4

The foundations of powers of organizations

Introduction

International organizations, it is generally agreed, can only work on the basis of their legal powers. Thus, organizations have acquired certain powers to found their actions on, and once they act beyond those powers, their acts may be declared invalid, at least in theory.[1] To give a simple example: it is reasonably clear that a predominantly economic organization such as the OECD will not be able to enter into a military pact; if and when it does, the act by which such a pact was concluded will, if all works according to plan, be invalidated.[2]

That raises the fundamental question of where organizations derive their powers from, and, if anything, it is this precise question which has boggled our minds for decades and is likely to continue to do so.[3] Surprisingly, analysis as well as conceptualization has rarely been forthcoming; most authors content themselves with making a few general remarks on

[1] It is a different matter altogether whether the relations between organizations and their members can fruitfully be studied by looking at the distribution of powers alone; there is some ground for the proposition that more refined concepts may be needed, as it may well be the case that in properly exercising a member-state power, the member-state nonetheless encroaches upon a power held by the organization. See the pathbreaking analysis by Gráinne de Búrca, 'Fundamental Human Rights and the Reach of EC Law' (1993) 13 *Oxford Journal of Legal Studies*, 283–319. For further exploration, see Jan Klabbers, 'Restraints on the Treaty-making Powers of Member-States Deriving from EU Law: Towards a Framework for Analysis', in Enzo Cannizaro (ed.), *The European Union as an Actor in International Relations* (The Hague, 2002), 151–75.

[2] As a jurisprudential matter, the above is in conformity with the notion of a legal power as a power of decision, rather than with the traditionally popular notion of a legal power as the power to exercise a choice. Compare Andrew Halpin, 'The Concept of a Legal Power', (1996) 16 *Oxford Journal of Legal Studies*, 129–52.

[3] The dominant explanation is along the lines of a delegation of powers from the member-states. For a thoughtful discussion, see Bruno de Witte, 'Sovereignty and European Integration: The Weight of Tradition', in Anne-Marie Slaughter *et al.* (eds.), *The European Court & National Courts: Doctrine and Jurisprudence* (Oxford, 1998), 277–304.

the powers of organizations before moving on to their specific topic of investigation. Monographs are, in other words, scarce, as are scholarly articles on the topic.[4]

Fortunately, though, there is a wealth of court decisions on the powers of organizations, going back to the early 1920s. Questions as to origins and scope of the powers of international organizations[5] arose already in one of the first requests for an advisory opinion submitted to the Permanent Court of International Justice, in 1922. The International Labour Organization, set up with the task of regulating labour relations, wondered whether its powers extended to regulation of the conditions of labour in the agricultural sector.[6] The Court had yet to be convinced of the principled significance of the request, and remarked merrily that no issues of substance were involved: 'The Question before the Court relates simply to the competency of the International Labour Organisation as to agricultural labour. No point arises on this question as to the expediency or the opportuneness of the application to agriculture of any particular proposal.'[7] And, seemingly not quite aware of the principled significance of the request, the Court proceeded:

> 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.[8]

Thus, the question of the proper scope of the powers of international organizations was regarded, in 1922, as merely a matter of interpretation, and

[4] At least in a general sense. There are plenty of works describing the powers of various organizations, but fairly little that is conceptual or analytical in outlook.

[5] A different question is that of the powers of specific organs of the organization in question. As Köck reminds us, here too the doctrine of implied powers may have a role to play. See Heribert Franz Köck, 'Die "implied powers" der Europäischen Gemeinschaften als Anwendungsfall der "implied powers" internationaler Organisationen überhaupt', in Karl-Heinz Böckstiegel *et al.* (eds.), *Völkerrecht, Recht der internationalen Organisationen, Weltwirtschaftsrecht: Festschrift für Ignaz Seidl-Hohenveldern* (Cologne, 1988), 279–99.

[6] *Competence of the ILO to Regulate the Conditions of Labour of Persons Employed in Agriculture*, advisory opinion, [1922] Publ. PCIJ, Series B, nos. 2 & 3.

[7] *Ibid.*, p. 21. [8] *Ibid.*, p. 23.

interpretation of the terms used in their context led the Court to the conclusion that under the constitution of the ILO, the organization was indeed empowered to regulate labour relations in the agricultural sector.[9]

On the same day, the Court gave another advisory opinion, again relating to the powers of the ILO in the field of agriculture, and again upholding the idea that the scope of powers must 'depend entirely upon the construction to be given to the same treaty provisions from which, and from which alone, that Organisation derives its powers'.[10] In this case, the Court eventually held that interpretation pointed to the absence of a power on the part of the ILO to discuss the modes of agricultural production *per se*, when such modes did not relate to the specific points regarding which the ILO had been given powers.

Four years later, in an opinion on the power to regulate incidentally, as a by-product of protecting employees, the activities of employers, the Court once more sought to find an answer in simply interpreting the pertinent provisions of the Treaty of Versailles by which the ILO had been called into existence.[11] Interestingly, though, under reference to its advisory opinion no. 2 and the relationship between an organization's powers and national sovereignty (which some states had urged the Court to consider),[12] the Court sternly remarked that it was not to be engaged in such flights of theoretical fancy:

> So, in the present instance, without regard to the question whether the 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, in interpreting Part XIII [of the Versailles Treaty], is called upon to perform a judicial function, and, taking the question actually before it in connection with the terms of the Treaty, there appears to be no room for the discussion and application of political principles or social theories, of which, it may be observed, no mention is made in the Treaty.[13]

[9] The main argument against ILO competence had been the occasional reference to 'industry' or derivations thereof. The Court held that such terms would 'in their primary and general sense' include agriculture, while acknowledging that they have also a more limited meaning. The context, then, made clear that the general and primary meaning was intended. *Ibid*., p. 35.

[10] *Competence of the ILO to Examine Proposals for the Organisation and Development of Methods of Agricultural Production*, advisory opinion, [1922] Publ. PCIJ, Series B, nos. 2 & 3, pp. 53–5.

[11] *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer*, advisory opinion, [1926] Publ. PCIJ, no. 13.

[12] See above, text accompanying notes 4–7.

[13] Advisory opinion no. 13, p. 23.

Thus, the Permanent Court's first attempts to address the relatively new phenomena of international organizations were, so to speak, still a bit hesitant. Those first cases indicate that the Court was not yet fully aware of the special nature (whichever special nature that may be) of organizations, and tried to answer questions relating to their operation simply by looking at the constituent documents as everyday treaties. No doctrine emerged yet out of those first opinions: legal questions were simply to be answered by reference to the established canons of treaty interpretation, rather than political principles or social theories.[14]

The doctrine of attributed powers

A year and a half after opinion no. 13 on the ILO's power to regulate incidentally the activities of employers, however, the Court would formulate a general rule. Having had some time to reflect and having become aware of the circumstance that organizational documents go beyond the mere contractual,[15] the Court presumably reached the conclusion that to answer every request for an advisory opinion by simply pointing to interpretation would, eventually, create uncertainty, and it must have thought the time ripe to offer some guidance. Confronted with the question of the precise scope of the powers of the European Commission for the Danube, which had been created by a so-called Definitive Statute, the Court answered famously that: '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.'[16] The Court therewith formulated what would later be called the principle of speciality or the principle of attribution, and despite the fact that the Court used the word 'functions' rather than 'powers', it is clear that the Court's opinion relates to 'powers' at any rate.

[14] See more generally Jan Klabbers, 'The Life and Times of the Law of International Organizations' (2001) 70 Nordic JIL, 287–317.

[15] The distinction between various sorts of treaties started to gain ground in the contemporary literature. Thus, McNair, in an influential article, specifically distinguished 'treaties akin to charters of incorporation' from contractual and law-making treaties, and from conveyance-like treaties: A. D. McNair, 'The Function and Differing Legal Character of Treaties' (1930), reproduced in Lord McNair, *The Law of Treaties* (Oxford, 1961), 739–54.

[16] *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, advisory opinion, [1926] Publ. PCIJ, Series B, no. 14, p. 64.

The idea that organizations can only work on the basis of powers specifically attributed to them squares nicely with the prevailing positivist mode of thinking in international law, a mode that, moreover, acquired judicial recognition around the same time as the principle of attribution was first formulated. Especially in the 1927 *Case of the SS Lotus*,[17] the Permanent Court had made clear that, as a matter of principle, restrictions on sovereign freedoms are not lightly to be presumed. Instead, the rules of international law emanate from the free will of sovereign states, as the Court famously held,[18] and from there it is only a small step to proclaiming that organizations must remain within the powers conferred upon them. After all, if rules cannot be thrust upon states against their will, then organizations too must function in accordance with the will of the member-states. It is no coincidence then that the idea was popular in particular (but not exclusively) in the classic Soviet doctrine on international organizations, which held in a nutshell that organizations should not circumvent states and their sovereign rights.[19]

The idea behind attribution is, quite simply, that international organizations, and their organs, can only do those things for which they are empowered. Perhaps the clearest expressions hereof are to be found in Articles 5 and 7 (formerly Articles 3b and 4, respectively) TEC. Article 5 (ex-Article 3b) not only contains the famous principle of subsidiarity, but starts by saying that '[t]he Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein'.[20]

That sounds unequivocal enough: clearly, the Community can only do those things which the member-states have told it that it can do. The same holds true for the separate institutions of the EC. Article 7 (ex-Article 4) TEC specifies: 'Each institution shall act within the limits of the powers conferred upon it by this Treaty.'

Again, a clear and unequivocal statement limits the things which the various organs can do, and in different wordings similar provisions may be found in the constituent treaties of other international organizations.

[17] *Case of the SS Lotus*, [1927] Publ. PCIJ, Series A, no. 10 [18] *Ibid*., p. 18.

[19] The classic statement of the Soviet position is Grigory I. Tunkin, 'The Legal Nature of the United Nations' (1966/II) 119 RdC, 1–67.

[20] Article 5 was only inserted by means of the Maastricht Treaty (in 1991), but the underlying principle was already recognized by the EC Court in some of its earliest decisions. See, e.g., case 20/59, *Italy* v. *High Authority* [1960] ECR 325, and case 25/59, *The Netherlands* v. *High Authority* [1960] ECR 355.

Thus, the organs of Ecowas 'shall perform the functions and act within the limits of the powers conferred upon them by or under' the constitution and protocols thereto;[21] the legal capacity of the FAO is limited to the powers granted by the constituent document;[22] and the Charter of the OAS provides that the OAS Permanent Council shall act within 'the limits of the Charter', while the General Assembly of the OAS is urged to exercise its powers 'in accordance with the provisions of the Charter'.[23]

The UN Charter too promises member-states that the UN shall not intervene in matters which are essentially within their domestic jurisdiction (Article 2, para. 7). Admittedly, this is not as clear as Article 5 (ex-Article 3b) TEC,[24] and the Permanent Court of International Justice has indeed held already in 1923 that the question of domestic jurisdiction is 'an essentially relative' question, which develops in accordance with international relations generally.[25] Nonetheless, at any rate in the literature, Article 2, para. 7 UN is often invoked as an expression of the constitutional limit of activities that the organization may legitimately engage itself within.[26]

Moreover, Article 24, para. 2 UN provides that the Security Council shall act in accordance with the purposes and principles of the UN Charter (those are broad, though), and Article 11 *juncto* Article 10 UN make clear that there are some limits to the powers of the General Assembly.

Its obvious attractions notwithstanding, the principle of attribution encounters at least two problems, one more or less theoretical, the other far more practical. Theoretically (or hypothetically, perhaps), if the notion of attribution is taken to its extreme, then organizations are little more than the mouthpieces of their member-states, and, if that is so, then their very *raison d'être* comes into question. If an organization's powers are limited to those powers explicitly granted, then the organization remains, in effect,

[21] Article 4, para. 2 Ecowas. [22] Article XVI, para. 1 FAO.

[23] Articles 80 and 52 OAS, respectively.

[24] Moreover, an opinion of the Office of Legal Affairs, answering a member-state's request to supervise elections, seems to suggest that the scope of the very notion of domestic jurisdiction may be altered upon the will of the UN: 'the Secretary-General does not feel he could properly involve the United Nations Secretariat as an observer in a national election without authorization for such involvement being granted by a competent deliberative organ of the United Nations'. See UNJY (1984), pp. 178–9.

[25] *Nationality Decrees Issued in Tunis and Morocco (French Zone)*, advisory opinion, [1923] Publ. PCIJ, Series B, no. 4, p. 24.

[26] Thus, e.g., Jochen A. Frowein, 'Are There Limits to the Amendment Procedures in Treaties Constituting International Organisations?' in Gerhard Hafner *et al.* (eds.), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern in Honour of His 80th Birthday* (The Hague, 1998), 201–18, esp. p. 209.

merely a vehicle for its members rather than an entity with a distinct will of its own, and if it is merely a vehicle for its member-states, then it is difficult to see why the particular form of an organization was chosen by those members over, say, a series of occasional conferences, or perhaps even the simple appointment of a joint public relations officer.

An objection with far more fundamental consequences in practice, however, is that while the notion of attribution may be a nice point of departure when it comes to discussing the powers of international organizations, organizations are usually held to be dynamic and living creatures, in constant development, and it is accepted that their founding fathers can never completely envisage the future.[27]

The practical problems this may bring with it are nicely illustrated by the recollection of a former adviser to the UN on peace-keeping (peace-keeping not being explicitly referred to in the Charter):

> 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, I suppose. But the work had to be done. Because I was 'independent', I could not receive a salary from the permanent UN budget, either. For those many years, my salary was in fact paid as part of the expenses of one or another peace-keeping operation that was in progress.[28]

The constituent documents of organizations necessarily come with gaps, simply because the drafters cannot be expected to think of every possible contingency, and because it may be expected, perhaps even hoped, that internal dynamics will move the organization forward. In those circumstances, the organization should not be limited by those powers granted to it upon its creation; instead, the organization must be allowed some flexibility. It must be allowed certain powers which, while not expressly granted, are granted by implication. And it is this thought, the so-called doctrine of implied powers, which is at the heart of most of the talk about the powers of international organizations. There is (or at least there used to be) virtual agreement amongst statesmen and scholars alike that implied powers exist and are, generally, a good thing. The main disagreement concerning the doctrine of implied powers relates to the justification of specific implied

[27] See, e.g., Alan Dashwood, 'The Limits of European Community Powers' (1996) 21 ELR, 113–28, p. 125.

[28] Lauri Koho, 'Military Advisor in the Office of the Secretary-General', in Kimmo Kiljunen (ed.), *Finns in the United Nations* (Helsinki, 1996), 105–33, p. 112.

powers, something which in turn hinges on the exact basis on which the implication takes place.

The doctrine of implied powers

A pivotal role in the development of the law of international organizations has been played by the doctrine of implied powers, first developed to come to terms with power struggles between central government and local authorities in the context of federal states.[29] Most observers appear to agree that there are at least two ways in which implied powers can be, and have been, found to exist.[30] The first, and relatively innocent version, holds that implied powers flow from a rule of interpretation which itself holds that treaty rules must be interpreted in such a way as to guarantee their 'effet utile':[31] they must be interpreted so as to guarantee their fullest effect.

This particular version of the implied powers doctrine has already been embraced by the Permanent Court of International Justice in its advisory opinion of 1928 on *Interpretation of the Greco-Turkish Agreement of December 1st, 1926*.[32] The Greco-Turkish agreement had created a mixed commission and laid down, in cases where the mixed commission could not reach agreement, that resort to arbitration might be had. It failed to identify the party or parties entitled to resort to arbitration however, and the Court found that 'from the very silence of the article on this point, 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'.[33] Thus, the Court found a power to be implied in the existence of another, explicit power, in much the same way as it is sometimes said that treaties generally may contain implied clauses.[34]

[29] See generally Joachim Becker, *Die Anwendbarkeit der Theorie von den implied powers im Recht der Europäischen Gemeinschaften* (Münster, 1976), esp. 1–43.

[30] So already Bernard Rouyer-Hameray, *Les compétences implicites des organisations internationales* (Paris, 1962). See also Christine Denys, *Impliciete bevoegdheden in de Europese Economische Gemeenschap: Een onderzoek naar de betekenis van 'implied powers'* (Antwerp, 1990), distinguishing between instrumental and substantive implied powers.

[31] Note, though, that the doctrine is not itself, as is sometimes suggested, a rule of interpretation. Instead, it serves to justify using a particular interpretative device. Compare also Becker, *Die Anwendbarkeit*, p. 53.

[32] [1928] Publ. PCIJ, Series B, no. 16 [33] *Ibid*., p. 20.

[34] But with a twist: usually, implied treaty clauses serve to protect state sovereignty. Thus, it has been argued for a long time that treaties contain an implied *clausula rebus sic stantibus*: treaties are binding, but only as long as the circumstances of their conclusion remain present. Various

The Court of Justice of the (then) European Community for Coal and Steel approached the matter in similar fashion, in the classic *Fédéchar* case.[35] At issue was whether the Community's executive body, the High Authority, had the power to fix prices as part of a recognized power to regulate the market. The applicant had argued that no such power existed, simply because it remained unmentioned in the Treaty establishing the European Coal and Steel Community. The Court, however, held differently, and argued that indeed the power to regulate implied the power to fix prices, for without such power, the regulatory power would be deprived of its 'effet utile': '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'.[36]

The Court of Justice of (later) the European Community essentially upheld the same principle in a decision on the power of the Commission to take binding decisions as a consequence of its power to promote close co-operation between the Community's member-states in the field of social policy. The Court found the specific power to be implied in the more general power, again on the basis of effective interpretation. The Court was, however, quick to point out that the substantial scope of the power was not too grand: since Article 118 (now Article 137) TEC does not give the Commission wide 'stimulation' powers, it cannot give the Commission wide 'decision-making' powers either.[37]

Perhaps this rather careful approach to the implied powers doctrine was best formulated by Judge Green Hackworth, in his dissenting opinion to the International Court's advisory opinion in *Reparation for Injuries*. In a famous passage, Judge Hackworth wrote that '[p]owers not expressed cannot freely be implied. Implied powers flow from a grant of express powers, and are limited to those that are "necessary" to the exercise of powers expressly granted.'[38]

Judge Hackworth thus disagreed with the majority in *Reparation for Injuries*, and held that the majority used an unduly wide version of the implied powers doctrine by relating the power to be implied not to an express

other examples are listed in Sir Gerald Fitzmaurice, 'Fourth Report on the Law of Treaties' (1959/II) YbILC, pp. 46–7, and 70–4.

[35] Case 8/55, *Fédération Charbonnière de Belgique* v. *High Authority* [1954–6] ECR 292.

[36] *Ibid*., p. 299.

[37] Joined cases 281, 283–5 and 287/85, *Germany & others* v. *Commission* [1987] ECR 3203.

[38] *Reparation for Injuries Suffered in the Service of the United Nations*, advisory opinion, [1949] ICJ Reports 174, Hackworth J dissenting, p. 198.

provision, but rather to the functions and objectives of the organization concerned. As the majority had put it:

> Under international law, the Organisation 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 of law was applied by the Permanent Court of International Justice to the International Labour Organisation in its Advisory Opinion No. 13 of July 23rd, 1926, and must be applied to the United Nations.[39]

Several aspects of the passage just quoted require comments. First of all, it is debatable whether the precedent invoked by the Court was actually on point. In the Opinion mentioned, the Permanent Court, as illustrated above, made a point of not making a point. It affirmed that it was engaged in answering a question of law, and its question of law turned out to be, in effect, a question of interpretation.[40] The Permanent Court did not find any powers to exist by necessary implication only; and it most certainly did not derive such powers as it did find to exist solely from the functions or objectives of the ILO's constituent document.

Second, the yardstick created by the Court ('essential to the performance of its duties') is by its very nature a highly flexible one, and very much dependent for concretization on the eye of the beholder. Yet, who actually is the beholder in any given case? And who determines who shall be the beholder?[41] Reasonable people can and do differ concerning what they hold to be essential for the performance of an organization's duties, and while such disagreement is in all probability inevitable (or rather, perhaps: precisely because it is inevitable), the criterion of 'essential to the performance of duties' is not conducive to the creation of legal certainty.

Nonetheless, it is this wider version that is often thought to prevail, and there are indeed other judicial decisions which seem to point in the same direction. One of them is the 1954 advisory opinion of the International Court of Justice in the *Effect of Awards* case.[42] The Court was asked, *inter*

[39] *Reparation for Injuries*, majority opinion, p. 182 (reference omitted).

[40] See on this point also Krzysztof Skubiszewski, 'Implied Powers of International Organizations', in Yoram Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Dordrecht, 1989), 855–68, esp. pp. 863–4.

[41] See also H. W. A. Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989, Part 8' (1996) 67 BYIL, 1–73, p. 32.

[42] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, [1954] ICJ Reports 47.

alia, whether the General Assembly of the United Nations had the power to establish an administrative tribunal which itself would be capable of taking binding decisions, and the Court answered in the affirmative.

Under explicit reference to its earlier opinion in *Reparation for Injuries*, the Court held that the power of the General Assembly to create an administrative tribunal arose 'by necessary intendment' out of the United Nations Charter.[43] The Court reasoned that since the United Nations has the expressed aim of promoting freedom and justice for individuals, and since disgruntled staff members may be precluded from bringing suit against the UN in domestic courts due to possible jurisdictional immunities, it followed that, as the Court put it, 'the power to establish a tribunal, to do justice as 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'.[44] Here then, somewhat curiously perhaps, the well-being of the organization at large (the ostensible justification for implying a power) is reformulated in terms of the efficient working of one of its organs, the Secretariat. If anything, that even extends the scope of the implied powers doctrine: if it is not just the well-being of the organization but also that of its individual organs which must be taken into consideration in determining implied powers, then there is virtually no end to the powers that can be implied. The Court must have felt that, somehow, its reasoning on this point required some bolstering, and added that the power to create an administrative tribunal derived in the end from the necessity 'to do justice as between the Organization and the staff members'.

In other opinions too the Court paid heed to the notion that some of the UN's powers could have been granted to it by implication. Thus, in *Certain expenses*, it formulated the rule that: 'when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization'.[45] In other words: powers of the UN (and presumably those of other organizations as well, although the Court limited itself, wisely, to the UN) may be implied if they can be hooked up to the purposes of the organization; the conception is so

[43] *Ibid*., p. 57. [44] *Ibid*., p. 57.

[45] *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, advisory opinion, [1962] ICJ Reports 151, p. 168 (italics in original).

broad as to have inspired some authors to launch a concept of inherent powers.[46]

Another example sometimes mentioned[47] is the 1971 *Namibia* opinion,[48] in which the Court found that the General Assembly had the power to terminate South Africa's Mandate over South West Africa. Yet, while it is true that the Court did not point to an explicit power grant, it goes perhaps too far to explain this by the notion of implied powers. The Court built its entire reasoning in this opinion on the idea that the Assembly had succeeded to the supervisory role of the League of Nations; its power to terminate the Mandate rested upon this idea of succession, as the League's power to terminate was beyond debate.[49]

The decision of the Court of Justice of the European Community in *ERTA*[50] is also often offered in support of the wider version of the implied powers doctrine. Faced with the question as to whether the European Community was competent to conclude an agreement relating to road transport with third parties, the Court answered affirmatively, on the basis of the fact that since the Community was internally competent to legislate in matters of road transport, such internal competence must have an external counterpart in order not to be circumvented: 'the Member-States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those [internal] rules'.[51]

The reason why the *ERTA* decision is usually mentioned in support of a wide conception of implied powers resides in the fact that the Court ultimately sought a justification not so much in the 'effet utile' of the 'internal' transport provisions, but rather in the objectives of the Treaty and the duty of Community solidarity. As the Court put it:

> Under Article 3 (e), the adoption of a common policy in the sphere of transport is especially mentioned amongst the objectives of the Community.

[46] See below, pp. 75–8.

[47] So, e.g., Nigel D. White, 'The UN Charter and Peacekeeping Forces: Constitutional Issues' (1996) 3 *International Peacekeeping*, 43–63, p. 45.

[48] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, advisory opinion, [1971] ICJ Reports 16.

[49] *Ibid*., esp. paras. 102–3. Whether the Court's theory of succession was itself plausible is a different matter altogether.

[50] Case 22/70, *Commission* v. *Council (European Road Transport Agreement)* [1971] ECR 273.

[51] *Ibid*., para. 17.

> Under Article 5, the Member-States are required on the one hand to take all appropriate measures to ensure fulfillment of the obligations arising out of the Treaty or resulting from action taken by the institutions and, on the other hand, to abstain from any measure which might jeopardize the attainment of the objectives of the Treaty.
>
> If these two provisions are read in conjunction, it follows that to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member-States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope.[52]

Teleological though the reasoning clearly is, it is doubtful whether it is inspired by the same type of thinking as was demonstrated by the International Court of Justice in *Reparation for Injuries* or *Effect of Awards*. Instead of simply deriving a power from the functions or objectives of the treaty, the *ERTA* court derives it from what may loosely be termed a requirement of legal unity. The EC does not, strictly speaking, need an external transport power in order to function effectively or to attain its objectives. One could very well imagine that the EC would be none the worse off had the external power rested with the individual member-states, on condition that they do nothing to endanger the *acquis communautaire*. The basis of implication is, rather, to safeguard the unity of Community law.

Either way, the implied powers doctrine has proved immensely seductive,[53] appealing as it does to both our instrumentalist sentiments (we tend to think that law is made for a purpose, and thus the reaching of this purpose ought to be facilitated[54]) and our internationalist sentiments. The notion of attribution, by contrast, has generally been seen as the handmaiden of sovereignty, and sovereignty is, in the eyes of many international lawyers, a 'bad word'.[55]

[52] *Ibid*., paras. 20–2.

[53] See also Jerzy Makarczyk, '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* (The Hague, 1984), 501–19, esp. p. 505, arguing that there are few provisions of constituent documents which are not or cannot be used to enhance the organization's room to operate.

[54] The insight derives from John Griffiths, 'Is Law Important?' (1979) 54 *New York University Law Review*, 339–74. For an illustration, explicitly defending implied powers on grounds of instrumentalist logic (acceptance of a goal implies acceptance of the means to reach that goal), see Köck, 'Implied powers'.

[55] This quip was famously made by Louis Henkin, *International Law: Politics and Values* (Dordrecht, 1995), p. 8.

Nonetheless, there is another side to this, and it largely reflects the attractions and repulsions of both doctrines in reverse. Thus, while sovereignty is to some a bad word, to others it is an empowering word: the notion of sovereign statehood enables, indeed delimits, political communities, within which people can map out a common existence together. In this framework, international organizations are seen as potential intruders, capable of disturbing political balances within the state, and undermining democratic procedure. Hence, their powers must be kept in check, as any extension of powers (by implication or otherwise) will be at the expense of the position of some group in society. Thus, if an organization claims a power to occupy itself with topic X, then the parliament of member-state A loses some of its powers to deal with the topic, and in the worst-case scenario (which comes true all too often), judicial review by the courts of state A is relinquished as well without being replaced by review or control within the organization. This may lead to more effective international governance, but not necessarily to greater democracy or legitimacy, and may undermine the legal position of individual citizens.[56] The attractions of the implied powers doctrine are, in the end, the mirror image of what we dislike about the attribution doctrine, whereas the advantages of the attribution doctrine are the attractions of implied powers in reverse.

Reconciling the two doctrines

It will be clear that there is a certain tension between the doctrine of attribution on the one hand, and the doctrine of implied powers on the other. The doctrine of attribution finds its rationale, ultimately, in the manifest will of the founders: they have found it necessary to grant their organization certain powers, and that will must be respected. It stresses considerations of state sovereignty rather than the interests of the international community at large. From the same consideration it follows that powers not expressly granted are the result of intentional omissions, and here too then the intention (in this case, to withhold a power) must be respected. On this view, then, taken to the extreme, what you see is what you get; there is no room in the reasoning to imply any powers.

[56] See Jan Klabbers, 'Over het leerstuk der impliciete bevoegdheden in het recht der internationale organisaties', in Hanneke Steenbergen (ed.), *Ongebogen recht. Opstellen aangeboden aan prof. dr. H. Meijers* (The Hague, 1998), 1–11.

The standard reply is, however, that drafters cannot be omniscient, and that there may be circumstances where the organization would need a power not expressly granted, simply to be able to function effectively, and because such a power is simply necessary, it may well be implied. After all, so the argument runs, had the founders only thought of it, they would no doubt have granted the particular power without further ado. This argument, then, starts from the different premise of the needs of the organization (or perhaps international society at large), rather than the exigencies of state sovereignty.

Still, with this standard reply the reasoning is also based on, ultimately, the intentions of the drafters: had they only realized the need for a certain power, they would no doubt have intended their creation to be so endowed. And indeed this is the standard way in which the International Court of Justice at least has habitually justified any finding of implied powers, however broad: implied powers are usually said to have arisen 'by necessary intendment'[57] and to have, their implicit nature notwithstanding, been 'conferred' upon the organization.[58]

Perhaps a better way out is to limit the applicability of the doctrine of implied powers, and it is this that Judge Hackworth had in mind when dissenting from the majority in *Reparation for Injuries*. In his view, what mattered for an implied power was that there had to be an explicit power from which the implied power could, quite literally, be implied. The mere 'necessity' of some power was insufficient, if only because necessity as such is a blank cheque.

A similar idea is laid down in Article 300 (formerly Article 235) of the EC treaty: 'If action by the Community should prove necessary to attain . . . one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall . . . take the appropriate measures'.

The wording of Article 300 TEC oozes the same spirit as Judge Hackworth's dissent: if a power is necessary for the objectives of the EC, then Article 300 can be used. Thus, there is no need to go around creating new powers with the help of the implied powers doctrine: Article 300 can simply be used, which automatically means that the implied powers doctrine should be of limited application only. And indeed, due to the existence of a dynamic clause such as Article 300, the implied powers doctrine in Community law has been used mainly in the field of the Community's

[57] This is the formula used in *Effect of Awards*.
[58] This is the verb used in *Reparation for Injuries*.

external relations,[59] probably for the reason (in itself telling enough) that the connection between external action and the objectives of the Community (as required by Article 300 TEC) is sometimes not so clear as to allow the member-states by unanimity to expand the Community's powers.

Inherent powers?

In order to overcome the drawbacks of both the attribution doctrine (often thought to be too rigid) and the implied powers doctrine (sometimes thought to be not rigid enough), some writers have proposed a third source of powers. Already in the 1960s, some such conception was launched by Finn Seyersted, as an adjunct to his 'objective theory' of personality of international organizations.[60] Organizations, on this view, once established, would possess inherent powers to perform all those acts which they need to perform to attain their aims, not due to any specific source of organizational power (note, incidentally, how this underlines the fundamental identity between attribution and implication), but simply because they inhere in organizationhood. As long as acts are not prohibited in the organization's constituent documents, they must be deemed legally valid.[61]

While Seyersted's views, on both legal personality and inherent powers, were for a long time deemed somewhat exotic (while immensely respected, he never gained much of a following), the idea of inherent powers has recently been revived in the context of both the UN and the EC.

As far as the UN goes, the inherent powers doctrine has been revived out of dissatisfaction with the implied powers doctrine. Calling the latter a 'sham', Nigel White points out that the search for a basis of implication is often cumbersome, rarely completely convincing and, in fact, not even necessary: where organizations have inherent powers, there is no need to resort to contrived findings of powers being implied by founders of organizations.[62]

[59] Useful illustrations are I. MacLeod, I. D. Hendry & Stephen Hyett, *The External Relations of the European Communities* (Oxford, 1996), and Dominic McGoldrick, *International Relations Law of the European Union* (London, 1997).

[60] See the previous chapter.

[61] See Finn Seyersted, *Objective International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend upon the Conventions Establishing Them?* (Copenhagen, 1963), p. 28.

[62] Nigel White, 'Constitutional Issues'. The word 'sham' appears in the article's abstract, p. 43; I have assumed White's authorship thereof.

The advantages of the inherent powers doctrine are twofold, as White explains. First, it is thoroughly functional: it helps organizations reach their aims without being 'hidebound by the legal niceties of its individual, and often obscurely drafted, provisions'.[63] Second, it makes legal control easier in that it reduces the number of legal controls on the organization's functioning to two: first, the act must aim to achieve the organization's purpose, and second, it may not be expressly prohibited.[64]

In the context of Community law, the inherent powers notion is relaunched by Alan Dashwood, largely out of a growing sense of unease from viewing the external relations powers of the EC as being almost exclusively based on implied powers. After all, if the implied powers doctrine is taken seriously, this would mean that the drafters of the EC Treaty were keen on granting the EC external powers, had every intention to endow the EC with external powers, but never bothered to write those into the treaty, with the exception of specific powers in the field of commercial policy and, perhaps, the power to conclude association agreements (which says little about the substantive fields those may or may not cover).[65] Such a conception is indeed not entirely plausible perhaps: it takes a leap of faith to find such a wide array of powers implied despite the absence of any specific grant.

Analytically unsatisfactory as the implied powers doctrine may be, it is not immediately obvious that an inherent powers doctrine would be more plausible. One serious drawback (which also attaches to its spiritual cousin, the objective theory of personality) is that it possibly goes against the wishes of the drafters. Indeed, ironically, a finding that a specific act is not expressly prohibited in a constituent document (and thus must be deemed permitted, under the inherent powers doctrine) may always be countered by the argument that if not expressly prohibited, it may have been prohibited by implication.

Thus, instead of arguing that an action was lawful because it was based on an implied power, the tables might turn so as to argue that the action was unlawful because it was not in conformity with an implied prohibition. The only way to overcome this possibility is by completely ignoring the

[63] *Ibid*., p. 48. [64] *Ibid*.

[65] Compare Dashwood, 'The Limits'; see also Alan Dashwood, 'Implied External Competence of the EC', in Martti Koskenniemi (ed.), *International Law Aspects of the European Union* (The Hague, 1998), 113–23, and, for a reformulated version, Alan Dashwood & Joni Heliskoski, 'The Classic Authorities Revisited', in Alan Dashwood & Christophe Hillion (eds.), *The General Law of EC External Relations* (London, 2000), 3–19.

intentions (whether spelled out or implied) of the drafters and that, in turn, is difficult to reconcile with our usual insistence on the importance of intent.

Indeed, at the risk of engaging in semantic squabbles, the doctrine is incoherent by its insistence that a power is inherent as long as it is not expressly prohibited by the drafters: if the very notion of an inherent power is taken seriously, then whether the drafters prohibit the activity is, quite literally, irrelevant. A power that is inherent in organizationhood cannot be cast aside by founders, for if it can be set aside, then it is not, in any meaningful sense of the word, 'inherent'.[66]

Another problem with the inherent powers doctrine is that it seems to rely on a solid vision of the nature of international organizations. It is, after all, not nothing to call something 'inherent': taken seriously, this must mean that there is something in the nature of organizations which warrants the conclusion that certain things 'inhere' in them. Judging the historical record, at least it must be recognized that whatever is inherent in organizations has nonetheless kept itself from view for roughly a century and a half, until the 1990s (and even that is on the generous proposition that the doctrine has many more adherents than the ones mentioned above).

But also on a more practical level things may not be quite as clear as they seem. Thus, the test that an action must meet the requirement of being aimed at contributing to one of the purposes of the organization is, in practice, not terribly strict: there will be few activities which do not meet this requirement, in particular when the majority of the member-states support the activity as being in conformity with the organization's constituent documents.

To take a hypothetical (and admittedly wild) example: should the EC Council decide on the desirability of engaging in warfare, then there is fairly little that can be done about it as long as the Council decides so in accordance with the prescribed procedure. *In casu*, absent any specific power to engage in warfare, the procedure to follow would probably be that of Article 300 (ex-Article 235) TEC, which provides for unanimity. But if the Council is indeed unanimous on the desirability of engaging in warfare in light of its contribution to the completion of the internal market (the

[66] By way of analogy, Art. 51 of the UN Charter recognizes that states have an 'inherent' right to defend themselves; this is sometimes taken to mean they cannot do away with this right. While they may temporarily choose not to use their right of self-defence, they may always change their minds.

prerequisite mentioned in Article 300 itself), then any form of legal control is immediately exhausted. Thus, the inherent powers doctrine presumes a degree of objectivity which is no doubt unattainable (objectively, it may be difficult to see the link between warfare and the EC's purposes, but if everyone who matters sees such a link, however subjectively, then such a link exists, for all legal purposes) and, what is more, presumes an objective third party to effectuate this objectivity. It presumes, in short, an Archimedean point from which to evaluate behaviour (as well as a wise Archimedes), but such a point is, sadly perhaps, lacking.[67] The EC Court is probably the closest thing to an Archimedean institution in the law of international organizations; in other settings judicial review hardly even exists.[68]

All this is not to deny, as White correctly observes, that some of the advisory opinions of the ICJ come close to supporting what looks like an inherent powers doctrine, despite making use of the terminology of implied powers. In particular in the *Certain Expenses* opinion the reasoning pushes the bounds of the implied powers to their breaking point, or perhaps even beyond.[69] But that in itself does not vow for the correctness of the inherent powers doctrine; instead, if anything, it testifies to the uncertainties at the core of the implied powers doctrine.[70]

Implied powers under fire

The limits of, in particular, the implied powers doctrine have come to be increasingly realized during the 1990s, not just by scholarly calls to recognize the inherent powers doctrine, but also as evidenced by a few judicial

[67] Useful on this point (and many others) is Terry Nardin, *Law, Morality, and the Relations of States* (Princeton, 1983).

[68] On an optimistic note, the EC Court would probably do its best to find a way to prevent the EC from engaging in illegal (but unanimously endorsed) activities, but it would have a hard time doing so on the basis of the test prescribed by White.

[69] Compare also Nigel D. White, *The Law of International Organisations* (Manchester, 1996), p. 131.

[70] White himself has a hard time telling them apart. He seems to conflate them when speaking of peace-keeping as possibly being founded on 'implied, or perhaps more accurately, inherent, powers' ('Constitutional Issues', p. 43) and also when noting that the Security Council has a plausible 'implied or inherent power' to create peace-keeping forces (*ibid*., p. 51). Surely, if words mean anything at all, then inherent powers must be different from implied powers; the two doctrines cannot be used interchangeably at will, in particular not if implied powers depend, somehow, on a grant by the members (albeit implied) while inherent powers do not depend on a grant by the members.

decisions. While it is clear that the doctrine played a useful role when organizations were still in development, and more in particular when the very phenomenon of the international organization was still developing, it would seem that, at least in some of the more settled organizations, the doctrine has passed its heyday.

Thus, within the European Community, the Court of Justice has on several occasions refused to find the Community endowed with a certain power only by implication, and such refusals are difficult to reconcile with earlier wide-ranging applications of the doctrine. When asked whether the Community would possess exclusive competence to enter into international agreements concerning trade in services, the Court found no such power to exist, not even by implication, except where trade in services resembles trade in goods.[71] Similarly, when asked whether the Community would have the power to accede to the European Convention on Human Rights, the Court once again answered in the negative.[72] Of course, in both cases, the Court's answers are as such defensible;[73] what is striking though is the marked reluctance to find any implied powers, whereas in earlier years a finding of implied powers would have been almost a foregone conclusion.

Even more fundamentally, the Court flatly acknowledged the doctrine of attributed powers in a decision taken in October 2000 in the so-called *Tobacco Directive* case.[74] Here, the Court found, probably for the first time in its history, that the Community lacked altogether the power to engage in a certain activity (banning the advertising of tobacco products). The Community's powers, so the Court affirmed, are limited to those specifically conferred on the Community. While the Community does have the power to legislate on specific issues related to Europe's internal market, this does not mean that the Community has been given a general, possibly unlimited, power to regulate the internal market; the principle of attributed powers would not tolerate such a broad construction.[75]

[71] *Opinion 1/94 (re WTO Agreement)* [1994] ECR I-5267.

[72] *Opinion 2/94 (re European Convention on Human Rights)* [1996] ECR I-1759.

[73] At least on the point of the absence of implied powers. Whether the Court's somewhat contrived rendition (in *Opinion 1/94*) of trade in services as really concerning the movement of persons is defensible is a different question altogether.

[74] Case C-376/98, *Germany* v. *European Parliament and Council*, decision of 5 October 2000, not yet reported.

[75] *Ibid*., para. 83.

A similar trend to interpret organizational powers rather more narrowly than in the past is visible in recent decisions and opinions of the International Court of Justice. Asked for an advisory opinion by the World Health Assembly concerning the legality of nuclear weapons, the ICJ found that the World Health Organization's constitution did not grant the WHO the power to address issues concerning the legality of weapons systems.[76] The Court reasoned that, while the WHO would be abundantly empowered to deal with the effects of the use of nuclear weapons on health, its activities had no bearing on the question of legality: 'none of the functions of the WHO is dependent upon the legality of the situations upon which it must act',[77] and to the extent that the WHO is competent to address the health effects of activities, 'the competence of the WHO to deal with them is not dependent on the legality of the acts that caused them'.[78] Indeed, for the first time since the Permanent Court's opinion on the *Jurisdiction of the European Commission of the Danube*, the doctrine of attributed powers was invoked.[79]

The message, then, seems clear: the more well-established international organizations have reached the limits, at least for the time being, of what they can actually engage in. Their initial developmental stages are behind us, and now is not the time for adding new powers but instead for fulfilling their main tasks as envisaged. It is surely no coincidence that, also during the 1990s, the European Community was enriched with the notion of subsidiarity (which specifies that Community action must be justified, rather than automatic), and that, indeed, the very principle of attribution was explicitly inserted.[80] Both indicate strongly that, at least in the eyes of the member-states of the Community, the Community's expansion had gone far enough.

[76] For a brief commentary, illustrating how easy it would have been to find the WHO implicitly empowered to deal with the legality of nuclear weapons, see Pierre Klein, 'Quelques réflexions sur le principe de spécialité et la "politisation" des institutions spécialisées', in Laurence Boisson de Chazournes & Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge, 1999), 78–91.

[77] *Legality of the use by a state of nuclear weapons in armed conflict*, advisory opinion, [1996] ICJ Reports 66, para. 20.

[78] *Ibid*., para. 21.

[79] And in part defended, somewhat controversially, on the basis of the proper role of the WHO in the UN system: the UN deals with peace and security, whereas the specialized agencies deal with their own functional activities. For a critique, see Klein, 'Quelques réflexions'. See generally also C. F. Amerasinghe, 'The Advisory Opinion of the International Court of Justice in the WHO Nuclear Weapons Case: A Critique', (1997) 10 Leiden JIL, 525–39.

[80] Both can be found in Art. 5 (ex-Art. 3b) TEC.

Concluding remarks

Given the central importance of the implied powers doctrine in the law of international organizations (it helped provide a justification for pretty much any activity organizations have been involved in), it may be hypothesized that a change in our ideas on the implied powers doctrine reflects a change in the way we think of organizations generally. Or, in other words, the fact that the implied powers doctrine is losing some of its appeal, as evidenced both by judicial decisions and by scholarly writings which are keen to replace it with a new concept, may well indicate that organizations themselves are losing some of their appeal. Given the oscillation between organizations and their members, one would expect that a loss of popularity of organizations results in a gain in popularity for the state, a rediscovery of the state as a political community. This, however, is only in part correct. As will be tentatively discussed in the final chapter, states and organizations are both losing out, and that is, no matter how one thinks about the implied powers doctrine, something to express concern about.[81]

[81] This will be further developed in the final chapter, with much of the argument deriving from Jan Klabbers, 'The Changing Image of International Organizations', in Jean-Marc Coicaud & Veijo Heiskanen (eds.), *The Legitimacy of International Organizations* (Tokyo, 2001), 221–55.