9

Institutional structures

Introduction

Most international organizations possess a variety of organs, set up to perform various distinct functions and, perhaps, also to keep each other in check. Within the EC, the idea of the institutional balance as a principle behind the distribution of powers has gained some prominence, and has traditionally been honoured by the EC Court.[1] And with respect to the UN, as Martti Koskenniemi has noted, something similar may be seen:

> The Security Council should establish/maintain order: for this purpose, its composition and procedures are justifiable. The Assembly should deal with the acceptability of that order: its composition and powers are understandable from this perspective. Both bodies provide a check on each other. The Council's functional effectiveness is a guarantee against the Assembly's inability to agree creating chaos; the Assembly's competence to discuss the benefits of any policy – including the policy of the Council – provides, in principle, a public check on the Great Powers' capacity to turn the organization into an instrument of imperialism.[2]

In much the same way as state organs constitute the machinery of states, performing tasks in the name of the state,[3] so too do the organs of international organizations perform tasks in the name of the organization. Usually they lack a separate legal personality,[4] which indicates that they are not to be considered as actors in their own right.

[1] See, e.g., Case 9/56, *Meroni and others* v. *High Authority* [1957/8] ECR 133.

[2] See Martti Koskenniemi, 'The Police in the Temple. Order, Justice and the UN: A Dialectical View' (1995) 6 EJIL, 325–48, p. 339.

[3] See, e.g., Jan-Erik Lane, *Constitutions and Political Theory* (Manchester, 1996), p. 90.

[4] Within the EC, as much was confirmed by the ECJ in case C-327/91, *France* v. *Commission* [1994] ECR I-3641, where it found that an international agreement concluded by the Commission would bind the EC as a whole, despite the Commission's argument to the contrary.

While it seems to be reasonably clear that states acting together can create organizations and endow those with organs, two questions may occasionally give rise to problems. First, can organs themselves create other organs, and, if so, under what conditions? Second, what exactly is the position of member-states of the organization: are they to be considered not just as creators of the organization, but also as its organs? The latter may sound like a quaint question, but that is not what it is: it goes to the heart of the law of international organizations, in that it problematizes the relationship between the organization and its members – where the member-states help fulfil the tasks of the organization, why do we still insist on thinking in terms of organizations?

Regular organs

The European Union, created in Maastricht in late 1991, has only one formal institution: the European Council (thirteen heads of government plus the French and Finnish presidents[5]), although it is often said to be able to 'borrow' the EC's institutions.[6] The EC itself, in existence since 1952,[7] has five institutions: the Council of Ministers, the Commission, the European Parliament, the Court of Justice and, since the amendments incorporated in the Maastricht Treaty, the Court of Auditors. The EC can also boast a number of subsidiary and auxiliary organs, such as the Committee of the Regions or the Cohesion Fund. There is, moreover, a number of more or less independent bodies which are nonetheless in some way tied to the EC. Thus, monetary policy is made by the European Central Bank (a separate entity with its own personality[8]), and the European Investment Bank, similarly not an institution or organ of the EC, is envisaged in the EC Treaty,[9] and within the scope of the Community's protocol on privileges and immunities. The

[5] At least with respect to Finland, this is a function appropriated by the president against expectations. According to a former president, the idea was that Finland be represented by its prime minister. See Mauno Koivisto, *Witness to History* (London, 1997), p. 237.

[6] Thus, e.g., Ulrich Everling, 'Reflections on the Structure of the European Union' (1992) 29 CMLRev, 1053–77, esp. p. 1061.

[7] The ECSC Treaty entered into force in 1952; the EEC and Euratom were created in 1958. The present-day EU comprises these three Communities as well as two so-called 'pillars' dealing with other more or less common policies: a common foreign and security policy, and co-operation in police and judicial matters.

[8] See Art. 107 EC (formerly Art. 106). Some aspects are discussed in Chiara Zilioli & Martin Selmayr, 'The External Relations of the Euro Area: Legal Aspects' (1999) 36 CMLRev, 273–349.

[9] See Art. 266 EC (formerly Art. 198d).

EIB's independence is well illustrated by the circumstance that it is itself among the founding members of the EBRD, together with the EC.

Where the EC Treaty speaks of institutions, the United Nations Charter speaks of principal organs: Article 7, para. 1 lists six of those principal organs,[10] while Article 7, para. 2 allows for the establishment of such subsidiary organs 'as may be found necessary'. These have been of great variety, including such bodies as the International Law Commission and the Yugoslavia and Rwanda Tribunals, the various Sanctions Committees, and the Claims Compensation Commission to deal with the aftermath of the Gulf War.[11]

Organizations will generally have at least three main organs. First, they will usually have a plenary body: a body where all members meet at more or less regular intervals (once a year, or once every two or three years, occasionally once every five years). Usually, the persons composing the plenary will represent their government, but this is not necessarily the case. A well-known exception, e.g., is the ILO, whose plenary body consists half of government representatives, and half of representatives of employers and employees.[12] The latter ones should act independently from their governments.

The tasks of the plenary body are, typically, to set standards common to all, at least as far as the internal functioning of the organizations is concerned, and, where external effects are envisaged, these also usually (if not invariably) emanate from the plenary. Thus, within the EC, it is the plenary Council of Ministers that is generally endowed with legislative powers, increasingly in conjunction with the European Parliament. Within the UN, however, the powers of the plenary General Assembly are largely limited to making decisions on the internal functioning of the organization, such as determining and apportioning the budget. Indeed, in an important sense the UN lacks a legislative body.

[10] The Security Council, the General Assembly, the Economic and Social Council, the Trusteeship Council, the Secretariat and the International Court of Justice.

[11] For a fine study on the circumstances under which delegation of powers by the Security Council may lawfully take place, see Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford, 1999).

[12] Article 3, para. 1 ILO. In nominating representatives of employers and employees, so the PCIJ has held, 'the persons nominated should have been chosen in agreement with the organisations most representative of employers or workpeople, as the case may be'. See *Nomination of the Worker's Delegate for the Netherlands*, advisory opinion, [1922] Publ. PCIJ, Series B, no. 1, at 19.

Second, organizations typically have an executive body, which meets and may take decisions on shorter notice. Some of those have been granted the power to make binding decisions (the Security Council is an example[13]), whereas others are largely engaged in preparatory and executive activities. The EC Commission may largely, but not completely[14], be cited as an example of the latter.

With executive bodies, the question is usually how to compose them. The old GATT found an easy solution: its Council used to consist of those members willing to accept membership of the Council. Other organizations follow slightly more intricate procedures, which are usually based on the idea of representation, in one form or another.[15] The Security Council, for example, its five permanent members apart (who, incidentally, also represent at least an idea that was once current: the major allied powers of the Second World War), consists of group representatives according to a more or less fixed key: five African and Asian states, one from eastern Europe, two from Latin America and the Caribbean, and two from western Europe 'and others', which includes, amongst others, Canada and Australia.[16]

The idea of representation is stronger, though, in some other international organizations. For instance, the executive board of the International Monetary Fund consists of twenty-four members. Five of those are appointed by the member-states having the largest amount of quotas (i.e., money invested in the IMF). If not among those five, the two states who have loaned the largest amount of money may also appoint an executive director. Thus, in the mid-1990s, six states had an appointee on the board: USA, UK, France, Germany, Japan and Saudi Arabia.[17]

[13] But, as Alvarez notes, a certain legislative effect may well radiate from decisions applying the law. See José E. Alvarez, 'Judging the Security Council' (1996) 90 AJIL, 1–39, esp. pp. 20–2.

[14] It has the power to make binding determinations, sometimes derived directly from the Treaty, sometimes also delegated by the Council.

[15] Note that, as far as individuals go, there is support for the proposition that where they cease to be members of their national delegations they are also no longer eligible to function in executive bodies. See the *UNESCO (Constitution) case*, decided on 19 September 1949 by a special arbitral tribunal. In (1949) 16 AD, 331.

[16] The non-permanent members are elected by the General Assembly. Inability on the part of the Assembly to make up its mind does not immediately prevent the Council from functioning. See UNJY (1979), pp. 164–6.

[17] See H. G. Schermers & Niels M. Blokker, *International Institutional Law* (3rd edn, The Hague, 1995), p. 212.

The remaining eighteen members of the executive board are elected by the plenary body (the Board of Governors), and all represent groupings of some four or five states. Thus, the Italian member represents not just the interests of Italy, but also those of Greece, Portugal, Malta and San Marino.[18]

The EC Commission, for its part, consists presently of twenty individuals, appointed by the common accord of the member-states with the approval of the European Parliament.[19] The five large member-states (i.e., France, Germany, Italy, Spain and the UK) each nominate two commissioners, whereas the remaining ten members nominate one each.

Third, organizations typically possess an administrative body, a secretariat or suchlike.[20] Here, of course, there is generally little notion of actual representation, although it is scarcely a coincidence that the IMF's director traditionally hails from Europe while an American national traditionally heads the World Bank. The international civil service is usually thought to be neutral or impartial, working only for the interests of the organization as a whole. As Article 100, para. 1 of the UN Charter puts it, the staff are 'responsible only to the Organization'. The old practice of largely employing staff on loan from the host state, popular in particular before the First World War, has lost its attraction (although staff may be seconded from the member-states[21]). And there never was much attraction in Italy's 1927 law which provided that international civil servants were first screened by the government, and were required to give up their position if the government so demanded.[22] Still, while negotiating the UN Charter the Soviet Union echoed this position that only candidates approved by their national governments would qualify for UN posts; its proposal was ultimately defeated.[23]

That is not to say that secretariats, or, more particularly Secretaries-General, are necessarily passive observers performing strictly delimited

[18] *Ibid.* [19] See Art. 214 EC (formerly Art. 158).

[20] Indeed, as Claude puts it, the identity of every organization is lodged in its staff: 'The staff, in a fundamental sense, *is* the organization': Inis L. Claude, Jr, *Swords into Plowshares: The Problems and Progress of International Organization* (4th edn, New York, 1984), p. 191 (emphasis in original).

[21] On the modalities of secondment, see UNJY (1983), pp. 204–5.

[22] As reported in Stephen M. Schwebel, 'The International Character of the Secretariat of the United Nations', in his *Justice in International Law* (Cambridge, 1994), 248–96, p. 251. Schwebel seems to suggest that the practice of screening was perhaps more widespread than one may have expected.

[23] See Kurt Jansson, 'The United Nations Before and Now', in Kimmo Kiljunen (ed.), *Finns in the United Nations* (Helsinki, 1996), 33–60, p. 35.

administrative tasks.[24] Under Article 99 UN Charter, for example, the UN Secretary-General has a clear political role to fulfil, as Article 99 allows the Secretary-General to bring problems to the attention of the Security Council.[25] However, a problem is often how to play out that role, and where to find the limits. After all, it is here that the supposed neutrality of the Secretary-General may be put to the test: to bring a matter to the attention of the Council will most often be seen as already taking a stand on the political issue involved.[26]

The Secretary-General of the UN, because of the special importance of the organization, occupies something of a special place among Secretaries-General. Apart from the political powers under Article 99, it is widely accepted that the UN Secretary-General may engage in other more or less political activities as well, for example in mediating disputes between member-states.[27] The UN Charter does not provide a specific legal basis for such activities; therefore, it has been argued that such activities are allowed on the basis of customary international law, circumscribed by the specific powers of other organs.[28] In addition, it may of course also be the case that authorization flows from a decision of the General Assembly or the Security Council, or even from an agreement between disputing states.[29]

In other organizations too, administering functions are not always limited to administration pure and simple. In the EC, it is not uncommon for prominent Commission members to entertain conflict-ridden relationships

[24] For a general, if brief, overview, see Javier Pérez de Cuellar, 'The Role of the UN Secretary-General', in Adam Roberts & Benedict Kingsbury (eds.), *United Nations, Divided World* (2nd edn, Oxford, 1993), 125–42. A useful survey of the administrative tasks of the UN Secretary-General can be found in UNJY (1982), pp. 189–200. Also highly informative is Paul C. Szasz, 'The Role of the UN Secretary-General: Some Legal Aspects' (1991) 24 *New York University Journal of International Law & Politics*, 161–98.

[25] And a subtle way to influence things, as Franck notes, is to have the Office of Legal Affairs prepare legal opinions. See Thomas M. Franck, *Nation against Nation: What Happened to the UN Dream and What the US Can Do about it* (Oxford, 1985), p. 126.

[26] Compare also Stephen M. Schwebel, 'The Origins and Development of Article 99 of the Charter', in Schwebel, *Justice in International Law*, 233–47.

[27] An example is Secretary-General Pérez de Cuellar's role in the *Rainbow Warrior* dispute between New Zealand and France; his ruling of 6 July 1986 is reproduced in XIX UNRIAA, 199–215.

[28] Thus, where the Security Council bears, under the Charter, primary responsibility for peace and security, any independent acts on the part of the Secretary-General might encroach on the Council's powers. For a brief analysis, see Roberto Lavalle, 'The "Inherent" Powers of the UN Secretary-General in the Political Sphere: A Legal Analysis' (1990) 37 Neth ILR, 22–36.

[29] See, for a broad overview of the Secretary-General's activities, Thomas M. Franck & Georg Nolte, 'The Good Offices Function of the UN Secretary-General', in Roberts & Kingsbury (eds.), *United Nations, Divided World*, 143–82.

with leading politicians in the member-states, which in itself suggests that the Commission does not limit itself to mere administration. Former EC Commissioners such as Hirsch and Hallstein reportedly did not really see eye to eye with one-time French President Charles de Gaulle, a pattern repeated in the 1980s by the relationship between UK Prime Minister Margaret Thatcher and another dynamic Commission president, Jacques Delors. Indeed, the stimulating role of the Commission preparing to achieve both a single market and Economic and Monetary Union is generally acknowledged as an example of pro-active administration.[30] In a similar vein, it has been argued that the GATT Uruguay Round was only successfully concluded, in the early 1990s, because Peter Sutherland was a skilful enough Director-General to iron out any remaining rifts between the negotiating parties.[31]

The staff employed in the secretariats is usually selected on the basis of something approximating neutrality,[32] while taking adequate geographical representation into account. Thus, Article 101, para. 3 UN Charter puts it as follows: 'The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.'[33] It is clear that there may on occasion be something of a tension between the requirements of capability on the one hand, and geographical representation on the other,[34] and to some extent the peculiar outlook of the organization's senior management may be as

[30] It has been argued that the Commission's influence not only stems from its agenda-setting role, but is exercised in other ways as well. One of those ways is that, by threatening legal action before the EC Court, the Commission can persuade member-states to give in. See Susanne K. Schmidt, 'Only an Agenda Setter? The European Commission: Power over the Council of Ministers' (2000) 1 *European Union Politics*, 37–61.

[31] For an argument that personal characteristics alone are not determinative of a leadership role, see Michael G. Schechter, 'Leadership in International Organizations: Systemic, Organizational and Personality Factors' (1987) 13 *Review of International Studies*, 197–220.

[32] Within the UN, appointments are the exclusive competence of the Secretary-General. Objections of member-states cannot be accepted, least of all when the candidates are not nationals of the objecting state. See UNJY (1983), p. 203.

[33] Note that gender is never referred to. On the under-representation of women in the UN (and more generally), see Hilary Charlesworth & Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester, 2000), esp. ch. 6.

[34] Also in the unexpected way that sometimes member-states, in particular, fear a brain drain if a great number of their qualified nationals leave the country in order to become international officials. In such cases, the Secretary-General may be willing to consult with the state in question. See UNJY (1969), pp. 228–9.

much responsible for this tension as anything else. Julian Huxley, for example, the first Director-General of UNESCO, recalls with some disdain the difficulties, immediately after the Second World War, of finding 'a coloured person' of sufficient suitability. In the end, UNESCO employed a Haitian schoolteacher on its staff, but seemingly with mixed results.[35]

Nonetheless, while often derided, there is at least one advantage in trying to secure a broad basis of representation. As Claude astutely observed, a principle of geographical distribution 'is a concession to political necessity. It licenses a kind of international spoils system in which states seek to nourish their national self-esteem by securing an adequate quota of international jobs for their citizens. Ironically, perhaps, because it is politically necessary it is also politically and administratively desirable'.[36] Apart from geographical concerns, political considerations too may occasionally creep in, and the witch-hunt of people with leftist inclinations in the USA of the early 1950s, known as McCarthyism, even resulted, albeit in an incidental manner, in an opinion of the International Court of Justice after the contracts of several of UNESCO's employees were not renewed despite initial promises to that effect.[37] On the other hand, reportedly the ILO did hire Jewish refugees from Germany in the 1930s, a prominent example being the political theorist Hannah Arendt.[38]

Some other bodies

Some organizations are in the luxurious position of being endowed with judicial bodies.[39] These can be created to solve disputes between member-states (which can be said to be the case, albeit roughly so, with the ICJ) or to solve disputes between the organization and its staff (the various

[35] Julian Huxley, *Memories II* (Harmondsworth, 1973), p. 19. As if to apologize, he adds a footnote according to which 'with the newly won independence of so many colonies, coloured staff are now a numerous and valuable element in UNESCO'.

[36] Claude, *Swords into Plowshares*, p. 197.

[37] See the Court's advisory opinion in *Judgments of the Administrative Tribunal of the International Labour Organization upon complaints made against the United Nations Educational, Scientific and Cultural Organization*, [1956] ICJ Reports 77. The opinion deals mainly with issues of competence.

[38] See Elisabeth Young-Bruehl, *Hannah Arendt: For Love of the World* (New Haven, 1982), p. 107. Arendt enjoyed a brief secretarial spell at the ILO.

[39] While the ILO itself has several procedures to address issues of non-compliance with ILO-sponsored conventions, nonetheless judicial settlement is left to the ICJ, by virtue of Art. 37, para. 1 ILO. For a useful study of the ILO, see Ebere Osieke, *Constitutional Law and Practice in the International Labour Organisation* (Dordrecht, 1985).

administrative tribunals). Sometimes, as with the EC Court, the functions are combined,[40] although all staff cases in the Community nowadays end up before the Court of First Instance. The EC Court, moreover, also settles disputes between its institutions and member-states, and even between the Community's various institutions. In addition, it famously serves as a point of reference for domestic courts, due to the preliminary ruling procedure of Article 234 (ex-Article 177). Under this procedure, the courts of the member-states may (and sometimes must) ask the EC Court's opinion on questions concerning the interpretation and validity of Community law; more or less colloquially, therefore, domestic courts are often regarded as Community organs.[41]

Of course, when it comes to judicial organs the idea of representation is anathema (or rather, ought to be anathema perhaps[42]): Article 2 ICJ Statute holds, for example, that the Court shall be composed of independent judges, 'elected regardless of their nationality'. In actual practice, though, the five permanent members of the Security Council always have their own judge on the ICJ, and, moreover, there is the possibility of appointing an *ad hoc* judge in order to make sure that the parties to the dispute are both represented on the bench.[43] In addition, the Statute provides that, while no requirements of nationality may be posed, nonetheless the Court is supposed to represent the main forms of civilization and the principal legal systems of the world.[44]

In the EC Court, all member-states are naturally represented;[45] with the European Court of Human Rights, however, the number of judges shall equal the number of parties to the Convention, which gives rise to the possibility that judges need not necessarily be nationals of the state proposing them. Indeed, both San Marino and Liechtenstein have appointed nationals of other states as their judges.[46]

[40] Inter-state disputes before the ECJ are, however, extremely rare. One of the few that comes to mind is Case 141/78, *France* v. *United Kingdom* [1979] ECR 2923.

[41] Thus, it has been observed that the EC Court has been able to use national courts in constructing the EC legal system. See Joseph H. H. Weiler, Anne-Marie Slaughter & Alec Stone Sweet, 'Prologue – The European Courts of Justice', in Anne-Marie Slaughter, Alec Stone Sweet & Joseph H. H. Weiler (eds.), *The European Courts & National Courts: Doctrine and Jurisprudence* (Oxford, 1998), v–xiv, p. xiii.

[42] For a passionate plea to this effect, see Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford, 1933), ch. 10.

[43] Article 31, paras. 2 and 3 ICJ Statute.

[44] Article 9 ICJ Statute.

[45] Although the Treaty provides merely that the Court shall consist of fifteen judges. See Art. 221 (ex-Art. 165) TEC.

[46] San Marino's judge is an Italian citizen, while Liechtenstein's appointee has Swiss nationality.

Some organizations also possess a parliamentary body. The most famous among these is doubtless the European Parliament (one of the institutions of the European Community), but other organizations also have assemblies, an example being the Council of Europe.[47] In the case of NATO, the parliamentary body is based on agreement between the participating parliaments; therefore, it is not an official organ of NATO.

While the European Parliament has some real powers, other assemblies are usually purely advisory bodies. Here, of course, the idea of representation is in the foreground, but at least the European Parliament represents not so much the member-states' governments, as the peoples of Europe: since 1979, it is directly chosen by the European electorate every five years. As far as representation goes, something similar holds true with respect to other assemblies, albeit less obviously perhaps: the most often used construction is that assemblies are composed of members elected by and from the national parliaments of the member-states, who accordingly are said to hold a 'dual mandate'.

An institution in its own right, although not universally regarded as an international organization but mostly as an NGO, is the Interparliamentary Union, created by national parliaments and strictly limited to co-operation between parliaments.[48]

Comitology

In particular within the EU, there are numerous committees which help the institutions in their tasks of policy-making and decision-making or represent various interest groups at some stage in the decision-making process; so much so, indeed, that the word 'comitology' has become a catch-phrase (albeit not a very accurate one) to describe the plethora of committees which help make up the structure of the EU.[49]

The creation of such committees creates a few serious legal problems.[50] One relates to the question whether the creation of committees left, right

[47] For a proposal to transform the UN General Assembly into something resembling a parliament, partly based on direct elections, see Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford, 1995), pp. 483–4.

[48] See, e.g., Schermers & Blokker, *International Institutional Law*, p. 24.

[49] For a useful overview, see Ellen Vos, 'EU Committees: The Evolution of Unforeseen Institutional Actors in European Product Regulation', in Christian Joerges & Ellen Vos (eds.), *EU Committees: Social Regulation, Law and Politics* (Oxford, 1999), 19–47.

[50] On the more limited (as not all committees exercise delegated powers) topic of delegation of powers, see generally Sarooshi, *The Development of Collective Security*, ch. 1.

and centre does not disturb the vision of the founding fathers too much, in particular their system of institutional checks and balances. Another question relates to democracy and transparency: where decision-making takes place in committees, far from the public eye, it follows that any form of control is difficult to realize. A third problem has to do with the composition of, in particular, advisory committees: which interest groups are represented and can therewith exercise some influence on decision-making?

The growth of such committees in relative disregard of constituent documents is presumably inevitable, for it represents two intuitions of timeless quality. On the one hand, there is our need to take politics out of politics, as it were: the idea that decisions are best left to committees of experts, or at least ought to be taken upon the advice of expert committees, has a strong hold on our collective imagination. As a result, many organizations boast committees consisting of experts (scientists, often) which give advice or even take decisions on a seemingly disinterested basis. The spirit, if not the actual phenomenon of comitology itself, is probably best captured by the circumstance that the US delegation to the Versailles Conference which would create the League of Nations included historians, geographers and ethnologists. This was done, as US President Wilson explained, so as to be able to reach conclusions on the basis of facts;[51] scientific objectivity, in other words, should take the place of passionate politics.

On the other hand, there is also a strong desire to politicize things, in the sense of making sure that those who take decisions can in some way be held accountable, or at least do not drift away too much from the scrutiny of the public view.[52] Hence, committees tend to be created as watchdogs over those who are to prepare or implement policy, and committees are created in order to have various diverse interests represented in the decision-making process. Much as we would like to leave the running of our lives to those who know best, we also dimly realize that we cannot escape taking some responsibility ourselves, and that amounts to putting the politics back into politics, albeit without great enthusiasm. Kennedy has brilliantly portrayed this ambivalence with respect to the EU, which to his mind has become

[51] As referred to in Thomas M. Franck, *The Power of Legitimacy among Nations* (Oxford, 1990), p. 154.

[52] In other terms, we seem to be oscillating between form and substance, between the formalism of procedures and the desirability of giving effect to substance. Our substantive designs may well render formalism expendable, yet without formalism we have no guarantee that we will not become victimized by someone else's substantive designs. See generally Roberto M. Unger, *Law and Modern Society: Toward a Criticism of Social Theory* (New York, 1976).

'a broad political culture with a technocrat and legal face, in which politics is treated as having somehow already happened elsewhere – in the treaty, the European Summit, in the Member-States or in the Council and so forth'.[53] Kennedy also noted that there is nothing really unique about the EU: the same type of thing can be seen within states, as well as, it may be added, international organizations generally.

Creating organs

The standard method of creating organs is by means of the constituent treaty, and when a new organ is added, it is often done by amending the constituent treaty. Thus, while the UN continues to consist of six principal organs, the structure of the EC received its fifth institution in 1993, when the Maastricht Treaty entered into force: the Court of Auditors.

The reason why the most obvious method of creating organs is by means of an amendment of the constitution is that it may cause problems with member-states if existing organs are to create organs on the same hierarchical level. The member-states would probably not appreciate such a venture, as it may be considered to erode their sovereignty.

Nonetheless, it is generally accepted that organs may create subsidiary organs. Thus, for example, the General Assembly has created such subsidiary organs as UNCTAD; under the Charter, the authority for doing so derives from Article 7, para. 2, which provides that '[s]uch subsidiary organs as may be found necessary may be established in accordance with the present Charter'.

In addition to the general power to create subsidiary organs granted by Article 7, para. 2, the Charter also grants a specific power to do so to the General Assembly (Article 22), the Security Council (Article 29) and, arguably, to the Economic and Social Council (Article 68). The precise relationship between these powers has been the subject of some academic debate, the main question being whether in establishing subsidiary organs the principal organs ought to rely on the specific powers to do so, or rather on the more general power of Article 7, para. 2.

The answer, some suggest,[54] depends on the nature of the subsidiary organ to be established. Judging by their wording, Articles 22 and 29 limit

[53] David Kennedy, 'Receiving the international' (1994) 10 Conn JIL, 1–26, p. 22.

[54] See generally Danesh Sarooshi, 'The Legal Framework Governing United Nations Subsidiary Organs' (1996) 67 BYIL, 413–78.

the power to establish subsidiary organs for the Assembly and the Council, respectively, to such subsidiary organs as are deemed necessary for the exercise of their respective functions. Article 7, para. 2 is framed in broader terms though: the reference to the principal organ's functions is absent, and thus, under Article 7, para. 2, a principal organ can establish subsidiary organs which may perform functions that the principal organ itself cannot perform. Under a strict reading of Articles 22 and 29, the creation of such an organ would be more difficult to defend.[55]

Effect of awards

In the late 1940s, the General Assembly had created an administrative tribunal: a court to hear disputes between UN staff and the UN (UNAT). That caused no particular problems, until UNAT began to issue awards of compensation: the UN was to compensate staff members whose complaints had been found justified.

Accordingly, the Secretary-General asked the General Assembly to reserve some financial resources to that effect in the budget, and it was here that some member-states started to object, denying that the Assembly could be bound by judgments of UNAT. The Assembly could not solve the puzzle, and asked the ICJ for advice: does the General Assembly have the right to refuse to give effect to an award of compensation made by the Tribunal?[56]

The Court started its analysis by delimiting, and perhaps somewhat redefining, the question. The Court noted that it was only concerned with situations where the legality of the award was not in doubt: ultra vires considerations could easily be left aside. The first thing the Court did was look at the statute of the Tribunal: what did the General Assembly intend to do when it created the UNAT? Since the Statute spoke freely of 'Tribunal', 'Judgment', et cetera, and since art. 10 of the Statute held that UNAT's (judgments) were 'final and without appeal', the Court found that the Assembly had intended to create a judicial body, not just an advisory committee. It followed that decisions of a judicial body were *res judicata*, having binding force between the parties to the dispute. The next question, then, was to identify the parties to an administrative dispute.

[55] See also Sarooshi, *The Development of Collective Security*, pp. 92–8.

[56] *Effect of awards of compensation made by the United Nations Administrative Tribunal*, advisory opinion, [1954] ICJ Reports 47.

One side was easy to identify: disgruntled staff members. The other side of the equation was perhaps a bit more difficult, but the Court did not let itself get worried by that: the other party was the United Nations Organization, represented by its highest administrative officer, the Secretary-General. And since the UN was bound by judgments of UNAT, so too were the organs of the UN, such as the General Assembly.

The Court could perhaps have left it at this, but did not: it felt the need to refute some arguments that had been made before it. One of these arguments was that the Assembly did not have the power to create UNAT: nothing in the Charter would give it this power.

This is, of course, a potentially powerful argument. It is, however, also an argument that in practice could easily be overruled with the help of the implied powers doctrine. The Court simply noted that while the power to create UNAT was indeed not specified in the Charter, it could nonetheless be implied from the Charter 'by necessary intendment'.[57] After all, as the Court astutely remarked, the expressed aim of the Charter is to promote freedom and justice for individuals; it would hardly be consistent with this expressed aim if the UN should not afford its own staff judicial remedies to settle employment disputes.

The other arguments were a bit less fundamental perhaps and served to bolster the legitimacy of the Court's finding of an implied power. Some states had argued that having to compensate in order to do justice to UNAT judgments would erode the budgetary power of the General Assembly. This argument was cogently dismissed by the Court, holding that organizations do have all kinds of expenses which the budgetary power has no choice but to honour. One cannot seriously regard these as eroding budgetary powers.

Others had argued that, by creating UNAT, the Assembly interfered with the powers of the Secretary-General, being the highest administrative officer. This too was made short shrift of by the Court: it observed that the General Assembly had the power to make staff regulations (Article 101) and thus to interfere with the Secretary-General's work. There was a solid legal basis for such interference.

The most important counter-argument, however, was the argument according to which UNAT was but a secondary or subsidiary organ: consequently, it could not bind its own creator, the General Assembly. Here the Court noted that this argument was based on the assumption that the

[57] *Ibid*., at 57.

Assembly had created an organ necessary for the performance of the Assembly's own functions. In other words: the argument presupposed a mere delegation of powers to have taken place. The Court, however, held otherwise: the General Assembly was not delegating the performance of its own functions, but rather exercising a power it had under the Charter.[58]

The Court confirmed the broad scope of the power to create subsidiary organs in its opinion in *Application for review of Judgement No. 158*,[59] after a staff member had raised objections to a decision of UNAT and had asked the Committee on Applications for Review of Administrative' Tribunal Judgements to ask the ICJ for an advisory opinion. The question arose as to whether this Committee could properly be regarded as an organ of the General Assembly (otherwise, it might lack the power to ask for advisory opinions), and the Court held in the affirmative.

The Court argued that Article 22 of the Charter was clear enough, and 'specifically leaves it to the General Assembly to appreciate the need for any particular organ, and the sole restriction placed by that Article on the General Assembly's power to establish such organs is that they should be "necessary for the performance of its functions" '.[60]

Limits? The *Tadic* case

What the *Effect of awards* case leaves by and large unanswered is whether there may be limits to the powers of an organ to establish subsidiary organs. Such a question arose in October 1995 in connection with the International Criminal Tribunal for the Former Yugoslavia. The Appeals Chamber of the Tribunal was asked to investigate whether the Security Council had the power to establish the Tribunal,[61] or whether the Security Council had acted ultra vires.[62]

[58] Incidentally, the Court never seriously addressed the proper legal basis of UNAT's creation (Art. 7 or Art. 22 of the Charter).

[59] *Application for review of Judgement No. 158 of the United Nations Administrative Tribunal*, advisory opinion, [1973] ICJ Reports 166. The opinion is occasionally referred to as the *Fasla* opinion, after the staff member whose situation give rise to it.

[60] *Ibid*., para. 16.

[61] This was far from self-evident for, as Zacklin notes, the Council's competence does not normally involve the creation of legal bodies. See Ralph Zacklin, 'The Role of the International Lawyer in an International Organisation', in Chanaka Wickremasinghe (ed.), *The International Lawyer as Practitioner* (London, 2000), 57–68, p. 67.

[62] *Prosecutor* v. *Dusko Tadic*, reproduced in 35 ILM (1996) 32. For a general comment, see José E. Alvarez, 'Nuremberg Revisited: The *Tadic* Case' (1996) 7 EJIL, 245–64.

Not too surprisingly perhaps,[63] the Appeals Chamber of the Yugoslavia Tribunal found that the Yugoslavia Tribunal had been established in accordance with the powers of the Security Council.[64] Mr Tadic, accused of war crimes, had claimed before the Trial Chamber that the Tribunal was unconstitutional. The Trial Chamber had dismissed his argument (citing a lack of jurisdiction to decide on the legality of the Tribunal's creation), and he appealed to the Appeals Chamber.

The Appeals Chamber reasoned as follows: under Article 39 of the UN Charter, the Security Council has the power to determine whether there is a breach of the peace, threat to the peace, or an act of aggression. This power is a very wide one, although perhaps not unlimited: after all, under Article 24, para. 2, the Council must act within the principles and purposes of the Charter. Nonetheless, the power under Article 39 is a wide discretionary power.

If the Council determines that an Article-39 situation exists, so the Appeals Chamber continued, it can take such measures as it deems necessary. Under Article 40, it can take provisional measures; under Article 42, it can take measures involving armed force. Clearly, both do not apply to the establishment of a tribunal.

Instead, the Appeals Chamber argued that the Security Council had acted under Article 41, which provides in part that '[t]he Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures'.

Article 41 continues by providing some examples (not including the establishment of a tribunal), but the Appeals Chamber argued that these were, indeed, merely examples; the list of Article 41 does not constitute an exhaustive enumeration.

In other words: under Article 41 the Security Council has a wide discretionary power to take whatever measures it wants to take, as long as those (in the terms of Article 39) 'maintain or restore international peace and

[63] In a similar vein, G. P. Politakis, 'Enforcing International Humanitarian Law: The Decision of the Appeals Chamber of the War Crimes Tribunal in the Dusko Tadic Case (Jurisdiction)' (1997) 52 ZöR, 283–329, esp. p. 291.

[64] The General Assembly was, reportedly, less than pleased with the creation of the Tribunal, and demonstrated as much by leaving the Tribunal without a budget for its first year. See Mohammed Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts* (Dordrecht, 1994), p. 123.

security'. In setting up the Tribunal, the Security Council had considered that the Tribunal 'would contribute to the restoration and maintenance of peace' and thus, the Tribunal argued, there was nothing ultra vires about its establishment.

As a matter of law, the Appeals Chamber's decision is clearly defensible: the discretionary powers of the Security Council are wide indeed, and may well include the power to establish a tribunal with a view to the maintenance or restoration of international peace. Nonetheless, one jump of some magnitude must be made, and that is the jump that the establishment of a tribunal will indeed (or at least may be expected to) contribute to the maintenance or restoration of peace. As a matter of law, that jump can be made; as a practical matter, however, it need not necessarily be very credible. On the other hand, as the Appeals Chamber quite rightly remarked, the expected success or failure of policy cannot be a criterion of the legality or validity of that policy.[65] In short, the conclusion presents itself that, at the very least, there is an extremely strong presumption that Security Council acts will be intra vires. After all, the same wide discretion also applies to other acts.

As a basic principle, much the same will apply to and within other organizations. In the absence of express prohibitions to create subsidiary organs, existing organs must be deemed allowed to create sub-organs within the limits set by their constituent documents. Those limits are, invariably, flexible and, moreover, in the normal course of events each organ will itself be the first to determine whether it has acted intra vires. In good faith, then, the creation of subsidiary organs will normally go unchallenged. Indeed, where it is challenged by a majority of the organization's members, the subsidiary organ will simply not be created.

Inter-relationship: hierarchy or not?

Even if the Security Council were to act ultra vires, it remains to be seen what could possibly be done about it. Can ultra vires acts be nullified? If so, on what grounds? And by whom? The substantial questions will be discussed elsewhere,[66] but at this juncture some attention for the more general question is warranted: can organs of international organizations control each other, and, if so, under what conditions?

[65] *Tadic* case, para. 39. [66] See below, chapter 11.

The topic has gained some special importance in recent years, due to the activities of the Security Council with respect to Iraq, Yugoslavia, Rwanda and Libya. In the above-mentioned *Tadic* case, the question arose whether the Appeals Chamber was competent to hear such a question, relating to its own establishment. In terminology derived from continental administrative law: did the Chamber have the *Kompetenz-Kompetenz*?[67]

The answer is by no means self-evident. At the very least it must be noted that the Statute of the Yugoslavia Tribunal does not provide anything in this regard: the Tribunal's competence is limited, under art. 1, to 'the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991'.

Thus, the Tribunal's competence is clearly subject to various limitations. There is, first, a temporal limitation ('since 1991'). Second, competence is territorially limited to 'the territory of the former Yugoslavia', and third, there is a substantive limitation: 'serious violations of international humanitarian law'.

The Appeals Chamber itself, however, saw little problem, and used a two-step technique to give itself the competence to pronounce on its own establishment. First of all, although the Statute remained silent, the Tribunal had created its own Rules of Procedure, and in one of those rules had given itself an unlimited power to decide preliminary issues. The Trial Chamber was given the power to decide all preliminary motions, and, moreover, if jurisdiction was in doubt, then the Appeals Chamber could be activated.

The second step, then, was to regard the Tribunal's creation as somehow a matter of jurisdiction. The prosecutor, no doubt keen to come down with a verdict, had argued that the validity of the creation of the Tribunal could not be regarded as a matter of jurisdiction. The Appeals Chamber disagreed, however, and argued that the prosecutor's conception of jurisdiction was 'narrow', and 'falls foul of a modern vision of the administration of justice'.[68]

Interestingly, the pertinent paragraph of the judgment is almost completely made up of rhetorical questions. The Tribunal gives no legal arguments; such arguments as it does give are based on 'the higher interest of justice', and on 'common sense'.[69] Presumably, the Appeals Chamber was

[67] *Tadic* case, para. 18. [68] *Ibid*., para. 6.

[69] And, some paragraphs later, the Appeals Chamber invokes the decentralized nature of international law as a reason for rejecting too narrow a concept of jurisdiction. *Ibid*., para. 11.

keen on coming down with a decision favouring the legality of its own creation, for, if not answered at that moment, the question would come back to haunt it: if not answered there and then, any conviction of Mr Tadic would always remain tainted and the question of its legality would inevitably surface in subsequent cases.[70] And, presumably, this was a justified fear on the part of the Appeals Chamber.

Still, its chosen solution remains debatable, for various reasons. One reason is that the Statute itself remains silent, and, as noted, it clearly describes and limits the competence of the Tribunal. Second, to paraphrase the Appeals Chamber, the modern administration of justice does not just have to listen to demands of common sense and the higher interests of justice, but also places a premium on reasoning at the basis of an opinion. Legal reasoning is, as Judge Higgins put it in the *Nuclear weapons* opinion of the ICJ, an 'essential step in the judicial process'.[71] And legal reasoning is more than just invoking common sense and justice.[72] Third, while it is one thing to have the competence to decide on your own competence, as a matter of principle it is somewhat mystifying to judge on the validity of your own creation.[73]

In this light, perhaps the Appeals Chamber would have done better to ask the ICJ for an advisory opinion. Perhaps the outcome would have been the same; perhaps the ICJ would have reached the conclusion that the creation of the Tribunal would have been a perfectly valid act in contemporary international law. But at least such a conclusion from the ICJ would have possessed a higher degree of legitimacy than the same conclusion reached by the Appeals Chamber.

Leaving issues of *Kompetenz-Kompetenz* aside, the ICJ has always been very careful in concluding in favour of any hierarchy between the principal organs of the UN, and in particular between the General Assembly, the Security Council and the ICJ itself, and, as will be discussed below, probably for good reasons.[74]

[70] See also Politakis, 'Enforcing International Humanitarian Law', p. 325.

[71] *Legality of the threat or use of nuclear weapons*, advisory opinion, reproduced in [1996] ICJ Reports 226, Judge Higgins dissenting, para. 9.

[72] See Neil MacCormick's classic *Legal Reasoning and Legal Theory* (Oxford, 1978).

[73] See also Alvarez, 'Nuremberg Revisited'.

[74] When it comes to the possibility of judicial review of Security Council acts, Alvarez makes the useful argument that we should not expect too much from judicial review by the ICJ, and that the ICJ is not the only actor which may have important things to say about the legality of Security Council acts. See Alvarez, 'Judging the Security Council'.

The situation with respect to the remaining principal organs of the United Nations is relatively clear. Under Article 87 of the Charter, the Trusteeship Council is clearly subordinate to the General Assembly; somewhat less explicitly, something similar follows from Article 66 with respect to ECOSOC. The Secretary-General,[75] in turn, has very few powers of his own, and such powers as he does have are fairly general. They are not described as 'exclusive' or something similar, thus the question of hierarchy hardly presents itself; rather, his powers in many areas are complementary. While the Secretary-General has the power to bring matters to the attention of the Security Council (Article 99), this is clearly discretionary, and moreover does not get in the way of the powers of other organs.[76]

Things are different, though, with the remaining three principal organs. The 1962 *Certain Expenses* case[77] was the result of the inactivity of the Security Council in the 1950s when it came to peace-keeping. In 1950, the Council had allowed the UN to do something about the conflict in Korea, due to the absence of the USSR at the crucial moment.

The General Assembly, understanding that such a fortunate situation was not likely to happen again, adopted its famous Uniting for Peace resolution,[78] granting itself the power to send missions to the world's hot-spots. And indeed, in the 1950s, peace-keeping missions went to the Middle East (UNEF), and, in the early 1960s to the Congo (ONUC), more or less under authority of the General Assembly.[79]

As such, that presented few problems. Obviously, the General Assembly cannot take binding decisions, and thus cannot force member-states to send troops. Moreover, it cannot act under Chapter VII of the Charter, so both UNEF and ONUC were established with the consent of the parties involved.

[75] Incidentally, the Secretary-General is not an organ of the UN; the Secretariat is.

[76] Which is not to deny that any conflicts ever take place between the Secretary-General and other organs. For an insightful discussion of the power struggles between Secretary-General Hammarskjöld and the Security Council, often revolving around the interpretation of the latter's resolutions, see generally Georges Abi-Saab, *The United Nations Operation in the Congo 1960–1964* (Oxford, 1978). On the relationship between the Secretary-General and the ICJ, see Carl-August Fleischhauer, 'The Constitutional Relationship between the Secretary-General of the United Nations and the International Court of Justice', in Georges Abi-Saab *et al.*, *Paix, développement, démocratie: Boutros Boutros-Ghali Amicorum Discipulorumque* (Brussels, 1999), 451–74.

[77] *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, advisory opinion, [1962] ICJ Reports 151.

[78] Resolution 377 A(V), of 3 November 1950.

[79] With respect to ONUC, the General Assembly only intervened for a short period of time. See generally Abi-Saab, *The United Nations Operation.*

The question that did arise, though, related to the topic of the financing of peace-keeping operations. Sending troops was the sole prerogative of the Security Council, so France and the USSR argued, and, accordingly, the General Assembly had no binding powers concerning peace and security, and, therefore, the costs should not form part of the regular budget.

Asked to give an advisory opinion, the Court disagreed on this point, and found that since the Assembly had some responsibilities when it came to peace and security, costs made in that connection qualified as 'expenses of the Organization' within the meaning of Article 17, and could therefore simply be put on the normal budget.[80]

That, however, is not so important for present purposes. What is important, however, is the way the Court reached its conclusions. The Court refused to create a hierarchy between the Security Council and the General Assembly, and could use the text of the Charter for that purpose. Under Article 24, para. 1, the Security Council bears 'primary' responsibility for the maintenance of international peace and security, and, thus, it followed that the Council's powers were precisely that: primary. They were not, however, exclusive, as also appeared from the Assembly's power to recommend measures, for example, under Article 14. This implied, according to the Court, that the Assembly is empowered to take 'some kind of action'.[81] In other words: the Assembly's power to deal with peace and security was complementary.

There was but one important limitation: under the Charter, only the Security Council could take enforcement action, i.e. action going against the wishes of the state concerned, i.e. action under Chapter VII. And most importantly for present purposes is the following quotation:

> In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. 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; the opinion which the Court is in course of rendering is an *advisory* opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction.[82]

The message appears clear but, upon closer scrutiny, is not all that clear. Obviously, the Court did not wish to establish a hierarchy there and then,

[80] *Certain Expenses*, 151. See also the discussion above, in chapter 8.
[81] *Ibid*., at 163. [82] *Ibid*., p. 168 (emphasis in original).

but, equally obvious, it did not reach a final verdict: the qualification that each organ determines its own jurisdiction 'in the first place at least' keeps the door open for a more final determination. None has, however, been issued yet.

This hands-off approach, letting organs do as they please as long as they remain within their competence and hoping that no irreconcilable conflicts will result, seems also to be the approach guiding practice between the Security Council and the General Assembly,[83] and even between committees of a single organ.[84]

The International Court of Justice had another opportunity to look at the hierarchy issue in the *Lockerbie* case, in 1992.[85] As is well known, after a bomb exploded aboard a plane over Lockerbie, Scotland, the suspicion grew that two Libyan citizens were responsible. Libya was asked to hand them over to either the USA or the UK, and, upon Libya's refusal to do so, the Security Council imposed sanctions. Libya went to the International Court of Justice to ask the Court for interim measures of protection against the USA and the UK, arguing that these states were in breach of the 1971 Montreal Convention on safety of civil aviation, which provides that states shall either extradite or carry out prosecution themselves.[86]

Libya thus started proceedings against the USA and the UK (separately) for hindering Libya from fulfilling its obligations under the Montreal Convention. Moreover, Libya claimed that its territorial integrity was threatened, although Libya never actually referred to the Security Council. By contrast, the UK and the USA pointed out that the Security Council was also apprised of the matter; therefore, the Court should not indicate provisional measures. And indeed, the Court refrained from indicating provisional measures, but not simply because the Security Council was seized of the matter. Instead, the Court found a way out of a difficult situation by combining the fact that it was a request for provisional measures with

[83] See UNJY (1964), pp. 228–37. See also UNJY (1968), p. 185, for a skilful circumvention of possible jurisdictional conflict.

[84] See UNJY (1969), p. 211.

[85] *Case concerning questions of interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie* (Libya v. United Kingdom), Order [1992] ICJ Reports 3. Parallel proceedings between Libya and the United States are to be found in *ibid.*, 114.

[86] According to some, it was this request for extradition (without using that term) which intersected the judicial work of the Court with the political work of the Council, and therewith provoked the question of judicial control. See, e.g., Bedjaoui, *The New World Order*, p. 46.

the provision of Article 103 of the Charter, according to which in case of conflict between treaties, the provisions of the Charter prevail.

The Court emphasized that, because of Article 103, which was prima facie applicable and which prima facie gave rise to the supreme binding force of Council resolutions under Article 25, the Court could not regard the rights claimed by Libya under the Montreal Convention as 'appropriate for protection',[87] given the very existence of Security Council involvement, and even mentioned, slightly maliciously perhaps, that indicating measures to protect Libya might impair rights of the USA and the UK under the Council resolutions. Still, most importantly, the Court underlined four times in the last five paragraphs of the 1992 order that it was not making any definitive findings regarding the legal effect of Security Council Resolution 748.[88]

In February 1998, the Court finally judged on some of the preliminary objections raised by the USA and the UK. The respondents made the argument that the matter was to be governed by Council Resolutions 748 (1992) and 883 (1993). Both were 'determinative of any dispute over which the Court might have jurisdiction'.[89] The Court disagreed, pointing out that Libya's claim had already been brought before the Council had adopted Resolution 748 (1992). The only resolution adopted at the moment Libya filed its application was Resolution 731 (1992), but this could not be an impediment to admissibility 'because it was a mere recommendation without binding effect'.[90]

The respondents also argued that Libya's claim was rendered without object due to the effect of the later Council resolutions. Under the Rules of Court, so they claimed, this implied that the Court should decide the application inadmissible before the Court proceeded with the merits; otherwise, the Court would run the risk of having to dismiss later on an exclusively preliminary point.[91] While the Court agreed in principle, it denied that the overriding effect of the Council resolution constituted an argument of an

[87] *Lockerbie* case, paras. 40 (UK) and 43 (USA).

[88] In a similar vein, Thomas M. Franck, 'The "Powers of Appreciation": Who is the Ultimate Guardian of UN Legality?' (1992) 86 AJIL, 519–23.

[89] *Case concerning questions of interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie* (Libya v. UK), preliminary objections, decision of 27 February 1998, nyr, para. 41.

[90] *Ibid*., para. 44.

[91] This happened, indeed, in the *Case concerning the Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), second phase, [1970] ICJ Reports 3, where the Court in the merits phase decided that the claim was inadmissible for being of the wrong nationality. As a result, the Rules of Court were amended in 1972 so as to prevent such a situation.

exclusively preliminary character. Instead, the Court observed, any decision thereon entails at least two decisions on the merits: first, it would entail a decision that Libya's rights under the Montreal Convention are incompatible with the Council resolutions, and second, it would imply that those Council resolutions prevail. Therefore, the argument of respondents was not of an exclusively preliminary character, and, therefore, the Court could not decide the claim inadmissible.

In doing so, the Court still left open the issue of hierarchy between itself and the Security Council: it could afford not to address it on the theory that Libya filed its application before the two main resolutions were adopted,[92] and what matters for admissibility is the situation at the moment of filing the application. The only obstacle was that Resolution 731 had already been adopted; yet the Court could find this resolution to be a mere recommendation.[93]

Hierarchy in other organizations

In other organizations, the hierarchy between the various organs may be more clearly posited. Thus, within the European Community, the Court of Justice is the ultimate guardian of legality: 'The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed', as Article 220 EC (formerly Article 164) puts it. Still, while this may hold true for the European Community, it does not cover all activities of the European Union, as the Court is deliberately left out of the loop when it comes to both the Union's Common Foreign and Security Policy and its co-operation in matters of justice and crime.

Moreover, while the Court is the ultimate guardian of legality, that is not to imply that it occupies a higher position in other walks of life. Surely, the Council, the Commission and even the European Parliament may have political prerogatives which are not for the Court to touch, and if push really comes to shove, the member-states remain free simply to change the law (perhaps against the grain of the Court's suggestions), and arguably remain free to limit the effects of the Court's decisions.[94] After all, if need be, the

[92] For a scathing critique of the Council's actions by a former judge at the ICJ, see Bedjaoui, *The New World Order*, p. 73.

[93] The Court did not devote any argument to why Resolution 731 would merely be a recommendation. Its wording is, indeed, hortatory, but it is not self-evident that wording alone determines the issue. See also below, chapter 10.

[94] Moreover, at least in the early years of the EC, the Commission would refrain from starting proceedings if it suspected that the member-state concerned would ignore the decision. See

member-states can amend the treaties, insert new provisions or delete old ones, and there is little that the Court can do about it.[95] Indeed, there is little to protect individuals or businesses from such activities; at best, the principle of legitimate expectations may offer an initial shield against all-too-abrupt changes.

Similar considerations apply across the board. The general picture is that in most cases, regardless of any formal power distributions, the member-states remain masters of the treaty, and it is here of course that the distinction between the member-states acting together and the plenary organ becomes a very fine distinction. For even where a plenary organ would be subordinated to another organ, acting outside the confines of the plenary, the very same states can circumvent that other organ.

And with that in mind, the International Court has little to gain from pronouncing itself hierarchically superior to any of the other principal organs of the UN, or even from proclaiming the possibility of submitting decisions of the Security Council to judicial review. While such would no doubt satisfy the legal mind in the abstract, it is difficult to think of judicial review in any concrete type of situation, in light of both the wide discretion enjoyed by the Security Council (as illustrated by, for example, the *Tadic* case) and the circumstance that the member-states can always use devices other than the Security Council so as to avoid scrutiny.

The position of member-states

Most organizations have but limited resources and, consequently, limited staff. Such staff as there is is typically engaged in arranging meetings and preparing decisions, facilitating contacts between the member-states and their representatives, and similar activities. In other words, few officials are engaged in actually implementing the decisions taken by the organization. To put it succinctly: the Security Council may authorize armed action, but does not have its own troops;[96] while the EU sets tariffs at its external

Miguel Poiares Maduro, *We, the Court: The European Court of Justice and the European Economic Constitution* (Oxford, 1998), p. 10 (citing a former head of the Commission's legal service).

[95] Indeed, there appears to be no principled bar against the member-states taking powers 'back' from the Community. See Daniela Obradovic, 'Repatriation of Powers in the European Community' (1997) 34 CMLRev, 59–88.

[96] Those are foreseen in Art. 43 of the Charter though, and, curiously enough, the implementation of Art. 43 was long (and perhaps still is) regarded as only a matter of time. Thus, a memorandum from the UN's Office of Legal Affairs, written as late as 1982, treated the topic as one whose time would still come. See UNJY (1982), pp. 183–5.

boundaries, it does not have its own customs officers. In short: much of the implementation of decisions of international organizations rests with the member-states, and that raises the question of the exact position of those member-states within their organization.

This question, as might have been expected, defies an easy answer. Clearly, it appears counterintuitive to speak of member-states as organs of the organization. After all, member-states exist before the organization does; indeed, the members are the creators of the organization, so how could they be among its organs at the same time? Member-states are, moreover, lacking some of the elements that usually characterize organs: well-described tasks and powers, instructions as to composition, et cetera.

On the other hand, in many organizations the member-states are in part subordinate to the organization.[97] Partly this is expressed in the circumstance that in some organizations, binding decisions can be made even against the wishes of one or more members (this is, however, relatively rare), but partly also in more general clauses laying down duties of co-operation, often referred to as a duty of community solidarity (*Gemeinschaftstreue*, in German). The most famous among the pertinent provisions[98] is no doubt Article 10 (formerly Article 5) TEC, which provides: 'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty'. Other organizations have similar provisions, albeit less explicit. Article 2, para. 2 of the UN Charter orders UN members to 'fulfil in good faith the obligations assumed by them', with para. 5 of the same article adding that the members 'shall give the United Nations every assistance in any action it takes' in accordance with the Charter. The OECD Convention provides for duties of consultation and co-operation,[99] whereas the Statute of the Council of Europe calls for sincere and effective collaboration among the members.[100] The International Bauxite Association has a clause instructing its members 'to take all appropriate measures to ensure that obligations . . .

[97] Note also that Sarooshi can confidently write about delegation of Security Council powers to the UN member-states, which would seem to presuppose a conception of the member-states as organs of the organization. See Sarooshi, *The Development of Collective Security*, chs. 4 and 5.

[98] But see also, e.g., Art. 300, para. 7 (formerly Art. 228, para. 7) TEC, which explicitly treats the member-states and the institutions on an equal footing when it comes to the binding nature of treaties concluded by the Community.

[99] Article 3 OECD.

[100] Article 3 Council of Europe Statute.

are carried out',[101] with the Statute of the IAEA endorsing that members shall fulfil obligations assumed by them.[102]

On one level, such provisions read as little more than confirmations of the time-honoured *pacta sunt servanda* principle, yet as such they would be redundant, for it goes without saying that commitments are to be honoured. Hence, rather than merely confirming that *pacta sunt servanda*, such solidarity clauses remind the member-states of organizations that they may be called upon to do things which are not to their liking and which they may never even have expected;[103] rather than merely replicating the *pacta sunt servanda* norm (without which treaty-making would be unthinkable to begin with), they remind the member-states that they enter into a relationship which aspires to create 'an ever closer union', as the EC Treaty poetically puts it. Much in the same way as marriage is somehow more than a mere contractual arrangement, so too is the creation of an organization an act which involves not just the normal good-faith duty to give effect to one's commitments, but also a spirit of loyalty, camaraderie and mutual support.

With this in mind, given the reliance of organizations on the implementing acts of their member-states, it becomes all of a sudden less eccentric to think of member-states as organs of the organization. After all, carrying out the organization's programme is pretty much what one would associate with organs rather than creators.

Perhaps the easiest (but not a final) way to come to terms with this duality is to adopt the classic notion of 'dédoublement fonctionnel', a term once coined by French jurist Georges Scelle to describe the similarly problematic relationship of states (and their organs and representatives) with international law:[104] state organs act as state organs when they operate in the national legal system, but once they operate in the international system, they act as international agents.[105]

[101] Article V of the Agreement establishing the International Bauxite Association.

[102] Article IV, para. c IAEA.

[103] For an impressive overview of the possible obligations which may in whole or in part be derived from the notion of Community solidarity, see John Temple Lang, 'Community Constitutional Law: Article 5 EEC Treaty' (1990) 27 CMLRev, 645–81.

[104] Note also Kelsen's insistence that individual states can be characterized as organs of the international legal community. See Hans Kelsen, *Introduction to the Problems of Legal Theory* (1934: Oxford, 1992, trans. Litschewski Paulson & Paulson), esp. pp. 122–4.

[105] Cassese has suggested that Scelle's work (including the notion of 'dédoublement fonctionnel') may have great explanatory potential with respect to, especially, the EC legal system. See Antonio Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (*dédoublement fonctionnel*) in International Law' (1990) 1 EJIL, 210–31, esp. p. 231.

Concluding remarks

Again we have seen that there are several ways in which the relationship between organizations and their members colours the law of international organizations. The very question whether the member-states must be considered as organs of the organization pays testimony to this problematic relationship, as do attempts to politicize and depoliticize decision-making simultaneously through the creation of committees, making sure that either the member-states' interests are guaranteed or that those interests are circumvented in the name of expertise and objectivity (in which case no doubt another committee will see to it that the members' interests are represented after all).

Also the more formal creation of subsidiary organs may profitably be analysed in terms of the position of the member-states, for the members will eventually have to succumb, in one way or another, to the activities of such organs: the activities of a subsidiary organ may curtail the members' room to manoeuvre; the members may lose certain prerogatives with the creation of new organs; and, ultimately, they will have to pay for the organ's expenses as well. In those circumstances, it becomes imperative that the creation of new organs be done with care and caution, lest the organ is devoid of legitimacy before it even starts working.[106]

[106] Witness the resistance in the General Assembly to the creation, by the Security Council, of the Yugoslavia Tribunal. See, e.g., Julian J. E. Schutte, 'Legal and Practical Implications, from the Perspective of the Host Country, Relating to the Establishment of the International Tribunal for the Former Yugoslavia' (1994) 5 *Criminal Law Forum*, 423–50.