at 39, para. 147.

⁹³³ ILC, Second Report on Reservations, concluding at 87, para. 252.

agreement between the parties (to which they have consented) is best respected.⁹³⁴

Naturally, there is a counterargument to be made here. The emphasis on attributed powers is static. If an emphasis on attributed powers is tied to the consent of the drafters, the claim could be made that those drafters could impossibly foresee all the challenges that the HRC would meet (and hence, the powers that the HRC would be in need of). After all, the Committee should be able to perform its functions long after its initial establishment. An emphasis on the lack of expressly conferred powers can also be problematic if this serves as an excuse for not respecting treaty obligations. Both of these accounts have been built upon in objecting to such a constrained image of Committee powers.

1.3 Using One to Oppose the Other

Higgins famously located at the heart of the issue of reservations a complex "... balance to be struck between the legitimate role of States to protect their sovereign interests and the legitimate role of the treaty bodies to promote the effective guarantee of human rights".⁹³⁵ The two ways of constructing the powers of the HRC outlined above, result in a collision between these two concerns. Both constructions are presented by their proponents as not only legally sound, but also as the "right" construction of the powers of the Committee, while the argument of the opponent is presented as unacceptable and even *ultra vires*. As ILC Special Rapporteur Pellet notes, in this dichotomy there is a tendency of the one trying to affirm its monopoly over the other.⁹³⁶

From this constellation there does not seem to be any easy way out. When the doctrines are used to oppose one another, an emphasis on state consent can be targeted by the opponent for being ineffective and for crippling the Committee in performing its functions, while a claim to implied powers can be charged with not being respectful enough of state consent. The search for a balance between these two elements is in the context of reservations played out in different (albeit connected) contexts, such as, who is a participant in the regime, and what is the proper relationship between human rights and international law (and especially the Vienna Convention on the Law of Treaties). Issues of more specific concern are, for example, the role of reciprocity in objecting to

⁹³⁴ See Observations of States parties (US), (Official Records) at 126 also referring to the drafters of the treaty in order to make the point.

⁹³⁵ Higgins (1997), at xv.

⁹³⁶ ILC, Second Report on Reservations, at 72-73, para. 214.

reservations, and whether the human rights system is properly characterized as a special regime (and what the consequences of such a characterization might be).⁹³⁷

To begin with the first of these, the fact that rights are expressed in a treaty suggests that they are the result of a negotiation between states. The obligations contained in the treaty have been discussed and approved by state parties. Any reservations are presumably part of the agreement reached. This agreement is also the source of obligations of states. The Vienna Convention builds upon the reciprocity of contracting parties in stating that it is for other contracting states to accept or object to reservations.⁹³⁸ Hereby, in characterizing human rights treaties as “ordinary” treaties (and as falling within the Vienna Convention regime), the role of state consent and reciprocity as a source of obligations is emphasized.⁹³⁹

The Committee itself in General Comment 24 made a clear distinction between its approach, and the reservations regime of the Vienna Convention.⁹⁴⁰ In order to justify the necessity of the implied power, the HRC made its point by emphasizing that the focus of human rights treaties on individuals as the beneficiaries of the protection means that reciprocity does not work. Many arguments have been made to demonstrate why the emphasis on the protection of individuals makes the Vienna Convention regime unsatisfactory.

First of all some of the provisions of the Vienna Convention simply do not seem to make sense in the context of human rights. As an example, if the Vienna Convention regime is followed to the letter, the acceptance of a reservation by one state party would simultaneously mean that the acceptance “modifies those provisions to the same extent for that other party in its relations with the reserving State”.⁹⁴¹ Hence the state in accepting a reservation would in effect be making the same reservation itself. This, however, may be unworkable in the human rights context as the accepting state may not wish to deny the protection of a given article of the ICCPR to its own citizens.

Secondly, the effectiveness of reciprocal objections to reservations can be questioned. By emphasizing that states do not have an individual

⁹³⁷ These issues stand out from the outline of the different arguments above. Also see Craven (2000), and McGoldrick (2003). Klabbers (2004 “On Human Rights”), characterizes the debate on reservations as a struggle between a contractual and community conception of human rights treaties, at 154.

⁹³⁸ See 1969 Vienna Convention, esp. Article 20 and Article 21.

⁹³⁹ Notably, reciprocity and consent need not always however pull in the same direction. See Craven (2000), at 501.

⁹⁴⁰ Human Rights Committee, General Comment 24, para. 17.

⁹⁴¹ 1969 Vienna Convention, Article 21(1)(b).

interest in the achievement of the purposes of the human rights regime, but rather a common or collective interest to protect individuals, the question can be posed as to whether individual states can be relied upon to uphold that common interest. The claim has been made that for reciprocity to serve as a truly efficient challenge to impermissible reservations, *all* state parties would need to both object to the reservation, and refuse to accept the reserving state as a party to the treaty (as in any other case the treaty can enter into force for the reserving state).⁹⁴² This, however, is an unlikely scenario. In fact, due to the character of human rights treaties there may be a complete lack of impetus by a state to object to a reservation made by another state to begin with, as the actual disadvantages that follow from the making of that reservation concern the individuals of the reserving state. This leads to a potential lack of incentive of other states to object to reservations.⁹⁴³

Building on such criticism, the claim is made that an emphasis on the consensual nature of human rights treaties overemphasizes the capacity of the inter-state system to maintain the integrity of the ICCPR (from the perspective of the individual). Instead, a better way of safeguarding the common interest that the ICCPR aims at protecting, would be to rely upon the Committee to determine the application and effect of the ICCPR, which leads to a need for developing the powers of the Committee (e.g. in respect of reservations).⁹⁴⁴

However, whereas this solution to the balancing act between maintaining the treaty-character of the ICCPR and offering individuals as effective protection as possible, tilts the balance towards the Committee, this is not the only way the balance can be struck. Pellet admits that in certain situations the reciprocal function of the reservation mechanism may be almost meaningless. When a provision is “objective”, “One simply cannot say ... that the reservation is ‘established with regard to another party’”.⁹⁴⁵ This, however, does not mean that other parts of the reservations regime of the Vienna Convention would not apply. In such cases, Pellet claims, where reservations are entered to treaties that must apply without reciprocity, Article 21 of the Vienna Convention (on the legal effects of reservations and objections to reservations) does simply not apply, whereas other parts do (e.g. Article 19 on the freedom to formulate reservations, and Article 20(4) on refusing to allow the treaty to enter into force). The reservations regime is therefore not inapplicable to

⁹⁴² Craven (2000), at 496-497.

⁹⁴³ Lijnzaad (1995), at 67.

⁹⁴⁴ For a claim that the Vienna Convention regime sacrifices integrity, see Ghandhi (1998), at 356. Also see Lijnzaad (1995), summing her approach at 7.

⁹⁴⁵ ILC, Second Report on Reservations, at 43, para. 157 (emphasis in original).

human rights treaties.⁹⁴⁶ Nor does an objective character of ICCPR provisions mean that the Vienna Convention would not provide a legal regime for addressing reservations to those provisions. Instead, the choice between the Vienna Convention regime and deriving an implied power for the HRC becomes a choice between emphasizing effectiveness or state consent. Even those not in favor of expanding Committee powers admit that the Vienna Convention regime may be flawed in that all parts of the regime are not applicable to human rights treaties. Nevertheless, the claim is that however flawed, the Vienna Convention is still the general regime (and the only regime for authoritatively addressing reservations) upon which there is state consent.

The dichotomy between consent and effectiveness is present even when the discussion is phrased in more general terms. As indicated above, one of the basic assumptions that underlie the argument in favor of a widening of the powers of the HRC, is that human rights treaties constitute a special regime. The features of this special regime were put into words by the Inter-American Court of Human Rights (relying on both the ICJ *Reservations to the Genocide Convention* opinion, and the European Commission on Human Rights in *Austria v Italy* (Pfunders case)).⁹⁴⁷ According to the Inter-American Court, the American Convention on Human Rights does not embody a “reciprocal exchange of rights for the mutual benefit of the contracting States”, but instead, in ratifying the treaty states submit themselves “to a legal order within

⁹⁴⁶ ILC, Second Report on Reservations, at 42-43, paras 154-157. Article 21 of the 1969 Vienna Convention reads: “1. A reservation established with regard to another party in accordance with articles 19, 20 and 23: (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and (b) modifies those provisions to the same extent for that other party in its relations with the reserving State. 2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se. 3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation”.

⁹⁴⁷ As to the ICJ, see *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, (Advisory Opinion, 28 May 1951), ICJ Reports 1951 (hereinafter *Reservations to the Genocide Convention*), at 23: “In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties” (emphasis in original). Also see *Austria v Italy*, Application No. 788/60 (11 January 1961), 4 Yearbook of the European Convention on Human Rights (1961), at 140: “... the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement ... than to create subjective and reciprocal rights for the High Contracting Parties themselves”.

which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction".⁹⁴⁸

The ILC in its work on the fragmentation of international law has recognized that the underlying logic in such claims is one of self-contained regimes.⁹⁴⁹ The rationale of special regimes is the same as that of *lex specialis*.⁹⁵⁰ It refers to interrelated wholes of primary and secondary rules, sometimes called systems or subsystems that cover some particular problem differently from the way it would be covered under general law. As the ILC recognized, in the case of human rights law the self-contained character has even been taken to mean that special rules and techniques of interpretation and administration are thought to apply, which are somehow different from what "the general law" provides for analogous situations.⁹⁵¹ Another central assumption has been that the specific mechanisms of supervision and control defined in human rights treaties enjoy priority and even exclude attempts at enforcing human rights obligations through inter-state mechanisms.⁹⁵²

However, already at this general level the logic meets with serious challenges.⁹⁵³ The question can be raised whether there really can be such a thing as a self-contained regime. At any rate it would seem questionable as to whether self-contained regimes could function outside general international law. This follows from that the regime receives its binding force under international law. As a minimum, the rules of general law (such as the Vienna Convention on the Law of Treaties) always loom in

⁹⁴⁸ *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights* (Arts. 74 and 75), Advisory Opinion OC-2/82 (24 September 1982), Inter-American Court of Human Rights, Series A, No. 2, paras 29-30 (quote at para. 29). As a result the Inter-American Court concluded that it would be "manifestly unreasonable" to suggest that Article 20(4) of the 1969 Vienna Convention applied with the effect of conditioning the entry into force of the American Convention on Human Rights for a particular state upon the acceptance of its reservation by other contracting states, para. 34. Also see Craven (2000), at 507-508.

⁹⁴⁹ See Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Reports of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, International Law Commission, Fifty-eight session, 1 May-9 June and 3 July-11 August 2006, UN Doc. A/CN.4/L.682 (2006) (hereinafter ILC, Fragmentation of International Law), at 57-59, paras 129-132. Also see Addo (2006), at xxxii: "by their very nature, the transnational supervisory processes form a self-contained regime set around the specific terms of individual treaties".

⁹⁵⁰ ILC, Fragmentation of International Law, at 84, para. 191.

⁹⁵¹ ILC, Fragmentation of International Law, at 57, paras 128-129.

⁹⁵² Simma (2006), at 524-529, Simma himself is however critical of such reasoning.

⁹⁵³ Brownlie calls such characterizations as a source of confusion for understanding international human rights law, Brownlie (2003), at 529-530. Also see Simma (2006), at 524-529.

the background, ready to step in if there are gaps in the special regime or if that regime fails to function properly. Further, a regime can only receive its legally binding force by reference to rules and principles outside it.⁹⁵⁴ In other words, any special regime needs general international law.

Once again, then, while a case can be made that the ICCPR transcends in some respects the inter-state nature of general international law, the question can be raised as to whether any special regime can ever truly escape the (consensual) framework of general international law. The ICCPR regime can never fully free itself from the fact that the ICCPR is an agreement between states. The very fact that the ICCPR regime cannot fully free itself from this image means that the question of how to balance these two images of the Covenant will be constantly present.⁹⁵⁵

In search for reconciliation, moves towards a middle ground have been made. One of the arguments made has been to emphasize the character of the HRC as an international organization, hereby deriving the authority to interpret the reach of the competence of the HRC directly from Article 20(3) of the Vienna Convention. If the regime of the ICCPR (and the Optional Protocols) could be seen to establish the rudiments of an international organization, in that case Article 20(3) of the Vienna Convention provides that an organ of that organization (the HRC) is the proper actor for accepting reservations.⁹⁵⁶ In addition, support has been sought in the Vienna Convention preparatory work for also including treaty-monitoring bodies within the meaning of “international organization” of that article.⁹⁵⁷ Either way, the reconciliation hereby means that the effectiveness with having the Committee decide on the compatibility of reservations, is through these moves backed-up by the authority of the Vienna Convention.

Another path for reconciliation with the Vienna Convention has been to claim that HRC interpretations constitute subsequent practice in accordance with the Vienna Convention, Article 31(3)(b) which provides that in the interpretation of treaties: “There shall be taken into account, together with the context: ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties

⁹⁵⁴ ILC, *Fragmentation of International Law*, at 79, paras 176-178, and at 84-85, paras 192-193.

⁹⁵⁵ See Simma (2006), at 527 for a practical illustration in respect of countermeasures and human rights regimes.

⁹⁵⁶ Article 20(3) of the 1969 Vienna Convention reads: “When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization”.

⁹⁵⁷ Scheinin (2009), at 32.

regarding its interpretation".⁹⁵⁸ The logic of this move is that interpretations by the HRC in dealing with individual complaints, or in adopting Concluding Observations and General Comments would serve to express such an "agreement" between ICCPR state parties.⁹⁵⁹ Again, the authority of the Vienna Convention would hereby serve to validate the practice of the Committee.

All of these constructions raise their own set of questionmarks. The nature of the ICCPR/Committee as an institution is in itself a contentious matter, as is reliance on preparatory work as interpretative guidance.⁹⁶⁰ It can also be asked (as will be done below) whether there are institutional mechanisms for state parties to express their consent (or lack of it) on contentious issues. While it may not be necessary to test the support for every interpretation by the HRC in relation to all state parties, in the complete absence of such mechanisms some doubt is cast on whether interpretations of the Committee can be properly regarded as "subsequent practice ... which establishes the agreement of the parties".⁹⁶¹

These attempts at reconciliation indicate that in order to more firmly ground the claim to implied powers in state consent, the authority of the Vienna Convention must be relied upon. At the same time the additional questions that hereby arise (e.g. on the existence of subsequent practice) can also come to serve as an extension of the original disagreement (on whether the Committee has an implied power to determine the compatibility of reservations). One such question could be, for example, whether the objections by the US, UK, and France to General Comment 24 should be considered as proof of a lack of subsequent practice, or whether the tacit consent of other ICCPR state parties to the interpretation of the Committee indicate otherwise.

⁹⁵⁸ Article 31(3)(b), 1969 Vienna Convention.

⁹⁵⁹ Scheinin (2009), at 33.

⁹⁶⁰ On the Committee as an international organization, see above, Part I, chapters 2.1 and 2.2. On preparatory work as interpretative guidance, see above, Part II, Chapter 3.1.2.

⁹⁶¹ Article 31(3)(b), 1969 Vienna Convention. For the former point, see Amerasinghe (2005), at 55.

2 Meeting the Doctrines on their Own Terms

The examples above demonstrate some of the legal discussions upon which different constructions of the powers of the Committee are reflected.⁹⁶² These discussions can all, in one way or another, be traced back to the dichotomy between an emphasis on the limited and attributed character of powers of the HRC, and the need to provide effective protection of civil and political rights.

However, the antagonistic image of the debate on the powers of the Committee does not only express itself in between the attributed powers and implied powers arguments. As was discussed earlier on a more general level, it is also possible to object against somebody's interpretation of what is attributed to an organization with a different understanding of the scope of that attribution. The same goes for implied powers reasoning: the proper extent of powers of an organization can

⁹⁶² Additional discussions could be mentioned as well, such as whether there is a conflict between the ICCPR regime and the 1969 Vienna Convention to begin with. According to a "admissibility" or "permissibility" doctrine, the Vienna Convention rules apply only to permissible reservations (i.e. reservations that are compatible with the object and purpose of the treaty), leaving it open to the Committee to determine the compatibility with the ICCPR of "unacceptable" reservations. Conversely, the "opposability" doctrine claims that the Vienna Convention rules on accepting and objecting to reservations should be applied also to reservations that are inadmissible. See Baratta (2000), at 413, note 2. Another question concerns the effect of a determination of a reservation as impermissible, and more specifically, whether an unacceptable reservation can be severed from the ratification by a state of the ICCPR (meaning that the ICCPR would be operative for the reserving state without benefit of the reservation). For an overview, see Scheinin (2004), and for a critique, see ILC, Second Report on Reservations, at 74-79, paras 218-230. Yet another claim in order to impose limits on the use of implied powers, has been that organizations should not be able to alter their character. This would mean that binding powers in respect of some function or task would be a precondition for deriving binding powers also for the performance of other tasks. The possibility of utilizing an implied power to suspend and expel members would therefore depend on the power of an organization to induce compliance and/or adopt punitive measures in general. For such a claim, see Magliveras (1999), at 255-257. Traces of such a claim are also present in the reasoning of Pellet, who does not categorically deny the use of implied powers, but argues that "the exercise of this determination power cannot exceed that resulting from the powers given them [the treaty monitoring bodies] for the performance of their general monitoring role", ILC, Second Report on Reservations, at 87, para 252. The counterclaim to this would emphasize that the Committee already has something to the effect of binding powers. See Helfer and Slaughter (1997), at 351-352, and Scheinin (2005), at 101. This also demonstrates that any contention to the effect that the HRC cannot utilize more effective means than it already possesses only shifts the discussion to concern what the character of the Committee is, and whether there is a change of that character.

also be dealt with as a question of different perceptions of what powers are functionally necessary.⁹⁶³

2.1 Which Effectiveness?

The essence of implied powers reasoning has been located in a functionalist mindset. The doctrine is a mechanism by which to enhance the achievement of the object and purpose of the organization. This does not however mean that there would always be agreement on what degree of functionality is desirable, or on what powers are necessary in order to effectively achieve that object and purpose. As members of an organization may understand the proper role of that organization differently, they also interpret the functional necessity of powers differently. Consequently, functional necessity reasoning can be used to construct the powers of an organization both more and less expansively. While this has already been discussed above, the point can be illustrated also in the HRC context.⁹⁶⁴

The Committee arrived at its conclusion that it necessarily falls on the Committee to determine whether a reservation is compatible with the object and purpose of the ICCPR through identifying two functional necessities.⁹⁶⁵ First of all the power to determine the compatibility of a reservation was found necessary from an institutional point of view. If such a power would not exist, the argument went, the Committee could not know the scope of its duty to examine whether a state has complied with the ICCPR (a task conferred upon the HRC under Article 40 of the ICCPR). However, the power was also considered necessary for the functioning of the ICCPR regime at large, since leaving the decision on the compatibility of reservations to be made by states reciprocally was by the HRC regarded inadequate.⁹⁶⁶

The power that comes into existence out of these necessities, serves to advance the achievement of the object and purpose of the ICCPR. Testing whether the new or widened power falls within the object and purpose of the organization is a precondition for that power to exist. In short, there must be something that an implied power aims to fulfill.

⁹⁶³ See above, Part III, Chapter 1 at large (and esp. Chapter 1.3 for conclusions).

⁹⁶⁴ On functional necessity reasoning, see above, Part III, Chapter 1.1.3.

⁹⁶⁵ "This is in part because, as indicated above, it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions", Human Rights Committee, General Comment 24, para. 18 (also see quotes above, Part IV, Chapter 1.1).

⁹⁶⁶ Human Rights Committee, General Comment 24, paras 11 and 18.

Only such powers can be implied which fall within the object and purpose of the organization. The one problem is that several objects and purposes may be identified, which can even be conflicting. Any object and purpose of a multilateral treaty (whether or not that treaty serves as the constituent instrument of an international organization) may also allow for different interpretations.⁹⁶⁷

The absence of any abstract contents of the object and purpose of a treaty was illustrated by the ICJ in the *Reservations to the Genocide Convention* opinion in 1951 on whether a reserving state can be regarded a party to the Convention on the Prevention and Punishment of the Crime of Genocide, and maintain its reservation in face of objections by one or more of the other state parties.⁹⁶⁸ In the case both the majority and dissenting judges started from the same premises, and claimed to interpret the object and purpose of the Convention correctly, but understood that object and purpose very differently. In the minds of the majority opinion (in arguing that an objection to a reservation does not exclude the state from being a party to the Convention):

The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that *as many States as possible should participate*. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis.⁹⁶⁹

In the minds of the dissenting judges:

We believe that the integrity of the terms of the Convention is of greater importance than mere universality in its acceptance. While it is undoubtedly true that the representatives of the governments, in drafting and adopting the Genocide Convention, wished to see as many States become parties to it as possible, it was certainly not their intention to achieve universality at any price. There is no evidence to show that they desired to secure wide acceptance of the Convention even at the expense of the integrity or uniformity of its terms, irrespective of the wishes of those States which have accepted all the obligations under it. ... In the interests of the international community, it would be *better to lose as a party to the Convention a State which insists in face of objections on a modification of the terms of the Convention*, than to permit it to become a

⁹⁶⁷ As Addo puts it, any interpretation of the object and purpose will be “as compelling as the alternative”, Addo (2006), at xliii. Also see above, Part III, Chapter 1.1.4.

⁹⁶⁸ Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948), 78 *United Nations Treaty Series* 277.

⁹⁶⁹ *Reservations to the Genocide Convention*, ICJ Reports 1951, at 24 (emphasis added).

party against the wish of a State or States which have irrevocably and unconditionally accepted all the obligations of the Convention.⁹⁷⁰

Settling the issue proved not only an interpretative task, but also highly contentious. At any rate, the ICJ recognized, this was a question that could not be settled in the abstract.⁹⁷¹

Different understandings of the object and purpose of the ICCPR also reveal themselves in the reasoning on HRC powers.⁹⁷² The Committee itself in General Comment 24 set forth its understanding of the object and purpose of the ICCPR in a general fashion:

The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.⁹⁷³

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 also added that since every provision of the Covenant contributes to the protection of civil and political rights, all provisions are inseparable from that goal: “each of the many articles, and indeed their interplay, secures the objectives of the Covenant”.⁹⁷⁴ While this does not mean that reservations are excluded altogether, the Committee did emphasize the importance of safeguarding some of the ICCPR rights in particular, and above all, the means of implementation of the obligations of the ICCPR as part of the *raison d’être* of the Covenant and thus “essential to its object and purpose”.⁹⁷⁵

The Committee interpretation of the object and purpose of the ICCPR was hereby geared towards safeguarding the integrity of human rights protection. Any reservations to certain core rights or to the monitoring role of the Committee would be incompatible with the ICCPR

⁹⁷⁰ Dissenting Opinion by Judges Guerrero, Sir Arnold McNair, Read, Hsu Mo, *Reservations to the Genocide Convention*, ICJ Reports 1951, at 46-47 (emphasis added).

⁹⁷¹ *Reservations to the Genocide Convention*, ICJ Reports 1951, at 26.

⁹⁷² For a general overview, identifying definitions of the object and purpose of the ICCPR in relation to means of implementation, in relation to the treaty-law character of the ICCPR, and in relation to the substance of human rights treaties, see Lijnzaad (1995), 80-98.

⁹⁷³ Human Rights Committee, General Comment 24, para. 7.

⁹⁷⁴ Human Rights Committee, General Comment 24, para. 7. Koh (1982), at 74-75 calls this the “purposive” approach to reservations. However, for a critique of the logic of the Committee, see Schabas (1995), at 292.

⁹⁷⁵ Human Rights Committee, General Comment 24, para. 11.

object and purpose.⁹⁷⁶ In the same way, the indication was, a denial of a power to determine the compatibility of reservations would be incompatible with the object and purpose of the Covenant. This follows from that the power is part of the performance of the monitoring role of the Committee (which is “essential to its object and purpose”), and from that the alternative does not manage to live up to the establishment of an efficacious supervisory machinery (which is the very object and purpose of the ICCPR).

A different understanding of the object and purpose of the ICCPR was presented by the United States in its observation on General Comment 24. The US did not dispute the need for effective protection of human rights. The US did however claim that the Committee had misinterpreted the object and purpose of the Covenant insofar as it bears on the permissibility of reservations. In this vein, 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”.⁹⁷⁷ Consequently, the US claimed, as the interpretation of the ICCPR object and purpose by the Committee is mistaken, so too is the conclusion that it would be contrary to the object and purpose of the Covenant not to accept the Committee’s determinations of the compatibility of reservations with the Covenant.⁹⁷⁸

In the reasoning of the US and the HRC the dichotomy of the *Reservations to the Genocide Convention* opinion between an emphasis on the integrity of the treaty on the one hand, and on the strive for universal participation on the other, as competing ways of understanding the object and purpose of a treaty is reproduced. Above all, both arguments can build on the effectiveness of human rights protection in order to make their case. Whereas for the Committee effective protection requires the safeguarding of the integrity of the ICCPR, for the US effective protection is achieved through universal participation.

Transformed into an issue of powers this means that what is functionally necessary in order to achieve the object and purpose of the ICCPR depends on how that object and purpose is interpreted. If that object and purpose is geared towards integrity, then a case for the use of implied powers can be made (as in General Comment 24). If that object

⁹⁷⁶ See Human Rights Committee, General Comment 24, para. 19 where the notion “integrity” is explicitly used.

⁹⁷⁷ Observations of States parties (US), (Official Records) at 127. Also see Carrozza (2003), at 60.

⁹⁷⁸ Observations of States parties (US), (Official Records) at 127.

and purpose is geared towards universal participation in the regime, then it can be claimed that it is functionally necessary *not* to endanger that goal by widening the powers of the Committee. In fact, arguing that the HRC should remain within its expressly attributed powers can be said to be functionally necessary for the promotion of universal acceptance of the ICCPR, especially if there is a possibility that the development of mechanisms for supervision and enforcement (through use of implied powers) would not be accepted by all state parties.⁹⁷⁹ After all, the possibility of making reservations can also be a precondition for attracting parties to a treaty. If the determination of the contents of that reservation is removed from the hands of the reserving state, then the end result may be that the state becomes reluctant to participate in the treaty regime. In such a case there would also be a loss of effectiveness of the protection of civil and political rights as the goal of universal participation no longer would seem attainable.⁹⁸⁰

It should be added that the dichotomy between upholding the integrity of the Covenant and universality of participation is by no means the only way in which different conceptions of effective human rights protection present themselves. Whereas the HRC emphasized the effectiveness of having the Committee as an objective interpreter of the obligations of ICCPR state parties, Simma claims that such an approach is in fact a threat to effective protection of human rights. This follows from that human rights instruments are not equipped with proper mechanisms of supervision. For Simma the path towards increased effectiveness of human rights protection should rather address the “lack of vigour on the part of States parties to human rights conventions to take up and counter treaty breaches committed by other States parties”, that is, the non-functioning of the reciprocal mechanism provided for in Article 41 of the ICCPR.⁹⁸¹

⁹⁷⁹ A claim that enforcement mechanisms would not be accepted by all states is made by Baylis (1999), at 282 and 314.

⁹⁸⁰ Bradley and Goldsmith (2000), at 459 claim that it was the possibility of making reservations that made US accession to the ICCPR possible to begin with. To make matters even more complex, a similar construction can be made concerning the idea of safeguarding the integrity of the ICCPR as well. The claim that the HRC is better placed to uphold the integrity of the ICCPR can be met with a claim that the integrity of treaty obligations can only be upheld if the contents of those obligations are defined by state parties (i.e. by emphasizing the role of state consent as the source of those definitions). Also see ILC, Second Report on Reservations, at 16-19, paras 90-98.

⁹⁸¹ Simma (1994), at 372-373 (quote at 373).

2.2 What Consent?

To state that the Committee construction of its (functionally necessary) powers in General Comment 24 is the only one that can effectively achieve the object and purpose of the ICCPR, is only true when the object and purpose of the ICCPR is interpreted (circularly) as the creation of legally binding standards and providing an efficacious supervisory machinery. The ambiguousness that characterizes the determination of the extent of powers of the HRC does not however only concern the establishment of a connection between the necessity for better performance and the object and purpose of the ICCPR. Similar concerns also attach to the task of defining the attributed powers of the Committee.

By way of recollection, the US observation on General Comment 24 emphasized that the Covenant scheme does not “confer on the Committee the power” to render binding interpretations of the Covenant.⁹⁸² The logic in emphasizing the attributed powers of an organization is to establish a link between the powers of that organization and the consent to those powers by the member states. Most clearly this consent is stated in the express wording of the constituent instrument of an organization. When attribution/conferral is emphasized as a counterargument to implied powers, the element of attribution commonly serves as an argument in favor of the limited character of powers and the maintenance of the status quo in respect of impact upon member state sovereignty. Such an emphasis on attributed powers can also be combined with a reference to the intention of the drafters. This was also a nexus that the US built upon in its observation: “The drafters of the Covenant could have given the Committee this role but deliberately chose not to do so”.⁹⁸³

As has already been mentioned, a similar discussion can be found in the debate as to whether the Committee can take follow-up action in the form of review of concluded cases to ensure that its views are respected by state parties. While a majority of members argued in favor of such a power, a dissenting minority argued (similarly to the US observation) that the Committee could have no powers “that had not been *given* to it explicitly by States parties” and that it therefore lacked any competence for review of concluded cases.⁹⁸⁴

⁹⁸² Observations of States parties (US), (Official Records), at 126. The US observation has also been discussed above, in Part IV, Chapter 1.2.

⁹⁸³ Observations of States parties (US), (Official Records), at 126.

⁹⁸⁴ See Seventh Annual Report of the Human Rights Committee, at 93, para. 392 (emphasis added). Also see Gandhi (1998), at 335-338.

However, it can also be recalled from earlier discussions on ICJ case law on the attributed and implied powers doctrines that the implied powers of the UN were “*conferred upon it* by necessary implication, as being essential to the performance of its duties”.⁹⁸⁵ Similar reasoning was used in the *Legality of the Use* opinion, in which the claim was made that the conferred powers of organizations are *normally* the subject of an express statement. However, they can also be implied.⁹⁸⁶ What the ICJ in effect was saying in both of these cases was that powers are conferred in two ways: through express provisions and implicitly. In this way, while the implied powers and attributed powers doctrines can serve as mechanisms by which to express differences in constructing powers of an organization, the consent of member states must underlie both express and implied powers in order for those to be characterized as conferred upon the organization.⁹⁸⁷

Interestingly, both the observation by the United Kingdom on General Comment 24 as well as ILC Special Rapporteur Pellet, both of which deny the existence of binding powers of the HRC to determine the compatibility of reservations with the ICCPR object and purpose, nevertheless accept the existence of such non-express powers that are needed for the effective performance of the expressly attributed powers and functions of the Committee. The United Kingdom reasoned that:

... the Committee must necessarily be able to take a view of the status and effect of a reservation where this is required in order to permit the Committee to carry out its substantive functions under the Covenant.⁹⁸⁸

This means that even those critical to binding HRC powers nevertheless coincide with the Committee on this point, and admit that there is more to the Committee powers than what has been expressly codified in the ICCPR. However, the fact that powers are necessary for the performance of express powers or functions does not mean that they would be uncontroversial. There are no powers (whether attributed or implied) that somehow automatically reveal themselves the minute they become necessary. To the contrary, there may still be controversy as to whether implied powers are necessary in order to fulfill the expressly conferred functions and powers effectively. This way there will always be room for different interpretations of what additional powers may arise out of the

⁹⁸⁵ *Reparation for Injuries*, ICJ Reports 1949, at 184 (emphasis added).

⁹⁸⁶ *Legality of the Use*, ICJ Reports 1996, para. 25.

⁹⁸⁷ This was earlier discussed as different aspects of the attribution notion, see above, Part III, Chapter 1.2.2.

⁹⁸⁸ Observations of States parties (UK), (Official Records) at 132, para. 11. As to the ILC, see Second Report on Reservations, at 69-70, paras 208-209.

expressly attributed powers or the “substantive functions”.⁹⁸⁹ Hence, although there may be agreement on the need for the exercise of such implied powers by the Committee that are necessary for the performance of its express functions (this way at least partly reconciling the approaches of the Vienna Convention regime and the HRC), the identification of those powers may still be controversial.

Such controversy need not only have its source in a disagreement over what powers are necessary for the performance of express functions (or exercise of express powers), but can also have its source in an uncertainty concerning what the express powers and functions of the organization are. A linguistic vagueness which allows for such uncertainties may even be intentional. By way of an example, Article 40 of the ICCPR which establishes the reporting procedure of state parties has been characterized as intentionally vague for the simple reason that many states could not agree, at the time of drafting of the Covenant, on the need and form of supervisory measures. In other words, it is not clear what state parties have consented to. This vagueness of the article has later made a development of the reporting procedure possible (the adoption of Concluding Observations instead of individual comments on state reports).⁹⁹⁰

All of this goes to demonstrate how an emphasis on attributed powers does not necessarily remove an ambiguity regarding the extent of HRC powers. Even for the expressly attributed powers questions can arise, for example on the meaning of the express wording, whether the consent to express powers entails such additional powers that are needed for the effective performance of functions (and exercise of powers), and if so, what those additional powers are. To put it differently, although attributed powers are often invoked in order to emphasize the very core of an organization to which members have given their consent, there need not be agreement on the contents of that consent. There may also be a difference as to whether it is the consent of the drafters or the consent of the present membership that is to be taken into account.

Such differences are expressed through different conceptions of what the attributed powers of the organization entail. A claim that attributed powers are limited to what the drafters provided for the

⁹⁸⁹ As was exemplified in Part III, Chapter 1.1.4 on the determination of *ultra vires*.

⁹⁹⁰ Article 40(4), ICCPR, reads: “The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties”. The controversy over whether the adoption of Concluding Observations is envisaged by the article concerned the meaning of the word “reports”. The possibility of adopting Concluding Observations was made possible through a formal amendment of the Rules of Procedure of the Committee. See Boerefijn (1999), Chapter XIV, esp. at 292-294.

organization can be met by claiming that that attribution never intended to exclude such powers that are needed for the exercise of those (original) powers (as the UK and Pellet do). This is not to deny that there are differences between these forms of attribution. As to expressly attributed powers, the assumption can be made that there is (original) consent to them (although the exact scope of that consent may be uncertain). As to implied powers, such powers can only become characterized as attributed if they are backed up by subsequent consent of state parties.

In this respect 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 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 HRC.⁹⁹¹ This suggests that if there would be an absence of contrary *opinio juris* also to the binding power claimed by the HRC, such a power could be hereby be characterized as conferred upon the Committee.

3 Constitutionalism and the Human Rights Committee

Different constructions of powers of the Committee reflect differences on where the strengths of the work of the Committee are located. At one end of the spectrum the HRC’s tasks of developing and illuminating the contents of the ICCPR, and in engaging in deliberation with state governments (hereby also promoting deliberation and progressive improvement within a state) are deemed insufficient. As a consequence a development of the adjudicatory capacities of the Committee is envisaged. Mainly this development has been visible in a desire to judicialize the procedure of individual communications. Also the possession of a power to determine the compatibility of reservations with the object and purpose of the ICCPR (as envisaged in General Comment 24) can be seen as an expression of such judicialization.

However, the more the determination of ICCPR contents is removed from states, the more concerns about state party input are bound to arise. An increased judicialization seems to run counter to an

⁹⁹¹ ILC, Second Report on Reservations, at 70, para. 210. In the *Legality of the Use* opinion the ICJ also examined the practice of the WHO in support of its denial of powers. See *Legality of the Use*, ICJ Reports 1996, para. 27.

approach to the HRC which locates its main strengths in the deliberative tasks and rather envisages a development of the political aspects of the Committee.⁹⁹² These two images are not only present in the visions of the HRC by academics, but are present also among Committee members.⁹⁹³

Admittedly constitutionalism as such has not been a prominent concern in respect of the Committee. There is no comparable discussion on the constitutional features or the constitutionalization of the HRC as there is concerning the UN, the WTO, and the EU. On the other hand, while it would probably be inappropriate to characterize the ICCPR legal regime as a constitutional legal order, the same is true in many respects also of the WTO. The main concern in earlier discussions on constitutionalism has not even been to define what characteristics should attach to constitutionalism in organizations, or to what extent individual organizations display such characteristics as of now. Instead, the aim has been to outline some of the issues that are bound to arise once questions of legal powers are turned into a more general issue of constitutional governance. As there is a discussion on the merits of developing the judicial and/or democratic features of the HRC, as well as a discussion on the relationship between the two, constitutionalism can be used as a generic term for discussing these features in the Committee context.⁹⁹⁴

The following discussion should hereby not be seen as an attempt to analyze whether the ICCPR regime constitutes a constitutional legal order *per se*. Nor should a definitive answer be expected as to how to strike a balance between judicial and democratic elements of the Committee. Instead, a critical discussion of both formal and substantive constitutionalism will serve to highlight some of the issues that emerge when turning from dealing with the role of the HRC through an

⁹⁹² Crawford (2000), at 1. Also see Hessler (2005), at 37.

⁹⁹³ As to the members of the Committee, this perception was confirmed during a research visit to the 84th session in Geneva (July 2005), during which the author had the opportunity to interview a number of members of the Committee. The views of the members displayed great variety both in respect of identified present merits and in respect of preferred future development. The dichotomy between a desire to develop the Committee into a more powerful supervisory machinery, and an emphasis on ensuring political input into the Committee work and improving its deliberative capacities was particularly apparent.

⁹⁹⁴ For a suggestion that both approaches are present in discussions on treaty bodies at large, see International Law Commission, Meeting with Human Rights Bodies (15 and 17 May 2007), Fifty-ninth session, 7 May-8 June and 9 July-10 August 2007, UN Doc. ILC(LIX)/RT/CRP.1 (2007), para. 28, recognizing that while some participants prefer an emphasis on treaty bodies for upholding the integrity of human rights treaties, there is also an alternative approach which emphasizes the role of treaty bodies in working with states to understand and overcome diverging interpretations (e.g. concerning reservations) and in engaging in discussions with states (hence also showing greater concern for the universality of human rights treaties).

attributed powers – implied powers dichotomy to discussing the role and tasks of the Committee in terms of judicialization and democratization.

3.1 Arguing in Favor of Judicialization

Although there is some uncertainty on how exactly to characterize the HRC, it can at least be safely assumed that as of now, the Committee is not a court. Even if the Committee, when acting under its individual communication procedure, formulates its views in a way which approximate that of a court, the decisions are not formally legally binding. Under the inter-state procedure this is even more pronounced, as the HRC is to act in a conciliatory role only. As to the state reporting system, the task of the Committee is to study these reports in dialogue with state parties.⁹⁹⁵

Yet, there is also a constant critique that a characterization of the HRC activities as non-judicial inadequately describes the nature and impact of Committee activities. Most commonly judicial characteristics are found in the communications procedure. The logic is that since the treaty obligations themselves are legally binding for ICCPR state parties, and the HRC is the authoritative interpreter of the treaty, therefore “a finding of a violation by a UN human rights treaty body must be understood as an indication of the State party being under a legal obligation to remedy the situation”.⁹⁹⁶ Further, not all views expressed by the Committee (under the Optional Protocol) are correctly characterized as recommendations. Scheinin claims that in its views the HRC has been consistent in claiming that where a violation of the ICCPR has been established through the procedure of the first Optional Protocol, the state party has a legal obligation to provide an effective remedy (as proclaimed in Article 2(3) ICCPR).⁹⁹⁷

⁹⁹⁵ Ghandhi (1998), at 40-41, and Helfer and Slaughter (1997), at 280-281. Also see ILC, Eleventh Report on Reservations, at 16-17, para. 53 indicating that there is agreement on this between treaty bodies and the ILC.

⁹⁹⁶ Scheinin (1999), at 444.

⁹⁹⁷ For several examples, see Scheinin (2005). Article 2(3), ICCPR reads: “3. Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted”. Already in the first set of views adopted during the 7th session of the HRC in 1979, the Committee claimed that a finding of a violation of the

Helfer and Slaughter note that the fact that the HRC has adopted interpretations (of the ICCPR) that are at odds with the positions espoused by state parties, the fact that the HRC gives reasons for its decisions which improves the quality of legal reasoning, and that it interacts with other tribunals, all demonstrate a commitment to making at least the individual communications system more court-like.⁹⁹⁸ Even more prospectively, some authors have regarded the HRC as a plausible foundation for the establishment of a future universal/world human rights court.⁹⁹⁹ This idea is not in itself a novelty. Ever since the Paris Peace Conference in 1946, where Australia proposed the creation of an international human rights court, the idea has been brought up repeatedly.¹⁰⁰⁰

It should be pointed out at the outset that as an issue of formal constitutionalism, a judicialization of the Committee is not so much concerned with establishing a mechanism for reviewing the activities of the institution itself (as there is no political organ to be controlled). Instead, a judicialization of the Committee is mainly concerned with increasing the binding elements and improving upon the enforcement of the legal order towards the state parties of the ICCPR and the first Optional Protocol.

There are some merits that are commonly associated with such judicialization (and eventually also with the idea of having a world human rights court). The claimed benefits include: more efficient protection of human rights, avoiding further fragmentation of international human rights law, and avoiding the politicization of human rights issues. A common effectivity claim is that a working (state) reporting system requires a power to issue legally binding decisions.¹⁰⁰¹ Some authors emphasize that elevating the Committee views into legally

Covenant entails that the state party is under an “obligation” to provide an effective remedy to the victim, see *Moriana Hernández Valentini de Bazzano et al. v Uruguay*, Human Rights Committee, Communication No. 5/1977, Views (15 August 1979), UN Doc. CCPR/C/7/D/1977, para. 10.

⁹⁹⁸ Helfer and Slaughter (1997), at 354-366.

⁹⁹⁹ See de Zayas (2001), at 72.

¹⁰⁰⁰ For a brief overview, see Ghandhi (1998), at 408. For a concrete example, see MacBride (1968), and also Das (1979) who presents a draft General Protocol for Promotion and Protection of Human Rights and Fundamental Freedoms, which includes a part on the establishment, structure, composition, and functions of an International Court of Human Rights. For more recent examples, see International Law Association, Committee on International Human Rights Law and Practice, First Report, Helsinki Conference 11-17 August 1996, part (v)(a), Mutua (1998), at 259, and Nowak (2007).

¹⁰⁰¹ For Helfer and Slaughter effective adjudication means that the court has a power to compel parties to appear before it as well as to comply with its judgment, Helfer and Slaughter (1997), at 283-284.

binding decisions would be the most important step in improving the protection of individuals under the ICCPR. In addition, a need for a mechanism for ensuring compliance with the decisions of the HRC is often envisaged.¹⁰⁰²

As to the work of the HRC itself, General Comment 24 did not elaborate on the judicialization of the HRC as such, but only on the preferability of having the Committee determine the compatibility of reservations with the ICCPR. Yet, the reasoning of the Committee corresponds to arguments used in favor of judicialization more generally. First of all the Committee emphasized the need for upholding the effectiveness of the protection of rights (which could not be achieved through reciprocity, the Committee claimed). Secondly, the Committee regarded itself as particularly well positioned to address reservations without entanglement in political issues:

Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established *objectively*, by reference to legal principles, and the Committee is particularly well placed to perform this task.¹⁰⁰³

An independent judicial machinery is preferred to the political expediency which is seen to dominate the approach of governments to human rights problems. Interpretations should be objective, legally sound, and culturally neutral. This can be achieved, the argument is, by leaving decisions on the contents of the ICCPR to be made by experts/judges.

A central element in this line of reasoning is a faith in the expert members of the Committee as particularly well equipped to interpret the ICCPR. Judges (and experts acting in a quasi-judicial capacity) are to be preferred to representatives of states, since judges/experts are less prone to be influenced by political considerations. They are hereby also better positioned to discover and defend the exact content of rights. All principles enunciated must have universal applicability. This goes for a future human rights court, as well as for the judicialization of the Committee in awaiting the creation of that court. In the search for this universality, a politically unaccountable judiciary is seen as best placed for discerning the hierarchy of values and for resolving conflicts between rights. In short, the idea is that judges/experts are best positioned to

¹⁰⁰² See Hakki (2002), at 97 *et seq.* Also see Robertson and Merrills (1996), at 42-43.

¹⁰⁰³ Human Rights Committee, General Comment 24, para. 18 (emphasis added).

serve as guardians of moral truths (and even as reevaluators of those truths).¹⁰⁰⁴

As was discussed earlier, judicialization is often also presented as a means for correcting the failures of democratic bodies. A common claim in national contexts is that the judiciary should defend human rights against infringement by the majority. As for international organizations a need for judicial review is also seen to arise out of flaws in the democratic processes of organizations.¹⁰⁰⁵ For the HRC the question does not arise as an issue of constraining the relationship between political and judicial actors of the ICCPR regime (the political body being non-existent). However, a similar idea is present in hopes that judicial protection of human rights is able more efficiently to defend civil and political rights against infringement by national majorities (at the national level).

For advocates of judicialization of the international protection of human rights, the ideal system would be one in which a standard code of human rights would be enforceable on the national, regional, and universal levels. Appeals from decisions of national courts would go to regional, and in some cases to a universal human rights court. Such a system would be hierarchical, bringing with it foreseeability and consistency to the international protection of human rights.¹⁰⁰⁶ This way an emphasis on the judicialization of the Committee also taps into the question of fragmentation of international (human rights) law at large: judicialization is needed in order for human rights to become truly universal.¹⁰⁰⁷

¹⁰⁰⁴ See Alfredsson (2001) (in the title capturing the general spirit of the various articles of the book through the phrase “More Law and Less Politics”). For a more general argument in this respect (in the context of US constitutional law), see Perry (1982), at 100. Also see Buergenthal (2001), at 395-398.

¹⁰⁰⁵ See above, Part III, Chapter 2.2.2.3, and Part II, Chapter 3.2.2.

¹⁰⁰⁶ This is emphasized in many proposals for the creation of an international human rights court. See references above (in the same chapter), note 1000. Also see The International Helsinki Federation for Human Rights, General Recommendations of the Working Group (1993), para. 18 emphasizing a need for streamlining and making the “myriad of international fora and mechanisms” more effective.

¹⁰⁰⁷ In fact, Craven claims that fragmentation of international law has been a particularly prominent fear in the human rights context. See Craven (2000), at 490. The idea of an international human rights court also assumes a central role as a building block in the vision of a cosmopolitan legal order of Held. See Held (1995), at 279.

3.2 Potential Risks with Judicialization

3.2.1 The Committee Is Politicized

In emphasizing the special character of the ICCPR, the Committee builds on the “collective values” of human rights treaties.¹⁰⁰⁸ As such treaties do not consist of mutual obligations between states, but instead provide rights for individuals, this means that the legal interest that states have in the performance of other states is not a personal interest, but derives from upholding the regime (of protecting individuals) as a whole. This collective value both defines and transcends individual states’ legal interests. This character of human rights treaties is also used as an explanation for why the institutions of the human rights regime must play the dominant role in determining the contents and effect of human rights treaties: as the Committee is constitutive of the collective values of the ICCPR regime, the contents of that regime cannot be interpreted differently by individual states.¹⁰⁰⁹

However, to reserve the role of interpreting the contents of human rights obligations of states for the Committee, is only unproblematic under the assumptions on the benefits of judicialization outlined above. In other words, the claim that it is for the Committee to be the guardian of collective values, builds on the capacity of the Committee to avoid entanglement in political issues, and therefore to enhance effective protection of civil and political rights. In this form an emphasis on judicialization echoes what Evans has called a belief in the triumph of rationality over politics: the task of improving implementation and drafting new laws that clarify the already universally accepted norms is regarded as a merely technical task.¹⁰¹⁰

Such a faith in the rationality of human rights issues can however be questioned. As Redgwell puts it in asking whether the question of reservations really needs to be authoritatively determined at all:

Just as ambiguity in the language of contracts may facilitate the reaching of “agreement”, silence on reservations to international treaties is a means of achieving agreement on the text without addressing the underlying political, cultural and / or economic reasons What must be borne in mind is that, particularly in the human rights context, while

¹⁰⁰⁸ The notion is used by Craven (2000), e.g. at 515.

¹⁰⁰⁹ See Human Rights Committee, General Comment 24, para. 17, and Craven (2000), at 515-516.

¹⁰¹⁰ Evans (2005), at 14-15.

the language of discourse is treaty law the real issue is the incompatibility of different social and cultural traditions.¹⁰¹¹

The more general point has been made by Koskenniemi: all human rights receive their contents (and hence also their restrictive force) only by reference to a specific context and the way they are interpreted by the relevant authority.¹⁰¹² On a general level this manifests itself in the balance between encompassing the common good, and the need to take disagreement on rights into account.¹⁰¹³ After all, rights can be conflicting. Rights also come with exceptions. The choice between whether to follow the exception or the rule, or between which right to emphasize in a conflict between rights, cannot be made in the abstract, but will always prefer some values before others.¹⁰¹⁴

This means that while there are different ideologies and cultures which all cherish the moral worth of the individual, these may nevertheless disagree on the exact contents of a certain right, or strike the balance between different rights in different ways. While the possibility of universal human rights will be discussed more in-depth later on, the all important question for the present purpose is: Given this nature of human rights, what is the impact of this on the Committee if it would assume a role of judicial arbiter of such balancing acts?

A first consequence is that interpretations by an international institution (of the contents of rights) need not automatically be representative of a common denominator of all the world's cultural traditions. Instead, those interpretations will themselves express particular ways of balancing different values.¹⁰¹⁵ This balancing is in fact present in all of the activities of the Committee. Given the complexity and range of the issues that come before the Committee, it is inevitably engaged in the development of the ICCPR. The Committee will have to confront the ambiguities and indeterminacies of the ICCPR, resolve conflicts among its principles and rights, and work out the meaning of its terms.¹⁰¹⁶

¹⁰¹¹ Redgwell (1993), at 279-280 (footnote omitted).

¹⁰¹² Koskenniemi (2001), at 36-37. Campbell claims that at the concrete level not even the prohibition of torture is completely uncontroversial in respect of its scope. Campbell (2001), at 183.

¹⁰¹³ See in this respect Carrozza (2003), who introduces the concept of subsidiarity into international human rights law in order to reconcile the tension.

¹⁰¹⁴ Koskenniemi (2001), at 36-37.

¹⁰¹⁵ For the argument in respect of the UN, see Alston (1987), e.g. at 59-61. For a more general claim, see Bellamy (2001), at 17-18.

¹⁰¹⁶ Steiner (2000), at 39.

Given the political nature of human rights, states may be reluctant to entrust the Committee with adjudicative powers. In the words of Ando:

As I see it, the competence of [the European and Inter-American Court of Human Rights] ... to render binding decisions is based on the strong conviction shared by all the States parties to the respective conventions which establish them. This conviction has been nurtured by a long tradition of common history, religion, culture and human values. Where there is no such conviction and tradition, it is perhaps premature to expect that States parties are ready to authorise any monitoring body to render binding decisions.¹⁰¹⁷

If, however, the Committee nevertheless was to claim such a role, then another potential problem emerges. As indicated above, many authors see in the Committee an institution that is explicitly designed for a deliberative task. The main mechanism for such deliberation is presently the examination of state reports and the dialogue between ICCPR state parties and the Committee that this leads to. Also a development of the deliberative process has been called for.¹⁰¹⁸ An adjudicative role can however be at odds with such a deliberative role since the very aim of judicialization is to remove the political element from determining the contents of rights (which a deliberative process emphasizes). Although there is no reason to assume that the two never could be complementary, they are nevertheless very different as means for defining the contents of the ICCPR provisions. The two may also be exclusive of one another. This is the case if judicialization leads to a weakening of the impact of the deliberative procedure, as the Committee reserves interpretative authority for itself.

Above all, relying on experts or judges for interpreting the contents of human rights cannot escape the political nature of human rights.¹⁰¹⁹ In order to interpret and apply the ICCPR, the Committee can not only rely on principles of interpretation in the abstract, but will also have to pay attention to developments in both legal and moral thought.¹⁰²⁰ This means that an emphasis on judicialization can also challenge the legitimacy of the HRC itself. In resolving conflicts and defining the terms of the ICCPR the Committee (in an adjudicative role) will on the one hand face the expectation of delivering objective judgments on controversial issues of rights. On the other hand the

¹⁰¹⁷ Ando (1991-1992), at 172.

¹⁰¹⁸ See references above, Part I, Chapter 2.3.3, note 74, and below, Part IV, Chapter 3.3.

¹⁰¹⁹ Instead managerialism is structurally biased towards upholding the values which those experts embrace as important. See Koskeniemi (2007), at 16-17.

¹⁰²⁰ Steiner (2000), at 39.

interpretation that the Committee eventually lays forth will serve to uphold a particular set of rights (and hereby a particular set of values). Even if experts or judges realize that their task is one of balancing between different values, they will have to defend what “items” go into the balance.¹⁰²¹ The less there is agreement on the contents of a particular right or a balance between rights, the more controversial the interpretation of the HRC will be, and the more this will eventually challenge the perceived objectivity of the Committee.¹⁰²²

In order to avoid such a situation, the Committee could try to escape making a decision in such controversial cases. However, while a politicization of decisions on human rights disputes runs the risk of eventually undermining the judicial character of the Committee, an avoidance of controversial decisions would run the risk of undermining the effectiveness of the Committee (which would therefore also affect its credibility as a judicial body). If, on the other hand, a method of “consensus by deletion” is used (meaning that the eventual decision is stripped of all reasoning that is subject to controversy), this runs the risk of cutting off the underlying political discourse. As a consequence, the eventual decision may fail to deal with the actual point of the dispute.¹⁰²³ In fact, the reasoning of the HRC is already accused of being too abstract. Claims are also made that in order to increase its legitimacy the Committee should be more open about the political aspects that underlie its decisions.¹⁰²⁴ This, however, is precisely what a judicialization of the Committee would wish to avoid.

3.2.2 Disputes over Civil and Political Rights are Overlegalized

Whereas the discussion above took hold of the challenges that arise for the Committee in forcing it to decide politically controversial issues, a judicialization of the Committee also raises concerns that something may be lost when disputes over civil and political rights are settled by a judiciary. There are many aspects to this question.¹⁰²⁵ First of all, a judicialization of the Committee means relying on the skills of expert

¹⁰²¹ Evans (2005), at 39-44.

¹⁰²² Goldsworthy even goes as far as to claim that as judges are forced to strike controversial balances, an emphasis on judicial enforcement may eventually even diminish the rule of law. The more controversial a decision is, the higher the risk will also be that the law will hereby lose its predictability. See Goldsworthy (2001), at 74-76.

¹⁰²³ Loughlin (2001), at 53.

¹⁰²⁴ As to views the claim is made by Steiner (2000), at 42-43.

¹⁰²⁵ 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 disagreement. Also see Loughlin (2001), at 58.

members in creating a coherent jurisprudence and making enforcement effective. The ICCPR sends two sets of signals in this respect. On the one hand there are explicit safeguards in the ICCPR that aim at upholding and protecting the independence of Committee members: members are supposed to serve in their personal capacity, and they shall perform their duties impartially and conscientiously.¹⁰²⁶ On the other hand “geographical distribution” and “representation of different forms of civilization and of the principal legal systems” is to be taken into account in order for the HRC to be equally representative of ideological and cultural views.¹⁰²⁷

Express provisions on such representativeness are by no means uncommon in international judicial institutions and can be found, for example, in the ICC and ICJ Statutes.¹⁰²⁸ However, such provisions do not do away with the critique that can be directed towards reliance on a “doctrine of expertise”.¹⁰²⁹ Although some cultural and geographical representativeness of judges (and hence the judicial body at large) may be ensured through such provisions, the idea of deliberating on the political differences at the heart of controversial interpretative issues is still not central to judicial bodies. Instead, as concluded earlier, the merits of judicial settlement are rather located in the avoidance of political deliberation.

If the Committee is developed in a more judicial manner, the underlying expectation is hereby that it is through this adjudicative role that cumbersome issues of interpretation of rights can authoritatively and effectively be overcome. The risk that resides herein is twofold. First of all, by restricting discussions on civil and political rights to questions of law, a judicial approach potentially excludes political participation and debate.¹⁰³⁰ Secondly, as the performance of the adjudicative function in itself builds on avoiding political deliberation, the actual (political) heart of the problem hereby runs the risk of escaping attention. As a result, as soon as the legal argument in a disagreement on the contents of human rights is made the decisive argument, the inherent political dimension of the question is not addressed at all.

As for the HRC, reservations can once again be used as an example. A reservation need not necessarily imply ill will on the part of

¹⁰²⁶ See Articles 28(3) and Article 38, ICCPR.

¹⁰²⁷ See Article 31(2), ICCPR. Also see Young (2002), at 113.

¹⁰²⁸ See ICC Statute, Article 36(8): “The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for: (i) The representation of the principal legal systems of the world; (ii) Equitable geographical representation; and (iii) A fair representation of female and male judges”. Also see ICJ Statute, Article 9.

¹⁰²⁹ The notion is used by Hutchinson and Monahan (1987), at 111.

¹⁰³⁰ See above, Part III, Chapter 2.2.2.3.

the reserving state. Instead, domestic reasons may dictate the use of a reservation: national law constraints, higher national standards, ideological dissent, political objectives, conflict with vital interests, harmonization of parallel obligations, precautionary measures, balancing acts, economic constraints, or religious reasons, are all examples of potential causes for adopting reservations.¹⁰³¹ At the same time a judicialization of the HRC could pose a considerable challenge to national political and legal systems as the Committee could only develop a coherent jurisprudence through imposing a measure of harmony on the “idiosyncrasies of national systems” in the interest of general principles.¹⁰³² Reservations serve to accommodate such competing domestic and international considerations.¹⁰³³

If there is no agreement domestically on a particular right, or on a balance between conflicting rights, it may become politically too controversial for a government to assume international obligations.¹⁰³⁴ “Overlegalization”, to use Helfer’s notion, happens when changes are imposed upon national laws and practices, to which there is no domestic agreement.¹⁰³⁵ In the face of a lack of popular support, or if the adjudicator does not manage to interpret correctly the contents of that support, but nevertheless chooses to impose a solution to the question at hand, it will be substituting political agreement (or disagreement) with its own interpretation. Hence the deliberative process within ICCPR state parties (and with it the expression of consent by the peoples of those states) would be subordinated to governance by the expert members of the HRC (with only limited political accountability).¹⁰³⁶ At worst, critics claim, a judicialization of transnational actors could hereby even come to diminish the value of national democratic practices.¹⁰³⁷

Consequently, critics claim, the mere skill of judges cannot be relied upon for producing legitimate decisions. In a similar way it has been emphasized in respect to the ICC 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, and in this way making decisions that are acceptable to local populations. Ultimately,

¹⁰³¹ Tyagi (2000) enumerates these at 190-201, also see Goodman (2002), e.g. at 537 and 546.

¹⁰³² Moravcsik (1998), at 10.

¹⁰³³ Reservations serve to recognize the diversity of nations and make it possible to reach agreement on and movement towards general principles of human rights, while at the same time accommodating this diversity. Bradley and Goldsmith (2000), at 402 and 457-458.

¹⁰³⁴ Bradley and Goldsmith (2000), concluding at 467-468.

¹⁰³⁵ See Helfer (2002).

¹⁰³⁶ Chandler (2001), esp. at 85-87.

¹⁰³⁷ Evans (2005), at 112.

such acceptance is needed in order to achieve compliance and internalization of international norms.¹⁰³⁸

None of this is to say that the performance of a judicial role by the Committee would be categorically illegitimate. Every state may fail to fulfill the obligations assumed under the ICCPR. In delivering its views there is no reason to assume as a point of departure that the decision of the HRC will be perceived as illegitimate in the eyes of ICCPR state parties. In the case of states that do not provide for protection of basic civil and political rights or democratic structures for public deliberation nationally, the importance of international judicial protection of civil and political rights becomes ever more important. A HRC with judicial powers (or even a true world human rights court) can perform important functions in protecting and upholding civil and political rights of individuals.¹⁰³⁹

However, at the same time, in performing such tasks the Committee cannot escape a critique which targets the functions of the Committee (and especially a strengthening of its judicial function) for substituting decisions of local institutions, which have better access to local human rights problems, and are better placed to interpret the discretion needed for implementing human rights law nationally. Pildes has made a similar point in respect of the ICC:

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.¹⁰⁴⁰

The plausibility of such a critique is affected by a number of circumstances, and a backlash to judicialization should not be confused with a case of a state trying to avoid fulfilling its obligations under the ICCPR. After all, there will always be instances where states refer to

¹⁰³⁸ See Turner (2004), at 1-2 and 16-19.

¹⁰³⁹ Somewhat discomfoting is however Robertson's conclusion that in 85 per cent of cases (up until 1997) the defaulting state did not implement the HRC's views or offer a remedy to the applicant. Robertson (2006), at 57.

¹⁰⁴⁰ Pildes (2003), at 159.

domestic political or ideological concerns merely out of bad faith.¹⁰⁴¹ Yet, the all important point is that the moment that a development of the judicial powers of the Committee is criticized (for whatever reason), also a question of the legitimacy of the ICCPR regime arises. If the HRC does suffer from a legitimacy deficit, then a development of the powers of the Committee could even lead to a backlash towards judicialization. This, the HRC already has some experience with through the denunciation by Jamaica, Trinidad & Tobago, and Guyana of the first Optional Protocol.¹⁰⁴² Also future ratifications could be affected.¹⁰⁴³

In order to include an element of balancing and to alleviate the reluctance of states to submit themselves to judicial review, a suggestion has been made for introducing a margin of appreciation doctrine (as known from the ECtHR context) to the ICCPR.¹⁰⁴⁴ The usefulness of introducing such a doctrine is however questionable. From a strictly formal point of view, such a move would only make explicit the balancing act that is present in the determination of the scope of obligations anyway. In addition, the mere introduction of a margin of appreciation doctrine does not do away with the critique that politically accountable actors surpass international judicial institutions for example on access to local knowledge in deliberative decision-making.¹⁰⁴⁵

Given the absence of political organs in the Committee, it comes as no surprise that suggestions on how to improve on the legitimacy of the Committee often capitalize on the need of more elaborate and transparent argumentation, as a way of being open about the political underpinnings of its decisions.¹⁰⁴⁶ Such a claim could even build on experiences with the ECtHR. Helfer and Slaughter claim that it is only through an openness of reasoning to different perspectives of human rights that the success of the European system for protection of human

¹⁰⁴¹ In fact, the very task of asserting whether a state is objecting to judicialization of the ICCPR regime or trying to escape its obligations, will be part of the discussion on the proper extent of HRC powers. This question has also been discussed above in the context of the *ultra vires* doctrine, see Part III, Chapter 1.1.4.

¹⁰⁴² Although the more immediate cause for the denunciations were rulings by the highest regional appellate court, the Judicial Committee of the Privy Council (prohibiting the execution of criminal defendants who had filed petitions with international tribunals). On the cases, see Helfer (2002), at 1860-1894.

¹⁰⁴³ Baylis (1999), at 314. On other forms of backlash, see Goldstein and Martin (2001).

¹⁰⁴⁴ Wilkins (2002) argues that the HRC could develop into an international human rights court based on the model of the ECtHR. This, he claims, would require introducing a margin of appreciation doctrine into the ICCPR regime. Also see Carrozza (2003), e.g. at 61-62.

¹⁰⁴⁵ Hessler (2005), at 44. A variation of this argument is presented by Helfer and Slaughter in claiming that for this reason regional institutions are more easily perceived as legitimate interpreters of human rights. See Helfer and Slaughter (1997), at 365 and 389.

¹⁰⁴⁶ See Hakki (2002), at 97-98.

rights has been reached. A similar openness can be claimed to be even more important at a global level, where political and cultural differences in between states are greater.¹⁰⁴⁷ However, not all authors are satisfied with developing the judicial role of the Committee. Instead, also a democratization of the Committee is envisaged.

3.3 Democratic Legitimacy and the Committee

The legitimacy of courts is often dealt with as an issue of fair process. The same is true for the HRC. The impartiality of the Committee, its independence, management of workload, and transparency and confidentiality of procedures, are commonly enumerated as crucial elements of the legitimacy of the HRC.¹⁰⁴⁸ This is difficult to disagree with. Surely fair process is a central element of the legitimacy of the Committee. However, procedural rules are not enough. Although the guarantees of fair process may serve to improve on the compliance with the decisions of the HRC, the discussion above suggests that all challenges to a judicialization of the Committee can not necessarily be met as procedural issues. Instead, the counterargument goes, a more direct political input is needed. Interestingly some visions on the creation of a world human rights court have in fact also emphasized the need for a universal political human rights body. This body would perform the task of determining permissible human rights policies through deliberation.¹⁰⁴⁹

Suggestions have even been made to abandon any judicialization of the HRC altogether, and instead focus on avenues for expressing and taking the consent of ICCPR state parties into account.¹⁰⁵⁰ This emphasis on the virtues of the Committee as a deliberative body takes hold of its potential in openly confronting the dilemmas before it and in encouraging debate, this way developing and expounding the ICCPR.¹⁰⁵¹

¹⁰⁴⁷ Helfer and Slaughter (1997), at 319-321.

¹⁰⁴⁸ Young (2002), at 91-139.

¹⁰⁴⁹ See Mutua (1998), at 259-260. Notably the argument can also be used the other way around. Nowak argues that the strong mandate of the (political) Human Rights Council requires a strengthening of the judicial counterpart (the treaty bodies). See Nowak (2007), at 252.

¹⁰⁵⁰ See Hessler (2005), at 50-51. Also see Steiner (2000).

¹⁰⁵¹ As to politicization of the human rights regime at large, see O'Flaherty and O'Brien (2007), at 164 claiming that the fact that treaty-body findings are not legally binding may actually be both "prudent and appropriate", as "this position reflects the insight that where compliance regimes target States, ..., the most effective 'enforcement' is provision of comprehensive support over time for the internalisation of human rights norms in national law, policy and practice. This, in turn, requires a movement of the human rights

Whereas state reporting already has a dialogic role, this could be expanded to views as well. In fact, views have been pictured as particularly well suited for developing and illuminating the ICCPR as they are more contextual than state reports.¹⁰⁵² Seen in this light, the best way that the HRC can contribute to the protection of civil and political rights is no longer through strengthening its role as an authoritative interpreter or through developing its enforcement capacity, but rather through serving as a deliberative body which performs a legal role by expounding the ICCPR (e.g. for the use of other bodies).¹⁰⁵³

If the HRC acts as a final adjudicator without being sufficiently sensitive to a potential lack of common ground on the contents of civil and political rights, the risk is that its decisions will be perceived as imperial.¹⁰⁵⁴ In order to avoid this, political deliberation is needed. In more general terms, the claim is that there can be no adequate institutionalization of human rights (at least on a global scale) without a corresponding institutionalization of transnational forms of democratic participation and accountability. This follows from that political deliberation is the only nonpaternalistic way for revealing the underlying causes for different conceptions of rights, to which any system of protection of rights must be sensitive.¹⁰⁵⁵ A deliberative approach, engaging in cross-cultural dialogue, is also the only way through which human rights can become rooted in the deepest commitments of individuals across diverse systems of belief, tradition, and culture.¹⁰⁵⁶

discourse from the category of law and obligation to that of politics, policy and programming". O'Flaherty and O'Brien propose that while treaty bodies could elicit information about state compliance, the Human Rights Council would be well suited to enact implementation (due to its political influence and capacity for sanctioning), at 165, note 141.

¹⁰⁵² See Steiner (2000), at 51-52 for a discussion on differences from a deliberative point of view between Concluding Observations on state reports, views on individual communications, and General Comments.

¹⁰⁵³ Steiner claims that some of the more recent views have in fact been phrased in such a way, Steiner (2000), esp. at 39-41, 44, and 51-53. Also see Hessler (2005), at 36 for a more general argument that deliberative and participatory institutions generate morally better interpretations of human rights law than less deliberative ones.

¹⁰⁵⁴ Ignatieff (2001), at 20-21. Carrozza (2003), at 77 calls this "tyranny".

¹⁰⁵⁵ See Habermas (1998), e.g. at 415, and McCarthy (2002), esp. at 258. Schaumburg-Müller (2006), at 87-88 claims that since preference is still for well-established communities (states) rather than global or cosmopolitan approaches, any initiatives that aim at circumventing the state will raise issues of legitimacy.

¹⁰⁵⁶ Orentlicher (2001), at 156-157. Or as Campbell (2001), at 185 puts it, only this way can people come to "own these rights, identify with them and retain a commitment to them". In a similar way, see Chandler (2006), at 291. As a consequence, Otto claims, this dialogue should not necessarily be concerned with human rights as a question of law to begin with, but also take into account political, social, and economic issues in discussing the nature of the legal unity. See Otto (1997), at 36-44.

In the following two different aspects of the idea of democratic deliberation in the HRC will be discussed more in detail. The first discussion focuses on avenues of political input on a practical level. The second discussion deals with the more fundamental question of the possibility and nature of universal human rights. However, before moving on to these discussions two additional remarks should be made.

First of all, bearing in mind the fairly modest institutional character of the HRC, it may seem exaggerated to reflect upon the Committee through a discussion on democratic legitimacy. However, the issue is of some importance also in the HRC context. The more the body of human rights law grows, the more important the issue of legitimacy will become. This is a development that can be identified not only in human rights law, but also in environmental law, where calls for effectiveness, on the one hand, emphasize the need for introducing decision-making procedures which are not dependent on the consent of states (or at least not on the consent of all states). On the other hand, the more effective the legal order becomes, the more tangible the impact of the legal order will be for the state parties. As a result, a pressure will grow to hold the legal order to the same standards of legitimacy as national legal orders.¹⁰⁵⁷

Secondly, a claim sometimes made (mainly when arguing in favor of judicial review of human rights) is that there is something contradictory in the thought that human rights could be defined democratically, by majority rule. After all, are human rights not essentially about protecting individuals and minorities against violations by the majority?¹⁰⁵⁸ Such a criticism of democratic decision-making on human rights does not however recognize that also a judiciary may fail to offer protection of the rights of minorities. Therefore the fact that a democratic process may make a bad decision does not by itself make adjudication legitimate. Instead, legitimacy is an issue that is of concern both for political bodies as well as for the judiciary.¹⁰⁵⁹ In fact, when the source of legitimacy is located in political deliberation, then the creation of mechanisms for such deliberation becomes necessary also for the legitimacy of judicial bodies. This leads to the conclusion that, the more a judicialization of the Committee is emphasized, the more acute the need will potentially also be to increase the representative and deliberative capacities of the Committee (as a more legitimate way of defining the

¹⁰⁵⁷ Bodansky (1999), at 606 *et seq.*

¹⁰⁵⁸ See Appiah (2001), at 108-109 arguing that our most fundamental rights serve to restrain majorities, and that these restraints cannot be “consented” away.

¹⁰⁵⁹ Waldron (1998), at 351-352.

contents of the rights which are to be enforced).¹⁰⁶⁰ With this in mind there is good reason to explore the possibilities for political participation and deliberation on human rights in the HRC context.

3.4 On the Difficulties of Democratization

3.4.1 Introducing Democratic Elements to the Committee

The work of the HRC (as well as other treaty-bodies) suffers from many flaws that affect their effective performance. These include non-reporting and late reporting by states, a backlog of reports, ineffectual working principles, poor publicity and accessibility, lack of fact-finding capacities, weakness of complaint systems, and an inadequacy of follow-up measures.¹⁰⁶¹ While some of these may be interesting from a democratic perspective, the main reason for focusing on these flaws has nevertheless been to enhance the effectiveness of the Committee. As the drive (at least among academics) has predominantly been towards exploring avenues for enhancing the enforcement of human rights law, any discussion on the democratic character of the Committee has been scarce.

Only on rare occasions have authors writing about the Committee explicitly addressed the crucial role of political representation and backing for enhancing the effectiveness of the protection of civil and political rights. In this respect, for example Scheinin seems to admit that the effectiveness of the findings of the HRC are not necessarily dependent on providing the Committee with binding powers, but that effective human rights protection could also be achieved through systematic political backing (by the community of states) for the findings made through the existing procedures.¹⁰⁶² The poor representativity of ICCPR

¹⁰⁶⁰ Erman (2005), at 223-224. Also see Campbell (2001), at 193. It is for this reason that visions of a world human rights court have sometimes also emphasized the need for a universal political human rights body. See references above (in the same chapter), note 1049. A claim has even been made that those affected by a decision on human rights have a democratic right to participate in the making of that decision. The right of democratic participation, Gould argues, basically arises from the right to self-determination, meaning that people should be free to control the conditions of their own activity, and that where this activity is social or joint, this gives the people a right to codetermine those conditions. Gould (2004), e.g. at 175.

¹⁰⁶¹ See Bayefsky (2001), and the Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body, Fifth Inter-Committee Meeting of the Human Rights Bodies (Geneva, 19-21 June 2006), UN Doc. HRI/MC/2006/2 (22 March 2006) (hereinafter Concept Paper for a Unified Standing Treaty Body).

¹⁰⁶² Such an approach is however often considered a second-best option only, see Scheinin (2007), at 69.

state parties in the Committee (the HRC having only 18 members) has also been considered as one reason for the non-usage of the inter-state complaint mechanism (envisaged in articles 41 and 42 of the ICCPR).¹⁰⁶³

Although comprehensive discussions on the democratic character of the HRC is a rarity, a far more common claim is that a precondition for implementation (by whatever means), is that a broad range of key actors must be closely involved in the work of human rights bodies. With regard to the UN Human Rights Council, for example, the involvement of NGOs is considered one of the main merits of its working procedures, as this representation of civil society enables a dialogue between states and civil society actors. It is therefore argued that the treaty-bodies could take inspiration from this, in order to ensure greater interaction with national institutions and NGOs.¹⁰⁶⁴

The role of NGO input in the Committee work could hereby be a first issue to capitalize on. The role of NGOs is actually of some importance for the work of the Committee both in respect of individual communications and state reporting. As for individual communications, the Optional Protocol does not afford NGOs any special status in the proceedings, although the protocol does state that the Committee shall consider communications "... in the light of all written information made available to it by the individual and by the State Party concerned".¹⁰⁶⁵ The importance of NGO work instead derives from the reports and briefing materials that they make available to the Committee members. As for state reports, the Committee has tacitly moved to more open use of NGO information. NGOs are regularly present in the consideration of state reports, provide briefings on human rights situations for Committee members, submit written information that is distributed to Committee members, and are consulted in the preparation of consideration of a state report.¹⁰⁶⁶ It could be said hereby that there is an input by civil society into the work of the HRC.

Yet, as a question of improving the democratic legitimacy of the Committee, NGO representation is neither necessarily sufficient, nor completely unproblematic.¹⁰⁶⁷ The first note to be made is that NGO representation in the HRC is only indirect. NGOs serve as a source of

¹⁰⁶³ Scheinin (2007), at 56.

¹⁰⁶⁴ This is the argument of Kjaerum (2007), at 21-22.

¹⁰⁶⁵ Optional Protocol, Article 5(1).

¹⁰⁶⁶ See Human Rights Committee, Report on the Informal Meeting on Procedures, UN Doc. CCPR/C/133 (22 December 1997), para. 9: "The group of three should receive all materials on the State well in advance of the Committee's discussion on the State's report. The group should also seek information from NGOs". In general, see Boerefijn (1999), at 216-220, and Gandhi (1998), at 318-319.

¹⁰⁶⁷ This has been touched upon earlier, see Part III, Chapter 2.3.3.2.

information, but do not participate in the decision-making. Unequal resources and variations in access to political centers are also bound to make NGO participation selective. All NGOs do not necessarily get their voice heard at the national, or at the international level. This is even more likely the more the NGO presents ideas that challenge basic principles of the society (which is often the case in human rights issues). Preferring highly professional and powerful (international) NGOs over poorer domestic NGOs is hardly a solution, as this favors NGOs that work in richer countries. A further source of uncertainty in respect of NGO input is that NGOs themselves often do not follow democratic practices and are neither representative nor transparent.¹⁰⁶⁸ Moreover, even if NGOs would not suffer from such flaws, it is questionable as to whether NGO representation suffices for ensuring an input of democratic legitimacy. As the Committee is composed of independent expert members, an improvement of political representation is not only a question of involving civil society, but also of involving ICCPR state parties.

Turning to states, there are two arenas where ICCPR state parties could potentially discuss the work of the HRC and its interpretation of the contents of the ICCPR. The first of these is the Meeting of the States Parties (established by Article 30 of the ICCPR). This meeting could in principle also deal with substantive issues of rights, brought before it by both the Committee and governments. A parallel could be made to the Assembly of States Parties of the ICC, which has been characterized as a quasi-political organ, at least ideally soothing the concerns over lack of state input in the work of the court. The Assembly is composed of representatives of the states that have ratified and acceded to the Rome Statute. Although it is set up separately from the judicial function of the court, it has important tasks that affect the operation of the court, such as participation in the process of defining both procedural and substantive elements of criminal law. It also appoints judges and may remove them. In Gallant's mind it is the existence of the Assembly which warrants treating the ICC structure at large as an international organization.¹⁰⁶⁹

¹⁰⁶⁸ Mutua (2007), at 605-612 (with further references), and Evans (2005), at 139-140. Problems with resources have an impact in different ways, ranging from ability to actually participate in HRC sessions, to the capacity to produce, translate, and distribute materials. See Boerefijn (1999), at 220. For general accounts of potential problems, see Kamminga (2005), at 110, and Mutua (2001). It should be noted that the task of defining an NGO can also be problematic, see Alston (2005).

¹⁰⁶⁹ ICC Statute, Article 112. For the characterization, see Gallant (2003), at 559-561. Also see Bos (2002), at 301. It may even be of some interest to note that Article 112(2)(g) of the ICC Statute provides that the Assembly shall: "Perform any other function consistent with this Statute or the Rules of Procedure and Evidence", hereby opening up a path for the development of the tasks of the Assembly, for example through use of implied powers, Bos (2002), at 308.

However, attempts to develop the Meeting of the States Parties of the HRC in such a direction (e.g. for dealing with questions of interpretation) have failed. In practice the meeting is therefore merely a body for electing HRC members.¹⁰⁷⁰

Another avenue for discussing the work of the HRC presents itself in the context of the annual report that the HRC is to submit to the UN General Assembly (according to Article 45 of the ICCPR).¹⁰⁷¹ This report is discussed in the General Assembly's Third Committee (on social, humanitarian, and cultural issues). Although the discussions on these reports have had an influence on the work of the Committee, these discussions have nevertheless rarely addressed the substantive work of the Committee. Instead, focus has mainly been on procedural issues.¹⁰⁷²

While neither the Meeting of the States Parties, nor the discussions before the Third Committee have turned into a forum through which states could discuss substantive issues of civil and political rights, there are some *ex post* mechanisms which do provide state parties with the opportunity for expressing their interpretation of the ICCPR.¹⁰⁷³ One of the procedures that has been utilized by some states to lay forth their understanding of ICCPR contents, is the opportunity that state parties have (under Article 40(5) of the ICCPR) to submit Observations on General Comments (to the Committee). It was through use of this mechanism that the UK, the US, and France made their observations to General Comment 24. However, in general this mechanism, the scope of which is restricted to General Comments, has been rarely utilized.¹⁰⁷⁴ More importantly, any *ex post* mechanism only serves as a reaction (by an individual state) to an interpretation that the HRC has already adopted. As such it is quite different from a process of open deliberation. The same is also true for a claim that state parties always have the possibility of amending the ICCPR.¹⁰⁷⁵

Finally it could be asked whether the representativity of Committee members (representing an equitable geographical

¹⁰⁷⁰ See Boerefijn (1999), at 133-144, and Nowak (2005), at 752.

¹⁰⁷¹ Article 45, ICCPR reads: "The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities".

¹⁰⁷² For an overview, see Boerefijn (1999), at 87-110, and Nowak (2005), 793-796. Also see examples in McGoldrick (1991), at 97-98 of the rare cases where substantive issues have been touched upon.

¹⁰⁷³ Also in the context of the WTO, the possibility of *ex post* legislative approval has been considered as a democratic safeguard. However, see Howse (2007), at 6 for a critique.

¹⁰⁷⁴ For examples, see Nowak (2005), at 751.

¹⁰⁷⁵ The possibility of amendment is provided for in Article 51, ICCPR, and Article 11, Optional Protocol. On amendment, also see above, Part II, Chapter 2.5, note 358 and accompanying text.

distribution, different forms of civilization, and principal legal systems), could serve as a substitute for the involvement of states.¹⁰⁷⁶ HRC members are also elected by the Meeting of the States Parties (by states) which could be thought to ensure that Committee members are representative of the range of ICCPR state parties.¹⁰⁷⁷ However, even if it would be accepted that election of experts/judges reduces democratic concerns, this is still of only limited help. The Committee is still restricted (and will be even more so, the more the Committee is judicialized) in its reasoning by its (quasi-)judicial nature to the effect that it seeks to avoid political deliberation.

More pragmatically, the actual composition of the Committee has in fact been subject to critique, particularly since the Committee throughout its history has displayed an overrepresentation by Western countries (which only recently has become less flagrant).¹⁰⁷⁸ If this is the case, then the problem is not only that the Committee does not establish mechanisms for summoning the civil and political rights community to debate.¹⁰⁷⁹ Even if there was such political debate, as long as the Committee itself is unrepresentative, that debate would still not necessarily produce legitimate decisions.

To meet with the problems of democratic legitimacy outlined so far, some concrete suggestions have been made for institutional improvement. One of the more radical suggestions for improving on the democratic legitimacy of interpretation and decision-making on civil and political rights has been the abolishment of the Committee altogether, and its replacement with two organs: one clearly judicial, the other clearly political. The importance of the political body derives from that it would perform the task of determining the contents of human rights policies, and decide which cases to refer to the judiciary.¹⁰⁸⁰

A more modest institutional reform would be to develop the Meeting of the States Parties into something resembling a Conference of the Parties as known in environmental treaties. Such a Conference could

¹⁰⁷⁶ Article 31(2), ICCPR.

¹⁰⁷⁷ Article 30(4), ICCPR. This issue was debated already when drafting the ICCPR, some states advocating a more “objective and impartial” process where the election would be conducted by the ICJ, see Nowak (2005), at 676.

¹⁰⁷⁸ See Young (2002), at 113-114, and Nowak (2005), at 680. After the 2002 elections the Western group (excluding Central and Eastern Europe) had eight Committee members and the African group two members. As of 2008, there are seven members of the Western group and five members of the African group.

¹⁰⁷⁹ This paraphrases Steiner (2000), at 43.

¹⁰⁸⁰ This is the idea of Mutua (1998), at 259-260. Notably in Mutua’s model the political body would be composed of expert members instead of state representatives, hereby falling short of providing an input of state consent to the formulation of human rights policies.

perform tasks of developing obligations (through amendments and interpretations), but even supervise implementation and compliance.¹⁰⁸¹ In such a role the Conference would constitute something of a “treaty-management organization” (whereas the Meeting of the States Parties is more of an ad hoc conference).¹⁰⁸²

An even more modest proposal for increasing political input has emphasized introducing Days of General Discussion as known, for example from the Committee on the Rights of the Child and the Committee on Economic, Social, and Cultural Rights. The task of these Days is explicitly to enhance a deeper understanding of the substantive content and implications of the Conventions. The aim would hereby be that these Days would assist the HRC in developing its understanding of human rights issues and to allow input of all interested parties.¹⁰⁸³

As there is (at least ideally) some kind of representativeness to the composition of the HRC, some avenues for ICCPR state parties to deal with substantive issues (although unused in practice), and an NGO involvement which does provide an input of civil society, the eventual question is whether this really provides for an input of social legitimacy to the Committee. Above all, the question is whether this input is in balance with the (quasi-)judicial tasks of the Committee.¹⁰⁸⁴ The suggestions for improvement mentioned here apparently focus on very different things and answer to varying degrees to a need for developing the political side of the HRC. They are neither exhaustive of possibilities, nor necessarily sufficient for full social legitimacy. However, such initiatives demonstrate that there is a discussion on how to ensure proper political input, and that there are many available avenues in developing the political side of the Committee. In the current debate on treaty-body reform the recent Concept Paper on the High Commissioner’s Proposal for a Unified Standing Treaty Body by the Inter-Committee Meeting of the Human Rights Bodies suggests that a possible future unified treaty-body should maintain its links to national constituencies.¹⁰⁸⁵ There seems

¹⁰⁸¹ See Churchill and Ulfstein (2000), at 636-647. As to the use of “noncompliance mechanisms” instead of traditional dispute settlement procedures Churchill and Ulfstein identify two advantages. First of all issues of compliance are better dealt with in a multilateral context due to the nature of the obligations, and secondly, this promotes the resolution of compliance problems in a cooperative rather than adversarial manner.

¹⁰⁸² Churchill and Ulfstein (2000), at 656. Interestingly the merits with having a political input in the protection of human rights was also an argument in objecting to the merger of the European Court and Commission of Human Rights. See Janis *et al.* (1995), at 91-97.

¹⁰⁸³ See Vandenhoe (2004), at 184-190. Days of General Discussion are also envisaged in the Concept Paper for a Unified Standing Treaty Body, para. 57.

¹⁰⁸⁴ Beetham (1998), at 67-68 makes a claim that the HRC is “relatively democratic”.

¹⁰⁸⁵ Concept Paper for a Unified Standing Treaty Body, para. 62.

to be good reason then to look for how such links could best be established.

3.4.2 Is There a Universal Conception of Human Rights?

As the example of the EC/EU suggests, when an organization evolves and strengthens its role, at some point the question will arise as to whether there is a common identity among member states, which is strong enough to sustain that development. The more tangible the activities of the Committee become for ICCPR state parties, the more likely it is for such a question to arise also in respect of the ICCPR regime. Or, as Helfer and Slaughter put it: "The Committee's ability to improve compliance with its judgments will prove an important test of the cultural and political homogeneity thesis".¹⁰⁸⁶

In fact, the question is of concern even irrespective of the legal character of HRC activities. The merits of the Committee need not be located in its adjudicative powers, but can also be found in generating and defining human rights, this way constructing and reshaping the ICCPR. Eventually, if the performance of such a task is perceived legitimate, the Committee could hereby even create a compliance pull.¹⁰⁸⁷ For the performance of such tasks it is no less important that "..., the people (who are to implement these standards) must perceive the concept of human rights and its content as their own. To be committed to carrying out human rights standards, people must hold these standards as emanating from their worldview and values,".¹⁰⁸⁸ Due to the universal aspiration of the ICCPR, the question becomes whether the rights of the ICCPR can be perceived "as their own" by all people of the world, or differently, whether rights contained in the ICCPR are truly universal.

Different approaches can be identified as to the possibility of universal human rights. At the one end of the spectrum there is something that could be labeled a cosmopolitan approach to human rights which recognizes and builds upon the existence of universal human rights. At the other extreme there is a denial of the existence of a shared conception of human rights. The distinction between these approaches cannot be upheld too categorically. Those most critical rarely deny that a universal conception could one day materialize. On the other hand many cosmopolitans do recognize that the universal conception that

¹⁰⁸⁶ Helfer and Slaughter (1997), at 365.

¹⁰⁸⁷ See above, Part IV, Chapter 3.3. Also see Donnelly (2006), esp. at 72 *et seq.* For the idea of "compliance pull", see Chayes and Chayes (1995).

¹⁰⁸⁸ An-Na'im (1992), at 431.

they identify is still in need of concretization (e.g. through the work of international institutions).¹⁰⁸⁹ Nevertheless, the rough distinction can be upheld for the purpose of demonstrating that the issue is far from settled.

To begin at the more positive end, cosmopolitans build their entire project on the possibility of universal human rights. Rights are seen as the essential foundation upon which to build democracy at the global level as the human rights agenda embodies much of what is required for the foundation of global democratic citizenship. This follows from that the possession of rights enable people to be equal participants in the affairs of society. All humans are claimed to share certain common needs, such as subsistence, security and respect, and the capacity for individual and collective choice. There are also some minimum means that all people require for meeting their needs. These needs are what rights serve to protect.¹⁰⁹⁰

Identifying these common needs as the foundation of universal human rights claims is not to deny difference. Even Held admits that “the rights that are entrenched in democratic public law” must be abstractly framed so as to be reflective of diverse material, cultural and political circumstances.¹⁰⁹¹ The universality of human rights is not therefore a universality of practical application.¹⁰⁹² Instead, the universality exists in a more abstract sense. It is in this abstract sense that rights establish and express a “minimum universal morality” which can be built upon in working towards a cosmopolitan legal order.¹⁰⁹³

A look at practice provides some support for this assumption. Already the very adoption of the ICCPR suggests that at least in some sense there is agreement on the rights enumerated in the Covenant. If coupled also with the status of the Universal Declaration of Human Rights, there seems to be good reason to accept the existence of a shared conception of at least some human rights.¹⁰⁹⁴ At the very least, this expresses that the pursuits and concerns of the ICCPR do not stand out as

¹⁰⁸⁹ See Held (1995), at 281-283.

¹⁰⁹⁰ See Held (1995), at 189, Beetham (1999), e.g. at 138, and also Beetham (1998), at 66.

¹⁰⁹¹ Held (1995), at 200-201.

¹⁰⁹² However, Held does in fact also identify a category of rights that can be made binding and which the international human rights court (which Held envisages) is to protect. Held (1995), e.g. at 269.

¹⁰⁹³ The expression is used by Beetham (1999), at 143. Also see Koskeniemi (2001), at 43. The claim is furthermore that any problems that a cosmopolitan human rights regime may encounter, derive from a weak enforcement regime on the one hand, and from deficiencies in implementation on the other. Beetham (1999), at 143-144.

¹⁰⁹⁴ Donnelly claims that this reveals the existence of “a common moral position”, Donnelly (1984), at 414.

completely alien to the majority of states.¹⁰⁹⁵ The existence of a sense of commonness is not however the same thing as a pre-existing consensus on the content of rights. Instead, this is where political deliberation enters the picture as the process through which differences concerning rights can be aired. As Lagerspetz puts it: "... public political discourse is created *in, and through*, the fact that we express our sense of legitimacy and social justice. The discourse itself consists of our attempts to voice conflicting views on such issues".¹⁰⁹⁶ The task of the (late) United Nations Commission on Human Rights has been described as one of fostering communicative interaction and facilitating such a discourse, with the goal of creating a shared conception of human rights. In a similar way (as discussed above) the idea of building and developing a universally shared understanding of civil and political rights has been a way of viewing the main merits of the HRC.¹⁰⁹⁷

However, to conclude that there is in some sense a universal conception of human rights (or, universal human rights) can only be the beginning of the discussion. That assertion in itself does not yet reveal anything about the nature of the universal conception. To recall the earlier discussion on the possibility of a *demos*: it is not only the existence, but the nature of the *demos* that is at the heart of the legitimacy discussion for example in the EU context. The legitimacy of European integration is dependent upon whether the sense of commonness between EU members is substantive enough to sustain the ever deepening integration. As a parallel way of reasoning it could be assumed that the more binding authority the HRC wishes to exercise, the stronger and more concrete the shared conception of civil and political rights (and hence, the sense of belonging to a community of shared values) needs to be.¹⁰⁹⁸

The nature and extent of a universal conception of human rights is also what a more critical approach capitalizes on. Those critical of the possibility of universal human rights can agree with the fact that people may, in spite of a plurality of values, share a common ethical view. This means that there can be agreement, even on a global scale, on a complex

¹⁰⁹⁵ This paraphrases Lagerspetz (1998), at 130. Or, as Kaldor puts it in another context, it itself implies a shared commitment to a "global human rights culture", Kaldor (1999), at 210.

¹⁰⁹⁶ Lagerspetz (1998), at 107-110 (quote at 107, emphasis in original). Also see Evans (2005), at 53.

¹⁰⁹⁷ As to the Commission, see Erman (2005), esp. at 180.

¹⁰⁹⁸ See above, Part III, Chapter 2.3.3.2. Moravcsik argues that it is only when states become more unified and where there is prior sociological, ideological, and institutional convergence toward common norms, that greater independence for adjudicators becomes possible, Moravcsik (1995), at 178. This is however only true as far as it does not build upon the existence of consensus as a precondition for the legitimacy of institutions (which at times seems to be Moravcsik's claim, see e.g. at 181).

of different values in the form of a list of rights like that of the ICCPR. However, the crucial question is whether this common ethical view can materialize in a way that will enable the solving of substantive conflicts between values.¹⁰⁹⁹

The only reason that an illusion of a universal conception can be upheld, critics claim, is that serious analysis on the nature and origin of human rights is not engaged with. At the same time, when human rights are dealt with on an abstract level, rights serve to obscure rather than clarify our understanding of the social world. Although rights are essentially socially constructed, a commitment to the universality of human rights tends to overlook the particularities that follow from this.¹¹⁰⁰ One way of upholding this universality has been the use of justificatory minimalism. In this way the coupling of an interpretation of a right with a particular ethical tradition can be avoided. Incidentally, the HRC has been criticized for exercising such a policy.¹¹⁰¹ If there would be closer analysis, critics argue, then we might come to the conclusion that there is no shared conception of rights in any useful sense of the term. This absence of truly universal human rights could also help explain why international human rights are not always perceived as authoritative.¹¹⁰²

One of the more fundamental critiques of the possibility of an (unforced) consensus on human rights has been presented by Taylor.¹¹⁰³ The problem is not only that the achievement of universal human rights may require “space and time in global and epochal proportions”.¹¹⁰⁴

¹⁰⁹⁹ This builds on Hallamaa (2001), at 102 who is critical of the possibility. This disagreement not only manifests itself in how a balance is struck between conflicting values, but also affects (among other things) how the facts of a given case are perceived.

¹¹⁰⁰ Stammers accuses the “global human rights industry” for doing this, Stammers (1999), at 990-991. A common example of such an abstract claim is that rights must be broadly and liberally constructed. See in this respect for example Committee member Bhagwati in his individual opinion in the *Stewart v. Canada* Communication: “The question is: are we going to read human rights in a generous and purposive manner or in a narrow and constricted manner? Let us not forget that basically, human rights in the International Covenant are rights of the individual against the State; they are protections against the State and they must therefore be construed broadly and liberally”, Individual opinion by Prafullachandra Bhagwati (dissenting), in *Charles E. Stewart v. Canada*, Human Rights Committee, Communication No. 538/1993, UN Doc. CCPR/C/58/D/538/1993 (1996), appendix E. While a general principle of constructing rights broadly so as to benefit the individual can be agreed upon, this does not mean that there needs to be agreement on what a “broad and liberal” construction of a particular right means. Yet, such agreement is precisely what is assumed when presenting the contents of a particular right as a result of the application of this general principle.

¹¹⁰¹ Cohen (2004), at 213. As to the HRC, see Steiner (2000), at 42-45.

¹¹⁰² Thompson (1998), at 186. Thompson herself is however critical of such a communitarian critique and instead more positive to the idea of a world community.

¹¹⁰³ The following is based mainly on Taylor (1999).

¹¹⁰⁴ Carrozza (2003), at 71-77 (quote at 77).

Instead, Taylor identifies far more serious obstacles. First of all the concept of rights can be targeted for being a Western concept. This means that it builds on certain assumptions that may not be shared by all societies. This is a discussion that has been undertaken in many contexts, one of these being whether civil and political rights with their emphasis on individualism are well suited for Asian societies or compatible with a traditional Asian emphasis on family and social harmony.¹¹⁰⁵ The universality of the human rights concept is in the face of such critique often upheld by emphasizing the flexibility of the human rights concept (therefore allowing for cultural differences).¹¹⁰⁶ Taylor approaches this problem pragmatically: as long as the end result is political trust and respect of such immunities and liberties that we describe as human rights, the actual form of the human rights protection (whether based on individualism backed up with Western model judicial review, or on a group identity backed by the moral authority of the Thai monarchy) should not really matter.¹¹⁰⁷

A more serious critique concerns the underlying justification of human rights. Taylor uses the example of two societal orders which both claim to defend human rights and democracy, but depart from a fundamentally different philosophical basis. In the West, democracy and human rights have been furthered by the steady advance of a humanism, building on the status and dignity of human beings. This is echoed also in the ICCPR in recognizing that the Covenant rights "... derive from the inherent dignity of the human person".¹¹⁰⁸ As part of this, maximizing personal freedom and self-control is a major value. In Buddhist philosophy the protection of human rights, while similar in respect of its agenda, is however quite different from the Western conception as to its justifications. In fact, the entire philosophical basis and its source of appeal stand out as unfamiliar to the Western observer. Whereas the Western conception emphasizes the importance of the human agent, the Buddhist departs from a demand of nonviolence, which on its part generates a whole host of other demands, such as social equality, ecologically responsible development, and limitation of greed (all of which are considered sources of anger and conflict). In order to uphold

¹¹⁰⁵ This discussion in itself raises questions of whether it is correct to describe Western values as liberal and Asian values as communitarian, and furthermore, whether it is correct to see these as antithetical to each other. The topic is dealt with from a number of perspectives in Bauer and Bell (1999 "The East").

¹¹⁰⁶ For a brief overview, see especially Bauer and Bell (1999 "Introduction"), at 5-9.

¹¹⁰⁷ Taylor (1999), at 129-133.

¹¹⁰⁸ Preamble, ICCPR.

these values a substantive amount of the same norms of human rights as in the Western conception become crucial.¹¹⁰⁹

Assuming that agreement on the contents of human rights is more easily achieved among people who identify reasonably strongly with each other, such differences are of some concern. As a result of such differences, there may be agreement on a set of human rights norms (like the ICCPR), but a profound difference in respect of how and why these norms become objects of commitment. The different philosophical starting points are also bound to lead to differences in prioritizing between rights. Taylor's concern is hereby that if "we can only acknowledge agreement with people who share the whole package, and are moved by the same heroes", then a consensus on human rights will either never come or must be forced.¹¹¹⁰

Taylor eventually outlines an even more fundamental obstacle for universal human rights. This concerns the idea of equality in the form of non-discrimination (which is also reflected in the ICCPR).¹¹¹¹ The problem with the idea of equality is that it is hard to introduce in societies in which social differences are still considered meaningful. Rejecting a certain discriminatory practice may therefore result in denying the very identity of both the favored and the oppressed. In fact, culture and equality have even been characterized as "fundamentally incompatible commitments".¹¹¹² The whole shape of the change that could allow for a consensus on human rights in such a case would at any rate need to entail a redefinition of those identities. This, Taylor concludes, will take time, and is an unfinished project even in the West (e.g. concerning gender equality).¹¹¹³

This critique need not be a reason to despair of ever achieving legitimate interpretations of civil and political rights.¹¹¹⁴ What it does mean, however, is that as long as universal human rights only exist on an

¹¹⁰⁹ See Taylor (1999), at 133-137 for further examples.

¹¹¹⁰ Taylor (1999), at 136-138 (quote at 136).

¹¹¹¹ See ICCPR, Preamble, which recognizes the "... equal and inalienable rights of all members of the human family" as the foundation of freedom, justice and peace in the world, and Article 26: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

¹¹¹² McGoldrick (2005), at 38.

¹¹¹³ Taylor (1999), at 138-140. On the political nature of equality-issues, also see Tomuschat (2005).

¹¹¹⁴ McCarthy, for example, while sharing many of Taylor's concerns, also sees a possibility for convergence of cultural differences through global societal changes, McCarthy (2002), at 269.

abstract level and the underlying philosophy for appreciating rights vary between states, a more substantive concretization of human rights (in individual cases) is always bound to be contentious. This is of concern for both a judicialization of the HRC and for the idea of democratic legitimation of Committee decisions. For the adjudicative role the problem is that the Committee could be forcing a set of values upon states on which there is no agreement. As for the idea of democratic legitimacy, a lack of understanding of “what moves the other” puts the entire idea of deliberation on the contents of rights at risk.¹¹¹⁵ In the case of non-discrimination, if Taylor’s critique is accepted, it may be that as a precondition for any deliberation on the contents of the right (to non-discrimination), a more “sympathetic understanding” of the situation of each party must first be achieved: “If the sense is strong on each side that the spiritual basis of the other is ridiculous, false, inferior, unworthy, these attitudes cannot but sap the will to agree of those who hold these views”.¹¹¹⁶ To put it in yet another way, if other positions are discarded for being subjective (instead of objective), irrational (instead of rational), or passionate (instead of reasonable), then there can never be a genuine discourse between different conceptions of rights.¹¹¹⁷

4 Concluding Remarks: Three Dichotomies and the Determination of Human Rights Committee Powers

The aim of this fourth part of the thesis has been to project the earlier discussions on the doctrines of attributed powers, implied powers, and constitutionalism on the question of powers of the Human Rights Committee. In doing this, the task has not been to explore the question of what powers the Committee can exercise as such, but to illustrate how reasoning on powers through these doctrines provides for different answers to such a question.

The question of proper extent of powers of the Committee was first dealt with as a tension between attributed powers and implied powers reasoning. This tension was exemplified by the discussion on the powers of the Committee to determine the compatibility of reservations by states with the object and purpose of the ICCPR. A first dichotomy in

¹¹¹⁵ For a critique of communitarianism on these accounts, see Thompson (1998), at 186-190.

¹¹¹⁶ Taylor (1999), at 138-140 (quote at 138).

¹¹¹⁷ Koskeniemi (2004), at 58.

constructing HRC powers arose out of the reasoning of the Committee in General Comment 24 and the consequent observations by the UK and the US (as well as the consequent discussions between the HRC and the ILC). While the HRC emphasized the need for implied powers in order to perform its functions, and in order for the protection of civil and political rights to be effective, the counterargument emphasized the absence of any attributed powers in this respect. In the face of such an absence, the claim was, use of any non-express powers (especially if binding) would run contrary to the consent of ICCPR state parties.

Presented in this way, the debate on General Comment 24 illustrates how the two ways of constructing the powers of the Committee build on attributed and implied powers reasoning as counterparts to one another. An emphasis on implied powers is made to avoid leaving the decision on the compatibility of reservations being made on the basis of reciprocity (as this is considered ineffective), while attributed powers are emphasized to avoid a development of the Committee tasks (no matter how effective) to which there is no express consent. This dichotomy is also reproduced through a number of legal discussions, such as the discussion on the special characteristics of the ICCPR, and whether (and how) the Vienna Convention on the Law of Treaties is applicable.

These contradictory positions have been characterized as the “alternative identities of the human rights treaty”, hence indicating that they represent different images of the ICCPR altogether.¹¹¹⁸ At the same time neither approach seems completely satisfactory in the extreme. On the one hand those emphasizing the express wording of the ICCPR as the sole source of Committee powers admit that the attribution must nevertheless entail such additional powers which enable effective performance of express functions (*effet utile*). On the other hand, in developing the efficiency of the HRC authority is sought in the rules of the Vienna Convention on the Law of Treaties in order to ensure a consensual basis (of the power to determine the compatibility of reservations).

The second level upon which the question of powers of the Committee was dealt with was by looking at the attributed and implied powers doctrines individually. This showed how the debate over Committee powers not only takes the shape of a dichotomy between attributed and implied powers, but that the disagreement can be located also within these doctrines. This shift of level also brought new issues into focus in discussing the proper extent of Committee powers. While an emphasis on the implied powers of the Committee can be claimed to be functionally necessary in order to protect the integrity of the ICCPR, an

¹¹¹⁸ Craven (2000), at 513-517.

emphasis on attributed powers can also be defended as functionally necessary if the measure of effectiveness is the achievement of universal participation (in the ICCPR and the Optional Protocols).

An emphasis on the attributed powers of the Committee turned out equally ambiguous. In respect of General Comment 24, both the ILC and the UK claimed that from the expressly attributed powers of the Committee, such non-express powers can be derived that are needed for the performance of the express powers and functions. Even within the expressly attributed powers there inheres therefore a degree of functionality. Put differently, the non-express power was seen to inhere in the attribution of powers to the HRC. The reasoning of ILC Special Rapporteur Pellet demonstrated explicitly how the determination of the scope of powers is really a search for consent (irrespective of whether the power itself is express or implied). Even in this search, the dichotomy between increasing effectiveness and maintaining the status quo enters, for example as a question of whether it is the intent of the original drafters or the consent of the present membership that should be taken into account.

Whereas the dichotomy between attributed powers and implied powers begs the question of how it can be known which one is to prevail, the very aim of constitutionalism is to structure such uncertainties. In this respect both a judicialization and a democratization of the Committee have been presented as necessary developments for arriving at correct interpretations of the ICCPR. However, judicialization and democratization, as elements of constitutionalism, also establish themselves as competing approaches. In contrasting these to each other they seem to reproduce much of the dichotomy between attributed powers and implied powers reasoning.

Perhaps in no field of international law has the drive towards judicialization, with a corresponding aversion towards political deliberation, been as prominent as in the field of human rights. The restriction of state sovereignty through judicial powers is commonly considered as the very measure of success of international human rights law. This spirit can be found in General Comment 24 as well. The merits with a judicialization of the Committee is commonly located in more effective protection of rights, avoidance of a politicization of human rights issues, and in serving as a safeguard against bad decision-making by political organs. The merits with increased social legitimacy and the corresponding emphasis on an input by ICCPR state parties into HRC work derives from the capacity of political deliberation to remain true to the (political) nature of human rights, from being a representative approach, and from being potentially more receptive and sensitive (than

a judiciary) to cultural and moral issues of rights, therefore producing more legitimate interpretations of the ICCPR.

As to the criticism, at worst, judicialization is targeted for not providing a continuous debate on differences and incommensurabilities of human rights. Judicialization hereby risks creating a facade of public decision-making, which in fact is hegemonic. This could in itself serve as an argument in favor of a more open and democratic design of the Committee. Through a more democratic structure, the idea is that the Committee could better take into account inequalities of power and include the voice of “others”, enable an active questioning of prevailing hegemonies and dominations, positively assert diversities, and address issues of economic justice and substantive equality.¹¹¹⁹

However, an emphasis on democratic legitimacy suffers from a bundle of problems of its own. Most fundamentally this concerns whether there is a shared conception of civil and political rights, substantive enough to enable useful deliberation on those rights. Taylor, who was relied upon in making the critical point, speculates that due to an absence of universal human rights, any consensus may only come about through enforcement after all. However, a lack of a shared conception of human rights also has an impact on the legitimacy of such enforcement. In the absence of universal human rights, decisions by a judicialized Committee would not automatically lead to “justified claims on our allegiance”.¹¹²⁰ This suggests that such a judicialization of the Committee might have to settle for a degree of legitimacy deficit. This was indeed one of the responses to the problems of constitutionalism in organizations outlined earlier.¹¹²¹

The way in which the two aspects of constitutionalization have been contrasted is of course exaggerated. Most academics and activists place themselves somewhere in between in arguing in favor of a judicialization of the Committee, but not necessarily for the creation of a human rights court. Likewise, arguments aiming at increased democratic input do not necessarily aim at turning the Committee into a political assembly of some sort. Yet, even more modest proposals cannot escape the issues raised in the preceding chapters. These questions underlie any discussion on a development of the powers of the Committee.

Instead of discussing Committee powers merely through the question of proper interpretation of the ICCPR or the Vienna Convention on the Law of Treaties, a shift into discussing the powers of the Committee as an emphasis on the judicial or democratic elements of the

¹¹¹⁹ Otto (1997), esp. at 31 *et seq.*

¹¹²⁰ The expression is borrowed from Lagerspetz (1998), at 110.

¹¹²¹ See above, Part III, Chapter 2.4.

body, turns interest to the all important question of what role of the Committee is advocated through different constructions of its powers. The question of whether the HRC can exercise a power to determine the compatibility of reservations with the ICCPR is not in this perspective merely a question of how to reconcile the ICCPR regime with the Vienna Convention on the Law of Treaties. The far more serious concern is how to reconcile different approaches concerning how to best protect civil and political rights.

While constitutionalism does not strike a choice between increased effectiveness and maintaining the status quo in the abstract, it gears interest to the question of legitimacy. This focus transcends the dichotomy between attributed powers and implied powers by asking not only whether the Committee can legally possess a judicial power, but whether the Committee can legitimately perform a judicial task. As long as all eyes are focused on finding legal arguments in favor (or against) the existence, for example of a power to determine the compatibility of reservations, the far more important question of how to balance judicial and democratic elements in protecting civil and political rights of individuals never necessarily enters.

Part V General Conclusion

What is this great evil? How did it steal into the world?
From what seed, what root did it spring?
Who's doing this? Who's killing us? Robbing us of light and life.
Mocking us with the sight of what we might have known.
The Thin Red Line (1998)

1 A Recapitulation

The aim of this thesis has been to describe the function of three doctrines, all of which serve as means of expressing what an organization can or should do in order to fulfill its object and purpose. The doctrines of attributed powers, implied powers, and constitutionalism all approach this question differently. These three doctrines are also children of their time, so to speak. This means that they have all at some point emerged and served as the mainstream approach for addressing the exercise of powers of organization (although for constitutionalism this status may still be in the making). As such, the three doctrines not only serve to express different images of international organizations, but also serve to express differences concerning the role of international organizations in international relations at large.

The different images of international organizations that follow from relying on the doctrines were in the introductory Part I of the thesis framed as different ways of answering the question of “who decides”. The first task of the thesis was therefore to provide a closer look at how the three doctrines address that question. As it was clear already from the very first pages of this thesis that the three doctrines can be used as competing approaches to powers of an organization, the question also arises how the proper reach of powers of an organization can ever be known. In other words, as the three doctrines all produce different images of organizations and none of them enjoy priority over the others, this makes the question of powers look indeterminate.

Claims on the inevitability of use of implied powers, on an emphasis of attributed powers as unambiguous, or on judicialization as an apolitical way of making organizations more effective, were all discarded at the outset of the thesis as insufficiently informative of the nature of the three doctrines. Such claims do not remove the ambiguity

attached to a definition of the scope of powers of an organization. If anything, such claims seem to oversimplify the actual dispute. As the aim of this thesis has been to explore how the doctrines manage to express political disagreement over the extent of powers of organizations, such general claims rather spurred the desire to achieve a better understanding of the three doctrines.

The first step in working towards such an understanding was to outline the dichotomy between the attributed and implied powers doctrines in Part II. In international case law the limited character of the activities of an organization has been emphasized through underlining its attributed powers. A development of the legal means of an organization on its part often builds on the use of implied powers. When put to such use the doctrines of attributed powers and implied powers, as general principles governing the question of powers of organizations, establish themselves as opposites to one another. The uses to which the attributed and implied powers doctrines have been put clearly expresses their opposite driving forces: implied powers reasoning emphasizes the functional effectiveness of organizations, whereas attributed powers reasoning seeks to maintain the status quo by restricting the organization to those powers that members have explicitly consented to. While a use of implied powers hereby expands the scope of the activities of an organization, an emphasis on attributed powers serves to safeguard member sovereignty against such expansion. In addition, in this use of the two doctrines an emphasis on either often builds its argument on the demerits of the other.

This divide between the different emphasis of the attributed and implied powers arguments also serves as a reflection of the dual role of powers of organizations. On the one hand powers establish organizations as independent actors. On the other hand the powers of an organization are an expression of the consent of the membership. As a consequence, neither an emphasis on the attributed character of powers, nor an emphasis on the functional independence of organizations, can be completely satisfactory on its own without making the entire image of international organizations one-sided. If the idea that an organization can utilize non-express powers is pushed to the extreme, the role of members as the constituents of organizations is affected. In this respect the idea of inherent powers which is sometimes presented as an independent theory on constructing powers of organizations, explicitly builds on the eradication of member input from a determination of the scope of powers. If the attributed character of powers is overemphasized, then the independence of the organization is affected (as is exemplified by the case law of the PCIJ). Instead of excluding one another, these two sides of

international organizations will always need to establish (and re-establish) themselves in a balance in the individual organization.

The need to re-establish the balance also explains why neither of the two doctrines has been obliterated by the other (although such claims have sometimes been made). What this means in practice, is that the attributed and implied powers doctrines are always employable as competing means for constructing the powers of an organization. It is only when there is agreement on the balance between the two that one or the other will seem obsolete. In the opposite case, when there is a disagreement (or at least an uncertainty) concerning the extent of powers, this dichotomy between attributed and implied powers makes the question of extent of powers of an organization seem ambiguous. In order to structure this uncertainty, recourse is often had, for example, to domestic jurisdiction clauses or principles of interpretation. Also the idea of constitutionalizing organizations contains within it a promise of structuring dichotomies at the heart of organizations.

However, as an indication of things to come, domestic jurisdiction clauses and principles of interpretation were not found capable of settling disagreements over the scope of powers in any easy way. What the discussion in Part II did suggest, however, was that assessing the extent of powers of organizations in terms of domestic jurisdiction clauses and principles of interpretation transforms the discussion by adding new parameters to it. As an example, while the existence of domestic jurisdiction clauses in constituent instruments do not tilt interpretations of the scope of powers of a particular organization automatically in favor of member sovereignty, it does turn interest from a discussion on what powers can be derived from the express wording or the object and purpose of an organization, into differences on how to define the *domaine réservé* of members. The fact that a constitutionalization of organizations has come to mean different things in different organizations (and even different things in individual organizations), suggested already at this early stage that the same may be true for that doctrine.

Although the picture of reasoning on powers of organization that arises from international case law presents the attributed and implied powers doctrines as opposites to one another, there is when taking a closer look more to that reasoning than at first meets the eye. While the opposing use of the two doctrines makes perfect sense, each of the two doctrines can also reproduce the same tension within them individually. This means that the question of proper construction of powers can also be discussed in terms of competing conceptions of effectiveness (are implied powers needed or is the organization functionally effective within its expressly attributed powers?), or as a question of whether there is consent

among members to the use of an implied power (hereby warranting the characterization of that implied power as conferred upon the organization by its members). As eventually also the idea of constitutionalism in organizations was found to contain within it two different (and potentially conflicting) aspects, it became apparent that not only do the three doctrines lend themselves for expressing different approaches to powers of an organization, but also that the doctrines can express similar images of an organization (albeit in different terms).

These discussions in Part III of the thesis made it particularly clear that a claim that implied powers arise somehow automatically in the context of organizations, or that an emphasis on attributed powers more truly safeguards member sovereignty, does not express any inherent qualities of these doctrines. The attributed and implied powers doctrines *can* be used to present different constructions of powers and make perfect sense when used that way. However, as far as there is agreement on the extent of powers, all such powers (whether express or implied) can be characterized as attributed. The implied powers doctrine itself can also be used to present varying constructions of powers. Above all, if there is agreement that an organization should remain within its expressly conferred powers only (and there is agreement on how those express powers are interpreted), then this is simultaneously the construction of powers that is perceived as functionally necessary.

This conceptualization of the attributed and implied powers doctrines also suggests that the dichotomy between members and the organization, which was introduced as a tool for understanding the function of the two doctrines when they are used as opposites to one another, hereby loses some of its explanatory force. After all, if all powers can be described as attributed, that is, if member consent can be located behind all constructions of powers of an organization, then there is really no conflict between increasing the independence and effectiveness of the organization, and member sovereignty. In this sense the attributed powers argument loses its role as a means by which to emphasize the limited character of organizations, and instead becomes an emphasis on consent.

As to the implied powers doctrine, the fact that functional necessity reasoning at the heart of that doctrine need not serve to add powers to the organization to begin with, also means that the use of implied powers is not necessarily the ultimate embodiment of functional effectiveness of an organization. Instead, reliance on express powers only can be functional enough. It further follows from the nature of functional necessity reasoning that when the implied powers doctrine is used to add to the body of powers of an organization, the doctrine allows for different

constructions of (implied) powers. If there is agreement on a narrow construction of a particular implied power (such as the power of the HRC to determine the compatibility of reservations with the ICCPR as far as this is necessary for the performance of its own functions), that power could even be characterized as conferred upon the organization. However, in the face of a competing (and wider) construction of that implied power (such as a general power of the HRC to authoritatively determine the compatibility of reservations with the ICCPR), the dichotomy between safeguarding member jurisdiction and enhancing the effectiveness of the organization reappears.

Despite such reconciliations of the attributed and implied powers doctrines, the two do however still serve to express different preferences on what powers an organization should enjoy. The two doctrines therefore still have different driving forces. What such a reconciliation of the doctrines does highlight, however, is that the dichotomy between the independence of the organization and member sovereignty has its source in differences *between members* on the proper role of the organization. However truistic this conclusion may sound, it also enriches the debate on powers. This is the case, for example, when turning from the formal legal question of whether the object and purpose of the HRC allows for implied powers, first to the question of how to balance the functional effectiveness of the HRC with concerns for the sovereignty of ICCPR state parties, and further to demonstrating that the actual dispute can also be framed as a clash between different conceptions of effectiveness between those state parties. In the context of the HRC it was this move that revealed how the question of powers at heart may also be traced back to different ways of balancing universal participation with maintained integrity of the ICCPR.

A similar approach was also used in the third part of the thesis for discussing constitutionalism in organizations. Two aspects of the doctrine of constitutionalism were separated, one emphasizing a judicialization of organizations, the other gearing interest towards concerns of democratic legitimacy. These aspects were labeled formal and substantive constitutionalism. Formal constitutionalism/judicialization emphasizes a development of the formal legal procedures of organizations, a creation of legal hierarchies, and a need to develop the legally binding elements of the legal order (both in order to supervise the performance of members as well as the political organs of the organization). An emphasis on questions of (social) legitimacy on its part underlines the importance of a link between organizations and societies. Democratic governance is presented as the ideal way of ensuring such a link. The two aspects of constitutionalism are also vulnerable to the critique of the adversary. In

this respect formal constitutionalism has been characterized as “juridification of politics”, while substantive constitutionalism has been feared to result in a “politicization of law”.¹¹²²

Because of the difficulties with translating and implementing the idea of constitutionalism beyond the state context, formal and substantive aspects of constitutionalism are often emphasized separately in discussions on the constitutionalization of organizations. In such use, formal and substantive constitutionalism reproduces the arguments of the attributed and implied powers doctrines in various ways. The idea of attributed powers ties neatly to the emphasis of substantive constitutionalism on member consent. A judicialization of an organization can on its part simultaneously be (and often is) a claim for increasing the functional effectiveness of the legal regime. If this judicialization takes place through the use of implied powers (as in the case of HRC General Comment 24) the parallel is complete. In such a case an emphasis on the necessity of a power of judicial review (for the effective achievement of the object and purpose of the organization), is turned into an argument on the necessity of judicialization, for example of the human rights regime (which in practice is materialized through a development of the legal powers of human rights institutions). The relationship is even demonstrated by the fact that an emphasis on the independent performance of international organizations that a use of implied powers brings with it, has been taken to demonstrate the constitutional character of the legal orders of organizations (such as the UN and the EC).

However, the connection between attributed powers and substantive constitutionalism, or between implied powers and formal constitutionalism, are not the only connections possible. Instead, faith can also be put in a judicialization of organizations as a counterforce (in the form of a legality check) to an expansion of the powers of an organization. A democratization of organizations does not on its part by definition entail a limitation of the powers of an organization. Instead, it is the emphasis of substantive constitutionalism on member consent which can serve to add the necessary input of democratic legitimacy that is needed for further development of the powers of an organization (as the example of European integration demonstrates in different ways).

Eventually, because of the different claims that can be presented as a constitutionalization of organizations, such a constitutionalization fails to structure the member – organization dichotomy in an abstract and apolitical manner. Instead, constitutionalism can reproduce this dichotomy in between its formal and substantive aspects, as well as

¹¹²² Möllers (2004), at 130-136.

within these aspects individually. This means that any reference to a constitutionalization of an organization will also be a political claim not only concerning governance in that organization, but with it also concerning the powers of that organization.

While formal and substantive constitutionalism were discussed separately in order to highlight the tensions within that doctrine, the formal and substantive aspects of constitutionalism should eventually constitute themselves in a balance to one another. Although this balancing act also brings with it an uncertainty concerning the contents of constitutionalism, this does not mean that discussing activities of organizations as a question of the judicial or democratic aspects of the legal regime would be useless. In shifting focus from whether an organization should exercise attributed or implied powers to the question of what that attribution contains and what is meant by functional effectiveness, new aspects of disputes over powers are brought into light. When moving on to addressing the question of the extent of powers of organizations as an issue of how to balance judicial and political aspects of that organization even further questions are introduced. By being open to this balancing act at the heart of constitutionalism, issues are bound to arise concerning the proper nature of the organization, and the source of legitimacy of both the organization itself as well as of its decisions.

Notably, such questions *only* reveal themselves in an atmosphere which is open to constant redefinition of the balance between the judicial and democratic elements of an organization. In this respect the critical discussion of constitutionalism served to highlight some of the issues that are likely to arise (or which at least should arise) concerning the merits and demerits of a judicialization of organizations, and the prerequisites of transnational democratic governance. Through such discussions a legal dispute over the extent of powers of an organization is put in a wider context. The valuable insights that are hereby gained on what an organization should do (and through which legal means) simultaneously reveal the depth of the political disagreement at the heart of different interpretations of powers of that organization.

2 Contributions to Understanding Powers of Organizations

2.1 Revealing Different Aspects of “Who Decides”

Understanding the nature of the doctrine of attributed powers, implied powers, and constitutionalism is not only interesting as a conceptual exercise. Instead, as Part IV on the Human Rights Committee demonstrated in particular, shifting levels on which to use the doctrines also shifts the focus of the question of powers. In moving from an opposing use of the attributed and implied powers doctrines, to a focus on the tensions within these doctrines individually and finally to the idea of transcending these tensions through judicialization or democratization of organizations, the debate on the extent of powers of an organization takes different shapes. While this is revealing of the nature of legal reasoning through these doctrines, it is also of practical significance in trying to come to terms with the wide range of issues that may arise in constructing powers of a particular organization.

As to the HRC, the attributed and implied powers arguments have been relied upon most elaborately in the discussion on whether the Committee possesses a power to determine the compatibility of reservations by state parties with the ICCPR. While the Committee relied on implied powers reasoning in constructing such a power in General Comment 24, the US and the UK emphasized the limited character of Committee powers and presented express attribution as the only proper source of Committee powers. In the absence of such express attribution, so the argument went, no such power would exist.

This tension between providing more effective means for the HRC to protect civil and political rights, and being respectful of state consent as the basis of international legal obligations, expresses itself in different legal debates such as: whether the power is necessary for the performance of the pre-existing functions of the Committee, whether emphasizing state consent leads to ineffective protection of civil and political rights, whether the ICCPR (along with other human rights treaties) should be characterized as a special regime, what the impact of such a characterization on the applicability of the Vienna Convention on the Law of Treaties would be, whether a non-applicability of the reciprocal system of the Vienna Convention for objecting to reservations automatically indicates that the Committee should exercise such a power, or whether General Comment 24 amounts to “subsequent practice in the application of the treaty” (in the sense of Article 31(3)(b) of the Vienna

Convention). While there may be agreement on some of these issues, for others the debate is still ongoing.

When the attributed and implied powers arguments were focused on individually, new disagreements were highlighted. While the implied power identified in General Comment 24 was geared towards fulfilling the object and purpose of the ICCPR, the question can be raised whether the Committee has interpreted that object and purpose correctly. In between the US and the Committee two competing conceptions of that object and purpose emerged. While the Committee understood the prime objective of the ICCPR to be the establishment of an efficient supervisory mechanism, the US emphasized the objective of securing the widest possible adherence to the ICCPR regime. As a result of these conceptions of the object and purpose of the ICCPR opposite constructions of the powers of the Committee emerged. What this way of approaching the question of HRC powers revealed, was how a disagreement over powers need not be framed as a question of whether or not to enhance the means available for the HRC, but can also be seen as a question of different conceptions of effectiveness.

An emphasis on the conferred character of Committee powers on its part served in the Observation of the US on General Comment 24, as a means for emphasizing the limits to the activities of the Committee. On the face of it, the logic was that the Committee can only exercise those powers which the drafters chose to explicitly express in the text of the ICCPR. At the same time the UK in its Observation, while emphasizing the necessity for express conferral for the exercise of binding powers, recognized that there may exist non-express powers which are needed for the exercise of pre-existing powers and fulfillment of functions. Through such a move an uncertainty is introduced in respect of what it means to say that powers have been conferred upon the HRC. Instead of an emphasis on attributed powers serving as an emphasis on the status quo, this attribution appears to entail some implied powers. The Observations of the US and the UK therefore even appear as opposites, although they were both initially raised as objections to a development of the powers of the HRC. In this way a dispute over the extent of powers can also take the form of a disagreement on whether there inheres in the conferral of functions and powers an element of *effet utile* or not, or on what powers are needed for the fulfillment of express functions.

The shift of reasoning from the dichotomy between the attributed character of powers and the functional needs of the organization, into the nature of functional necessity reasoning and the contents of the attribution of powers, demonstrates that the differences concerning HRC powers cannot be reduced merely to a question of how to reconcile the

Vienna Convention on the Law of Treaties with the ICCPR, but has a background in different conceptions of ICCPR effectiveness and state party consent. While the debate on the relationship between the Vienna Convention on the Law of Treaties and the ICCPR appears as a formal question of competing legal regimes (or even as a question on the fragmentation of international law), the origin of the dispute can be located in political differences for example on where to locate the main objective of the ICCPR (enforcement or universal participation). If some day the approaches to the reservations-issue of the HRC and the ILC/Vienna Convention are reconciled, this reconciliation is not brought about through the sudden discovery of the perfect legal argument, but requires as a precondition an agreement among states on such underlying differences.

Returning then to one of the driving forces of this thesis, what makes a claim that implied powers are somehow automatically desirable in the context of international organizations due to their special nature misleading (or as the claim in General Comment 24 was: are needed for effective protection of civil and political rights due to the special nature of human rights), is hereby that such a claim does not acknowledge (or at least does not reveal) that it builds on a particular conception of the nature of organizations. Yet, it is precisely that conception of international organizations (or of human rights protection) that should be the target of the debate.

The aim of the critical discussion on both the idea of judicialization and democratization of the HRC, through some of the classical issues raised in debates on constitutionalism, was to demonstrate that the merits that are attached to either also have serious questionmarks attached. For the critical minded, a judicialization of the HRC will result in the eradication of the necessary political element from a discourse on civil and political rights. In a more optimistic account the merits of judicialization are located in increased effectiveness, better enforcement, and improved objectivity in determining the obligations of states (under the ICCPR). The merits with increased democratic deliberation are located in the social legitimacy that is hereby bestowed. Critics however question whether a useful discourse on human rights is even possible to begin with, given the absence of universal human rights in any useful sense of the term.

A search for a balance between judicial and democratic elements of a legal order, and hence a search for a common policy on how to develop the HRC, is in essence a debate on the constitutional character of that legal order. In striking this balance, questions on the source of legitimacy of HRC interpretations and on the universality of human

rights are bound to arise. These general questions, as well as more concrete concerns on the plausibility of democratic governance in the ICCPR regime, or on the risks with judicialization of the HRC, is what addressing the question of HRC powers as a question of the judicial and democratic qualities of the ICCPR regime highlights. In this respect, when shifting from the discussion on different conceptions of effectiveness to issues of judicialization and democratization, for example the claim on the importance of maintaining the integrity of the ICCPR appears in a new setting. No longer is the choice between universal participation and upholding the integrity of the ICCPR solely a matter of preferred interpretation of the object and purpose of the ICCPR. Instead, that question is also essentially intertwined with the question of who can legitimately uphold that integrity and by what means.

2.2 In Prospect

The implications for the HRC of the critical discussion on judicialization and democratization were not very encouraging. Although there are ways in which mechanisms for increasing democratic input in the work of the Committee could be developed (and the discussion was by no means exhaustive), such reforms would not necessarily remove the legitimacy challenges that the Committee faces. The critique of the possibility of universal human rights suggested that there need not be agreement on all civil and political rights except on a very abstract level. In fact, on some rights, critics claim, differences may be so fundamental so as to make impossible a useful discourse on their concrete contents. This is of concern for the possibility of ever arriving at legitimate interpretations of the ICCPR, and affects both the possibility of useful discourse between the Committee and states (through state reports), as well as the authority of the views of the Committee.

An absence of a shared conception of civil and political rights also means that the Committee cannot claim to be in possession of such a conception either. In making such a claim the Committee would be charged with defending and imposing a particular understanding of human rights. This is troubling for the idea of judicializing the HRC, as the (judicialized) Committee would hereby appear as politicized (which is what the judicialization would be aimed at avoiding in the first place). Trying to avoid decision-making on controversial questions is not a good option either, if the main goal is to increase efficiency through judicial enforcement.

Solutions to such problems that have been indicated in international institutional law discussions build for example on reducing the demand for legitimacy, or on settling for a degree of legitimacy deficit. As to the first of these, the more emphasis is put on the deliberative role of the Committee in the consideration of state reports, than on a judicialization of the individual complaint mechanism, the lesser the challenge to the legitimacy of the Committee will be. Following the logic whereby consensual decision-making moots the question of legitimacy (as there is no imposition of one “will” upon another), an increase of the democratic input in the work of the Committee through providing avenues for ICCPR state parties to discuss, and possibly even decide, on the interpretation of civil and political rights, would improve the legitimacy of the HRC. The one problem with this approach is however that it does not correlate too well with a desire for strengthening judicial enforcement. As to the alternative of accepting a degree of legitimacy deficit as inescapable, such an approach is problematic as it means that political differences concerning the contents of the ICCPR are overlooked in the name of judicial efficiency.

None of this should be overdramatized. After all, the HRC is a fully functional treaty-body. Even if there is a discussion on the role and development of the HRC, this discussion is rarely concerned with overhauling the present system altogether. Instead, the typical legal debate concerns a very specific legal power (as in the case of General Comment 24). To speak about a constitutionalization of the HRC is therefore unnecessary and exaggerated. A comprehensive discussion of whether judicial enforcement of civil and political rights can be legitimate has not even been the main purpose of the discussion of Committee powers. Instead, contrasting the ideas of judicializing and democratizing the Committee served to demonstrate how the generic notion of constitutionalism on the one hand reflects the very same controversies that can be found at the level of more concrete legal reasoning on powers of organizations, while on the other hand potentially adding new perspectives to the discussion.

In this respect, a judicialization of the HRC does not manage to escape controversies concerning the proper reach of Committee powers. If anything, such a development will in itself constitute a controversial development of the powers of the Committee. The risk that a judicialization of the HRC is perceived as controversial is especially prominent if such a change is brought about in a manner that does not allow members to consent (or object) to the development. While it is true that ICCPR state parties have given their abstract consent to the Committee for adopting General Comments in order to develop the

ICCPR, a lack of agreement on such powers would indicate that the Committee has transcended the limits of that abstract consent. In such a case, the judicial power would not become an established part of the attributed powers of the HRC.

The discussion also demonstrated that the Committee, in performing a judicial role, will still need to make politically controversial decisions (whether on the extent of its own powers or on the contents of particular rights). While there may be agreement on many aspects of the ICCPR, this need not hold true for all civil and political rights. When there is no agreement, the question of legitimacy of HRC interpretations is likely to arise. Put differently, when disagreement arises concerning the exercise of a particular power or on the contents of a particular right, the critique against that interpretation will not only be phrased in terms of misinterpretation of the powers of the Committee, or as a misunderstanding of the contents of a particular right, but will also be raised in terms of the legitimacy of the Committee.

Eventually the issue of legitimacy should be of concern irrespective of whether or not the focus of the discussion is on a judicialization or democratization of the HRC. An implied power must be legitimate if it is to become an established part of the legal means of the Committee. In other words, no constitutionalization of the ICCPR regime is needed in order to address legitimacy challenges that may arise out of a strengthening of the judicial functions of the HRC. However, when the proper legal construction of powers of any organization is discussed, such concerns too often escape attention. In deriving a power for the HRC to determine the compatibility of reservations with the ICCPR, the point of departure was that such a power is necessary for the fulfillment of the object and purpose of the ICCPR, and for the performance of the existing functions of the Committee. Whether the use of such a power leads to a judicialization of the ICCPR regime (and whether such a development is desirable) has only rarely been the target of the debate.

This, finally, leads to a more general question on the usefulness of reasoning through formal legal doctrines. As the thesis set off with an outline of the politics of legal reasoning, the idea was that this approach would reveal how the three doctrines are open for expressing substantive (political) claims. The discussions in the consequent chapters have demonstrated how being mindful of the nature and function of these doctrines can make the political context visible of what appears as a formal legal dispute. However, if it is only by being mindful of the political character of the doctrines that their function can be properly understood, does this mean that reasoning on powers of organizations should strive to be more openly political?

The doctrines can be used for justifying and criticizing the powers of international organizations. This means that fixed meanings of the doctrines do exist. The critique of an overly formal use of the doctrines has rather been an endeavor at opening up the formal appearance of these doctrines, this way demonstrating how all uses of the doctrines (whether there is agreement on that use or not), will constitute a particular ordering of the relationship between members and the organization. As long as there is an awareness of this political nature of any construction of powers of organizations, there is no need to discard the formal facade of that reasoning. However, this awareness is essential. Without an understanding of why a particular construction of powers should be preferred before a competing one, the doctrines are useless as tools for constructing powers of organizations. If recourse to the doctrines serves to obscure or ignore political debate (e.g. on how to best protect civil and political rights), then reasoning through the doctrines may turn out to be more of an obstacle for reaching common ground, than a means of expressing differences. A better understanding of powers of organizations is therefore necessary for sustaining the formal doctrines themselves.

Svensk sammanfattning

Att förstå internationella organisationers befogenheter: En studie av doktrinerna om tilldelade befogenheter, implicita befogenheter och konstitutionalism – med ett speciellt fokus på kommittén för de mänskliga rättigheterna

Avhandlingens syfte har varit att beskriva funktionen av tre doktriner som alla är etablerade mekanismer för att beskriva vad en organisation kan eller bör göra för att uppfylla sitt syfte och ändamål. Doktrinerna om tilldelade befogenheter, implicita befogenheter och konstitutionalism förhåller sig alla olika till denna fråga. De tre doktrinerna är även barn av sin tid. Detta betyder att var och en av doktrinerna har uppkommit och har i något skede utgjort det rådande förhållningssättet till frågan om organisationers befogenheter (även om denna status för konstitutionalismens del ännu är under utveckling). På det här sättet fungerar doktrinerna inte enbart som uttryck för olika konstruktioner av internationella organisationer, utan uttrycker även olika uppfattningar om organisationers roll i internationella relationer mer allmänt.

De olika bilder av internationella organisationer som doktrinerna förmedlar karakteriserades i den referensram som uppställdes i del I av avhandlingen som olika sätt att svara på frågan "vem avgör". Avhandlingens första uppgift var härmed att klargöra hur de olika doktrinerna tar sig an denna fråga. Eftersom det redan av avhandlingens första sidor framgick att doktrinerna kan ses som konkurrerande förhållningssätt till organisationer, uppstår även frågan hur den exakta omfattningen av en organisations befogenheter egentligen kan vetas. Med andra ord, eftersom var och en av de tre doktrinerna förhåller sig olika till frågan om befogenheter, och ingen av doktrinerna har företrädare framom de två andra, framstår organisationers befogenheter som obestämbara. Argument som betonar till exempel implicita befogenheters oundviklighet, tilldelade befogenheters otvetydiga karaktär, eller en juridifiering av organisationer som ett apolitiskt sätt för att effektivisera organisationer, förkastades redan inledningsvis som otillfredsställande och bristfälligt informativa om doktrinernas natur. I stället för att råda bot på den oklarhet som frågan om organisationers befogenheter ger upphov till, överförenklar de den underliggande tvisten. Eftersom avhandlingens syfte har varit att utforska hur de tre doktrinerna uttrycker politiska meningsskiljaktigheter beträffande organisationers befogenheter, har dylika argument snarare sporrat viljan att uppnå en bättre förståelse av de tre doktrinerna.

Första steget mot denna förståelse togs i del II av avhandlingen i form av en översikt av dikotomin mellan tilldelade och implicita befogenheter. I internationell rättspraxis har den begränsade karaktären av en organisations handlingsfrihet ofta understrykts genom en betoning av organisationens tilldelade befogenheter. En utveckling av de medel som organisationen har till sitt förfogande bygger å sin sida på bruk av implicita befogenheter. I denna bemärkelse framstår dessa två doktriner som motsatser till varandra. Det sätt på vilket dessa två doktriner har använts i folkrätten betonar även deras motsatta drivkrafter: doktrinen om implicita befogenheter är en mekanism för att befrämja organisationens funktionella effektivitet, medan doktrinen om tilldelade befogenheter strävar till att bibehålla status quo (genom att begränsa organisationens befogenheter till dem som medlemmarna uttryckligen har samtyckt till). Medan bruk av doktrinen om implicita befogenheter utvidgar en organisations verksamhetsområde, betonas däremot tilldelade befogenheter i syfte att skydda medlemsstaternas jurisdiktion mot en sådan utvidgning. Då doktrinerna används på detta sätt bygger bägge dessutom ofta sitt resonemang på att betona nackdelarna med den motsatta doktrinen.

Skillnaden mellan en betoning av organisationens tilldelade och implicita befogenheter återspeglar även befogenheters dubbla roll. Å ena sidan etablerar förekomsten av befogenheter en organisation som en självständig aktör. Å andra sidan utgör dessa befogenheter ett uttryck för det samtycke som organisationens medlemmar har givit organisationen. Samtidigt är ingen av dessa två roller tillfredsställande på egen hand. Medan bruk av implicita befogenheter betonar organisationers självständighet, verkar en extrem formulering av doktrinen om implicita befogenheter frigöra sig från den konstitutiva roll som medlemmarnas samtycke har för organisationers verksamhet. En idé om inneboende befogenheter som ibland identifieras som en självständig teori om organisationers befogenheter bygger i detta avseende uttryckligen på att åtskilja en bedömning av organisationers befogenheter från detta samtycke. Om däremot den tilldelade karaktären av organisationers befogenheter betonas för kategoriskt, påverkas bilden av organisationer som självständiga aktörer (som Fasta mellanfolkliga domstolens tidiga rättspraxis demonstrerar). Dessa två grundläggande karaktärsdrag måste i varje organisation hitta en säregen balans.

Behovet av att ständigt återskapa denna balans förklarar även varför ingendera av doktrinerna har utplånat den andra (trots att sådana argument ibland har framförts). Detta betyder i praktiken att doktrinerna om tilldelade och implicita befogenheter är alltid användbara som konkurrerande konstruktioner av en organisations befogenheter. Enbart i

fall av en överenskommelse om hur dessa två ska balanseras kan någondera framstå som obsolet. Det är i det motsatta fallet, ifall en oenighet (eller i alla fall en ovisshet) om befogenheternas exakta utsträckning råder, som dikotomin mellan tilldelade och implicita befogenheter får hela frågan om organisationers befogenheter att framstå som obestämbar. I syfte att strukturera denna ovisshet vänds ofta intresset till exempel till allmänna skyddsklausuler (så kallade domestic jurisdiction clauses) eller tolkningsprinciper. Även tanken om konstitutionalisering av organisationer kan anses inbegripa ett löfte om att strukturera de dikotomier som karakteriserar organisationer.

Diskussionen om skyddsklausuler och tolkningsprinciper antydde dock att dessa inte undanröjer meningsskiljaktigheter beträffande befogenheter. Vad denna diskussion i stället demonstrerade var hur åberopandet av skyddsklausuler och tolkningsprinciper omvandlar frågan om befogenheter och härigenom berikar den. Medan till exempel förekomsten av skyddsklausuler i en organisation inte i sig medför att medlemmarnas jurisdiktion automatiskt kommer att skyddas mot en befogenhetsutvidgning, vänder däremot åberopandet av en sådan klausul intresset från en fråga om vilka befogenheter som kan härledas från uttryckliga befogenheter eller organisationens syfte och ändamål, till en fråga om gränserna för medlemmarnas nationella jurisdiktion. Det faktum att en konstitutionalisering av organisationer har förespråkats i olika syften för olika organisationer (och även för enskilda organisationer) antydde redan i detta tidiga skede att en liknande funktion kunde gälla för denna doktrins del.

Även om doktrinerna om tilldelade och implicita befogenheter såsom de vanligen använts i internationell rättspraxis framstår som motsatser till varandra, är detta dock inte det enda sättet på vilket doktrinerna kan användas. Förutom att dessa två doktriner framstår som motsatser till varandra, kan denna spänning återskapas även inom doktrinerna individuellt. Detta betyder att frågan om organisationers befogenheter inte enbart framstår som en fråga om att balansera organisationers effektivitet med medlemmarnas nationella suveränitet, utan kan även diskuteras som en fråga om tävlande uppfattningar av effektivitet (behövs implicita befogenheter eller är organisationen funktionellt effektiv som den är?), eller som en fråga om huruvida organisationens medlemmar har samtyckt till bruk av implicita befogenheter (vilket härmed skulle berättiga en karakterisering av dessa befogenheter som tilldelade). Då även idén om konstitutionalism i organisationer omfattar två olika (och potentiellt motstridiga) aspekter, framstår alla tre doktriner inte enbart kapabla att uttrycka olika förhållningssätt till organisationers befogenheter. Alla tre doktriner kan

även användas för att förmedla liknande bilder av en organisation (i olika termer).

Diskussionerna i del III av avhandlingen demonstrerade hur påståenden om att implicita befogenheter skulle uppstå automatiskt i organisatoriska sammanhang, eller om att tillit till tilldelade befogenheter mer rättroget garanterar medlemmars suveränitet, inte kan anses utgöra uttryck för några inneboende karaktärsdrag av dessa doktriner. Doktrinerna om tilldelade och implicita befogenheter *kan* användas för att framföra idéer om olika sätt att konstruera en organisations befogenheter och är fullt meningsfulla då de används på detta sätt. Då enighet om utsträckningen av en organisations befogenheter finns, kan emellertid alla organisationens befogenheter (vare sig uttryckliga eller implicita) karakteriseras som tilldelade. Då doktrinen om tilldelade befogenheter används i denna bemärkelse kan olika konstruktioner av befogenheter framföras genom bruk av doktrinen. Framför allt, om det finns en enighet om att en organisation skall vara begränsad i sin verksamhet till sina uttryckligen tilldelade befogenheter (och det finns en enighet om hur dessa uttryckligen tilldelade befogenheter ska tolkas), då utgör detta samtidigt den konstruktion av organisationens befogenheter som upplevs funktionellt nödvändig. I detta fall försvinner motsättningen mellan tilldelade och implicita befogenheter.

Denna begreppsliga karakterisering av doktrinerna om tilldelade och implicita befogenheter antyder även att dikotomin mellan organisationen och dess medlemmar, som introducerades som ett redskap för att förstå dessa två doktriners funktion då de används som motsatser till varandra, delvis förlorar sin förklarande kraft. Om alla befogenheter kan karakteriseras som tilldelade, det vill säga om medlemmarnas samtycke ligger bakom alla konstruktioner av en organisations befogenheter, då finns det inte längre någon egentlig konflikt mellan en ökning av en organisations självständighet och effektivitet och medlemmarnas suveränitet. Härmed förlorar också doktrinen om tilldelade befogenheter sin roll som en mekanism för att betona organisationers begränsade karaktär (till fördel för medlemmarnas suveränitet). I stället kommer den tilldelade (eller icke-tilldelade) karaktären av befogenheter att uttrycka förekomst (eller avsaknad) av samtycke.

Det nödvändighetskriterium som utgör kärnan av doktrinen om implicita befogenheter behöver å sin sida inte över huvudtaget utöka organisationens befogenheter. I stället kan bruk av enbart uttryckligen tilldelade befogenheter upplevas tillräckligt funktionella. Detta betyder också att organisationers effektivitet inte nödvändigtvis behöver förkroppsligas i doktrinen om implicita befogenheter. Det följer dessutom

från denna doktrins natur att den tillåter olika konstruktioner av (implicita) befogenheter. Om det råder enighet om en snäv tolkning av en specifik implicit befogenhet (så som befogenheten för kommittén för de mänskliga rättigheterna att fastställa överensstämmelsen av reservationer med internationella konventionen om medborgerliga och politiska rättigheter till den utsträckning som detta är nödvändigt för att kommittén ska kunna verkställa sina egna funktioner), då kunde denna befogenhet även karakteriseras som tillskriven till organisationen. Däremot, i fall av en tävlande (och mer vidsträckt) tolkning av denna implicita befogenhet (så som en allmän befogenhet för kommittén för de mänskliga rättigheterna att auktoritativt fastställa överensstämmelsen av reservationer med internationella konventionen om medborgerliga och politiska rättigheter), återkommer dikotomin mellan att respektera konventionsparternas suveränitet och kommitténs effektivitet inom doktrinen om implicita befogenheter.

Trots denna "försoning" av doktrinerna, förmedlar de dock alltså olika bilder av organisationers befogenheter. De två doktrinerna bibehåller härmed alltså sina säregna och olika drivkrafter. Vad försoningen däremot framhäver är att dikotomin mellan organisationens självständighet och medlemmarnas suveränitet har sin källa i olika uppfattningar *mellan medlemmarna* av en organisation beträffande organisationens roll. Diskussionen om kommittén för de mänskliga rättigheterna demonstrerade även på ett mer konkret plan hur denna insikt, hur truistisk den än kan låta, berikar diskussionen om organisationers befogenheter. Detta är fallet till exempel då intresset vänds från en formell diskussion om huruvida kommitténs syfte och ändamål tillåter bruk av implicita befogenheter, först till frågan om hur kommitténs funktionella effektivitet ska balanseras med värnande av konventionsparternas suveränitet, och vidare till insikten att den egentliga tvisten även kan ses som en konflikt mellan olika uppfattningar om effektivt skydd av mänskliga rättigheter. Beträffande kommittén för de mänskliga rättigheterna var det detta utspel som visade hur frågan om kommitténs befogenhet att fastställa reservationers laglighet även kan återföras till olika sätt att betona universellt deltagande gentemot bibehållande av integriteten av internationella konventionen om medborgerliga och politiska rättigheter.

En likadan infallsvinkel användes i del III av avhandlingen för att diskutera tanken om konstitutionalism i organisationer. Två aspekter av konstitutionalisering identifierades, varav den ena betonar en juridifiering av organisationer, medan den andra vänder intresset till frågor om demokratisk legitimitet. Dessa betecknades formell och substantiell konstitutionalism. Med formell konstitutionalism/

juridifiering avses en strävan till att utveckla organisationers formella rättsliga förfaringssätt, skapandet av rättsliga hierarkier, samt en strävan efter att utveckla rättsordningens rättsligt tvingande element (såväl i form av rättslig övervakning av organisationens medlemmar, som av organisationens politiska organ). En betoning av (social) legitimitet understryker däremot vikten av en länk mellan organisationer och samhällen. Demokratiskt styre framställs som det optimala sättet att garantera denna länk. Dessa två aspekter av konstitutionalism är även sårbara för motpartens kritik. I detta avseende har formell konstitutionalism karakteriserats som en juridifiering av politik, emedan farhågor även har framförts att en betoning på substantiell konstitutionalism leder till en politisering av rätten.¹¹²³

Som ett resultat av svårigheten med att tillämpa idén om konstitutionalism bortom ett inomstatligt sammanhang, har formell och substantiell konstitutionalism i en diskussion om konstitutionalisering av internationella organisationer ofta betonats separat. Genom denna separering återskapar formell och substantiell konstitutionalism på olika sätt de argument som även kan framföras genom doktrinerna om tilldelade och implicita befogenheter. Idén om tilldelade befogenheter sammanfaller med den betoning på medlemmarnas samtycke som en diskussion om organisationers demokratiska legitimitet medför. En juridifiering av en organisation bygger däremot ofta på behovet av ökad funktionell effektivitet. Om denna juridifiering sker genom bruk av implicita maktbefogenheter är parallellen komplett.

En betoning av nödvändigheten av en befogenhet för rättslig omprövning (för att effektivt kunna uppfylla organisationens syfte och ändamål) omvandlas härmed till ett argument om nödvändigheten med en juridifiering till exempel av skyddet av mänskliga rättigheter (som i praktiken förverkligas genom en utveckling av människorättsorganens befogenheter). Förhållandet belyses även genom att den betoning på organisationers självständiga handlingsförmåga (och härmed förmågan att utveckla organisationens rättsordning) som bruk av implicita befogenheter medför, har i själva verket använts som ett argument för att påvisa Förenta nationernas och den Europeiska gemenskapens konstitutionella karaktär.

Kopplingen mellan tilldelade befogenheter och substantiell konstitutionalism, eller mellan implicita befogenheter och formell konstitutionalism, är dock inte de enda möjliga sambanden mellan dessa doktriner. Tillit kan även ställas till en juridifiering av organisationer som en motkraft (i form av laglighetsövervakning) till en utvidgning av organisationens befogenheter. En demokratisering av organisationer

¹¹²³ Möllers (2004), at 130-136.

medför å sin sida inte per definition en begränsning av organisationens befogenheter. I stället är det den betoning på medlemmarnas samtycke som substantiell konstitutionalism medför, som kan tillfoga den demokratiska legitimitet som är nödvändig för en vidareutveckling av en organisations befogenheter (som exemplet med senare tids europeisk integration på ett omvänt sätt demonstrerar).

På grund av den mängd olika anspråk som kan kläs i termer av en konstitutionalisering av organisationer lyckas inte denna konstitutionalisering strukturera dikotomin mellan organisationen och dess medlemmar på ett abstrakt och apolitiskt sätt. I stället återfinns denna dikotomi såväl inom konstitutionalism i form av dess olika aspekter, som inom de olika aspekterna individuellt. Varje hänvisning till konstitutionalism kommer i detta bruk även alltid att utgöra ett politiskt anspråk beträffande organisationers uppgifter.

Emedan en separering av formell och substantiell konstitutionalism gjordes i syfte att kunna kritiskt belysa konstitutionalismens inneboende spänningar, borde den formella och substantiella aspekten av konstitutionalism slutligen utgöra en balans med varandra. Även om denna balansering medför att konstitutionalismbegreppet blir mångtydigt, betyder detta inte att en diskussion om organisationers befogenheter som en fråga om juridifiering eller demokratisering av organisationer skulle vara ofruktbar. Som redan antydts, avslöjar ett skifte av fokus till exempel från huruvida en organisations syfte och ändamål inbegriper implicita maktbefogenheter, till frågan om vad som menas med funktionell effektivitet, nya aspekter i en befogenhetsdiskussion. Det samma sker då frågan om utsträckningen av en organisations befogenheter diskuteras som en fråga om hur de juridiska och politiska aspekterna av samarbetet i en organisation ska balanseras. Genom att vara öppen för denna balansgång kommer frågor till exempel om organisationens natur och legitimiteten med såväl organisationen själv som dess handlingar och beslut att uppstå.

Dessa frågor uppenbarar sig dock enbart då en konstitutionalisering medför en ständig omdefiniering av balansen mellan organisationens juridiska och politiska beståndsdelar. Den kritiska diskussionen av konstitutionalism i organisationer som har förts i denna avhandling har framhåvt vissa frågor som sannolikt kommer att uppkomma (eller i alla fall borde uppkomma) beträffande för- och nackdelarna med en juridifiering av organisationer, samt huruvida förutsättningar finns för transnationellt demokratiskt styre. Genom dylika diskussioner sätts en utveckling av en organisations befogenheter i ett vidare sammanhang. De värdefulla insikter som härmed tillförs till en

diskussion om vad en organisation borde göra (och med vilka rättsliga medel) belyser samtidigt djupet av den politiska oenighet som ligger till grund för olika tolkningar av organisationens befogenheter.

Bibliography

Monographs and articles

- Abbott, Kenneth W., Keohane, Robert O., Moravcsik, Andrew, Slaughter, Anne-Marie and Snidal, Duncan, "The Concept of Legalization", in Judith L. Goldstein, Miles Kahler, Robert O. Keohane and Anne-Marie Slaughter (eds), *Legalization and World Politics*, 2001, MIT Press, 17-35.
- Abbott, Kenneth W. and Snidal, Duncan, "Why States Act through Formal International Organizations", in 42 *Journal of Conflict Resolution* 1998, 3-32.
- Addo, Michael K., "Introduction", in Michael K. Addo (ed.), *International Law of Human Rights*, 2006, Ashgate Publishing, xi-lvi.
- Akande, Dapo, "The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice", in 9 *European Journal of International Law* 1998, 437-467.
- Akande, Dapo, "The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?", in 46 *International and Comparative Law Quarterly* 1997, 309-343.
- Akram, Munir and Shah, Syed Haider, "The Legislative Powers of the United Nations Security Council", in Ronald St. John Macdonald and Douglas M. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, 2005, Martinus Nijhoff Publishers, 431-455.
- Alfredsson, Gudmundur, "Concluding Remarks: More Law and Less Politics", in Gudmundur Alfredsson, Jonas Grimheden, Bertrand G. Ramcharan, and Alfred de Zayas (eds), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller*, 2001, Kluwer Law International, 913-926.
- Allain, Jean, *A Century of International Adjudication: The Rule of Law and its Limits*, 2000, T.M.C. Asser Press.
- Allan, James, "The Effect of a Statutory Bill of Rights where Parliament is Sovereign: The Lesson from New Zealand", in Tom Campbell, Keith Ewing, and Adam Tomkins (eds), *Sceptical Essays on Human Rights*, 2001, Oxford University Press, 375-390.
- Allan, Trevor, *Constitutional Justice: A Liberal Theory of the Rule of Law*, 2001, Oxford University Press.
- Allott, Phillip, "Intergovernmental Societies and the Idea of Constitutionalism", in Jean-Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organizations*, 2001, United Nations University Press, 69-103.
- Alston, Philip, "The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?", in Philip Alston (ed.), *Non-State Actors and Human Rights*, 2005, Oxford University Press, 3-36.

- Alston, Philip, "Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann", in *Jean Monnet Working Paper* 12/2002.
- Alston, Philip, "The United Nations and the Elliptical Notion of the Universality of Human Rights", in *Is Universality in Jeopardy?*, Report of a symposium organized by the United Nations in connection with the commemoration of the fortieth anniversary of the Organization (Geneva, 16-17 December 1985), 1987, United Nations.
- Alter, Karen, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, 2001, Oxford University Press.
- Alter, Karen, "Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration", in Anne-Marie Slaughter, Alec Stone Sweet, and Joseph Weiler (eds), *The European Court and National Courts – Doctrine and Jurisprudence*, 2000, Hart Publishing, 227-252.
- Altman, Andrew, "Legal Realism, Critical Legal Studies, and Dworkin", 15 *Philosophy and Public Affairs* 1986, 205-235.
- Alvarez, José E., "International Organizations and Their Exercise of Sovereign Powers" (Book review of Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers*, 2005, Oxford University Press), in 101 *American Journal of International Law* 2007, 674-679.
- Alvarez, José E., *International Organizations as Law-makers*, 2005, Oxford University Press.
- Alvarez, José E., "The New Dispute Settlers: (Half) Truths and Consequences", in 38 *Texas International Law Journal* 2003, 405-444.
- Alvarez, José E., "Constitutional Interpretation in International Organizations", in Jean-Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organizations*, 2001, United Nations University Press, 104-154.
- Alvarez, José E., "Crimes of States/Crimes of Hate: Lessons from Rwanda", in 24 *Yale Journal of International Law* 1999, 365-483.
- Alvarez, José E., "Judging the Security Council", 90 *American Journal of International Law* 1996, 1-39.
- Amerasinghe, Chittharanjan F., *Principles of the Institutional Law of International Organizations*, 2005 (2nd ed.), Cambridge University Press.
- Amerasinghe, Chittharanjan F., *Jurisdiction of International Tribunals*, 2003, Kluwer Law International.
- Ando, Nisuke, "The Future of Monitoring Bodies – Limitations and Possibilities of the Human Rights Committee", in *Canadian Human Rights Yearbook* 1991-1992, 169-209.

- Angelet, Nicolas, "Protest Against Security Council Decisions", in Karel Wellens (ed.), *International Law: Theory and Practice: Essays in Honour of Eric Suy*, 1998, Martinus Nijhoff Publishers, 277-285.
- An-Na'im, Abdullahi Ahmed, "Conclusion", in Abdullah Ahmed An-Na'im (ed.), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, 1992, University of Pennsylvania Press, 427-435.
- Appiah, Anthony K., "Grounding Human Rights", in Michael Ignatieff, *Human Rights as Politics and Idolatry* (edited by Amy Gutmann), 2001, Princeton University Press, 101-116.
- Arangio-Ruiz, Gaetano, "The 'Federal Analogy' and UN Charter Interpretation: A Crucial Issue", in 8 *European Journal of International Law* 1997, 1-28.
- Archer, Clive, *International Organizations*, 1995 (2nd ed.), Routledge.
- Archibugi, Daniele, "Cosmopolitan Democracy and its Critics: A Review", in 10 *European Journal of International Relations* 2004, 437-473.
- de Aréchaga, Eduardo Jiménez, "Self-Executing Provisions of International Law", in Kay Hailbrunner, Georg Ress and Torsten Stein (eds), 98 *Staat und Völkerrechtsordnung* 1989, Springer-Verlag, 409-419.
- Arend, Anthony Clark, *Legal Rules and International Society*, 1999, Oxford University Press.
- Arnall, Anthony, *The European Union and its Court of Justice*, 2006, Oxford University Press.
- Arnall, Anthony, "Does the Court of Justice have Inherent Jurisdiction?", in 27 *Common Market Law Review* 1990, 683-708.
- Axtmann, Roland, "What's Wrong with Cosmopolitan Democracy?" in Nigel Dower and John Williams (eds), *Global Citizenship: A Critical Reader*, 2002, Edinburgh University Press, 101-113.
- Baratta, Roberto, "Should Invalid Reservations to Human Rights Treaties Be Disregarded?", in 11 *European Journal of International Law* 2000, 413-425.
- Barnett, Michael N. and Finnemore, Martha, "The Politics, Power, and Pathologies of International Organizations", in 53 *International Organization* 1999, 699-732.
- Bauer, Joanne R. and Bell, Daniel A. (eds), *The East Asian Challenge for Human Rights*, 1999, Cambridge University Press.
- Bauer, Joanne R. and Bell, Daniel A., "Introduction", in Joanne R. Bauer and Daniel A. Bell (eds), *The East Asian Challenge for Human Rights*, 1999, Cambridge University Press, 3-23.
- Bayefsky, Anne F., *The UN Human Rights Treaty System: Universality at the Crossroads*, 2001, Kluwer Law International.

- Baylis, Elena, "General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties", in 17 *Berkeley Journal of International Law* 1999, 277-329.
- Bederman, David J., *The Spirit of International Law*, 2002, University of Georgia Press.
- Bederman, David J., "The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel", in 36 *Virginia Journal of International Law* 1996, 275-377.
- Beetham, David, *Democracy and Human Rights*, 1999, Polity Press.
- Beetham, David, "Human Rights as a Model for Cosmopolitan Democracy", in Daniele Archibugi, David Held and Martin Köhler (eds), *Re-imagining Political Community: Studies in Cosmopolitan Democracy*, 1998, Polity Press, 58-71.
- Beetham, David, *The Legitimation of Power*, 1991, Humanities Press International.
- Behboodi, Rambod, "Legal Reasoning and the International Law of Trade - The First Steps of the Appellate Body of the WTO", in 32 *Journal of World Trade* 1998, 55-100.
- Bekker, Peter, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities*, 1994, Martinus Nijhoff Publishers.
- Bellamy, Richard (ed.), *Constitutionalism and Democracy*, 2006, Ashgate Publishing.
- Bellamy, Richard, "Constitutive Citizenship versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act", in Tom Campbell, Keith Ewing, and Adam Tomkins (eds), *Sceptical Essays on Human Rights*, 2001, Oxford University Press, 15-39.
- Bellamy, Richard and Castiglione, Dario, "Democracy, Sovereignty and the Constitution of the European Union: The Republican Alternative to Liberalism", in Zenon Bankowski, and Andrew Scott (eds), *The European Union and its Order: The Legal Theory of European Integration*, 1999, Blackwell Publishing, 169-190.
- Bermann, George A., "Competences of the Union", in Takis Tridimas and Paolisa Nebbia (eds), *European Union Law for the Twenty-first Century: Rethinking the New Legal Order* (vol. 1), 2004, Hart Publishing, 65-74.
- Bermann, George A. and Nicolaïdis, Kalypso, "Appendix: Basic Principles for the Allocation of Competence in the United States and the European Union", in Kalypso Nicolaïdis and Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, 2001, Oxford University Press, 483-504.
- Bernhardt, Rudolf, "Article 103", in Bruno Simma (ed., in collaboration with Hermann Mosler, Albrecht Randelzhofer, Christian Tomuschat and Rüdiger

- Wolfrum), *The Charter of the United Nations, a Commentary*, 2002 (2nd ed.), Oxford University Press, 1292-1302.
- Bienen, Derk, Rittberger, Volker and Wagner, Wolfgang, "Democracy in the United Nations System: Cosmopolitan and Communitarian Principles", in Daniele Archibugi, David Held and Martin Köhler (eds), *Re-imagining Political Community: Studies in Cosmopolitan Democracy*, 1998, Polity Press, 287-308.
- Bickel, Alexander M., *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 1962, Bobbs-Merrill Educational Publishing.
- Bix, Brian, *Law, Language, and Legal Determinacy*, 1993, Clarendon Press.
- Blokker, Niels, "Beyond 'Dili': On the Powers and Practice of International Organizations", in Gerard Kreijen (ed.), *State, Sovereignty, and International Governance*, 2002, Oxford University Press, 299-322.
- Bodansky, Daniel, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?", in 93 *American Journal of International Law* 1999, 596-624.
- Boerefijn, Ineke, *The Reporting Procedure Under the Covenant on Civil and Political Rights: Practice and Procedures of the Human Rights Committee*, 1999, Intersentia.
- von Bogdandy, Armin, "Globalization and Europe: How to Square Democracy, Globalization, and International Law", in 15 *European Journal of International Law* 2004, 885-906.
- von Bogdandy, Armin, "Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship", in J. Frowein, R. Wolfrum (eds), and C. Philipp (ass. ed.), 5 *Max Planck Yearbook of United Nations Law* 2001, 609-674.
- Bolton, John, "Speech Two: Reject and Oppose the International Criminal Court", in Alton Frye, *Toward an International Criminal Court? Three Options Presented as Presidential Speeches*, 1999, Council on Foreign Relations, 37-52.
- Bos, Adriaan, "Assembly of States Parties", in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court - A Commentary*, 2002 (Volume I), Oxford University Press, 297-314.
- Bossuyt, Marc J., *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*, 1987, Martinus Nijhoff Publishers.
- Bradley, Curtis A. and Goldsmith, Jack L., "Treaties, Human Rights, and Conditional Consent", in 149 *University of Pennsylvania Law Review* 2000, 399-468.
- Brown, Chester, "The Inherent Powers of International Courts and Tribunals", in LXXVI *British Yearbook of International Law* 2005, 195-244.
- Brown, Neville and Kennedy, Tom, *The Court of Justice of the European Communities*, 1994, Sweet & Maxwell.

- Brownlie, Ian, *Principles of Public International Law*, 2003 (6th ed.), Oxford University Press.
- Bryde, Brun-Otto, "International Democratic Constitutionalism", in Ronald St. John Macdonald and Douglas M. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, 2005, Martinus Nijhoff Publishers, 103-125.
- Brölmann, Catherine, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties*, 2007, Hart Publishing.
- Brölmann, Catherine, "A Flat Earth? International Organizations in the System of International Law", in 70 *Nordic Journal of International Law* 2001, 319-340.
- Buerghenthal, Thomas, "The U.N. Human Rights Committee", in J. Frowein, R. Wolfrum (eds), and C. Philipp (ass. ed.), 5 *Max Planck Yearbook of United Nations Law* 2001, 341-398.
- Buffard, Isabelle and Zemanek, Karl, "The 'Object and Purpose' of a Treaty: An Enigma?", in 3 *Austrian Review of International and European Law* 1999, 311-343.
- de Búrca, Gráinne, "Sovereignty and the Supremacy Doctrine of the European Court of Justice", in Neil Walker (ed.), *Sovereignty in Transition*, 2003, Hart Publishing, 449-460.
- de Búrca, Gráinne, "The Institutional Development of the EU: A Constitutional Analysis", in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law*, 1999, Oxford University Press, 55-81.
- de Búrca, Gráinne and de Witte, Bruno, "The Delimitation of Powers Between the EU and its Member States", in Anthony Arnall and Daniel Wincott (eds), *Accountability and Legitimacy in the European Union*, 2002, Oxford University Press, 201-222.
- Burrows, Noreen, "Question of Community Accession to the European Convention Determined: Court of Justice, Opinion 2/94 Relating to the Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms", in 22 *European Law Review* 1997, 58-63.
- Buteau, Michele and Oosthuizen, Gabriel, "When the Statute and Rules are Silent: The Inherent Powers of the Tribunal", in Richard May, David Tolbert, John Hocking, Ken Roberts, Bing Bing Jia, Daryl Mundis, and Gabriël Oosthuizen (eds), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, 2001, Kluwer Law International, 65-81.
- Byers, Michael, "Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity", in 10 *Global Governance* 2004, 165-186.
- Cameron, Iain and Horn, Frank, "Reservations to the European Convention on Human Rights: The Belilos Case", in 33 *German Yearbook of International Law* 1990, 69-129.

- Caminos, Hugo and Lavallo, Roberto, "New Departures in the Exercise of Inherent Powers by the UN and OAS Secretaries-General: The Central American Situation", in 83 *American Journal of International Law* 1989, 395-402.
- Campbell, A.I.L., "The Limits of Powers of International Organizations", 32 *International and Comparative Law Quarterly* 1983, 523-533.
- Campbell, Tom, "Democratizing Human Rights", in Burton M. Leiser and Tom D. Campbell (eds), *Human Rights in Philosophy and Practice*, 2001, Ashgate Publishing, 175-195.
- Caron, David D., "The Legitimacy of the Collective Authority of the Security Council", in 87 *American Journal of International Law* 1993, 552-588.
- Carr, Edward, *The Twenty Years Crisis 1919-1939*, 1966 (2nd ed.), St. Martin's Press.
- Carrillo-Salcedo, Juan Antonio, "The Inherent Powers of the International Criminal Tribunal for the Former Yugoslavia to Issue 'Subpoena Duces Tecum' to a Sovereign State", in René-Jean Dupuy (ed.), *Mélanges en L'honneur de Nicolas Valticos*, 1999, Éditions A. Pedone, 269-280.
- Carrozza, Paolo G., "Subsidiarity as a Structural Principle of International Human Rights Law", in 97 *American Journal of International Law* 2003, 38-79.
- Carty, Anthony, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs*, 1986, Manchester University Press.
- Cass, Deborah Z., *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy and Community in the International Trading System*, 2005, Oxford University Press.
- Chandler, David, "Taking Human Rights to its Limits or Why We Need A Critical Review", in Malte Brosig (ed.), *Human Rights in Europe: A Fragmented Regime?*, 2006, Peter Lang, 275-304.
- Chandler, David, "Universal Ethics and Elite Politics: The Limits of Normative Human Rights Theory", in 5 *International Journal of Human Rights* 2001, 72-89.
- Chayes, Abram and Chayes, Antonia Handler, *The New Sovereignty: Compliance with International Regulatory Agreements*, 1995, Harvard University Press.
- Cheng, Bin, "Introduction to Subjects of International Law", in Mohammed Bedjaoui (ed.), *International Law: Achievements and Prospects*, 1991, Martinus Nijhoff Publishers, 23-40.
- Churchill, Robin R. and Ulfstein, Geir, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law", in 94 *American Journal of International Law* 2000, 623-659.
- Claude, Inis L., *Swords Into Plowshares: The Problems and Progress of International Organization*, 1964 (3rd ed.), University of London Press.
- Cohen, Joshua, "Minimalism About Human Rights: The Most We Can Hope For?", in 12 *Journal of Political Philosophy* 2004, 190-213.

- Coicaud, Jean-Marc, "International Democratic Culture and Its Sources of Legitimacy: The Case of Collective Security and Peacekeeping Operations in the 1990s", in Jean-Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organizations*, 2001, United Nations University Press, 256-308.
- Coleman, W.D. and Porter, T., "International Institutions, Globalisation and Democracy: Assessing the Challenges", in 14 *Global Society* 2000, 377-398.
- Cornell, Drucilla, "Institutionalization of Meaning: Recollective Imagination and the Potential for Transformative Legal Interpretation", in 136 *University of Pennsylvania Law Review* 1988, 1135-1229.
- Craig, Paul, "Constitutions, Constitutionalism, and the European Union", in 7 *European Law Journal* 2001, 125-150.
- Craig, Paul, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework", in *Public Law* 1997, 467-487.
- Craven, Matthew, "Legal Differentiation and the Concept of the Human Rights Treaty in International Law", in 11 *European Journal of International Law* 2000, 489-519.
- Crawford, James, "The UN Human Rights Treaty System: A System in Crisis?", in Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring*, 2000, Cambridge University Press, 1-12.
- Crawford, James, "The Charter of the United Nations as a Constitution", in Hazel Fox (ed.), *The Changing Constitution of the United Nations*, 1997, British Institute of International and Comparative Law, 3-16.
- Cremona, Marise, "External Relations and External Competence: The Emergence of an Integrated Policy", in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law*, 1999, Oxford University Press, 137-175.
- Croley, Steven P., "The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law", in 62 *University of Chicago Law Review* 1995, 689-794.
- Cronin, Bruce, "The Two Faces of the United Nations: The Tension between Integovernmentalism and Transnationalism", in 8 *Global Governance* 2002, 53-71.
- Cronin-Furman, Kathleen Renée, "The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship", in 106 *Columbia Law Review* 2006, 435-463.
- Curtin, Deidre and Dekker, Ige, "The EU as a 'Layered' International Organization: Institutional Unity in Disguise", in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law*, 1999, Oxford University Press, 83-136.
- Dahl, Robert A., "Can International Organizations Be Democratic? A Skeptic's View", in Ian Shapiro and Casiano Hacker-Cordon (eds), *Democracy's Edges*, 1999, Cambridge University Press, 19-36.

- Daniel, Donald and Hayes, Bradd, "Securing Observance of UN Mandates through the Employment of Military Force", in Michael Pugh (ed.), *The UN, Peace and Force*, 1997, Frank Cass, 105-125.
- Darrow, Mac, *Between Light and Shadow: The World Bank, the International Monetary Fund, and International Human Rights Law*, 2003, Hart Publishing.
- Das, Kamleshwar, "Some Reflections on Implementing Human Rights", in B.G. Ramcharan (ed.), *Human Rights Thirty Years after the Universal Declaration*, 1979, Martinus Nijhoff Publishers, 131-157.
- Dashwood, Alan, "Implied External Competence of the EC", in Martti Koskenniemi (ed.), *International Law Aspects of the European Union*, 1998, Kluwer Law International, 113-124.
- Dehousse, Renaud, "Beyond Representative Democracy: Constitutionalism in a Polycentric Polity", in J.H.H. Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State*, 2003, Cambridge University Press, 135-156.
- Dehousse, Renaud, "Community Competences: Are there Limits to Growth?", in Renaud Dehousse (ed.), *Europe After Maastricht: An Ever Closer Union?*, 1994, Law Books in Europe, 103-125.
- Dekker, I.F. and Myjer, E.P.J., "Air Strikes on Bosnian Positions: Is NATO Also Legally the Proper Instrument of the UN?", in 6 *Leiden Journal of International Law* 1996, 411-416.
- Delbrück, Jost, "Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?", in 10 *Indiana Journal of Global Legal Studies* 2003, 29-43.
- Delbrück, Jost, "Article 24", in Bruno Simma (ed., in collaboration with Hermann Mosler, Albrecht Randelzhofer, Christian Tomuschat and Rüdiger Wolfrum), *The Charter of the United Nations, a Commentary*, 2002 (2nd ed.), Oxford University Press, 442-452.
- Detter, Ingrid, *Law Making by International Organizations*, 1965, P.A. Norstedt & Söner.
- Dicey, A.V., *Introduction to the Study of the Law of the Constitution*, 1924 (8th ed.), Macmillan and Co.
- Diez-Picazo, Luis, "Treaty or Constitution? The Status of the Constitution for Europe", in Joseph Weiler and Christopher L. Eisgruber (eds), *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper 5/2004.
- Doehring, Karl, "Unlawful Resolutions of the Security Council and Their Legal Consequences", in J. Frowein, R. Wolfrum (eds), and C. Philipp (ass. ed.), 1 *Max Planck Yearbook of United Nations Law* 1997, 91-110.
- Donnelly, Jack, "The Virtues of Legalization", in Saladin Mackled-Garcia and Başak Çali (eds), *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law*, 2006, Routledge, 67-80

- Donnelly, Jack, "Cultural Relativism and Universal Human Rights", in 6 *Human Rights Quarterly* 1984, 400-419.
- Douglas-Scott, Sionaidh, *Constitutional Law of the European Union*, 2002, Pearson.
- Ducat, Craig and Chase, Harold, *Constitutional Interpretation*, 1992, West Publishing Company.
- Dunoff, Jeffrey, "Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law", in 17 *European Journal of International Law* 2006, 647-675.
- Dupuy, Pierre-Marie, "The Constitutional Dimension of the Charter of the United Nations Revisited", in J. Frowein, R. Wolfrum (eds), and C. Philipp (ass. ed.), 1 *Max Planck Yearbook of United Nations Law* 1997, 1-34.
- Dworkin, Ronald, *Law's Empire*, 1986, Hart Publishing.
- Dyrberg, Peter, "Accountability and Legitimacy: What is the Contribution of Transparency?", in Anthony Arnall and Daniel Wincott (eds), *Accountability and Legitimacy in the European Union*, 2002, Oxford University Press, 81-96.
- Eaton, M. R., "Common Foreign and Security Policy", in David O'Keeffe and Patrick Twomey (eds), *Legal Issues of the Maastricht Treaty*, 1994, Chancery Law Publishing, 215-225.
- Edgeworth, Brendan, *Law, Modernity, Postmodernity: Legal Change in the Contracting State*, 2003, Aldershot.
- Eeckhout, Piet, *External Relations of the European Union*, 2004, Oxford University Press.
- Efraim, Athena Debbie, *Sovereign (In)equality in International Organizations*, 2000, Kluwer Law International.
- Eleftheriadis, Pavlos, "The Direct Effect of Community Law: Conceptual Issues", in 16 *Yearbook of European Law* 1996, 205-221.
- Elias, O.A. and Lim, C. L., *The Paradox of Consensualism in International Law*, 1998, Kluwer Law International.
- Ely, John Hart, *Democracy and Distrust*, 1980, Harvard University Press.
- Endicott, Timothy A.O., "Linguistic Indeterminacy", 16 *Oxford Journal of Legal Studies* 1996, 667-697.
- Engström, Viljam, "Implied Powers of International Organizations: On the Character of a Legal Doctrine", in XIV *Finnish Yearbook of International Law* 2003, 129-157.
- Eriksen, Erik Oddvar, and Fossum, John Erik, "Europe in Search of its Legitimacy: Assessing Strategies of Legitimation", in *ARENA Working Papers* 38/2002.
- Erman, Eva, *Human Rights and Democracy: Discourse Theory and Global Rights Institutions*, 2005, Ashgate Publishing.

- Escorihuela, Alejandro Lorite, "Alf Ross: Towards a Realist Critique and Reconstruction of International Law", in 14 *European Journal of International Law* 2003, 703-766.
- Estella, Antonio, *The EU Principle of Subsidiarity and its Critique*, 2002, Oxford University Press.
- Evans, Tony, *The Politics of Human Rights: A Global Perspective*, 2005, Pluto Press.
- Everling, Ulrich, "Reflections on the Structure of the European Union", in 29 *Common Market Law Review* 1992, 1053-1077.
- Fassbender, Bardo, "The Meaning of International Constitutional Law", in Ronald St. John Macdonald and Douglas M. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, 2005, Martinus Nijhoff Publishers, 837-851.
- Fassbender, Bardo, "The United Nations Charter as Constitution of the International Community", in 36 *Columbia Journal of Transnational Law* 1998, 529-619.
- Fatouros, A.A., "On the Hegemonic Role of International Functional Organization", in 23 *German Yearbook of International Law* 1980, 9-36.
- Ferejohn, John and Pasquino, Pasquale, "Rule of Democracy and Rule of Law", in José Maria Maravall and Adam Przeworski (eds), *Democracy and the Rule of Law*, 2003, Cambridge University Press, 242-260.
- Fernandez Esteban, Maria Luisa, *The Rule of Law in the European Constitution*, 1999, Kluwer Law International.
- Fish, Stanley, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*, 1989, Duke University Press.
- Fiss, Owen, "Objectivity and Interpretation", in 34 *Stanford Law Review* 1982, 739-763.
- Fitzmaurice, Gerald, *The Law and Procedure of the International Court of Justice*, 1986, Grotius Publications.
- Franck, Thomas M., "The Political and the Judicial Empires: Must there be Conflict over Conflict-resolution?", in Najeeb Al-Nauimi and Richard Meese (eds), *International Legal Issues Arising Under the United Nations Decade of International Law*, 1995, Martinus Nijhoff Publishers, 621-632.
- Franck, Thomas M., "The 'Powers of Appreciation': Who is the Ultimate Guardian of UN Legality?", 86 *American Journal of International Law* 1992, 519-523.
- Franck, Thomas M., *The Power of Legitimacy among Nations*, 1990, Oxford University Press.
- Frankenberg, Günter, "The Return of the Contract: Problems and Pitfalls of European Constitutionalism", in 6 *European Law Journal* 2000, 257-276.

- Frankenberg, Günter, "Toqueville's Question. The Role of a Constitution in the Process of Integration", in 13 *Ratio Juris* 2000, 1-30.
- Freeman, Samuel, "Constitutional Democracy and the Legitimacy of Judicial Review", in 9 *Law and Philosophy* 1990-1991, 327-370.
- Frid, Rachel, *The Relations between the EC and International Organizations: Legal Theory and Practice*, 1995, Kluwer Law International.
- Friedman, Barry, "The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five", in 112 *Yale Law Journal* 2002, 153-259.
- Frowein, Jochen Abr., "Unilateral Interpretation of Security Council Resolutions – a Threat to Collective Security?", in Volkmar Götz, Peter Selmer, and Rüdiger Wolfrum (eds), *Liber amicorum Günther Jaenicke – Zum 85. Geburtstag*, 1999, Springer, 97-112.
- Føllesdal, Andreas, "Why International Human Rights Judicial Review might be Democratically Legitimate", in 52 *Scandinavian Studies in Law* 2007, 103-122.
- Føllesdal, Andreas, "Survey Article: The Legitimacy Deficits of the European Union", 14 *Journal of Political Philosophy* 2006, 441-468.
- Gallant, Kenneth S., "The International Criminal Court in the System of States and International Organizations", in 16 *Leiden Journal of International Law* 2003, 553-591.
- Gallie, W.B., "Essentially Contested Concepts", in 56 *Proceedings of the Aristotelian Society* 1955-1956, 167-198.
- Gardner, J.P. (ed.), *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions*, 1997, British Institute of International and Comparative Law.
- Garner, Bryan A. (ed.), *Black's Law Dictionary*, 2004 (8th ed.), Thomson/West.
- Gavison, Ruth, "What Belongs in a Constitution?", in 13 *Constitutional Political Economy* 2002, 89-105.
- Gazzini, Tarcisio, "NATO Coercive Military Activities in the Yugoslav Crisis (1992-1999)", in 12 *European Journal of International Law* 2001, 391-435.
- Gerhart, Peter M., "The Two Constitutional Visions of the World Trade Organization", in 24 *University of Pennsylvania Journal of International Economic Law* 2003, 1-75.
- Ghandhi, P.R., *The Human Rights Committee and the Right of Individual Communication*, 1998, Ashgate Publishing.
- Gill, T.D., "Legal and some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter", in XXVI *Netherlands Yearbook of International Law* 1995, 33-138.

- Gold, Joseph, *Interpretation: The IMF and International Law*, 1996, Kluwer Law International.
- Goldstein, Judith L., Kahler, Miles, Keohane, Robert O., and Slaughter, Anne-Marie, "Introduction: Legalization and World Politics", in Judith L. Goldstein, Miles Kahler, Robert O. Keohane and Anne-Marie Slaughter (eds), *Legalization and World Politics*, 2001, MIT Press, 1-16.
- Goldstein, Judith L., Kahler, Miles, Keohane, Robert O. and Slaughter, Anne-Marie (eds), *Legalization and World Politics*, 2001, MIT Press.
- Goldstein, Judith L. and Martin, Lisa L., "Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note", in Judith L. Goldstein, Miles Kahler, Robert O. Keohane and Anne-Marie Slaughter (eds), *Legalization and World Politics*, 2001, MIT Press, 219-248.
- Goldstein, Leslie, "State Reaction to Two Trans-State-Courts: The European Court of Justice (1958-1994) and the U.S. Supreme Court (1789-1860)", in Mary Volcansek (ed.), *Law Above Nations: Supranational Courts and the Legalization of Politics*, 1997, University Press of Florida, 20-32.
- Goldsworthy, Jeffrey, "Legislative Sovereignty and the Rule of Law", in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights*, 2001, Oxford University Press, at 61-78.
- Goodman, Ryan, "Human Rights Treaties, Invalid Reservations, and State Consent", in 96 *American Journal of International Law* 2002, 531-560.
- Goodrich, Peter, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis*, 1987, Macmillan Press.
- Goodrich, Peter, *Reading the Law: A Critical Introduction to Legal Method and Techniques*, 1986, Basil Blackwell.
- Gordon, Edward, "The World Court and the Interpretation of Constitutive Treaties: Some Observations on the Development of an International Constitutional Law", in 59 *American Journal of International Law* 1965, 794-833.
- Gould, Carol C., *Globalizing Democracy and Human Rights*, 2004, Cambridge University Press.
- Gowlland-Debbas, Vera, "The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case", in 88 *American Journal of International Law* 1994, 643-677.
- Grande, Edgar, "Post-National Democracy in Europe", in Michael Th. Greven and Louis W. Pauly (eds), *Democracy Beyond the State? The European Dilemma and the Emerging Global Order*, 2000, Rowman and Littlefield, 115-138.
- Grimm, Dieter, "Constitutional Adjudication and Democracy", in Mads Andenas and Duncan Fairgrieve (eds), *Judicial Review in International Perspective, Liber Amicorum in Honour of Lord Slynn of Hadley*, 2000, Kluwer Law International, 103-120.

- Grimm, Dieter, "Does Europe Need a Constitution?", in 1 *European Law Journal* 1995, 282-302.
- Groom, A.J.R. and Taylor, Paul (eds), *Functionalism: Theory and Practice in International Relations*, 1975, University of London Press.
- Haas, Ernst B., *Beyond the Nation-state: Functionalism and International Organization*, 1964, Stanford University Press.
- Habermas, Jürgen, *The Inclusion of the Other: Studies in Political Theory*, 2002, Polity Press.
- Habermas, Jürgen, "Why Europe Needs a Constitution", in 11 *New Left Review* 2001, 5-26.
- Habermas, Jürgen, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, 1998, MIT Press.
- Habermas, Jürgen, *Legitimation Crisis*, 1975, Beacon Press.
- Hakki, Matin Murat, "The Silver Anniversary of the UN Human Rights Committee: Anything to Celebrate?", in 6 *International Journal of Human Rights* 2002, 85-102.
- Hallamaa, Jaana, "Moralisk pluralism, etisk konsensus och social integration", i Lars Østnor (red.), *Etisk pluralisme i Norden*, 2001, Høyskoleforlag, 93-116.
- Halpin, Andrew, "The Concept of a Legal Power", in 16 *Oxford Journal of Legal Studies* 1996, 129-152.
- Halter, Ulrich, "Pathos und Patina: The Failure and Promise of Constitutionalism in the European Imagination", in 9 *European Law Journal* 2003, 14-44.
- Harrington, Joanna, "Punting Terrorists, Assassins and Other Undesirables: Canada, the Human Rights Committee and Requests for Interim Measures of Protection", in 48 *McGill Law Journal* 2003, 55-87.
- Harrison, R.J., "Neofunctionalism", in Paul Taylor and A.J.R. Groom (eds), *International Organisation: A Conceptual Approach*, 1978, Nichols Publishing Company, 253-269.
- Hart, H.L.A., *The Concept of Law*, 1994 (2nd ed.), Clarendon Press.
- Hartley, Trevor, *The Foundations of European Community Law*, 2007 (6th ed.), Oxford University Press.
- Hartley, Trevor, *Constitutional Problems of the European Union*, 1999, Hart Publishing.
- Heiskanen, Veijo, "The Rationality of the Use of Force and the Evolution of International Organization", in Jean-Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organizations*, 2001, United Nations University Press, 155-185.

- Held, David, "The Transformation of Political Community: Rethinking Democracy in the Context of Globalization", in Ian Shapiro and Casiano Hacker-Cordon (eds), *Democracy's Edges*, 1999, Cambridge University Press, 84-111.
- Held, David, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*, 1995, Polity Press.
- Helfer, Laurence R., "Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes", in 102 *Columbia Law Review* 2002, 1832-1911.
- Helfer, Laurence R. and Slaughter, Anne-Marie, "Toward a Theory of Effective Supranational Adjudication", in 107 *Yale Law Journal* 1997, 273-391.
- Henkin, Louis, *International Law: Politics and Values*, 1995, Martinus Nijhoff Publishers.
- Herdegen, Matthias, "The 'Constitutionalization' of the UN Security System", in 27 *Vanderbilt Journal of Transnational Law* 1994, 135-159.
- Hertzberg, Lars, *The Limits of Experience*, 1994, Acta Philosophica Fennica.
- Hessler, Kristen, "Resolving Interpretive Conflicts in International Human Rights Law", in 13 *Journal of Political Philosophy* 2005, 29-52.
- Higgins, Rosalyn, "Introduction", in Gardner, J.P. (ed.), *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions*, 1997, British Institute of International and Comparative Law, xv-xxix.
- Higgins, Rosalyn, *Problems and Process: International Law and How We Use It*, 1994, Oxford University Press.
- Higgins, Rosalyn, "The United Nations: Some Questions of Integrity", in 52 *Modern Law Review* 1989, 1-21.
- Higgins, Rosalyn, "Policy Considerations and the International Judicial Process", in 17 *International and Comparative Law Quarterly* 1968, 58-84.
- Hirsch, Mosche, *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles*, 1995, Martinus Nijhoff Publishers.
- Hirschl, Ran, "Hegemonic Preservation in Action? Assessing the Political Origins of the EU Constitution", in Joseph Weiler and Christopher L. Eisgruber (eds), *Altneuland: The EU Constitution on a Contextual Perspective*, Jean Monnet Working Paper 5/2004.
- Hirschl, Ran, "The Political Origins of the New Constitutionalism", in 11 *Indiana Journal of Global Legal Studies* 2004, 71-108.
- Hohfeld, Wesley Newcomb, *Fundamental Legal Conceptions as Applied in Juridical Reasoning*, 1919 (3rd printing 1964), Yale University Press.

- Holmes, Peter, "The WTO and the EU: Some Constitutional Comparisons", in Gráinne de Búrca and Joanne Scott (eds), *The EU and the WTO: Legal and Constitutional Issues*, 2001, Hart Publishing, 59-80.
- Howse, Robert, *The WTO System: Law, Politics and Legitimacy*, 2007, Cameron May.
- Howse, Robert, "From Politics to Technocracy-and Back Again: The Fate of the Multilateral Trading Regime", in 96 *American Journal of International Law* 2002, 94-117.
- Howse, Robert, "The Legitimacy of the World Trade Organization", in Jean-Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organizations*, 2001, United Nations University Press, 355-407.
- Howse, Robert, "Transatlantic Regulatory Cooperation and the Problem of Democracy", in George A. Bermann, Matthias Herdegen, and Peter L. Lindseth (eds), *Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects*, 2001, Oxford University Press, 469-480.
- Howse, Robert and Nicolaïdis, Kalypso, "Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far", in Roger B. Porter, Pierre Sauve, Arvind Subramanian, Americo Beviglia Zampetti (eds), *Equity, Efficiency and Legitimacy: The Multilateral System at the Millennium*, 2001, Brookings Institution Press, 227-252.
- Hurley, S.L., "Objectivity and Disagreement", in Ted Honderich (ed.), *Morality and Objectivity*, 1985, Routledge, 54-97.
- Hutchinson, Allan C., "The Rule of Law Revisited: Democracy and Courts", in David Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order*, 1999, Hart Publishing, 196-224.
- Hutchinson, Allan C. and Monahan, Patrick, "Democracy and the Rule of Law", in Allan C. Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology*, 1987, Carswell, 97-123.
- Hutchinson, Allan C. and Morgan, Derek, "The Semiology of Statutes" (Book review of D.R. Miers and A.C. Page, *Legislation*, 1982, Sweet & Maxwell), in 21 *Harvard Journal on Legislation* 1984, 583-595.
- Hyde, Alan, "The Concept of Legitimacy in the Sociology of Law", in *Wisconsin Law Review* 1983, 379-426.
- Ignatieff, Michael, "Human Rights as Politics", in Michael Ignatieff, *Human Rights as Politics and Idolatry* (edited by Amy Gutmann), 2001, Princeton University Press, 3-52.
- Iwasawa, Yuji, "WTO Dispute Settlement as Judicial Supervision", in 5 *Journal of International Economic Law* 2002, 287-305.
- Jackson, John H., *The World Trade Organization: Constitution and Jurisprudence*, 1998, Royal Institute of International Affairs.

- Jacobs, Francis G., "Recent Developments in the Principle of Proportionality in European Community Law", in Evelyn Ellis (ed.), *The Principle of Proportionality in the Laws of Europe*, 1999, Hart Publishing.
- Janis, Mark, Kay, Richard, and Bradley, Anthony, *European Human Rights Law: Text and Materials*, 1995 (1st ed.), Clarendon Press.
- Jayakar, Krishna, "Globalization and the Legitimacy of International Telecommunications Standard-Setting Organizations", in 5 *Indiana Journal of Global Legal Studies* 1998, 711-738
- Joerges, Christian, "'Deliberative Supranationalism' - Two Defences", in 8 *European Law Journal* 2002, 133-151.
- Johnston, Douglas M., "Functionalism in the Theory of International Law", in XXVI *Canadian Yearbook of International Law* 1988, 3-60.
- Johnstone, Ian, "Security Council Deliberations: The Power of the Better Argument", in 14 *European Journal of International Law* 2003, 437-480.
- Joutsamo, Kari, Aalto, Pekka, Kaila, Heidi and Maunu, Antti, *Eurooppaoikeus*, 2000, Lakimiesliiton kustannus.
- Jowell, Jeffrey, "The Rule of Law Today", in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution*, 2000, Oxford University Press, 3-22.
- Kaldor, Mary, "Transnational Civil Society", in Tim Dunne and Nicholas J. Wheeler (eds), *Human Rights in Global Politics*, 1999, Cambridge University Press, 195-213.
- Kamminga, Menno T., "The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?", in Philip Alston (ed.), *Non-State Actors and Human Rights*, 2005, Oxford University Press, 93-111.
- Kelsen, Hans, "The Old and the New League: The Covenant and the Dumbarton Oaks Proposals", in 39 *American Journal of International Law* 1945, 45-83.
- Kennedy, David W., "International Law and the Nineteenth Century: History of an Illusion", in 65 *Nordic Journal of International Law* 1996, 385-420.
- Kennedy, David W., "A New World Order: Yesterday, Today, and Tomorrow", in 4 *Transnational Law and Contemporary Problems* 1994, 329-375.
- Kennedy, David W., *International Legal Structures*, 1987, Nomos.
- Kennedy, David W., "The Move to Institutions", in 8 *Cardozo Law Review* 1987, 841-988.
- Kennedy, Duncan, *A Critique of Adjudication: {fin de siècle}*, 1998, Harvard University Press.
- Kirgis, Frederic L., "The Security Council's First Fifty Years", in 89 *American Journal of International Law* 1995, 506-539.
- Kjaerum, Morten, "The UN Reform Process in an Implementation Perspective", in Stéphanie Lagouette, Hans-Otto Sano, and Peter Scharff Smith (eds), *Human*

- Rights in Turmoil: Facing Threats, Consolidating Achievements*, 2007, Martinus Nijhoff Publishers, 7-23.
- Klabbers, Jan, "On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization", in 74 *Nordic Journal of International Law* 2005, 405-428.
- Klabbers, Jan, "Straddling Law and Politics: Judicial Review in International Law", in Ronald St. John Macdonald and Douglas M. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, 2005, Martinus Nijhoff Publishers, 809-835.
- Klabbers, Jan, "Constitutionalism Lite", in 1 *International Organizations Law Review* 2004, 31-58.
- Klabbers, Jan, "On Human Rights Treaties, Contractual Conceptions and Reservations", in Ineta Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime*, 2004, Martinus Nijhoff Publishers, 149-182.
- Klabbers, Jan and Leino, Päivi, "Death by Constitution? The Draft Treaty Establishing a Constitution for Europe", in 4 *German Law Journal* 2003, 1293-1305.
- Klabbers, Jan, "International Legal Histories: The Declining Importance of Travaux Préparatoires in Treaty Interpretation?", in 50 *Netherlands International Law Review* 2003, 267-288.
- Klabbers, Jan, *An Introduction to International Institutional Law*, 2002, Cambridge University Press.
- Klabbers, Jan, "Restraints on the Treaty-Making Powers of Member States Deriving From EU Law: Towards a Framework for Analysis", in Cannizzarro, Enzo (ed.), *The European Union as an Actor in International Relations*, 2002, Kluwer Law International, 151-175.
- Klabbers, Jan, "The Life and Times of the Law of International Organizations", in 70 *Nordic Journal of International Law* 2001, 287-317.
- Klabbers, Jan, "Institutional Ambivalence by Design: Soft Organizations in International Law", in 70 *Nordic Journal of International Law* 2001, 403-421.
- Klabbers, Jan, "Some Problems Regarding the Object and Purpose of Treaties", in 8 *Finnish Yearbook of International Law* 1997, 138-160.
- Klabbers, Jan, *The Concept of Treaty in International Law*, 1996, Kluwer Academic Publishers.
- Koh, Jean Kyongun, "Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision", in 23 *Harvard International Law Journal* 1982, 71-116.
- Koho, Lauri, "Military Advisor in the Office of the Secretary-General", in Kimmo Kiljunen (ed.), *Finns in the United Nations*, 1996, The Finnish UN Association, 105-133.

- Koskenniemi, Martti, "Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization", in 8 *Theoretical Inquiries in Law* 2007, 9-36.
- Koskenniemi, Martti, *From Apology to Utopia: The Structure of International Legal Argument*, 2005 (Reissue with a new Epilogue), Cambridge University Press.
- Koskenniemi, Martti, "Legal Universalism", in Sinkwan Cheng (ed.), *Law, Justice, and Power: Between Reason and Will*, 2004, Stanford University Press, 46-69.
- Koskenniemi, Martti, "Legal Cosmopolitanism: Tom Franck's Messianic World", in 35 *New York University Journal of International Law and Politics* 2003, 471-486.
- Koskenniemi, Martti, "Legitimacy, Rights, and Ideology: Notes Towards a Critique of the New Moral Internationalism", in 7 *Associations* 2003, 349-373.
- Koskenniemi, Martti, "What is International Law For?", in Malcolm Evans (ed.), *International Law*, 2003, Oxford University Press, 89-114.
- Koskenniemi, Martti, "Human Rights, Politics and Love", in 4 *Mennesker og Rettigheter* 2001, 33-45.
- Koskenniemi, Martti, "The Silence of Law/The Voice of Justice", in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons*, 1999, Cambridge University Press, 488-510.
- Koskenniemi, Martti, "International Law Aspects of the Common Foreign and Security Policy", in Martti Koskenniemi (ed.), *International Law Aspects of the European Union*, 1998, Kluwer Law International, 27-44.
- Koskenniemi, Martti, "Onko YK:n sotilaallisella toiminnalla tulevaisuutta?", in 25 *Oikeus* 1996, no. 1, 62-67.
- Koskenniemi, Martti, "The Place of Law in Collective Security", in 17 *Michigan Journal of International Law* 1996, 455-490.
- Koskenniemi, Martti, "The Police in the Temple Order, Justice and the UN: A Dialectical View", in 6 *European Journal of International Law* 1995, 325-348.
- Koskenniemi, Martti and Leino, Päivi, "Fragmentation of International Law? Postmodern Anxieties", in 15 *Leiden Journal of International Law* 2002, 553-579.
- Krajewski, Markus, "Democratic Legitimacy and Constitutional Perspectives of WTO Law", in 35 *Journal of World Trade* 2001, 167-186.
- Krisch, Nico, "The Pluralism of Global Administrative Law", in 17 *European Journal of International Law* 2006, 247-278.
- Krisch, Nico and Kingsbury, Benedict, "Introduction: Global Governance and Global Administrative Law in the International Legal Order", in 17 *European Journal of International Law* 2006, 1-13.

- Kymlicka, Will, "Citizenship In an Era of Globalization: Commentary on Held", in Ian Shapiro and Casiano Hacker-Cordon (eds), *Democracy's Edges*, 1999, Cambridge University Press, 112-126.
- Köhler, Martin, "From the National to the Cosmopolitan Public Sphere", in Daniele Archibugi, David Held and Martin Köhler (eds), *Re-imagining Political Community: Studies in Cosmopolitan Democracy*, 1998, Polity Press, 231-251.
- Lagerspetz, Olli, *Trust: The Tacit Demand*, 1998, Kluwer Academic Publishers.
- Lauterpacht, E., "'Partial' Judgments and the Inherent Jurisdiction of the International Court of Justice", in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice*, 1996, Cambridge University Press, 465-486.
- Lauterpacht, E., "The Development of the Law of International Organizations by the Decisions of International Tribunals", in 152 *Recueil des Cours* 1976, 377-478.
- Leigh, Monroe, "The United States and the Statute of Rome", in 95 *American Journal of International Law* 2001, 124-131.
- Leino, Päivi, "When Every Picture Tells a Story: The European Court of Justice and the Jigsaw Puzzle of External Human Rights Competence", in Jarna Petman and Jan Klabbers (eds), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi*, 2004, Martinus Nijhoff Publishers, 261-290.
- Lenaerts, Koen and Corthaut, Tim, "Judicial Review as a Contribution to the Development of European Constitutionalism in the 21st Century", in Takis Tridimas and Paolisa Nebbia (eds), *European Union Law for the Twenty-first Century: Rethinking the New Legal Order* (vol. 1), 2004, Hart Publishing, 17-64.
- Lenaerts, Koen, van Nuffel, Piet and Bray, Robert, *Constitutional Law of the European Union*, 1999, Sweet & Maxwell.
- Lepard, Brian D., *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions*, 2002, Pennsylvania State University Press.
- Levasseur, Alain A. and Scott, Richard F., *The Law of the European Union: A New Constitutional Order*, 2001, Carolina Academic Press.
- Lijnzaad, Liesbeth, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?*, 1995, Martinus Nijhoff Publishers.
- Locke, John, *Two Treatises of Government*, 2000 (first published in 1690), McMaster University Archive of the History of Economic Thought.
- Loughlin, Martin, "Rights, Democracy, and Law", in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights*, 2001, Oxford University Press, 41-60.
- Loughlin, Martin, *Swords and Scales: An Examination of the Relationship between Law and Politics*, 2000, Hart Publishing.

- MacBride, Sean, "The Strengthening of the International Machinery for the Protection of Human Rights", in Asbjørn Eide and August Schou (eds), *International Protection of Human Rights, Proceedings of the Seventh Nobel Symposium* (25-27 September 1967), 1968, Almqvist & Wiksell.
- Macdonald, Ronald St. J., "The International Community as a Legal Community", in Ronald St. John Macdonald and Douglas M. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, 2005, Martinus Nijhoff Publishers, 853-909.
- Macdonald, Ronald St. J., "The Charter of the United Nations as a World Constitution", in Michael N. Schmitt and L. C. Green (eds), *International Law Across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green on the Occasion of his Eightieth Birthday*, 2000, Naval War College Press, 263-300.
- Macdonald, Ronald St. J., "The United Nations Charter: Constitution or Contract?", in Ronald St. J. Macdonald and Douglas M. Johnston, *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory*, 1983, Martinus Nijhoff Publishers, 889-912.
- Macdonald, Terry and Macdonald, Kate, "Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry", in 17 *European Journal of International Law* 2006, 89-119.
- Maduro, Miguel Poiras, "The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism", in 3 *International Journal of Constitutional Law* 2005, 332-356.
- Maduro, Miguel Poiras, "How Constitutional Can the European Union Be? The Tension Between Intergovernmentalism and Constitutionalism in the European Union", in Joseph Weiler and Christopher L. Eisgruber (eds), *Altneuland: The EU Constitution in a Contextual Perspective, Jean Monnet Working Paper* 5/2004.
- Maduro, Miguel Poiras, "Contrapunctual Law: Europe's Constitutional Pluralism in Action", in Neil Walker (ed.), *Sovereignty in Transition*, 2003, Hart Publishing, 501-537.
- Maduro, Miguel Poiras, "Europe and the Constitution: What If This Is As Good As It Gets?", in J.H.H. Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State*, 2003, Cambridge University Press, 74-102.
- Maduro, Miguel Poiras, *We the Court: The European Court of Justice and the European Economic Constitution. A Critical Reading of Article 30 of the EC Treaty*, 1998, Hart Publishing.
- Magliveras, Konstantinos, *Exclusion from Participation in International Organisations: The Law and Practice Behind Member States' Expulsion and Suspension of Membership*, 1999, Kluwer Law International.
- Makarczyk, Jerzy, "The International Court of Justice on the Implied Powers of International Organizations", in Jerzy Makarczyk (ed.), *Essays in International*

- Law in Honour of Judge Manfred Lachs*, 1984, Martinus Nijhoff Publishers, 501-518
- Malanczuk, Peter, *Akehurst's Modern Introduction to International Law*, 1997 (7th ed.), Routledge.
- Marks, Susan, *The Riddle of all Constitutions: International Law, Democracy, and the Critique of Ideology*, 2000, Oxford University Press.
- Marschik, Axel, "Legislative Powers of the Security Council", in Ronald St. John Macdonald and Douglas M. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, 2005, Martinus Nijhoff Publishers, 457-492.
- Martenczuk, Bernd, "The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?", in 10 *European Journal of International Law* 1999, 517-547.
- Martin Martinez, Magdalena, *National Sovereignty and International Organizations*, 1996, Kluwer Law International.
- Mattli, Walter and Slaughter, Anne-Marie, "Revisiting the European Court of Justice", in 52 *International Organization* 1998, 177-209.
- McCalla, Robert, "NATO's Persistence After the Cold War", in 50 *International Organization* 1996, 445-475.
- McCarthy, Thomas, *The Critical Theory of Jürgen Habermas*, 1978, Polity Press.
- McCarthy, Thomas, "On Reconciling Cosmopolitan Unity and National Diversity", in Pablo De Greiff and Ciaran Cronin (eds), *Global Justice and Transnational Politics: Essays on the Moral and Political Challenges of Globalization*, 2002, MIT Press, 235-274.
- McCoubrey, Hilarie and White, Nigel, *The Blue Helmets: Legal Regulation of United Nations Military Operations*, 1996, Dartmouth Publishing.
- McDougal, Myres, Lasswell, Harold, and Miller, James, *The Interpretation of International Agreements and World Public Order*, 1994, Martinus Nijhoff Publishers.
- McGinnis, John O. and Movsesian, Mark L., "The World Trade Constitution", in 114 *Harvard Law Review* 2000, 511-605.
- McGoldrick, Dominic, "Multiculturalism and its Discontents", in 5 *Human Rights Law Review* 2005, 27-56.
- McGoldrick, Dominic, "The Human Rights Committee", in Patrick Capps, Malcolm Evans and Stratos Konstantinidis (eds), *Asserting Jurisdiction: International and European Legal Perspectives*, 2003, Hart Publishing, 199-241.
- McGoldrick, Dominic, *International Relations Law of the European Union*, 1997, Longman.

- McGoldrick, Dominic, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, 1991, Clarendon Press.
- McLeod, I., Hendry, I.D. and Hyett, Stephen, *The External Relations of the European Communities*, 1996, Clarendon Press.
- Mégret, Frédéric and Hoffmann, Florian, "The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities", in 25 *Human Rights Quarterly* 2003, 314-342.
- Menon, P.K., "International Organizations as Subjects of International Law", in 70 *Revue de Droit International* 1992, 61-81.
- Meyring, Bernd, "Intergovernmentalism and Supranationality: Two Stereotypes for a Complex Reality", in 2 *European Law Review* 1997, 221-247.
- Mitrany, David, *The Functional Theory of Politics*, 1975, London School of Economics and Political Science.
- Moravcsik, Andrew, "Is there a 'Democratic Deficit' in World Politics? A Framework for Analysis", in 39 *Government and Opposition* 2004, 336-363.
- Moravcsik, Andrew, "Explaining the Emergence of Human Rights Regimes: Liberal Democracy and Political Uncertainty in Postwar Europe", in *Weatherhead Center for International Affairs, Harvard University, Working Paper Series* 98-17, December 1998.
- Moravcsik, Andrew, "Explaining International Human Rights Regimes: Liberal Theory and Western Europe", in 1 *European Journal of International Relations* 1995, 157-189.
- Morawiecki, Wojciech, "Legal Regime of the International Organization", in XV *Polish Yearbook of International Law* 1986, 71-101.
- Morgenthau, Hans J., *Politics Among Nations: The Struggle for Power and Peace*, 1967 (4th ed.), Knopf.
- Morgenthau, Hans J., "Positivism, Functionalism, and International Law", in 34 *American Journal of International Law* 1940, 260-284.
- Morton, Jeffrey, "The Legality of NATO's Intervention in Yugoslavia in 1999: Implications for the Progressive Development of International Law", in 8 *ILSA Journal of International and Comparative Law* 2002, 75-101.
- Muller, A.S., *International Organizations and their Host States: Aspects of their Legal Relationship*, 1995, Kluwer Law International.
- Mutua, Makau, "Standard Setting in Human Rights: Critique and Prognosis", in 29 *Human Rights Quarterly* 2007, 547-630.
- Mutua, Makau, "Human Rights International NGOs: A Critical Evaluation", in Claude E. Welch, Jr. (ed.), *NGOs and Human Rights: Promise and Performance*, 2001, University of Pennsylvania Press, 151-163.

- Mutua, Makau, "Looking Past the Human Rights Committee: An Argument for De-marginalizing Enforcement", in 4 *Buffalo Human Rights Law Review* 1998, 211-260.
- Möllers, Christoph, "The Politics of Law and the Law of Politics: Two Constitutional Traditions in Europe", in Erik Oddvar Eriksen, John Erik Fossum and Agustín Menéndez (eds), *Developing a Constitution for Europe*, 2004, Routledge, 129-139.
- Neyer, Jürgen, "Discourse and Order - On the Conditions of Governance in Non-Hierarchical Multi-Level Systems", in *ARENA Working Papers* 09/2002.
- Nijman, Janne Elisabeth, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 2004, T.M.C. Asser Press.
- Nollkaemper, André, "The Legitimacy of International Law in the Case Law of the International Criminal Tribunal for the Former Yugoslavia", in Thomas A.J.A Vandamme and Jan-Herman Reestman (eds), *Ambiguity in the Rule of Law: The Interface between National and International Legal Systems*, 2001, Europa Law Publications, 13-23.
- Nollkaemper, André, "The European Community and International Environmental Co-operation - Legal Aspects of External Community Powers", in 2 *Legal Issues of European Integration* 1987, 59-88.
- Nolte, Georg, "Article 2(7)", in Bruno Simma (ed., in collaboration with Hermann Mosler, Albrecht Randelzhofer, Christian Tomuschat and Rüdiger Wolfrum), *The Charter of the United Nations, a Commentary*, 2002 (2nd ed.), Oxford University Press, 148-171.
- Nowak, Manfred, "The Need for a World Court of Human Rights", in 7 *Human Rights Law Review* 2007, 251-259.
- Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2005 (2nd ed.), N.P. Engel.
- Nye, Joseph S., "Globalization's Democratic Deficit: How to Make International Institutions More Accountable", in 80 *Foreign Affairs* 2001, 2-6.
- Offe, Claus, "The Democratic Welfare State in an Integrating Europe", in Michael Th. Greven and Louis W. Pauly (eds), *Democracy Beyond the State? The European Dilemma and the Emerging Global Order*, 2000, Rowman and Littlefield, 63-89.
- O'Flaherty, Michael and O'Brien, Claire, "Reform of UN Human Rights Treaty Monitoring Bodies: A Critique of the Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body", in 7 *Human Rights Law Review* 2007, 141-172.
- Oppenheim, L., "The Science of International Law: Its Task and Method", in 2 *American Journal of International Law* 1908, 313-356.
- Orakhelashvili, Alexander, *Peremptory Norms in International Law*, 2006, Oxford University Press.

- Orentlicher, Diane F., "Relativism and Religion", in Michael Ignatieff, *Human Rights as Politics and Idolatry* (edited by Amy Gutmann), 2001, Princeton University Press, 141-158.
- Osieke, Ebere, "The Legal Validity of Ultra Vires Decisions of International Organizations", in 77 *American Journal of International Law* 1983, 239-256.
- Otto, Dianne, "Rethinking the 'Universality' of Human Rights law", in 29 *Columbia Human Rights Law Review* 1997, 1-46.
- Patomäki, Heikki and Teivainen, Teivo, *A Possible World: Democratic Transformation of Global Institutions*, 2004, Zed Books.
- Patterson, Dennis, "Normativity and Objectivity in Law", in 43 *William and Mary Law Review* 2001, 325-363.
- Peczenik, Aleksander, *On Law and Reason*, 1989, Kluwer Academic Publishers.
- Perry, Michael J., *The Constitution, the Courts, and Human Rights: An Inquiry In the Legitimacy of Constitutional Policymaking by the Judiciary*, 1982, Yale University Press.
- Peters, Anne, "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures", in 19 *Leiden Journal of International Law* 2006, 579-610.
- Peters, Anne, "Global Constitutionalism Revisited", in 11 *International Legal Theory* 2005, 39-65.
- Peters, Anne, "The Position of International Law within the European Community Legal Order", in 40 *German Yearbook of International Law* 1997, 9-77.
- Petersmann, Ernst-Ulrich, "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration", in 13 *European Journal of International Law* 2002, 621-650.
- Petersmann, Ernst-Ulrich, "Time for Integrating Human Rights into the Law of Worldwide Organizations. Lessons from European Integration Law for Global Integration Law", in *Jean Monnet Working Paper* 7/2001.
- Petersmann, Ernst-Ulrich, "Proposals for Strengthening the UN Dispute Settlement System: Lessons from International Economic Law", in J. Frowein, R. Wolfrum (eds), and C. Philipp (ass. ed.), 3 *Max Planck Yearbook of United Nations Law* 1999, 105-156.
- Petersmann, Ernst-Ulrich, "Constitutionalism and International Organizations", in 17 *Northwestern Journal of International Law and Business* 1996-1997, 398-469.
- Pildes, Richard H., "Conflicts Between American and European Views of Law: The Dark Side of Legalism", in 44 *Virginia Journal of International Law* 2003, 145-168.

- Pildes, Richard H., "Forms of Formalism", in 66 *University of Chicago Law Review* 1999, 607-621.
- Polakiewicz, Jörg, "Collective Responsibility and Reservations in a Common European Human Rights Area", in Ineta Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime*, 2004, Martinus Nijhoff Publishers, 95-132.
- Pollux, "The Interpretation of the Charter", in XXIII *British Yearbook of International Law* 1946, 54-82.
- Posner Eric A. and Yoo, John C., "Judicial Independence in International Tribunals", in 93 *California Law Review* 2005, 1-74.
- Prechal, Sacha, "Institutional Balance: A Fragile Principle with Uncertain Contents", in Ton Heukels, Niels Blokker, and Marcel Brus (eds), *The European Union after Amsterdam: A Legal Analysis*, 1998, Kluwer Law International, 273-295.
- Rama-Montaldo, Manuel, "Contribution of the General Assembly to the Constitutional Development and Interpretation of the United Nations Charter", in Ronald St. John Macdonald and Douglas M. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, 2005, Martinus Nijhoff Publishers, 493-513.
- Rama-Montaldo, Manuel, "International Legal Personality and Implied Powers of International Organizations", in XLIV *British Yearbook of International Law* 1970, 111-155.
- Rasmussen, Hjalte, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking*, 1986, Martinus Nijhoff Publishers.
- Raz, Joseph, "On the Authority and Interpretation of Constitutions: Some Preliminaries", in Larry Alexander (ed.), *Constitutionalism: Philosophical Foundations*, 2001, Cambridge University Press, 152-193.
- Redgwell, Catherine, "Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties", in 64 *British Yearbook of International Law* 1993, 245-282.
- Reinisch, August, *International Organizations before National Courts*, 2000, Cambridge University Press.
- Reinsch, Paul S., "International Unions and their Administration", in 1 *American Journal of International Law* 1907, 579-623.
- Reisman, Michael, "The Constitutional Crisis in the United Nations", 87 *American Journal of International Law* 1993, 83-100.
- Ress, Georg, "The Interpretation of the Charter", in Bruno Simma (ed., in collaboration with Hermann Mosler, Albrecht Randelzhofer, Christian Tomuschat and Rüdiger Wolfrum), *The Charter of the United Nations, a Commentary*, 2002 (2nd ed.), Oxford University Press, 13-32.

- Reuter, Paul, *Introduction to the Law of Treaties*, 1995, Kegan Paul International.
- Riesenhuber, Eva, *The International Monetary Fund under Constraint: Legitimacy of its Crisis Management*, 2001, Kluwer Law International.
- Robertson, A. H. and Merrills, J. G., *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights*, 1996, Manchester University Press.
- Robertson, Geoffrey, *Crimes Against Humanity: The Struggle for Global Justice*, 2006 (3rd ed.), The New Press.
- Romano, Cesare P.R., "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle", in 31 *International Law and Politics* 1999, 709-751.
- Rosand, Eric, "The Security Council as 'Global Legislator': Ultra Vires or Ultra Innovative?", in 28 *Fordham International Law Journal* 2005, 542-590.
- Rosas, Allan, "Whither Sovereignty?", in *Juridisk Tidskrift* 1994-1995, 312-318.
- Rosenfeld, Michel, "The Rule of Law and the Legitimacy of Constitutional Democracy", in 74 *Southern California Law Review* 2001, 1307-1350.
- Rosenne, Shabtai, *Developments in the Law of Treaties 1945-1986*, 1989, Cambridge University Press.
- Rosenne, Shabtai, *Breach of Treaty*, 1985, Grotius Publications.
- Rosenne, Shabtai, "Bilateralism and Community Interest in the Codified Law of Treaties", in L. Friedmann, L. Henkin and O. Lissitzyn (eds), *Transnational Law in a Changing Society: Essays in Honour of Philip C. Jessup*, 1972, Columbia University Press, 202-227.
- Roth, Brad R., "Evaluating Democratic Progress", in Gregory H. Fox and Brad R. Roth (eds), *Democratic Governance and International Law*, 2000, Cambridge University Press, 493-516.
- Rubinfeld, Jed, "Unilateralism and Constitutionalism", in 79 *New York University Law Review* 2004, 1971-2028.
- Sands, Philippe and Klein, Pierre, *Bowett's Law of International Institutions*, 2001, Sweet & Maxwell.
- Sarooshi, Danesh, *International Organizations and their Exercise of Sovereign Powers*, 2005, Oxford University Press.
- Sarooshi, Danesh, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers*, 1999, Clarendon Press.
- Sato, Tetsuo, "The Legitimacy of Security Council activities under Chapter VII of the UN Charter after the end of the Cold War", in Jean-Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organizations*, 2001, United Nations University Press, 309-352.

- Sato, Tetsuo, *Evolving Constitutions of International Organizations*, 1996, Kluwer Law International.
- Schabas, William, "Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?", in 21 *Brooklyn Journal of International Law* 1995, 277-325.
- Schaumburg-Müller, Sten, "The Uneasy Balance between Individual Rights and the Necessity of Communities", in Stéphanie Lagoutte, Hans-Otto Sano and Peter Scharff Smith (eds), *Human Rights in Turmoil: Facing Threats, Consolidating Achievements*, 2006, Martinus Nijhoff Publishers, 71-96.
- Scheinin, Martin, "Impact on the Law of Treaties", in Menno T. Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law*, 2009, Oxford University Press, 23-36.
- Scheinin, Martin, "The International Covenant on Civil and Political Rights", in Geir Ulfstein (ed.), *Making Treaties Work: Human Rights, Environment and Arms Control*, 2007, Cambridge University Press, 48-69.
- Scheinin, Martin, "The Human Rights Committee's Pronouncements on the Right to an Effective Remedy - An Illustration of the Legal Nature of the Committee's Work Under the Optional Protocol", in Nisuke Ando (ed.), *Towards Implementing Universal Human Rights: Festschrift for the Twenty-Fifth Anniversary of the Human Rights Committee*, 2005, Martinus Nijhoff Publishers, 101-115.
- Scheinin, Martin, "Reservations by States under the International Covenant on Civil and Political Rights and its Optional Protocols, and the Practice of the Human Rights Committee", in Ineta Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime*, 2004, Martinus Nijhoff Publishers, 41-58.
- Scheinin, Martin, "Towards a World Human Rights Court", Public lecture at the Graduate Institute of International Studies (HEI), Geneva, 2002 (on file with author).
- Scheinin, Martin, "International Mechanisms and Procedures for Implementation", in Raija Hanski and Markku Suksi (eds), *An Introduction to the International Protection of Human Rights: A Textbook*, 1999, Institute for Human Rights, Åbo Akademi University, 429-452.
- Scheinin, Martin, "Direct Applicability of Economic, Social, and Cultural Rights: A Critique of the Doctrine of Self-Executing Treaties", in Krzysztof Drzewicki, Catarina Krause and Allan Rosas (eds), *Social Rights as Human Rights: A European Challenge*, 1994, Institute for Human Rights, Åbo Akademi University, 73-87.
- Schermers, Henry G. and Blokker, Niels M., *International Institutional Law: Unity within Diversity*, 2003 (4th ed.), Martinus Nijhoff Publishers.

- Schilling, Theodor, "The Autonomy of the Community Legal Order: An Analysis of Possible Foundations", in 37 *Harvard International Law Journal* 1996, 389-409.
- Scholte, Jan Aart, O'Brien, Robert and Williams, Marc, "The WTO and Civil Society", in *CSGR Working Paper*, no. 14/98 (also reproduced in 33 *Journal of World Trade* 1999, 107-123).
- Schwarzenberger, Georg, *A Manual of International Law*, 1967 (5th ed.), Stevens and Sons.
- Schmidt, Markus G., "Follow-up Procedures to Individual Complaints and Periodic State Reporting Mechanisms", in Gudmundur Alfredsson, Jonas Grimheden, Bertrand G. Ramcharan and Alfred de Zayas (eds), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller*, 2001, Kluwer Law International, 201-215.
- Schmitter, Philippe C., *How to Democratize the European Union – and Why Bother?*, 2000, Rowman & Littlefield Publishers.
- Schweigman, David, *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice*, 2001, Kluwer Law International.
- Schütze, Robert, "Parallel External Powers in the European Community: From 'Cubist' Perspectives Towards 'Naturalist' Constitutional Principles?", in 23 *Yearbook of European Law* 2004, 225-274.
- Schütze, Robert, "Organized Change Towards an 'Ever Closer Union': Article 308 EC and the Limits to the Community's Legislative Competence", in 22 *Yearbook of European Law* 2003, 79-115.
- Seibert-Fohr, Anja, "The Potentials of the Vienna Convention on the Law of Treaties with Respect to Reservations to Human Rights Treaties", in Ineta Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime*, 2004, Martinus Nijhoff Publishers, 183-211.
- Seidl-Hohenveldern, Ignaz, "The Legal Personality of International and Supranational Organizations", in 21 *Revue Egyptienne de Droit International* 1965, at 35-72.
- Seyersted, Finn, *United Nations Forces in the Law of Peace and War*, 1966, A.W. Sijthoff.
- Seyersted, Finn, *Objective International Personality of Intergovernmental Organizations: Do their Capacities Really Depend on the Conventions Establishing them?*, 1963, Copenhagen.
- Seyersted, Finn, "United Nations Forces", in XXXVII *British Yearbook of International Law* 1961, 351-475.
- Shaw, Josephine, *European Community Law*, 1993, Macmillan.
- Shaw, Malcolm N., "The Security Council and the International Court of Justice: Judicial Drift and Judicial Function", in A.S. Muller, D. Raič, and J.M.

- Thuranszky (eds), *The International Court of Justice: Its Future Role after Fifty Years*, 1997, Martinus Nijhoff Publishers, 219-259.
- Simma, Bruno, and Pulkowski, Dirk, "Of Planets and the Universe: Self-contained Regimes in International Law", in 17 *European Journal of International Law* 2006, 483-529.
- Simma, Bruno, "From Bilateralism to Community Interest in International Law", in 250 *Recueil des Cours* 1994, 217-384.
- Simma, Bruno, "Consent: Strains in the Treaty System", in Ronald St. J. Macdonald and Douglas M. Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory*, 1983, Martinus Nijhoff Publishers, 485-511.
- Simpson, Gerry, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, 2004, Cambridge University Press.
- Singer, Michael, "Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns", in 36 *Virginia Journal of International Law* 1995, 53-165.
- Skogly, Sigrun I., *The Human Rights Obligations of the World Bank and the International Monetary Fund*, 2001, Cavendish Publishing.
- Skubiszewski, Krzysztof, "Implied Powers of International Organizations", in Yoram Dinstein (ed.), *International Law at a Time of Perplexity*, 1989, Kluwer Academic Publishers, 855-868.
- Slaughter, Anne-Marie, "The Real New World Order", in 76 *Foreign Affairs* 1997, 183-197.
- Sloan, Blaine, "The United Nations Charter as a Constitution", in 1 *Pace Yearbook of International Law* 1989, 61-126.
- Soares, Antonio Goucha, "The Principle of Conferred Powers and the Division of Powers Between the European Community and the Member States", in 23 *Liverpool Law Review* 2001, 57-78.
- Solum, Lawrence B., "On the Indeterminacy Crisis: Critiquing Critical Dogma", in 54 *University of Chicago Law Review* 1987, 462-503.
- Spaak, Torben, *The Concept of Legal Competence: An Essay in Conceptual Analysis*, 1994, Dartmouth Publishing.
- Spiermann, Ole, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary*, 2005, Cambridge University Press.
- Stammers, Neil, "Social Movements and the Social Construction of Human Rights" in 21 *Human Rights Quarterly* 1999, 980-1008.
- Steffek, Jens, "The Legitimation of International Governance: A Discourse Approach", in 9 *European Journal of International Relations* 2003, 249-275.

- Stein, Eric, "International Integration and Democracy: No Love at First Sight" in 95 *American Journal of International Law* 2001, 489-534.
- Stein, Eric, "Lawyers, Judges, and the Making of a Transnational Constitution", in 75 *American Journal of International Law* 1981, 1-27.
- Steinberg, Richard H., "Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints", in 98 *American Journal of International Law* 2004, 247-275.
- Steiner, Henry J., "Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee", in Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring*, 2000, Cambridge University Press, 15-53.
- Sugihara, Takane, "The Judicial Function of the International Court of Justice with Respect to Disputes Involving Highly Political Issues", in A.S. Muller, D. Raič and J.M. Thuranszky (eds), *The International Court of Justice: Its Future Role after Fifty Years*, 1997, Martinus Nijhoff Publishers, 117-138.
- Summers, Robert S., *Essays in Legal Theory*, 2000, Kluwer Academic Publishers.
- Sweet, Alec Stone, "Constitutional Dialogues in the European Community", in Anne-Marie Slaughter, Alec Stone Sweet and Joseph Weiler (eds), *The European Court and National Courts – Doctrine and Jurisprudence*, 2000, Hart Publishing, 305-330.
- Szafarz, Renata, *The Compulsory Jurisdiction of the International Court of Justice*, 1993, Kluwer Academic Publishers.
- Talmon, Stefan, "The Security Council as World Legislature", in 99 *American Journal of International Law* 2005, 175-193.
- Tamanaha, Brian Z., *On the Rule of Law: History, Politics, Theory*, 2004, Cambridge University Press.
- Taylor, Charles, "Conditions of an Unforced Consensus on Human Rights", in Joanne R. Bauer and Daniel A. Bell (eds), *The East Asian Challenge for Human Rights*, 1999, Cambridge University Press, 124-144.
- Teubner, Günther, "Societal Constitutionalism: Alternatives to State-centred Constitutional Theory?", in Christian Joerges, Inger-Johanne Sand and Günther Teubner (eds), *Transnational Governance and Constitutionalism*, 2004, Hart Publishing, 3-28.
- van Themaat, VerLoren P., "The Internal Powers of the Community and the Union", in Jan Winter, Deirdre Curtin, Alfred Kellermann and Bruno de Witte (eds), *Reforming the Treaty on European Union*, 1996, Kluwer Law International, 249-263.
- Thompson, Janna, "Community Identity and World Citizenship", in Daniele Archibugi, David Held and Martin Köhler (eds), *Re-imagining Political Community: Studies in Cosmopolitan Democracy*, 1998, Polity Press, 179-197.

- Tietje, Christian, "The Changing Legal Structure of International Treaties as an Aspect of an Emerging Global Governance Architecture", in 42 *German Yearbook of International Law* 1999, 26-55.
- Tomuschat, Christian, "The Human Rights Committee's Jurisprudence on Article 26 – A Pyrrhic Victory?", in Nisuke Ando (ed.), *Towards Implementing Universal Human Rights: Festschrift for the Twenty-Fifth Anniversary of the Human Rights Committee*, 2005, Martinus Nijhoff Publishers, 225-247.
- Toth, A.G., "The European Union and Human Rights: The Way Forward", in 34 *Common Market Law Review* 1997, 491-529.
- Trachtman, Joel P., "The Constitutions of the WTO", in 17 *European Journal of International Law* 2006, 623-646.
- Troper, Michel, "The Logic of Justification of Judicial Review", in 1 *International Journal of Constitutional Law* 2003, 99-121.
- Tully, James, "The Unfreedom of the Moderns in Comparison to their Ideals of Constitutional Democracy", in 65 *Modern Law Review* 2002, 204-228.
- Tunkin, Grigory, "The Legal Bases of International Organization Action", in René-Jean Dupuy (ed.), *A Handbook on International Organizations*, 1988, Martinus Nijhoff Publishers, 261-276.
- Tunkin, Grigory, "International Law in the International System", in 147 *Recueil des Cours* 1975, 1-218.
- Tuori, Kaarlo, "The Failure of the EU's Constitutional Project", in 3 *No Foundations: Journal of Extreme Legal Positivism* 2007, 37-48.
- Tuori, Kaarlo, *Critical Legal Positivism*, 2002, Ashgate Publishing.
- Turner, Jenia Iontcheva, "Nationalizing International Criminal Law", in 41 *Stanford Journal of International Law* 2004, 1-53.
- Tyagi, Yogesh, "The Conflict of Law and Policy on Reservations to Human Rights Treaties", in 71 *British Yearbook of International Law* 2000, 181-258.
- Unger, Roberto Mangabeira, *False Necessity: Anti-necessitarian Social Theory in the Service of Radical Democracy*, 2001 (2nd ed.), Verso.
- Unger, Roberto Mangabeira, "The Critical Legal Studies Movement", in 96 *Harvard Law Review* 1983, 561-675.
- Unger, Roberto Mangabeira, *Law in Modern Society: Toward a Criticism of Social Theory*, 1976, The Free Press.
- Usher, John, *EC Institutions and Legislation*, 1998, Longman.
- Vandenhole, Wouter, *The Procedures Before the UN Human Rights Treaty Bodies: Divergence or Convergence?*, 2004, Intersentia.
- Vignes, Daniel, "The Impact of International Organizations on the Development and Application of Public International Law", in Ronald St. J. Macdonald and Douglas M. Johnston (eds), *The Structure and Process of International Law: Essays*

- in Legal Philosophy, Doctrine and Theory*, 1983, Martinus Nijhoff Publishers, 809-855.
- de Visscher, Charles, *Theory and Reality in Public International Law* (translated by P.E. Corbett), 1968, Princeton University Press.
- Voitovich, Sergei, *International Economic Organizations in the International Legal Process*, 1994, Martinus Nijhoff Publishers.
- Waldron, Jeremy, "Is the Rule of Law an Essentially Contested Concept (in Florida)?", in 21 *Law and Philosophy* 2002, 137-164.
- Waldron, Jeremy, "Precommitment and Disagreement", in Larry Alexander (ed.), *Constitutionalism: Philosophical Foundations*, 2001, Cambridge University Press, 271-299.
- Waldron, Jeremy, "Judicial Review and the Conditions of Democracy", in 6 *Journal of Political Philosophy* 1998, 335-355.
- Walker, Neil, "Taking Constitutionalism Beyond the State", in 56 *Political Studies* 2008, 519-543.
- Walker, Neil, "Constitutionalising Enlargement, Enlarging Constitutionalism", in 9 *European Law Journal* 2003, 365-385.
- Walker, Neil, "Postnational Constitutionalism and the Problem of Translation", in J.H.H Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State*, 2003, Cambridge University Press, 27-54.
- Walker, Neil, "The EU and the WTO: Constitutionalism in a New Key", in Gráinne de Búrca and Joanne Scott (eds), *The EU and the WTO: Legal and Constitutional Issues*, 2001, Hart Publishing, 31-57.
- Walker, Neil, "Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe", in Gráinne de Búrca and Joanne Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?*, 2000, Hart Publishing, 9-30.
- Watson, Geoffrey R., "Constitutionalism, Judicial Review, and the World Court", in 34 *Harvard International Law Journal* 1993, 1-45.
- Weiler, Joseph, "On the Power of the Word: Europe's Constitutional Iconography", in 3 *International Journal of Constitutional Law* 2005, 173-190.
- Weiler, Joseph, "Conclusions", in *Europe 2004: Le Grand Debat*, conference in Brussels (15 and 16 October 2001), 2002 (available at <http://europa.eu.int/comm/governance/>).
- Weiler, Joseph, *The Constitution of Europe: "Do the New Clothes have an Emperor?" and other Essays on European Integration*, 1999, Cambridge University Press.
- Weiler, Joseph, "Epilogue: The European Courts of Justice: Beyond 'Beyond Doctrine' or the Legitimacy Crisis of European Constitutionalism", in Anne-Marie Slaughter, Alec Stone Sweet and Joseph Weiler (eds), *The European Court*

- and National Courts – Doctrine and Jurisprudence*, 1998 (reprinted 2000), Hart Publishing, 365-391.
- Weiler, Joseph and Eisgruber, Christopher (eds), *Altneuland: The EU Constitution in a Contextual Perspective*, *Jean Monnet Working Paper* 5/2004.
- Weiler, Joseph and Haltern, Ulrich R., “Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz”, in Anne-Marie Slaughter, Alec Stone Sweet and Joseph Weiler (eds), *The European Court and National Courts – Doctrine and Jurisprudence*, 2000, Hart Publishing, 331-364.
- Weiler, Joseph and Wind, Marlene, “Introduction: European Constitutionalism Beyond the State”, in J.H.H Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State*, 2003, Cambridge University Press, 1-4.
- Weinrib, Ernest, “The Intelligibility of the Rule of Law”, in Allan C. Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology*, 1987, Carswell, 97-123.
- de Wet, Erika, “The Emergence of International and Regional Value Systems as Manifestation of the Emerging International Constitutional Order”, in 19 *Leiden Journal of International Law* 2006, 611-632.
- de Wet, Erika, “The International Constitutional Order”, in 55 *International and Comparative Law Quarterly* 2006, 51-76.
- de Wet, Erika, *The Chapter VII Powers of the United Nations Security Council*, 2004, Hart Publishing.
- Weatherill, Stephen, “Competence”, in Bruno de Witte (ed.), *Ten Reflections on the Constitutional Treaty of Europe*, 2003, European University Institute, 45-66.
- Wendt, Alexander, “A Comment on Held’s Cosmopolitanism”, in Ian Shapiro and Casiano Hacker-Cordon (eds), *Democracy’s Edges*, 1999, Cambridge University Press, 127-133.
- Werner, Wouter, “The Never-ending Closure: Constitutionalism and International Law”, in Nicholas Tsagourias (ed.), *Transnational Constitutionalism: International and European Models*, 2007, Cambridge University Press, 329-367.
- Wheatley, Steven, “The Security Council, Democratic Legitimacy and Regime Change in Iraq”, in 17 *European Journal of International Law* 2006, 531-551.
- White, Nigel D., “The Will and Authority of the Security Council after Iraq”, in 17 *Leiden Journal of International Law* 2004, 645-672.
- White, Nigel D., “The World Court, the WHO, and the UN System”, in Niels M. Blokker and Henry G. Schermers (eds), *Proliferation of International Organizations: Legal Issues*, 2001, Kluwer Law International, 85-109.
- White, Nigel D., *The Law of International Organizations*, 1996, Manchester University Press.

- Wiener, Antje, "Editorial: Evolving Norms of Constitutionalism", in 9 *European Law Journal* 2003, 1-13.
- Wilkins, Burleigh, "International Human Rights and National Discretion", in 6 *Journal of Ethics* 2002, 373-382.
- Wincott, Daniel, "Democracy and Constitutionalism in the European Community", in Zenon Bankowski and Andrew Scott (eds), *The European Union and its Order: The Legal Theory of European Integration*, 1999, Blackwell Publishing, 113-130.
- de Witte, Bruno, "Sovereignty and European Integration: The Weight of Legal Tradition", in Anne-Marie Slaughter, Alec Stone Sweet and Joseph Weiler (eds), *The European Court and National Courts – Doctrine and Jurisprudence*, 2000, Hart Publishing, 278-304.
- de Witte, Bruno, "Direct Effect, Supremacy, and the Nature of the Legal Order", in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law*, 1999, Oxford University Press, 177-213.
- Wolfram, Karl, Mützelburg, Bernd and Witschel, Georg, "Article 109", in Bruno Simma (ed., in collaboration with Hermann Mosler, Albrecht Randelzhofer, Christian Tomuschat and Rüdiger Wolfrum), *The Charter of the United Nations, a Commentary*, 2002 (2nd ed.), Oxford University Press, 1364-1372.
- Young, Kirsten A., *The Law and Process of the U.N. Human Rights Committee*, 2002, Transnational Publishers.
- de Zayas, Alfred, "The Examination of Individual Complaints by the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights", in Gudmundur Alfredsson, Jonas Grimheden, Bertrand G. Ramcharan, and Alfred de Zayas (eds), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller*, 2001, Kluwer Law International, 67-121
- Zemanek, Karl, "General Course on Public International Law", in 266 *Recueil des Cours* 1997, 9-336.
- Zemanek, Karl, "Peace-keeping or Peace-making?", in Niels Blokker and Sam Muller (eds), *Towards More Effective Supervision by International Organizations: Essays in Honour of Henry G. Schermers* (vol. I), 1994, Martinus Nijhoff Publishers, 29-47.
- Zurn, Christopher F., *Deliberative Democracy and the Institutions of Judicial Review*, 2007, Cambridge University Press.
- Zurn, Christopher F., "Deliberative Democracy and Constitutional Review", in 21 *Law and Philosophy* 2002, 467-542.
- Zürn, Michael, "Democratic Governance Beyond the Nation-State: The EU and Other International Institutions", in 6 *European Journal of International Relations* 2000, 183-221.

International Treaties

- 1944 Articles of Agreement of the International Bank for Reconstruction and Development (22 July 1944), in force 27 December 1945, 2 *United Nations Treaty Series* 134.
- 1945 Charter of the United Nations (26 June 1945), in force 24 October 1945, 1 *United Nations Treaty Series* xvi.
- 1945 Statute of the International Court of Justice (26 June 1945), in force 24 October 1945, 1 *United Nations Treaty Series* xvi.
- 1945 Constitution of the Food and Agriculture Organization of the United Nations (16 October 1945), in force 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).
- 1946 Constitution of the World Health Organization (22 July 1946), in force 7 April 1948, 14 *United Nations Treaty Series* 185.
- 1947 Convention of the World Meteorological Organization (11 October 1947), in force 23 March 1950, 77 *United Nations Treaty Series* 143.
- 1948 Convention on the International Maritime Organization (6 March 1948), in force 17 March 1958, 289 *United Nations Treaty Series* 48.
- 1948 Charter of the Organization of American States (30 April 1948), in force 13 December 1951, 119 *United Nations Treaty Series* 3.
- 1948 Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948), in force 12 January 1951, 78 *United Nations Treaty Series* 277.
- 1954 International Agreement concerning the International Institute of Refrigeration (1 December 1954), in force (provisionally) 1 December 1954, 826 *United Nations Treaty Series* 191.
- 1955 Articles of Agreement of the International Finance Corporation (11 April 1955), in force 20 July 1956, 264 *United Nations Treaty Series* 117.
- 1960 Articles of Agreement of the International Development Association (26 January 1960), in force 24 September 1960, 439 *United Nations Treaty Series* 249.
- 1966 International Covenant on Civil and Political Rights, United Nations General Assembly Resolution 2200A (XXI) (16 December 1966), in force 23 March 1976, 999 *United Nations Treaty Series* 171.
- 1966 Optional Protocol to the International Covenant on Civil and Political Rights, United Nations General Assembly Resolution 2200A (XXI) (16 December 1966), in force 23 March 1976, 999 *United Nations Treaty Series* 302.

- 1967 Convention establishing the World Intellectual Property Organization (14 July 1967), in force 26 April 1970, 828 *United Nations Treaty Series* 3
- 1969 Vienna Convention on the Law of Treaties (23 May 1969), in force 27 January 1980, 1155 *United Nations Treaty Series* 331.
- 1976 Agreement establishing the International Fund for Agricultural Development (13 June 1976), in force 30 November 1977, 1059 *United Nations Treaty Series* 191.
- 1979 Constitution of the United Nations Industrial Development Organization (8 April 1979), in force 21 June 1985, 1401 *United Nations Treaty Series* 3.
- 1980 Agreement establishing the Common Fund for Commodities (27 June 1980), in force 19 June 1989, 1538 *United Nations Treaty Series* 3.
- 1985 Convention establishing the Multilateral Investment Guarantee Agency (11 October 1985), in force 12 April 1988, 1508 *United Nations Treaty Series* 99.
- 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (21 March 1986), not in force, 25 *International Legal Materials* 543.
- 1992 Treaty establishing the European Community (Maastricht consolidated version) (7 February 1992), in force 1 November 1993, OJ C 224/1 (31 August 1992).
- 1992 Convention of the International Telecommunications Union (22 December 1992), in force 1 July 1994, in International Telecommunication Union, *Collection of the Basic Texts of the International Telecommunication Union adopted by the Plenipotentiary Conference* 2007.
- 1994 Agreement Establishing the World Trade Organization (15 April 1994), in force 1 January 1995, 1867 *United Nations Treaty Series* 3.
- 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes, annex 2 to the Agreement Establishing the World Trade Organization (15 April 1994), in force 1 January 1995, 1869 *United Nations Treaty Series* 401.
- 1994 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), in force 28 July 1996, 33 *International Legal Materials* 1309.
- 1998 Rome Statute of the International Criminal Court, UN Doc. A/CONF 183/9 (17 July 1998), in force 1 July 2002, 2187 *United Nations Treaty Series* 90.
- 2001 Treaty establishing the European Community (Nice consolidated version) (26 February 2001), in force 1 February 2003, OJ C 325/33 (24 December 2002).

- 2001 Treaty on European Union (Nice consolidated version) (26 February 2001), in force 1 February 2003, OJ C 325/5 (24 December 2002).
- 2007 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (13 December 2007), not in force, OJ C 306/01 (17 December 2007).
- 2008 Treaty on European Union (Lisbon consolidated version) (30 April 2008), not in force, OJ C 115/01 (9 May 2008).
- 2008 Treaty on the Functioning of the European Union (Lisbon consolidated version) (30 April 2008), not in force, OJ C 115/47 (9 May 2008).

Case Law of International Courts and Treaty Bodies

Permanent Court of International Justice

- 1922 *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.
- 1922 *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.
- 1923 *Nationality Decrees issued in Tunis and Morocco (French zone)* (Advisory Opinion, 7 February 1923), PCIJ Publications 1923, Series B, no. 4.
- 1923 *Case of the S.S. "Wimbledon"* (Judgment, 17 August 1923), PCIJ Publications 1923, Series A, no. 1
- 1926 *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.
- 1927 *The Case of the S.S. "Lotus"* (Judgment, 7 September 1927), PCIJ Publications, Series A, no. 10.
- 1927 *Jurisdiction of the European Commission of the Danube between Galatz and Braila* (Advisory Opinion, 8 December 1927), PCIJ Publications 1927, Series B, no. 14.
- 1928 *Jurisdiction of the Courts of Danzig* (Advisory Opinion, 3 March 1928), PCIJ Reports 1928, Series B, no. 15.
- 1928 *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.
- 1931 *Railway Traffic between Lithuania and Poland (Railway Sector Landwarów-Kaisiadorys)* (Advisory Opinion, 15 October 1931), PCIJ Publications 1931, Series A/B, no. 42.

International Court of Justice

- 1948 *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.
- 1949 *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion, 11 April 1949), ICJ Reports 1949.
- 1950 *Competence of the General Assembly for the Admission of a State to the United Nations*, (Advisory Opinion, 3 March 1950), ICJ Reports 1950.
- 1950 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, (Second Phase), (Advisory Opinion, 18 July 1950), ICJ Reports 1950.
- 1951 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, (Advisory Opinion, 28 May 1951), ICJ Reports 1951.
- 1954 *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, (Advisory Opinion, 13 July 1954), ICJ Reports 1954.
- 1960 *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, (Advisory Opinion, 8 June 1960), ICJ Reports 1960.
- 1962 *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)* (Advisory Opinion, 20 July 1962), ICJ Reports 1962.
- 1963 *Northern Cameroons (Cameroons v United Kingdom)* (Preliminary Objections, Judgment, 2 December 1963), ICJ Reports 1963.
- 1966 *South West Africa cases (Ethiopia v South Africa; Liberia v South Africa)*, Second Phase (Judgment, 18 July 1966), ICJ Reports 1966.
- 1971 *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.
- 1974 *Nuclear Tests Case (Australia v France)*, (Judgment, 20 December 1974), ICJ Reports 1974.
- 1990 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)*, Application for Permission to Intervene by the Government of Nicaragua, (Order, 28 February 1990), ICJ Reports 1990.
- 1996 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion, 8 July 1996), ICJ Reports 1996.
- 1996 *Legality of the Threat or Use of Nuclear Weapons*, (Advisory Opinion, 8 July 1996), ICJ Reports 1996.
- 2001 *LaGrand Case (Germany v. United States of America)* (Judgment, 27 June 2001), ICJ Reports 2001.

European Court of Justice

- 1954 Case C-8/55, *Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community*, [1954-1956] European Court Reports 291.
- 1960 Case C-20/59, *Government of the Italian Republic v High Authority of the European Coal and Steel Community*, [1960] European Court Reports 325.
- 1960 Case C-25/59, *Kingdom of the Netherlands v High Authority of the European Coal and Steel Community*, [1960] European Court Reports 787.
- 1963 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.
- 1964 Case C-6/64, *Flaminio Costa v ENEL*, [1964] European Court Reports 585.
- 1971 Case C-22/70, *Commission of the European Communities v Council of the European Communities*, [1971] European Court Reports 263.
- 1973 Case C-6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, [1973] European Court Reports 215.
- 1976 Case C-3,4 and 6/76, *Cornelis Kramer and others*, [1976] European Court Reports 1279.
- 1977 Opinion 1/76, *Draft Agreement Establishing a European Laying-up Fund for Inland Waterway Vessels*, [1977] European Court Reports 741.
- 1986 C-294/83, *Partie Ecologiste – ‘Les Verts’ v European Parliament*, [1986] European Court Reports 1339.
- 1987 Cases C-281, 283-5, 287/85, *Federal Republic of Germany and others v Commission of the European Communities*, [1987] European Court Reports 3203.
- 1994 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.
- 1996 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.
- 2000 Case C-376/98, *Federal Republic of Germany v European Parliament and Council of European Union*, [2000] European Court Reports I-8419.
- 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 Luxembourg, Republic of Austria, and Federal Republic of Germany*, [2002] European Court Reports I-9427.

- 2008 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).

European Commission and Court of Human Rights

- 1961 *Austria v Italy*, Application No. 788/60 (11 January 1961), 4 Yearbook of the European Convention on Human Rights (1961).
- 1983 *Temeltasch v Switzerland*, Application No. 9116/80 (5 May 1982), 31 European Commission of Human Rights, Decisions and Reports (1983).
- 1988 *Belilos v Switzerland*, Judgment of 29 April 1988, European Court of Human Rights, Series A, No. 132 (1988).

Inter-American Court of Human Rights

- 1982 *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82 (24 September 1982), Inter-American Court of Human Rights, Series A, No. 2.

International Criminal Tribunal for the Former Yugoslavia

- 1995 *Prosecutor v Duško Tadić*, ICTY, Trial Chamber, Decision on the Defence Motion on Jurisdiction (rule 73), Case No. IT-94-1 (10 August 1995).
- 1995 *Prosecutor v Duško Tadić*, ICTY, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72 (2 October 1995).
- 1997 *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, Case No. IT-95-14-AR (29 October 1997).

International Criminal Tribunal for Rwanda

- 1997 *Prosecutor v Joseph Kanyabashi*, ICTR, Decision on the Defence Motion on Jurisdiction, Case No. ICTR-96-15-T (18 June 1997).

Human Rights Committee

- 1979 *Moriana Hernández Valentini de Bazzano et al. v Uruguay*, Human Rights Committee, Communication No. 5/1977, Views (15 August 1979), UN Doc. CCPR/C/7/D/1977.

- 1988 *C.L.D. v France*, Human Rights Committee, Communication No. 228/1987, Decision on admissibility (18 July 1988), UN Doc. CCPR/C/43/D/439/1990.
- 1996 *Charles E. Stewart v. Canada*, Human Rights Committee, Communication No. 538/1993, Views (16 December 1996), UN Doc. CCPR/C/58/D/538/1993.
- 1999 *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.
- 2000 *Piandiong et al. v The Philippines*, Human Rights Committee, Communication No. 869/1999, Views (19 October 2000), UN Doc. CCPR/C/70/D/869/1999.

Decisions and Documents of International Organizations

United Nations

- 1950 United Nations General Assembly Resolution 377(V), *Uniting for Peace*, 3 November 1950 (UN Doc. A/1775).
- 1956 United Nations General Assembly Resolution 1000 (ES-1), 5 November 1956 (UN Doc. A/RES/1000).
- 1999 United Nations Security Council Resolution 1272, 25 October 1999 (UN Doc. S/RES/1272).
- 2000 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).
- 2001 United Nations Security Council Resolution 1373, 28 September 2001 (UN Doc. S/RES/1373).
- 2004 United Nations Security Council Resolution 1540, 28 April 2004 (UN Doc. S/RES/1540).
- 2005 Report of the Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc. A/59/2005 (21 March 2005).
- 2008 *Peacekeeping Operations: Principles and Guidelines*, United Nations Department of Peacekeeping Operations, Department of Field Support, 2008.

European Union

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

- 1988 Resolution of the European Parliament on the Democratic Deficit in the EC (17 June 1988), OJ C 187/229 (1988).
- 2001 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.
- 2002 The European Convention, 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).
- 2002 The European Convention, Final Report of the Working Group V, CONV 375/01/02 (4 November 2002).
- 2003 The European Convention, *Draft Treaty establishing a Constitution for Europe*, CONV 850/2003 (18 July 2003), OJ C 310/01 (16 December 2004).
- 2005 Standard Eurobarometer 64: Public Opinion in the European Union, December 2005 (available at http://ec.europa.eu/public_opinion/index_en.htm).

North Atlantic Treaty Organization

- 1999 *The Alliance's Strategic Concept*, Approved by the 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).

Decisions and Documents of other International Bodies

Human Rights Committee

- 1983 Seventh Annual Report of the Human Rights Committee, United Nations General Assembly Official Records, 38th session, Suppl. No. 40 (UN Doc. A/38/40) (1983).
- 1989 Thirteenth Annual Report of the Human Rights Committee, United Nations General Assembly Official Records, 44th session, Suppl. No. 40 (UN Doc. A/44/40) (1989).
- 1993 Seventeenth Annual Report of the Human Rights Committee, United Nations General Assembly Official Records, 48th session, Suppl. No. 40 (UN Doc. A/48/40) (1993).
- 1994 Rules of Procedure of the Human Rights Committee, UN Doc. CCPR/C/3/Rev.3 (1994), 24 May 1994.

- 1994 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.
- 1995 Concluding Observations of the Human Rights Committee: United States of America, UN Doc. CCPR/C/79/Add.50 (1995).
- 1995 Observations of States parties under article 40, paragraph 5, of the Covenant, United States of America, 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).
- 1995 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).
- 1996 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).
- 1997 Human Rights Committee, Report on the Informal Meeting on Procedures, UN Doc. CCPR/C/133 (22 December 1997).
- 2000 Concluding Observations of the Human Rights Committee: Kuwait, UN Doc. CCPR/CO/69/KWT (2000).

International Law Commission

- 1966 Report of the International Law Commission on the work of its Eighteenth Session, 4 May-19 July 1966, Official Records of the General Assembly, 21st session, Suppl. No. 9, UN Doc. A/CN.4/191 (1966).
- 1987 Yearbook of the International Law Commission, 1987 (vol. I) (UN Doc. A/CN.4/SER.A/1987).
- 1987 International Law Commission, Relations between States and International Organizations, in 1 *Yearbook of the International Law Commission* 1987 (UN Doc. A/CN.4/SER.A/1987).
- 1996 Second Report on Reservations to Treaties, by Mr. Alain Pellet, Special Rapporteur, International Law Commission, 48th session, 6 May-26 July 1996, UN Doc. A/CN.4/477/Add.1 (1996).
- 1997 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, 52nd session, Suppl. No. 10, UN Doc. A/52/10 (1997).

- 2006 Eleventh Report on Reservations to Treaties, by Mr. Alain Pellet, Special Rapporteur, International Law Commission, 58th session, 1 May-9 June and 3 July-11 August 2006, UN Doc. A/CN.4/574 (2006).
- 2006 Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Reports of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, International Law Commission, 58th session, 1 May-9 June and 3 July-11 August 2006, UN Doc. A/CN.4/L.682 (2006).
- 2007 International Law Commission, Meeting with Human Rights Bodies (15 and 17 May 2007), 59th session, 7 May-8 June and 9 July-10 August 2007, UN Doc. ILC (LIX)/RT/CRP.1 (2007).

Other Bodies

- 1993 The International Helsinki Federation for Human Rights, General Recommendations of the Working Group (1993), reproduced in Ariel Bloed, Liselotte Leicht, Manfred Nowak and Allan Rosas (eds), *Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms*, 1993, Martinus Nijhoff Publishers, 319-324.
- 1996 International Law Association, Committee on International Human Rights Law and Practice, First Report, Helsinki Conference 11-17 August 1996.
- 2004 Commission on Human Rights, Final Working Paper on Reservations to Human Rights Treaties, by Ms. Françoise Hampson, UN Doc. E/CN.4/Sub.2/2004/42 (19 July 2004).
- 2006 Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body, Fifth Inter-Committee Meeting of the Human Rights Bodies (Geneva, 19-21 June 2006), UN Doc. HRI/MC/2006/2 (22 March 2006).

Other International Material

- 1945 Report of the Committee IV/2 of the United Nations Conference on International Organization, (12th June 1945), Doc. 933, IV/2/42 (13 *United Nations Conference on International Organization* 1945).
- 2005 Kuala Lumpur Declaration on the Establishment of the ASEAN Charter, Kuala Lumpur (12 December 2005), available at <http://www.aseansec.org/18030.htm>.

National Legal Material

Belgium

- 1994 The Constitution of Belgium, Coordinated text of 14 February 1994 (English translation by the Belgian House of Representatives, October 2007).

Germany

- 1993 *Brunner et al. v The European Union Treaty*, German Constitutional Court, Judgment of 12 October 1993, BVerfGE 89, 155 (reproduced in 31 *Common Market Law Review* 1994, 251-262).

United States of America

- 1819 *McCulloch v The State of Maryland et al.*, United States Supreme Court, 1819, 17 US (4 Wheat.) 316.

Index

- Abstract consent, 92, 93, 94, 192, 285
- Accountability, 121, 161, 167, 170, 182, 183, 186, 195, 196, 205, 207, 244, 251, 252, 253, 255
- Amendment, 18, 52, 89, 92, 221, 222, 239, 260, 262
- ASEAN, 9
- CFC, 1, 134, 136, 139, 166
- Civil society, 5, 190, 200, 201, 206, 258, 259, 262, 265
- Committee on Economic, Social, and Cultural Rights, 262
- Committee on the Rights of the Child, 262
- Concert of Europe, 41, 42
- Consensualism, 76, 77, 90, 93, 94, 95, 104, 189, 285
- Constituency, 78, 119, 181, 187, 195, 199, 262, 275
- Cosmopolitanism, 46, 121, 199, 200, 201, 245, 263, 264
- Counter-majoritarian problem, 181, 182, 183, 184, 185, 187
- De-constitutionalization, 113
- Deliberation, 20, 90, 114, 121, 161, 185, 188, 193, 194, 195, 197, 201, 240, 248, 250, 251, 252, 253, 254, 255, 256, 257, 260, 261, 265, 269, 271, 283, 285
- Demos*, 196, 197, 198, 199, 201, 202, 203, 204, 205, 207, 208, 265
- Diplomacy, 43, 119, 120, 170
- Division of powers, 6, 119, 163, 164
- Domestic jurisdiction clauses, 98, 100, 101, 125, 126, 276
- EC, 2, 6, 7, 12, 22, 23, 26, 39, 49, 51, 52, 61, 64, 65, 66, 67, 68, 71, 72, 74, 89, 93, 98, 99, 100, 101, 102, 103, 104, 114, 115, 116, 117, 118, 119, 123, 124, 125, 133, 136, 137, 143, 144, 145, 148, 152, 155, 164, 167, 168, 169, 175, 176, 178, 179, 180, 183, 187, 188, 189, 194, 205, 263, 279
 - Article 5, 10, 49, 52, 69, 88, 98, 99, 152, 258
 - Direct effect, 115, 116, 119, 179
 - Parallelism, 51, 61, 63, 64, 66, 68
 - Supranational character, 19, 23, 81, 89, 100, 116, 117, 132, 164, 178, 183, 184, 194
 - Supremacy, 116, 163, 179
- ECHR, 51, 68, 71, 203, 216
 - ECtHR, 216, 217, 253
- ECSC, 61, 67, 114
- EEC, 61, 62, 114, 115, 116
- Effet utile*, 48, 49, 62, 64, 66, 70, 107, 128, 129, 147, 282
- EU, 6, 7, 12, 14, 19, 23, 24, 27, 38, 39, 51, 65, 74, 78, 80, 81, 87, 107, 111, 114, 117, 119, 123, 124, 152, 161, 164, 178, 179, 182, 186, 187, 188, 191, 194, 196, 198, 200, 201, 202, 203, 204, 205, 207, 208, 211, 241, 263, 265, 279
 - Council of the European Union, 22, 64, 65, 89, 136, 182, 192
 - ECJ, 7, 51, 52, 62, 63, 65, 67, 68, 70, 71, 83, 89, 97, 99, 114, 116, 117, 145, 146, 150, 155, 167, 169, 178, 179, 180, 182, 186, 188
 - European Commission, 46, 47, 48, 68, 74, 87, 97, 182, 206, 216, 227
 - European Convention, 6, 7, 51, 69, 107, 169, 217, 227
 - European Parliament, 22, 52, 64, 65, 69, 117, 118, 175, 182, 194, 195, 198
 - Laeken Declaration, 7, 74
 - Treaty of Lisbon, 6, 52, 69, 175
- EURATOM, 61, 114
- FAO, 1, 135, 136, 137, 167
- Federalist Papers, 26
- Formalism, 30, 33, 35, 170, 182, 286
- Fragmentation, 19, 24, 228, 243, 245, 283
- GATT, 9, 88, 118
- Global administrative law, 196
- Government by judges, 181
- Hegemony, 33, 42, 184, 204, 207, 272
- Human rights court, 243, 244, 245, 252, 254, 257, 272
- IBRD, 133, 136, 137, 166, 174, 184
- ICAO, 1, 167
- ICC, 12, 183, 184, 250, 251, 252, 259
- ICCPR
 - General Comment 24, 16, 17, 18, 19, 216, 217, 218, 219, 220, 222, 225, 232, 234, 235, 237, 238, 240, 244, 246, 260, 270, 271, 281, 282, 283, 285
 - Meeting of the States Parties, 259, 260, 261, 262

Optional Protocol, 10, 11, 16, 17, 215, 216, 217, 218, 219, 221, 242, 243, 253, 258, 260, 271
 ICJ, 1, 3, 4, 13, 28, 29, 49, 50, 51, 53, 55, 56, 57, 58, 59, 60, 61, 62, 66, 67, 70, 71, 72, 74, 75, 81, 83, 85, 86, 88, 89, 94, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 124, 128, 129, 133, 136, 137, 138, 139, 140, 143, 144, 145, 146, 148, 150, 153, 154, 155, 166, 167, 171, 172, 173, 174, 177, 178, 180, 181, 183, 185, 187, 211, 221, 223, 227, 233, 234, 238, 240, 250, 261
 Article 38, 74, 75, 110, 250
 ICTR, 173
 ICTY, 29, 59, 85, 86, 91, 136, 137, 172, 173
 IDA, 134, 136, 166
 IEA, 110
 IFAD, 134, 136, 166
 IFC, 134, 136, 166
 ILC, 18, 21, 88, 103, 138, 216, 220, 222, 223, 224, 226, 227, 228, 229, 231, 236, 238, 240, 241, 242, 270, 271
 ILO, 1, 43, 44, 45, 47, 70, 91, 92, 167, 184
 IMO, 1, 135, 136, 167
 Imperialism, 54, 255
 Inherent powers, 39, 67, 82, 83, 84, 85, 86, 87, 137, 155, 219, 221, 237, 275
 Institutional law, 9, 11, 38, 41, 71, 73, 79, 143, 285
 International Institute of Refrigeration, 139, 144
 International Seabed Authority, 133, 136
 International Tin Council, 129
 International trade law, 119, 120
 Interpretive community, 34, 35
 ITU, 1, 43, 135, 136, 167
 Justiciability, 163, 170, 171, 172, 173, 174, 180
Kompetenz-Kompetenz, 137, 168, 177, 178, 179, 219
 League of Nations, 45, 46, 53, 91
 Legal personality, 7, 12, 13, 14, 15, 47, 55, 80, 81, 82, 84, 111, 133
 MIGA, 1, 134, 136
 NAFTA, 194, 196
 NATO, 89, 130, 131, 191
 NGO, 8, 78, 121, 200, 201, 204, 209, 258, 259, 262
 OAS, 147
 OECD, 9, 110
 ONUC, 59
 PCIJ, 13, 25, 43, 44, 45, 46, 47, 48, 49, 50, 53, 56, 57, 67, 70, 91, 97, 98, 100, 101, 116, 176, 177
 Policy-making, 74, 167, 175, 176, 181, 198
 Politicization, 159, 164, 174, 175, 179, 206, 243, 249, 254, 271, 279
 Polity, 165, 195, 198, 199, 207, 208
 Principle of conferral, 52, 153, 157
 Principle of speciality, 50, 51, 94, 145, 153, 154, 157
 Procedural rules, 146, 174, 175, 176
 Proportionality, 99, 100, 118, 119, 126, 133
Raison d'être, 143, 146, 227, 234
 Reciprocity, 17, 116, 118, 218, 221, 224, 225, 226, 227, 232, 236, 244, 270, 281
 Representativity, 121, 123, 124, 168, 177, 181, 182, 183, 185, 186, 193, 195, 196, 198, 199, 200, 201, 204, 205, 208, 209, 244, 250, 256, 257, 258, 259, 260, 261, 262, 271
 Rule of law, 5, 7, 19, 37, 113, 117, 118, 143, 161, 162, 163, 164, 165, 166, 168, 169, 170, 171, 178, 179, 187, 205, 210, 211, 249
 SEA, 64, 66
 Self-contained regimes, 228
 Skepticism, 30, 32, 33
 Sovereignty, 41, 42, 43, 44, 45, 46, 47, 49, 71, 73, 77, 96, 97, 98, 112, 115, 116, 118, 126, 132, 143, 151, 152, 156, 157, 158, 168, 173, 180, 199, 271, 277
 Subsidiarity, 69, 71, 98, 99, 100, 101, 126, 207, 247
 Transparency, 7, 121, 186, 195, 196, 198, 205, 253, 254, 259
 Treaty analogy, 91, 92, 93, 94
Ultra vires, 60, 67, 142, 143, 146, 149, 150, 224, 239, 253
 UN
 Administrative Tribunal, 58, 59
 Article 2(7), 98, 221
 Article 39, 2, 129, 131, 172, 173, 175, 176
 Brahimi Panel report, 5
 Commission on Human Rights, 265
 General Assembly, 3, 4, 5, 17, 18, 19, 22, 55, 58, 59, 82, 94, 101, 105, 110, 123, 124, 135, 145, 146, 151, 172, 185, 215, 216, 233, 260
 Peace building, 5
 Peace enforcement, 4, 131

Peacekeeping, 2, 3, 4, 5
 UNOSOM, 4
 UNPROFOR, 4
 Security Council, 2, 3, 4, 5, 22, 23, 24,
 25, 26, 34, 59, 60, 73, 77, 78, 91, 92,
 93, 122, 123, 124, 129, 130, 131, 145,
 146, 148, 149, 152, 167, 168, 172,
 173, 174, 180, 183, 185, 192, 200,
 211
 Uniting for Peace, 3
 UNCTAD, 110
 UNEF, 3, 59
 UNESCO, 1, 92, 167
 UNIDO, 110, 135, 136, 167
 Universal human rights, 11, 247, 256,
 263, 264, 265, 266, 268, 272, 283, 284
 UPU, 1, 42, 167
 Vienna Convention on the Law of
 Treaties, 9, 16, 17, 18, 28, 88, 101, 102,
 110, 122, 128, 218, 219, 223, 224, 225,
 226, 228, 229, 230, 239, 270, 272, 273,
 281, 283
 Article 31, 102, 103, 229, 230, 250, 261,
 281
 Subsequent practice, 94, 103, 148, 229,
 230, 281
 Teleological interpretation, 28, 50, 55,
 67, 104, 105, 106, 107, 108, 109, 111,
 112, 126, 149, 150, 211
 Textual interpretation, 104, 105, 106,
 107, 108, 109, 126, 211
 WHO, 1, 49, 50, 51, 68, 70, 71, 94, 104,
 108, 136, 137, 139, 145, 153, 154, 159,
 167, 172, 194, 196, 240
 WIPO, 1, 135, 136, 167
 WMO, 1, 92, 136, 167
 World War II, 53, 112
 WTO, 19, 23, 28, 38, 68, 74, 81, 82, 89, 94,
 99, 102, 118, 119, 120, 123, 124, 125,
 163, 164, 165, 168, 169, 174, 176, 183,
 188, 189, 192, 194, 195, 196, 199, 200,
 202, 206, 207, 208, 209, 212, 241
 Dispute settlement, 23, 24, 74, 75, 81,
 99, 102, 119, 120, 164, 166, 168, 169,
 176, 190, 207, 262



Viljam Engström

Understanding Powers of International Organizations

2009

The exercise of legal powers is the most concrete way by which international organizations make their presence felt. For this reason the question of powers is also often a source of disagreement. In international institutional law powers of organizations are commonly constructed through the attributed powers and implied powers doctrines. Even a discussion on constitutionalism in organizations has become increasingly popular. This study explores the function of the doctrines of attributed powers, implied powers, and constitutionalism in a debate on powers of organizations. A separate part is also devoted to discussing the doctrines in the context of the Human Rights Committee.

Åbo Akademi University Press
ISBN 978-951-765-465-4
978951765465-4



9789517 654654