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### **SOME PRELIMINARY REMARKS ON THE CONFERRAL BY STATES OF POWERS ON INTERNATIONAL ORGANIZATIONS**

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# **SOME PRELIMINARY REMARKS ON THE CONFERRAL BY STATES OF POWERS ON INTERNATIONAL ORGANIZATIONS**

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## ABSTRACT

This paper addresses the processes by which States confer their express powers on international organizations as well as the differing legal relationships that result from these conferrals. It is part of a longer, book-length, treatment of the conferrals by States of powers on international organizations.

There is a considerable lack of both clarity and consistent usage in the terms that are used to refer to the conferral by States of sovereign powers on international organizations. Such terms as ‘ceding’, ‘alienation’, ‘transfer’, ‘delegation’, and ‘authorization’ are used interchangeably by international and domestic courts as well as by commentators often to refer to the same conferral of power or the same term is used in a general way to refer to different types of conferrals. However not all conferrals of power are the same, and there are important differences that flow from the type of conferral for the legal relationship established between a State conferring power and an organization. The failure to distinguish between the different types of conferrals of power undermines analysis of the differing legal consequences of these conferrals as well as obscuring the domestic policy debates that surround the conferral of powers. It is for these reasons that this paper introduces a typology of the terms that can be used to describe conferrals by States of powers on international organizations; and then goes on to consider the first category in the proposed typology, an agency relationship that may flow from the conferral by States of powers on an organization.

## I. INTRODUCTION

A characteristic of the development of international organizations in the last half Century has been the shift in the locus of decision-making on a whole range of governance issues from national governments to international organizations. This process was not at first a major focus of attention, since organizations were initially cautious in the exercise of their limited powers and when organizations did make decisions that potentially bound Member States there was a primary role given to State consent in the acceptance of such obligations. However this institutional landscape is evolving. International organizations have increasingly themselves interpreted their powers – even of binding decision – in an expansive manner that blurs the role of State consent,<sup>1</sup> and States have increasingly conferred broader public powers of governance on international organizations.

The broad range of measures being taken by international organizations in the exercise of conferred powers has provoked a considerable response from a variety of domestic political and judicial actors and commentators alike in terms of questioning the *vires* of such action, but also, more generally, in terms of questioning both the propriety of conferring broad powers of governance on organizations as well as questioning their States continued participation in the work of organizations of which they are already Members. There is, however, a considerable lack of clarity in the discourse on these issues. The terms used to describe particular conferrals are often used interchangeably to refer to the same type of conferral of power or the same term is used in a general way to refer to different types of conferrals. However not all conferrals of power are the same, and there are important differences that flow from the type of conferral for the legal relationship that is thereby established between a State conferring power and an organization. The

failure to distinguish between the different types of conferrals of power undermines analysis of the differing legal consequences of these conferrals as well as obscuring the domestic policy debates that surround the conferral of powers. To consider all of these issues is, due to considerations of brevity, beyond the scope of this present paper.<sup>2</sup> The present, more limited, objective is to begin to provide a typology of the terms that can be used to describe conferrals by States of powers on international organizations. As such, this present paper will only consider the first category in our proposed typology: an agency relationship that may flow from the conferral by States of powers on an organization.<sup>3</sup> The preliminary issue that first requires consideration, however, is the legal processes by which States confer powers on an international organization.

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<sup>1</sup> For an account and analysis of the expansion, for example, by the European Community of its competences in a number of areas, see Weiler, J., *The Constitution of Europe* (1999), pp.44-56.

<sup>2</sup> This present paper is part of a longer, book-length, treatment of the conferrals by States of powers on international organizations. The longer work will set out more fully the typology of conferrals of power – thus examining more fully the range of legal relationships established between a State and an organization as a result of the conferral of powers – as well as considering in detail the policy considerations relating to these different types of conferrals.

<sup>3</sup> On this category of agency, see *infra* Section III in text.

## II. THE PROCESSES BY WHICH STATES CONFER POWERS ON INTERNATIONAL ORGANIZATIONS

The main way States confer their sovereign powers on an international organization is by concluding a treaty<sup>4</sup> wherein the States Parties undertake as a matter of binding obligation to confer powers on the organization. This obligation does not mean, however, that a State will necessarily be bound by the organization's exercise of conferred power or in fact that the conferral is not later revocable by the State. These aspects of the conferral will depend on the *type* of conferral of power, a matter that is considered in our typology of conferrals in Section III below. At this early stage in our discussion, however, it is necessary to consider the two main treaty mechanisms by which States can confer powers on an organization: by use of a constituent treaty or on a more *ad hoc* basis by use of a contractual treaty.

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<sup>4</sup> Another, less utilized method, is by a State making a unilateral declaration that provides for such a conferral. It is generally accepted that a State can impose a legally binding obligation on itself to carry out a particular act by making a unilateral declaration. (See *Legal Status of Eastern Greenland*, PCIJ, Series A/B, No.53, especially at pp.71-73; *Nuclear Tests (Australia v. France)*, ICJ Reports (1974), p.253 especially at p.267, *Nuclear Tests (New Zealand v. France)*, ICJ Reports (1974), p.457; Suy, E., *Les Actes juridiques unilatéraux en droit international public* (1962); De Visscher, P., 'Remarques sur l'évolution de la jurisprudence de la cour internationale de justice relative au fondement obligatoire de certains actes unilatéraux', in Makarczyk, J., (ed.), *Essays in International Law in Honour of Judge Manfred Lachs* (1984); Brownlie, I., *Principles of Public International Law*, (5<sup>th</sup> ed., 1998), pp.643-644; and the first, preliminary, report of the ILC Special Rapporteur on Unilateral Acts of States, UN Doc.A/CN.4/486 (1998).) And there is no reason why a State could not undertake in such a way to confer powers on an organization so long as the State itself possesses the power it is purporting to confer. (This derives from the general principle of law: *nemo dat quod non habet*: one cannot give what one does not possess. For application of this principle to another area of international law, the acquisition of title to territory, see, for example, the *Island of Palmas* case, *ILR*, 4, p.103 at p.104.)

Due, however, to the importance attached by States to the conferral of powers on international organizations, it is difficult to find examples of conferrals by means of the relatively informal and unclear process of making a unilateral declaration. Even where, however, a State does purport to confer powers on an organization by unilateral declaration, the conferral only becomes legally effective once it has been accepted by the organization in question. (On the necessity for such acceptance and on the methods of acceptance by means other than the organization concluding a treaty with the conferring State, see *infra* nn.17-19 and corresponding text.)

## 1. The conferral of powers by constituent treaty

The International Court of Justice has affirmed that the constituent treaty of an organization can act as a mechanism for the conferral by States of express powers on an organization. In the *WHO Advisory Opinion* case, the Court observed: ‘The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments.’<sup>5</sup> The constituent treaty may as such provide for the conferral of discrete sovereign powers on an organization, but the actual conferral of power only takes place once a State has ratified the treaty.

A technical objection that has been made to the constituent treaty being a means for the conferral of power is that it is not the Member States *per se* who confer powers on the organization but the constituent treaty. This type of argument has been made, for example, by Delbrück who contends that in the case of the UN Security Council the source of the Council’s enforcement powers was not as a result of a ‘delegation’, a type of conferral, of powers by UN Member States through the Charter but that they were derived in a technical sense from the Charter itself.<sup>6</sup> His argument is that it is not possible for Member States to delegate powers to the Council, since technically it is the Charter which confers these powers on the Council and not Member States. Accordingly, the argument runs, the Charter, as the constituent treaty of an international organization, has itself created in effect certain enforcement powers and conferred these on the Council.

This approach is, however, overly formalistic. It is true that UN Member States cannot themselves confer powers on, *in casu*, the Security Council, since in formal terms it is through the UN Charter that Member States gave powers to the Council. This does not, however, preclude the



Charter, as a constituent treaty, from acting as a mechanism by which States confer powers on an organ of the Organization. It is the UN Charter which confers the powers, but the original source of the substantive powers – which are transferred via the Charter – is UN Member States acting collectively.<sup>7</sup> This view is moreover supported by the clear wording of Article 24(1) which provides: ‘In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.’ This difference in approach – a recognition that it is the Member States of an organization that confer powers and not the constituent treaty *per se* – has important practical consequences for, *inter alia*, the issue of the possible responsibility of Member States for acts of an international organization, a matter considered below in our typology of conferrals in Section III.

However a constituent treaty is a complex instrument and its sole function is not to serve as a mechanism for the conferral by States of express powers on an organization.<sup>8</sup> This complexity does not, to reiterate, prevent the constituent treaty from being characterized as a mechanism for the conferral of powers, but it does mean that international organizations and their constituent treaties cannot be analysed in a comprehensive fashion by focusing only on the conferral by States of express powers on organizations. Two examples suffice to illustrate the point. First, the

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<sup>5</sup> *Legality of the Threat or Use of Nuclear Weapons, ICJ Advisory Opinion*, (1996), para.25.

<sup>6</sup> Delbrück, J., ‘Article 24’, in *The Charter of the United Nations*, (Simma, B., ed.), (1994, 1<sup>st</sup> ed.), p.404.

<sup>7</sup> This has been explained in more detail by Judge Bustamante in the *Expenses* case, *ICJ Reports* (1962), p.151 at pp.292-293; Suy, E., ‘The Role of the United Nations General Assembly’, in *The Changing Constitution of the United Nations*, (Fox, H., ed.), (1997), p.55 at p.64; Franck, T., ‘The United Nations as Guarantor of International Peace and Security’, in *The United Nations at Age Fifty: A Legal Perspective*, (Tomuschat, C., ed.), (1995), p.25 at p.37; and Sarooshi, D., *The United Nations and the Development of Collective Security* (1999), pp.28-31.

<sup>8</sup> As the ICJ has recognized in its case-law, constituent treaties are more complex in nature than other treaties. In the *WHO Advisory Opinion* case, the Court held: ‘But the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own

constituent treaty of an organization may exhibit certain constitutional characteristics which do not result directly from the conferral of express powers by States.<sup>9</sup> Second, the powers of an international organization are not restricted to those which are expressly conferred by Member States, since the orthodox view is that international organizations possess implied powers.<sup>10</sup>

It is beyond the scope of our present discussion to examine all of these characteristics and powers of international organizations. Our present focus is limited to the features and consequences of the conferral by States of express powers on international organizations. The reason for this limited approach, in addition to the obvious one of length, is that there has not been an extensive treatment of the conferral by States of express powers on organizations, despite the

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practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.’ (*Legality of the Threat or Use of Nuclear Weapons, ICJ Advisory Opinion*, (1996), para.19.)

<sup>9</sup> See, for example, Sato, T., *Evolving Constitutions of International Organizations: A Critical Analysis of the Interpretative Framework of the Constituent Instruments of International Organizations*, (1996), p.230.

It is beyond the scope of our present discussion to examine this issue in any detail, but suffice to note that even in the case of the two most prominent international organizations – the UN and the EC – whose founding treaties would be leading contenders for being characterised as constitutional documents, there has been a vigorous, largely inconclusive, debate about their possible constitutional natures. On the possible characterization of the UN Charter as a constitution, see the statement by the representative of the US Government in the oral proceedings in the *Expenses* case, *Pleadings, Oral Arguments, Documents*, 1962, p.413 at p.427; Crawford, J., ‘The Charter of the United Nations as a Constitution’, in *The Changing Constitution of the United Nations*, (Fox, H., ed.), (1997), p.3; Simma, B., ‘From Bilateralism to Community Interest in International Law’, *Recueil des cours*, 250 (1994-VI), p.209 at pp.258-262; Franck, T., ‘The ‘Powers of Appreciation’: Who is the Ultimate Guardian of UN Legality’, (Editorial Comment), *AJIL*, 86 (1992), p.519 at p.521; Reisman, W.M., ‘The Constitutional Crisis in the United Nations’, *AJIL*, 87 (1993), p.83; Waldock, H., ‘General Course on Public International Law’, *Recueil des cours*, 106 (1962-II), p.1 at pp.20-38; Fassbender, B., *UN Security Council Reform and the Right of Veto: A Constitutional Perspective*, (1998), pp.89-115; Herdegen, M., ‘The ‘Constitutionalization’ of the UN Security System’, *Vanderbilt Journal of Transnational Law*, 27 (1994), p.135 at p.150; and Macdonald, R., ‘The Charter of the United Nations in Constitutional Perspective’, *Australian Yearbook of International Law*, 20 (1999), p.205. But cf. Arangio-Ruiz, G., ‘‘The Federal Analogy’ and UN Charter Interpretation: A Crucial Issue’, *EJIL*, 8 (1997), p.1. On the possible constitutional character of the EC, see, for example, the ECJ case, *Parti Ecologiste, ‘Les Verts’ v. European Parliament*, Case 294/83, [1986] *ECR* 1339 at 1365; Weiler, *supra* n.1, p.12; Lenaerts, K., ‘Constitutionalism and the Many Faces of Federalism’, *American Journal of Comparative Law*, 38 (1990), p.205; Barendt, E., *An Introduction to Constitutional Law*, (1998), pp.69-85; and Mancini, G.F., ‘The Making of a Constitution for Europe’, *Common Market Law Review*, 26 (1989), p.595. Cf., however, Schilling, T., ‘The Anatomy of the Community Legal Order: An Analysis of Possible Foundations’, *Harvard International Law Journal*, 37 (1996), p.389.

<sup>10</sup> As the Court in the *WHO Advisory Opinion* stated: ‘Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as “implied” powers.’ (*Legality of the Threat or Use of Nuclear Weapons, ICJ Advisory Opinion*, (1996), para.25.) On this doctrine of implied powers, see also *Reparation for Injuries Suffered in the Service of the United Nations* case, *ICJ Reports* (1949), p.174 at pp.180, 182; and, from the voluminous literature, see Klabbers, J., *An Introduction to International Institutional Law* (2002), pp.67-75, and Schermers, H., and Blokker, N., *International Institutional Law*, (3<sup>rd</sup> ed., 1995), pp.158-163. Cf., however, the dissenting opinion of Judge Hackworth in the *Reparations* case who used a narrow theory of delegation of powers to find that the powers of the UN could only be implied from the powers expressly stipulated in the Charter and not from the functions or object and purpose of the Organization: *Reparation for Injuries Suffered in the Service of the United Nations* case, *ICJ Reports* (1949), p.174 at p.198.

fact that the vast majority of powers of international organizations are those which States expressly confer on them.

In addition to the conferral of express powers by means of a constituent treaty, States may also purport to confer powers on an organization by contractual treaty. In the case of purported conferrals by contractual treaty, there are two main issues that arise. The first is to ascertain whether the contractual treaty actually contains a substantive conferral of power. This enquiry is necessary since a treaty purporting to confer powers may in substance represent nothing more than either a request to the organization to exercise its power in a particular situation or the proffering of consent by the State in cases where such consent is necessary for the organization to be able to exercise an express or implied power that it already possesses. The second issue is to determine whether the organization has the competence to exercise the powers being conferred by contractual treaty.

## **2. The conferral of powers by contractual treaty**

There have been a number of cases where a group of States have concluded a treaty between themselves providing for the conferral of power on an organization on an *ad hoc* basis.<sup>11</sup>

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<sup>11</sup> See, for example, the Peace Treaty between Italy and the UK, US, France, and the Former USSR (the latter four States being known as the 'Four Powers') that conferred on the Four Powers the power to decide on the future of the Italian Colonies in Africa, but which in Annex XI(3) provided that if the Four Powers could not agree within one year of the entry into force of the Treaty then the power of decision was to be given to the UN General Assembly: *UNTS*, vol.49, p.3 at p.215. In the event the Four Powers could not agree and the conferral of power was accepted by the General Assembly when it adopted the following resolutions concerning the territories: 289 (IV) of 21 Nov. 1949; 387 (V) of 17 Nov. 1950 (Libya); 390 (V) of 2 Dec. 1950 (Eritrea); 442 (V) of 2 Dec. 1950 (Somalia); 515 (VI) of 1 Feb. 1952 (Libya); 617 (VII) of 17 Dec. 1952 (Eritrea); and 1418 (XIV) of 5 Dec. 1959 (Somalia). For a convenient summary of the discussion which took place in the UN concerning the use of the power, see: *UNYB, 1948-1949*, pp.256-279; *UNYB, 1950*, pp.345-373; and specifically in the case of Libya (*UNYB, 1951*, pp.266-277) and Eritrea (*UNYB, 1951*, pp.277-285, and *UNYB, 1952*, pp.262-266). For analysis of the conferral of power see Crawford, J., *The Creation of States in International Law*, (1979), pp.330-332, Vallat, F., 'The Competence of the United Nations General Assembly', *Recueil des cours*, 97 (1959-II), p.207 at pp.229-230, and Sloan, B., 'General Assembly Resolutions Revisited (Forty Years Later)', *British Year Book of International Law*, 58 (1987), p.39 at pp.61-62; and for a review and analysis of much of the State practice of *ad hoc* conferrals of a power of territorial disposition to international organizations and the competence of, in particular, the UN to exercise these powers, see: Crawford, *ibidem*, pp.323-333; and Brownlie, *supra* n.4, pp.170-172. For examples of cases where States conferred such a power of disposition on the League of Nations Council, see the

When States ratify such a treaty they bind themselves to confer the stipulated powers on the organization. However, the organization is not usually a party to such contractual treaties<sup>12</sup> and this raises the issue of the acceptance by an organization of conferred powers, an issue which is part of the broader question of when can a substantive conferral of power by contractual treaty be said to have taken place.

### (a) The role of an organization's reaction to a conferral of powers

It is a requirement that an international organization must accept a purported conferral of power by States for the conferral to have legal effect. The source of this requirement derives by analogy from Article 34 of the 1969 Vienna Convention on the Law of Treaties which provides that a 'treaty [between States] does not create either obligations or rights for a third State without its consent.' This general rule is applicable *mutatis mutandis* to the case of an international organization who is a third party to a treaty between States, since it exists as part of customary international law<sup>13</sup> and as such is applicable to international organizations.<sup>14</sup> Application of this

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*Treaty of Lausanne (Frontier between Turkey and Iraq) case, PCIJ, Series B No.12* (1925) at pp.27-28. See also the *ad hoc* conferral of governmental powers on the UN by contractual treaty in the cases of Cambodia and the Western Sahara (see *infra* nn.34, 48, respectively).

There has also been a significant practice of States conferring powers on an *ad hoc* basis to another State or States. For an example of the conferral of sovereign powers between States, consider the case concerning *Rights of Nationals of the United States of America in Morocco*, where the International Court referred to and interpreted the treaties concerned with the establishment of the protectorate, in particular the Treaty of Fez of 1912 between the Sultan of Morocco and France and stated: 'Under this Treaty, Morocco remained a sovereign State but it made an arrangement of a contractual character whereby France undertook to exercise certain sovereign powers in the name and on behalf of Morocco, and, in principle, all of the international relations of Morocco'. (*Rights of Nationals of the United States of America in Morocco, ICJ Reports* (1952), p.188.) See also for further examples of inter-State delegations: Sereni, A., 'Agency in International Law', *AJIL*, 34 (1940), p.638; and for a review and analysis of the practice where a State that has territorial sovereignty over a territory decides to confer on a group of other States the power to decide on the future status of the territory, see Crawford, *ibidem*, pp.308, 313-315.

<sup>12</sup> This does not of course preclude the conclusion of a treaty between States and an organization that provides for the conferral of powers. Such a treaty would be governed by the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations: on this Convention see Gaja, G., 'A "New" Vienna Convention on Treaties between States and International Organizations or between International Organizations: A Critical Commentary', *British Year Book of International Law*, 58 (1987), p.253.

<sup>13</sup> On the customary nature of the principle in Article 34 see Jennings, R., and Watts, A., *Oppenheim's International Law*, (1992, 9<sup>th</sup> ed.), pp.1260-1261 and the citations to International Court of Justice decisions and the ILC debates contained in n.3.

general rule in our case means that a treaty between States that purports to confer powers on an organization does not in law have this effect<sup>15</sup> without the consent of the organization.<sup>16</sup> The expression of this consent by the international organization may take a variety of forms depending on the type of organ of the organization which accepts the conferral. For example, in the case of a deliberative organ the adoption of a resolution accepting the conferral may be appropriate;<sup>17</sup> while in the case of the Secretariat (usually represented by a Secretary-General) a unilateral act or declaration<sup>18</sup> may be more appropriate. In any case, however, it is not the form that is decisive, but rather the indication of a clear intention by the organ concerned that it has accepted the conferral

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<sup>14</sup> On the applicability of Article 34 to international organizations see Chinkin, C., *Third Parties in International Law*, (1993), pp.11-12. This view is, moreover, supported by the reproduction of the rule, *mutatis mutandis*, in Article 34 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

For the more general principle that international organizations are subject to international law (and thus, among other sources, customary international law), see *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Reports (1980), pp.89-90; Higgins, R., *Problems and Process: International Law and How We Use It* (1994), p.46; and Thirlway, H., Part Eight, *British Year Book of International Law* 67 (1996), pp.12-19.

<sup>15</sup> What is of course also necessary for a delegation of power by treaty to become effective is that the treaty has entered into force.

<sup>16</sup> It would also seem necessary that this requirement of acceptance exists in the case of a unilateral declaration by a State that purports to confer powers on an organization.

This requirement of consent does not exist in the case of the constituent treaty of an international organization even though the organization is in law a third party to the constituent treaty (Chinkin, *supra* n.14, p.12) due to the nature of the special relationship of the organization to its constituent treaty (Chinkin, *ibidem*, p.12; and McNair, A., *The Law of Treaties*, (1961), pp.259-271.)

<sup>17</sup> See, for examples, the acceptance by the UN General Assembly in its resolutions of the delegation of power concerning the Italian colonies in Africa (see *supra* n.11); and the acceptance by the UN Security Council in resolution 745 of the delegation of power from the Paris Peace Accords concerning Cambodia (see *infra* n.38).

<sup>18</sup> The legally binding nature of these acts or declarations is akin to that of a unilateral act or declaration by a State under international law, which, if it was the State's intention, may impose a legally binding obligation on the State. The reason why such unilateral declarations may bind a State applies equally to the case of an international organization. In the context of a State, the International Court in the *Nuclear Tests* cases held: 'One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. ... Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognisance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.' (*Nuclear Tests (New Zealand v. France)*, ICJ Reports (1974), p.268.) There is no reason why an international organization - which like a State possesses international legal personality and the competence to accept binding obligations under international law - should not similarly be bound by such unilateral declarations. This approach of treating an international organization in an analogous manner to a State when acting to accept binding obligations under international law is reflected in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations which 'generally assimilates international organizations to States' for the purposes of determining when an international organization has expressed its consent to be bound by an international agreement. (Gaja, *supra* n.12, p.258)

of power.<sup>19</sup> This is what is necessary for a purported conferral of power on an organization by contractual treaty to have legal effect.

However, even where an organization may seem to have accepted a purported conferral of power, this does not mean that a substantive conferral will always have taken place. The reason for this is that the powers the States are purporting to confer may already be those an organization possesses under its constituent treaty. Put differently, a substantive conferral of powers by contractual treaty only takes place when the powers purporting to be conferred are those which the organization does not otherwise possess under its constituent treaty.<sup>20</sup> The determination as to whether this is the case will largely depend on the reaction of the organ on whom powers are purportedly being conferred. For example, an organ may make it clear in responding to a conferral that it is being given a power that it did not otherwise possess under its constituent treaty. This determination by an organ of the scope of its powers will, in the absence of review by a body which has jurisdiction to decide such a matter, certainly prevail over the interpretation of States purporting to confer powers on an organ of an organization.<sup>21</sup>

The accurate characterisation of a purported conferral of powers is of practical importance, since where there is a substantive conferral then the conferring States can arguably impose constraints on the organization's exercise of the conferred power, a matter considered in some

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<sup>19</sup> This is subject, however, to the form being consistent with the processes of lawful decision-making as specified in the practice and constituent treaty of the particular international organization. On the possibility of amending these processes, see *infra* n.49 and corresponding text *et sequentia*.

<sup>20</sup> In the case where a State conferring powers is a non-Member, there is an important policy issue from an organization's perspective that would seem to militate against such States being able to confer powers on an organization. Does an organization want to allow States to be able to confer discrete powers to be exercised on an *ad hoc* basis thereby allowing States to avoid the full range of organizational rights and obligations under the constituent treaty? This issue is thrown into even sharper relief when account is taken of the consideration discussed below that States may impose different processes of decision-making on an organization when exercising powers conferred on an *ad hoc* basis. See *infra* n.49 and corresponding text *et sequentia*.

<sup>21</sup> This locus of authoritative decision-making within an organization flows from the principle expounded by the International Court of Justice in the *Expenses* case that 'each organ must, in the first place at least, determine its own jurisdiction.' (*Expenses* case, *ICJ Reports* (1962), p.151 at p.168.)

detail below.<sup>22</sup> While in the case where there is no substantive conferral of power then the States Parties to the contractual treaty in question cannot seek to control or impose any limitations on the exercise by the organization of its power, since this is a matter governed solely by the constituent treaty.

This important difference can be illustrated, for example, by reference to cases where the response of the UN Security Council to a purported conferral of power by contractual treaty was to utilize its own powers under Chapter VII of the Charter rather than taking up the purported conferral that was on offer.<sup>23</sup> This has the consequence that the States purporting to confer powers

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<sup>22</sup> This situation is considered below in the section concerning the competence of an organization to exercise powers conferred on an *ad hoc* basis: *infra* n.49 and corresponding text *et sequentia*.

<sup>23</sup> An example of this is provided by the Dayton Peace Agreement concerning Bosnia and Herzegovina that was concluded between three States of the former Yugoslavia and which appeared, at least arguably, to confer powers on the UN Security Council in order to ensure the implementation of the terms of the Agreement. Article 1(1)(a) of Annex 1-A to the Dayton Peace Agreement invited the Security Council, 'to adopt a resolution by which it will authorise Member States or regional organisations and arrangements to establish a multinational military Implementation Force (hereinafter 'IFOR'). The Parties understand and agree that this Implementation Force may be composed of ground, air and maritime units from NATO and non-NATO nations, deployed to Bosnia and Herzegovina to help ensure compliance with the provisions of this Agreement (hereinafter 'Annex'). ...' The Security Council accepted the invitation of the Parties to establish a force (IFOR) to ensure implementation of the Agreement when, in resolution 1031, the Council, acting under Chapter VII of the Charter, decided to authorise 'the Member States acting through or in cooperation with the organization referred to in Annex 1-A of the Peace Agreement [NATO] to establish a multinational implementation force (IFOR) under unified command and control in order to fulfil the role specified in Annex 1-A and Annex 2 of the Peace Agreement'. The resolution then stated that the Council '[a]uthorizes the Member States acting under paragraph 14 above to take all necessary measures to effect the implementation of and to ensure compliance with Annex 1-A of the Peace Agreement, stresses that the parties shall be held equally responsible for compliance with that Annex, and shall be equally subject to such enforcement action by IFOR as may be necessary to ensure implementation of that Annex and the protection of IFOR, and takes note that the parties have consented to IFOR's taking such measures'.

Article 1 of Annex 1-A stipulates that the objectives of the Peace Agreement are to establish a durable cessation of hostilities; provide for the 'support and authorization of the IFOR and in particular to authorize the IFOR to take such actions as required, including the use of necessary force, to ensure compliance with this Annex, and to ensure its own protection'; and to establish lasting security and arms control measures as outlined in Annex 1-B to the General Framework Agreement. The objectives for which IFOR could use force against the States parties to the Agreement subsequently became, however, the point of contention between Russia and other members of the Security Council. The Russian representative stated in the Council that the Member States participating in IFOR were authorized to do only what the Bosnian sides agreed to. (S/PV.3607, p.25.) This position conceives of the States parties to the Dayton Agreement as conferring on the Council - and its delegatee, IFOR - the power to take military enforcement action against them when one of their number breaches the obligations specified in the Agreement. This is, however, a clear misconception of the legal position. The Security Council possesses under Article 42 of the Charter a power to order military enforcement to be taken against a State or an entity within a State; obviously without the need for the consent of those who are to be subject to such action. In the case of the Dayton Agreement, it was clear that once the Security Council had adopted resolution 1031 'acting under Chapter VII of the Charter' that the Council considered that it was exercising its own powers and not a power conferred by the States parties to the Agreement. As such, the Council was not constrained 'to do only what the Bosnian sides agreed to', since the authority of the Council did not derive from the Agreement but from its own powers under Chapter VII of the Charter which in the area of military enforcement action does not require the consent of the target State. Accordingly, the inclusion of the reference in resolution 1031 to the 'parties have consented to IFOR's taking such measures' was for political not legal reasons. Put differently, the mention of State consent in the resolution was of no legal consequence.

Another example that illustrates the distinction between the exercise by an organization of conferred powers and its own express powers under its constituent treaty is provided by the case of the UN Interim Administration Mission in Kosovo (UNMIK). UNMIK is a UN subsidiary organ established by the UN Secretary-General under the authority of, and pursuant to, Security Council resolution 1244 in order to exercise broad governmental powers over Kosovo. This resolution provides in

by contractual treaty are prevented from exercising the control that they wanted over the exercise of power by the UN. This occurred, for example, in the case where the UN Security Council – more specifically a UN subsidiary organ established by the Council, the UN Transitional Authority for Eastern Slavonia, Baranja and Western Sirmium – exercised governmental powers<sup>24</sup> over these areas of the territory of the Republic of Croatia.

An agreement was signed between the Government of the Republic of Croatia and the local authorities of Serbian ethnic origin in Eastern Slavonia on 12 November 1995<sup>25</sup> with the intention of providing for the peaceful re-integration of the region comprising Eastern Slavonia, Baranja, and Western Sirmium into the Croatian legal and constitutional system following four years of armed

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relevant part: ‘*Determining* that the situation in the region continues to constitute a threat to international peace and security, *Determined* to ensure the safety and security of international personnel and the implementation by all concerned of their responsibilities under the present resolution, and *acting* for these purposes under Chapter VII of the Charter of the United Nations, ... 2. *Welcomes* the acceptance by the Federal Republic of Yugoslavia of the principles and other required elements referred to in paragraph 1 above, and *demand*s the full cooperation of the Federal Republic of Yugoslavia in their rapid implementation; ... 7. *Authorizes* Member States and relevant international organizations to establish the international security presence in Kosovo as set out in point 4 of annex 2 with all necessary means to fulfil its responsibilities under paragraph 9 below; ... 10. *Authorizes* the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo; 11. *Decides* that the main responsibilities of the international civil presence will include: (a) Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648); (b) Performing basic civilian administrative functions where and as long as required; (c) Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections; (d) Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo’s local provisional institutions and other peace-building activities; ... (g) Supporting the reconstruction of key infrastructure and other economic reconstruction; ... (i) Maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo; ... .’ The Secretary-General interpreted the scope of these governmental powers given by the Security Council to UNMIK when he stated in a report to the Council the following: ‘35. The Security Council, in its resolution 1244 (1999), has vested in the interim civil administration authority over the territory and people of Kosovo. All legislative and executive powers, including the administration of the judiciary, will, therefore, be vested in UNMIK. 39. The authority vested in UNMIK will be exercised by the Special Representative [of the Secretary-General]. He will be empowered to regulate within the areas of his responsibilities laid down by the Security Council in its resolution 1244 (1999). In doing so, he may change, repeal or suspend existing laws to the extent necessary for the carrying out of his functions, or where existing laws are incompatible with the mandate, aims and purposes of the interim civil administration. ... 41. In the performance of the duties entrusted to UNMIK, the Special Representative will, as necessary, issue legislative acts in the form of regulations.’ (‘Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo’, S/1999/779, 12 July 1999). See also reports of the Secretary-General: S/1999/672, 12 June 1999 (on the establishment of UNMIK); and S/1999/987, 16 September 1999 (on the work of UNMIK).)

<sup>24</sup> On the competence of the UN to exercise such powers of governance within a State, see *infra* n.47 and corresponding text.

<sup>25</sup> Contained in S/1995/951, Annex.



conflict between the Croatian Government and the local Serbs.<sup>26</sup> The parties agreed in paragraph 2 of the agreement that during a transitional period, initially of 12 months, that a UN Transitional Authority shall govern the region in the interest of persons resident in or returning to the region.<sup>27</sup> Moreover, the parties requested that the Transitional Authority seek to achieve the following specific objectives: to demilitarise the parties which ‘shall include all military forces, weapons and police, except for the international force and for police operating under the supervision of, or with the consent of, the Transitional Administration’; to facilitate the ‘return of refugees and displaced persons to their homes of origin’; to ‘take the steps necessary to re-establish the normal functioning of all public services in the region without delay’; to ‘establish and train temporary police forces’; and to organise ‘elections for all local government bodies, including for municipalities, districts and counties’.<sup>28</sup>

The parties provided that the agreement enters into force ‘upon the adoption by the United Nations Security Council of a resolution responding affirmatively to the requests made in this agreement.’ The Security Council in resolution 1037 ‘acting under Chapter VII of the Charter of the United Nations,’ decided ‘to establish for an initial period of 12 months a United Nations peace-keeping operation for the Region referred to in the Basic Agreement, with both military and civilian components, under the name “United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium” (UNTAES)’ and further ‘Request[ed] the Secretary-General to appoint, in consultation with the parties and with the Security Council, a Transitional Administrator, who will have overall authority over the civilian and military components of

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<sup>26</sup> See ‘Report of the Secretary-General pursuant to Security Council resolutions 981 (1995), 982 (1995) and 983 (1995)’, S/1995/987, para.29; and ‘Report of the Secretary-General pursuant to Security Council resolution 1025 (1995)’, S/1995/1028, para.6.

<sup>27</sup> The provision states in full: ‘The United Nations Security Council is requested to establish a Transitional Administration, which shall govern the region during the transitional period in the interest of all persons resident in or returning to the region.’ (S/1995/951, Annex, p.2.)

UNTAES, and *who will exercise the authority given to the Transitional Administration in the Basic Agreement*'.<sup>29</sup> The express reference by the Council to its Chapter VII powers is important, since it means that the Council is exercising governmental powers over parts of Croatian territory using its Charter powers, and not as a consequence of governmental powers being conferred on it by the Republic of Croatia - the only party to the agreement which was a State. This characterisation of the legal basis for the exercise of powers was to prove controversial but important when determining whether it was Croatia or the UN Security Council who had the power to terminate the activities being carried out by the UN Transitional Administration.

Following the successful holding of elections in the region by UNTAES, the UN Transitional Administrator developed a two-phase 'exit strategy' which was described by the UN Secretary-General in the following terms: 'In the first phase, the Transitional Administrator would devolve to Croatia executive responsibility for the major part of civil administration of the region while maintaining his authority and ability to intervene and overrule decisions should the situation deteriorate and the achievements of UNTAES be threatened. The pace of devolution would be commensurate with Croatia's demonstrated ability to reassure the Serb population and successfully complete peaceful reintegration. In the second phase, and subject to satisfactory Croatian performance, remaining executive functions would be devolved, with Croatia assuming responsibility for the continued demilitarisation of the region and the gradual integration of the Transitional Police Force into the Croatian police force.'<sup>30</sup> This position was endorsed in express terms by the Security Council in resolution 1120. The Council, moreover, decided in resolution 1120 to extend the mandate of UNTAES for a further six months until 15 January 1998. This

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<sup>28</sup> S/1995/951, Annex, p.2. For a useful analysis of the exercise of a power of arrest by UNTAES to assist the work of the International Criminal Tribunal for the former Yugoslavia, see Lamb, S., 'The Powers of Arrest of the International Criminal Tribunal for the former Yugoslavia', *British Year Book of International Law*, 69 (1999), at pp.181-186.

<sup>29</sup> Emphasis added.

<sup>30</sup> S/1997/487, 23 June 1997, para.48. See also S/1997/767, 2 October 1997, para.3.

resolution was adopted despite the strong objections of Croatia who argued that UNTAES should at this time be immediately terminated and that powers of government be resumed immediately by Croatia. The fact of its adoption by the Security Council reiterated that the establishment and operation of UNTAES was an exercise by the Council of its own Chapter VII powers and not pursuant to the exercise of powers conferred by Croatia on an *ad hoc* basis. This control by the Council was further reiterated when it decided in resolution 1145 of 15 January 1998 to terminate UNTAES, the Council alone having decided that UNTAES had now fulfilled its mandate.<sup>31</sup>

To conclude, a contractual treaty that purports to confer on an organization a power that it already possesses under its constituent treaty will not, in general terms,<sup>32</sup> have the intended legal effect. In legal terms the contractual treaty may usefully be characterised as a request to the organization to exercise its power in a particular situation or even as the proffering of consent by the State in cases where such consent is necessary for the organization to be able to exercise its power,<sup>33</sup> but it should not, in general terms, be characterized as a substantive conferral of power. In the example examined above, however, even this consent was not needed, since the UN Security Council does not require the consent of States to exercise its Chapter VII powers. As

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<sup>31</sup> See the statement by the President of the Security Council on behalf of the Council: S/PRST/1998/3, 13 February 1998.

<sup>32</sup> On the exception to this general position, see text following *infra* n.33.

<sup>33</sup> Similar issues arise concerning the role that State consent plays in the establishment and utilization by the Security Council of UN peace-keeping forces. The establishment and utilization of such forces by the UN Security Council represents the exercise by the Council of an implied power under Chapter VII of the Charter (Sarooshi, D., 'The Role of the United Nations Secretary-General in United Nations Peace-Keeping Operations', 20 *Australian Yearbook of International Law* (1999), p.279 at pp.280-282). However, the ICJ in the *Expenses* case held that UN peace-keeping operations are not military enforcement "action" within the terms of Chapter VII. The consequence of this being that the deployment and utilization of a UN peace-keeping force is conditional on the consent of both the States contributing troops to the force and the host State where the force is to be deployed. (*Expenses case*, *ICJ Reports* (1962), p.165. See also on consent the report of the SG, A/3302, contained in Higgins, R., *United Nations Peacekeeping 1946-1967* (vol.1, 1969) at p.263; Garvey, J., "United Nations Peacekeeping and Host State Consent" (1970) 64 *AJIL* p.241; and Di Blase, A., "The Role of the Host State's Consent with Regard to Non-Coercive Actions by the United Nations" in Cassese, A., (ed), *United Nations Peace-Keeping: Legal Essays*, (1978), p.55.) It is important, however, not to confuse this consent requirement of States to contribute troops to a UN peace-keeping force (as contained in a Status of Forces Agreement) and of States to have the force stationed on their territory as being a conferral of power on the UN such that the States concerned can seek to control or specify limits on the use by the Council of its implied powers once their consent has been given. Cf. those cases where States have tried to exercise such control in the case of UN peace-keeping, see Sarooshi, *ibidem*, pp.288, 290-291, 295.)

such, the agreement represented no more than a request to the Council to exercise its Chapter VII powers.

There is, however, an important exception to the general position that a substantive conferral of powers only takes place when the powers purporting to be conferred are those which the organization does not possess under its constituent treaty. This exception is where the organ of an organization, although possessing the powers being conferred, chooses instead to take up the conferral using a general competence to do so rather than treating the purported conferral as an invitation to use its existing powers under the constituent treaty. This choice is not simply a matter of semantics. It has the important practical consequence that the States conferring powers may impose constraints on the exercise of powers by the organization. A good example of this is provided by the practice of the UN Security Council where it has chosen to accept a conferral of powers that would seem to fall within the scope of its powers under Chapter VII thereby constraining itself to exercise the power subject to the terms and conditions of the particular conferral.

A specific instance of this occurred in relation to the case of Cambodia where there was an *ad hoc* conferral of broad powers of internal governance on the UN through the Paris Peace Accords (the 'Accords').<sup>34</sup> The Accords created a Supreme National Council that was defined as the 'unique legitimate body and source of authority in which, throughout the transitional period, the sovereignty, independence and unity of Cambodia are enshrined'.<sup>35</sup> The Accords went on to stipulate

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<sup>34</sup> The Paris Conference concluded the following four Accords: the Final Act of the Paris Conference on Cambodia (*ILM*, 31 (1992), p.180); the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict (*ILM*, 31 (1992), p.183); the Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia (*ILM*, 31 (1992), p.200); and the Declaration on the Rehabilitation and Reconstruction of Cambodia (*ILM*, (1992), p.203). See on these Accords: Ratner, S., 'The Cambodia Settlement Agreements', *AJIL*, 87 (1993), p.1.

<sup>35</sup> The Agreement on a Comprehensive Political Settlement of the Cambodia Conflict (Comprehensive Settlement Agreement), Articles 3 and 5, *ibidem*. Security Council resolution 668 confirmed the sovereign nature of the Supreme National Council in 1990 when it described it as the 'unique legitimate body and source of authority in which, during the transitional period, the independence, national sovereignty and unity of Cambodia is embodied ... the Supreme National Council will therefore represent Cambodia externally and it is to designate its representatives to occupy the seat of Cambodia at the United Nations'. In respect of the Supreme National Council, see Ratner, *ibidem*, pp.10-12.

that the Supreme National Council ‘delegates to the United Nations all powers necessary to ensure the implementation of this Agreement’.<sup>36</sup> Accordingly, Article 2 of the Accords invited the Security Council to create the United Nations Transitional Authority in Cambodia (UNTAC) ‘with civilian and military components under the direct responsibility of the SG of the United Nations,’ ‘to provide UNTAC with the mandate set forth in this Agreement,’ and ‘to keep its implementation under continuing review’.<sup>37</sup> The Security Council accepted this conferral of power and established UNTAC by resolution 745 in 1992.<sup>38</sup> It was clear that the Security Council in establishing UNTAC was exercising powers conferred on it by the Paris Peace Accords and was not acting pursuant to the Council’s own Chapter VII powers, since there was no express reference in resolution 745 to Chapter VII.<sup>39</sup> As such, the Security Council was always careful to ensure that UNTAC did not exceed the mandate conferred on it by the Paris Peace Accords: thus, for example, in resolution 840 the Council requested UNTAC to ‘continue to play its role in conjunction with the Supreme National Council during the transitional period in accordance with the Paris Agreements’ and then went on to request the Secretary-General to make recommendations ‘on the possible role the United Nations and its agencies might play after the end of the mandate of UNTAC according to the Paris Agreements.’<sup>40</sup> More importantly, UNTAC was required to comply with certain directions (what was inaccurately termed as ‘advice’) of the Supreme National Council. As Matheson has observed:

The first major UN exercise in governance came with the 1991 Agreement on a Comprehensive Political Settlement of the Conflict in Cambodia. This Agreement established a Supreme National Council—composed of representatives of the contending Cambodian factions—that delegated various governmental

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<sup>36</sup> Comprehensive Settlement Agreement, *ibidem*, Article 6.

<sup>37</sup> *Ibidem*, Article 2.

<sup>38</sup> For consideration of the exercise by UNTAC of these conferred powers, see Ratner, *supra* n.34, Isoart, P., ‘L ‘Organisation des Nations Unies et le Cambodge’, *Revue Générale de Droit International Public*, 97 (1993), p.645, and Sarooshi, D., ‘Humanitarian Intervention and International Humanitarian Assistance: Law and Practice’, *Wilton Park Paper*, 86 (1993), pp.22-25.

<sup>39</sup> It should be noted that it is the consistent practice of the Council to make such a reference in cases where it is using its Chapter VII powers.

<sup>40</sup> In the event, UNTAC successfully completed its conferred mandate in 1993 and was subsequently terminated by UN Security Council resolution 860. On the conduct of elections by the UN in Cambodia, see: Vhu, N., ‘The holding of free and fair elections in Cambodia: the achievement of the United Nations’ impossible mission’, *Michigan Journal of International Law*, 16 (1995), p.1177.

functions to the United Nations, which were to be exercised by a UN Transitional Authority in Cambodia (UNTAC) to be created by the Security Council. Specifically, UNTAC was given direct control over Cambodian agencies in the areas of foreign affairs, national defense, finance, public security, and information; supervision over other agencies that could influence the outcome of elections; and the right to investigate various other government organs to determine whether they were undermining the accords and, if so, to take corrective measures. This authority was limited by the requirement that UNTAC follow any “advice” approved by a consensus of the factions represented in the Supreme National Council, to the extent that it did not conflict with the Agreement. All of these aspects of UNTAC’s role were added to the more traditional UN functions of enforcing a cease-fire and military demobilization, and conducting elections to establish a permanent national government.<sup>41</sup>

In cases where States do confer substantive powers on an organization by contractual treaty, there are two important issues that arise: The first concerns the competence of the organization to exercise these new powers under its constituent treaty; while the second concerns the extent to which the conferring States can exercise control over the organ when utilizing a conferred power. The second issue is considered in some detail below in the section on the typology of conferrals of power; while the first issue only arises in the case where power is conferred by contractual treaty and as such is considered in this present section.

### **(b) The competence of an organization to exercise powers conferred by contractual treaty**

The conferral of powers by contractual treaty on an international organization does not mean *ipso facto* that the organization can exercise lawfully the powers being conferred by States.<sup>42</sup> In order to exercise lawfully a power conferred by contractual treaty, an international organization must possess a competence to do so under its constituent treaty.<sup>43</sup> This requirement appears to

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<sup>41</sup> Matheson, M., ‘United Nations Governance of Postconflict Societies’, *AJIL* 95 (2001), p.76 at p.77.

<sup>42</sup> This can be contrasted with the case of a conferral of power by constituent treaty in which case the organization is always empowered to exercise the powers in question.

<sup>43</sup> As Judge Lauterpacht stated in the *Voting Procedure* case concerning the conferral by States of powers on the UN: ‘... in the case of the United Nations, whether the action is taken in pursuance of the objects of [the] organization, or in pursuance of a function accepted under some extraneous instrument such as a treaty. Such function must in any case lie within the orbit of its competence as laid down in the Charter. For the organization cannot accept the fulfilment of a task which lies outside the

pose a difficulty for an organization being able to exercise a power that is not expressly or impliedly conferred by its own constituent treaty. However, this apparent difficulty can be circumvented if the power being conferred can be said to fall within the general competence of an organization.

The concept of a general competence as it is being used here describes the range of activities that an organization is empowered to undertake in the pursuit of its functions and purposes as specified in its constituent treaty.<sup>44</sup> As such, the concept of the general competence of an organization is very similar to the concept of implied powers in the law of international organizations, since they both rely on implying a legal capacity from the objects and purposes of an organization as set out in its constituent treaty. There is, however, an important difference between the two concepts. The existence of an implied power gives an organ a specific enabling competence to act whereas a general competence does not as such enable an organ to act but rather, for present purposes, gives an organ a competence to operate in a particular area thus allowing an organ to take up and utilize a conferral of power.

This general competence is important since once its existence can be established in a particular case it allows an organization to exercise *ad hoc* conferred powers where the constituent treaty is silent on whether the organization can exercise the particular power or even where the constituent treaty may expressly stipulate that the organization does not itself possess such a power under the constituent treaty. An example of how a general competence provides flexibility in the latter case is illustrated by the case of *ad hoc* conferrals on the UN that raise an issue under Article 2(7) of the UN Charter. This provision states ‘Nothing contained in the present Charter

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scope of its functions as determined by its constitution.’ (*South-West Africa-Voting Procedure case, ICJ Reports (1955)*, p.67 at p.109 (referred to hereafter as the *Voting Procedure case*.)

<sup>44</sup> On the issue of the general competence of international organizations, see also Bekker, P., *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities*, (1994), p.75; and, for example, on its role in the establishment of UN subsidiary organs, see Sarooshi, D., ‘The Legal Framework Governing United Nations Subsidiary Organs’, *British Year Book of International Law*, 67 (1996), p.413 at pp.427-431.

shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state'.<sup>45</sup> This provision does not mean that the UN has no general competence to exercise powers that are concerned with the internal affairs of a State, but simply that nothing in the Charter gives the UN any specific powers – that is, ‘authorize[s] the United Nations’ – ‘to intervene’ in matters within the domestic jurisdiction of States.<sup>46</sup> If it can be established in a particular case that the UN possesses a general competence to exercise a power being conferred on the Organization, then an *ad hoc* conferral of power on the UN by contractual treaty would operate to circumvent application of Article 2(7) and the Organization would be able to exercise the conferred power *vis-à-vis* the conferring States. An example of this is provided by the UN's general competence – a competence established in detail elsewhere –<sup>47</sup> to exercise broad powers of internal governance that have been conferred on it by States in a number of cases – a practice that would otherwise seem to be prohibited by Article 2(7) of the Charter.<sup>48</sup>

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<sup>45</sup> However, Article 2(7) does contain an express exception to its own operation when it provides: ‘but this principle shall not prejudice the application of enforcement measures under Chapter VII [of the Charter]’. On Article 2(7) more generally, see: Higgins, R., *The Development of International Law through the Political Organs of the UN*, (1963), p.67, and ‘Reality and Hope in International Human Rights: A Critique’, *Hofstra Law Review*, 9 (1981), p.1485 at pp.1494-1499; Simma, *supra* n.6, p.139; Cot, J.-P. and Pellet, A., eds., *La Charte des Nations Unies*, (1991), p.141; Watson, J., ‘Autointerpretation, Competence, and the Continuing Validity of Article 2(7) of the UN Charter’, *AJIL*, 71 (1977), p.60; Bindschedler, R., ‘La délimitation des compétences des Nations Unies’, *Recueil des cours*, 108 (1963-I), p.307; and Arangio-Ruiz, G., ‘Le domaine réservé: L’organisation internationale et le rapport entre droit international et droit interne’, *Recueil des cours*, 225 (1990-VI), p.9.

<sup>46</sup> This approach to Article 2(7) relies on a narrow interpretation of the term ‘intervene’. As Simma’s commentary to the Charter provides: ‘“To intervene” means to take action with regard to domestic matters in order to alter those matters legally or politically, without giving the State concerned an opportunity to object to this intervention. Thus, we would be in the presence of a case of intervention if a UN fact-finding commission were to enter the territory of a state without its consent, or if states were obliged ... to appear before a UN organ against their will.’ (Simma, *supra* n.6, p.150.) See also Simma, *ibidem*, pp.147-148; and Higgins, *ibidem*, pp.106-110.

<sup>47</sup> See Sarooshi, *supra* n.7, pp.59-63. Crawford – in his ‘First Report on State Responsibility’ as International Law Commission (‘ILC’) Special Rapporteur on State Responsibility – has stated more generally: ‘There is no doubt that an organ of an international organization may perform governmental functions for or in relation to States, pursuant to “delegated” powers or even on the authority of the organ itself.’ (‘First Report on State Responsibility’ by ILC Special Rapporteur Crawford, A/CN.4/490/Add.5, 22 July 1998, paras.231-232.)

<sup>48</sup> Consider the following two cases both of which involved the *ad hoc* conferral of governmental powers on the UN: the UN Transitional Authority in Cambodia (UNTAC) (on this case see *supra* nn.34-41 and corresponding text); and the conduct of the referendum in Western Sahara by the UN Secretary-General (‘SG’) and his Special Representative. In the latter case of Western Sahara, there was a conferral of governmental powers by Morocco and the Frente POLISARIO (although of course the only State involved was Morocco) on the UN Secretary-General and his Special Representative in order to conduct the referendum in that country. The exercise of these powers were carried out with the political support and approval of the UN Security Council: see the following Security Council resolutions: 621 (1988), 658 (1990), 690 (1991), 725 (1991), 809 (1993), 907 (1994), 973 (1995), 995 (1995), 1002 (1995), 1017 (1995), 1042 (1996), 1056 (1996), 1084 (1996), 1108 (1997), 1131 (1997), 1133 (1997), 1148 (1998), 1163 (1998), 1185 (1998), 1198 (1998), 1204 (1998), 1215 (1998), 1224 (1998), 1228 (1998), 1232 (1999), 1235 (1999), and 1238 (1999). This conferral included the power ‘to ensure, among other things, that there shall be complete freedom of



The remaining, more problematic, issue of *vires* that requires consideration in the case of *ad hoc* conferrals is where the States conferring a power specify that it must be exercised using processes of decision-making that are different from those specified in the constituent treaty of the organization. An analogous type of issue arose before the International Court of Justice in the 1955 *Voting Procedure* case<sup>49</sup> – the conferral of power in this case being from one organization (the League of Nations) to another (the United Nations).

The main question in the case was what decision-making process was the UN General Assembly required to use when exercising the supervisory power of the Mandates system – a power previously exercised by the League of Nations Council that was subsequently transferred to the Assembly.<sup>50</sup> Was the General Assembly required to use the unanimity rule of the League Council or its own two-thirds majority process as stipulated in the UN Charter? The reason this issue arose was that the International Court in its earlier decision in the 1950 *South-West Africa* case held that even though the General Assembly was competent to exercise the supervisory power relating to the Mandates system, that the supervision by the General Assembly ‘should conform as far as possible to the *procedure* followed in this respect by the Council of the League of Nations’.<sup>51</sup>

The Court in the 1955 *Voting Procedure* case held on the issue:

The voting system of the General Assembly was not in contemplation when the Court, in its Opinion of 1950, stated that “supervision should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations”. The constitution of an organ usually prescribes the method of voting by which the organ arrives at its decisions. The voting system is related to the composition and functions of the organ. It forms one of the characteristics of the constitution of the organ. Taking decisions by a two-thirds majority vote or by a simple majority vote is one of the distinguishing features of the General Assembly, while

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speech and assembly, and of the press, as well as freedom of movement of personnel and property into, out of and within the Territory’ and ‘to issue regulations prohibiting graft, fraud, intimidation or harassment which could interfere with the organization and conduct of a free, fair and transparent referendum’. (S/1997/742, 2 September 1997, Annex III, paras.3, 4; and S/1997/882, 13 November 1997, para.14.) The broad nature of these conferred powers was illustrated by, for example, the statement by the Secretary-General that they included the competence to ‘suspend any law or measure which, in his judgment [the SG’s Special Representative], could obstruct the conduct of a free and fair referendum ... ’ (S/1997/882, 13 November 1997, para.21.)

<sup>49</sup> *South-West Africa-Voting Procedure* case, *ICJ Reports* (1955), p.67 (the *Voting Procedure* case).

<sup>50</sup> The Court found that the competence of the General Assembly to exercise such supervision could be based on Article 10 of the Charter: *International Status of South-West Africa* case, *ICJ Reports* (1950), p.128 at p.137.

<sup>51</sup> *International Status of South-West Africa* case, *ICJ Reports* (1950), p.128 at p.138. (Emphasis added.)

the unanimity rule was one of the distinguishing features of the Council of the League of Nations. These two systems are characteristic of different organs, and one system cannot be substituted for the other without constitutional amendment. To transplant upon the General Assembly the unanimity rule of the Council of the League would not be simply the introduction of a procedure, but would amount to a disregard of one of the characteristics of the General Assembly.<sup>52</sup>

The Court does not, however, explain what underlies its assumption that the voting procedure of an organ of an organization is an essential – and in the Court’s view inalienable – part of the organ’s institutional competence such that it cannot be changed except by constitutional amendment.

One rationale may be that Member States have conferred powers on an organ of an organization on the implied condition that they are to be exercised in accordance with the processes of decision-making of the organ as specified in its constituent treaty, and that this should apply also to powers conferred on the organization by States on an *ad hoc* basis or, as in the *Voting Procedure* case, by another international organization (the League of Nations). But it does not follow from this rationale that such an implied condition is immutable. States Parties to a constituent treaty can always agree to change the decision-making processes of an organ of the organization. The International Court in the *Voting Procedure* case itself acknowledged that this could be done by ‘constitutional amendment’. The point though is that such amendments are not restricted to the formal processes of amendment specified in a constituent treaty. Put differently, the existence of a formal amendment clause in a constituent treaty does not prevent its amendment by more informal amendment processes.<sup>53</sup> The only element required for amendment is that the

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<sup>52</sup> *Voting Procedure* case, *ICJ Reports* (1955), p.67 at p.75. Judge Basdevant held similarly: ‘It cannot be open to the General Assembly, depending upon its assessment of what it regards as possible in this connection, to alter what is laid down by Article 18 of the Charter in order to adapt that Article more or less to the methods employed in the League of Nations for the making of decisions of the Council.’ (*Ibidem*, p.82.)

<sup>53</sup> The existence of an amendment clause does not necessarily prevent amendment by use of other mechanisms: see *infra* n.55 and corresponding text. Moreover, the International Court in the *Namibia* case rejected the contention of the South African Government, based on the *obiter dicta* of Sir Percy Spender in the *Expenses* case, (*Expenses case, ICJ Reports* (1962), p.191) that where States have specified an express process for amendment of a treaty then it is not possible to amend the treaty using a different method, *in casu* subsequent practice. (Written Statement of South Africa, *Legal Consequences for States of the Continued Presence of South Africa in Namibia, ICJ Pleadings 1971*, Vol.1, at p.395.)

States Parties to the treaty – in the case of an organization its members – agree, or in other words provide their consent, to an amendment.<sup>54</sup> The main way in which the *de facto* amendment of the decision-making processes of an organization can take place is by the members providing their consent through acquiescence to the subsequent practice of an organ of the organization.<sup>55</sup> This

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Consider also, for example, the action taken in 1956 and 1957 by the six original member States of the European Coal and Steel Community when they twice modified the ECSC Treaty by informal agreement, disrespecting the formal procedure laid down in Article 36 of the ECSC Treaty. See Weiler, *supra* n.1, p.295; and Weiler, J.H.H., and Modrall, J., 'Institutional Reform: Consensus or Majority?', *European Law Review*, 10 (1985), p.316.

There are, however, a few writers who oppose the lawfulness of *de facto* processes of amendment: cf., for example, Arangio-Ruiz, G., 'The "Federal Analogy" and UN Charter Interpretation: A Crucial Issue', *EJIL*, 8 (1997), p.1 at p.25.

<sup>54</sup> This requirement is specified by Articles 39-40 of the Vienna Convention on the Law of Treaties. This requirement of consent does not mean, however, that all States Parties must give their consent before constitutional amendment can take place. Consider, for example, the UN Charter that requires for formal amendment (per Article 108) only a two-thirds majority decision (as well as the concurring votes of Permanent Members) and not full unanimity. For a review of the amendment procedures of a number of international organizations, see Schermers and Blokker, *supra* n.10, pp.728-734; and Klabbers, *supra* n.10, pp.88-93.

<sup>55</sup> The other, more common, way in which the doctrine of subsequent practice has been applied is to confirm an interpretation of a constituent treaty that has been rendered by application of the General Rule of treaty interpretation set out in Article 31(1) of the 1969 Vienna Convention on the Law of Treaties. The role of subsequent practice as a means of achieving *de facto* amendment or modification of the terms of a treaty although not as commonly invoked by courts and commentators has nonetheless been recognized in various international judicial pronouncements and in the writings of jurists. One of the earliest of these pronouncements was by Judge Lauterpacht in his separate opinion in the *Voting Procedure* case when he stated: '... it cannot be said, by way of an absolute rule, that in no circumstances may the General Assembly act by a system of voting other than that laid down in the Charter. There is no room for any emphasis of language suggesting that any such modification of the voting procedure is a juridical impossibility. Frequent practice of the League of Nations accomplished that juridical impossibility and the Court [Permanent Court of International Justice] expressly gave it its approval. On the other hand ... it does not seem to me permissible to go as far ... to hold that a modification of the system of voting is permitted every time when the Organization acts under a treaty other than its own constitutional Charter. The correct rule seems to lie half-way between these two solutions. The available practice and considerations of utility point to the justification of a rule which recognizes in this matter a measure of elasticity not inconsistent with the fundamental structure of the Organization.' (*Voting Procedure* case, *ICJ Reports* (1955), at pp.111-112.) See also, for example, Sir Gerald Fitzmaurice who stated that 'a tacit revision of the terms of a treaty might be deemed to have been effected through the subsequent practice or conduct of the parties in relation to it.' (Fitzmaurice, G., 'The Law and Procedure of the International Court of Justice, 1951-4', *BYIL*, 33 (1957), p.176 at p.252.)

Moreover, in the *Air Transport Services Agreement Arbitration (USA v. France)* the Arbitral Tribunal distinguished between the role of subsequent practice as a means of interpretation of a treaty from the role of subsequent practice as a possible source of modification of the obligations of the parties under a treaty. Concerning this second role of subsequent practice, the Arbitral Tribunal stated: 'As the Tribunal sees it, it is from another aspect that careful consideration must be given to the conduct of the Parties and to the attitude adopted by each of them, in particular from the time when the first differences of opinion as to principle arose regarding the application of the Agreement. This course of conduct may, in fact, be taken into account not merely as a means for interpreting the Agreement, but also as something more: that is, as a possible source of a subsequent modification, arising out of certain actions or certain attitudes, having a bearing on the juridical situation of the Parties and on the rights that each of them could properly claim. Here the Tribunal is not referring solely, nor even primarily, to the conclusion of subsequent agreements properly speaking which were expressly sanctioned in formal documents ... . What the Tribunal particularly has in mind are cases where express or implied consent has been given to a certain claim or the exercise of a certain activity, or cases where an attitude – whether it can rightly or not be described as a form of tacit consent – certainly has the same effects on the resulting juridical situation between the Parties as consent properly speaking would have. The Tribunal is referring in particular to assumptions such as the following: the interested party has not, in fact, raised an objection that it may have had the possibility of raising, or it has abandoned, or not renewed at a time when the opportunity occurred, the objection that it had raised at the outset; or while objecting in principle, it has in fact consented to the continuance of the action in respect of which it has expressed the objection; or again, it has given implied consent, resulting from the consent expressed in connection with a situation related to the subject-matter of the dispute. (*Air Transport Services Agreement Arbitration (USA v. France)* (1963), contained in 38 *ILR* pp.249-250.)

This approach was further reflected in Article 38 of the ILC's 1966 Draft Articles on the Law of Treaties which provided that 'A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.' In its commentary on this provision, the ILC stated: 'This article covers cases where the parties by common consent in fact apply the treaty in a manner which its provisions do not envisage. Subsequent practice in the

process of *de facto* amendment deserves more detailed consideration, since it may provide an important legal basis for an organization being able to accept and utilize a conferral of power that requires the use of processes of decision-making that are different from those specified in its constituent treaty.

The authoritative statement on this process of *de facto* amendment was made by the International Court of Justice in the *Namibia* case when it held that the subsequent practice of the UN Security Council in effect modified the provisions of Article 27(3) of the UN Charter relating to the effect of an abstention from voting by a UN Permanent Member.<sup>56</sup> The Court stated:

... the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. By abstaining, a member does not signify its objection to the approval of what is being proposed; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote. This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965

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application of a treaty, as stated in article 27, paragraph 3(b), is authoritative evidence as to its interpretation when the practice is consistent, and establishes their understanding regarding the meaning of the provisions of the treaty. Equally, a consistent practice, establishing the common consent of the parties to the application of the treaty in a manner different from that laid down in certain of its provisions, may have the effect of modifying the treaty. ... Although the line may sometimes be blurred between interpretation and amendment of a treaty through subsequent practice, legally the processes are distinct. Accordingly, the effect of subsequent practice in amending a treaty is dealt with in the present article as a case of modification of treaties.' (*Yearbook of the International Law Commission*, 1966, Vol.II, p.236. The Commission continued in its Commentary to state: 'In formulating the rule in this way the Commission intended to indicate that the subsequent practice, even if every party might not itself have actively participated in the practice, must be such as to establish the agreement of the parties as a whole to the modification in question.' (*Yearbook of the International Law Commission*, 1966, Vol.II, p.236.)) This provision proved controversial at the Vienna Conference and it was deleted from the draft articles of the Convention by a vote of 53 to 15, with 26 abstentions. This deletion is arguably, however, of little juridical consequence. Akehurst provides the correct interpretation of this fact when he states: '... only 10 of the 26 States which spoke in favour of the proposal to delete said that Article 38 was not in accordance with existing law; 3 States supported deletion because they thought that it was inappropriate for the Convention to deal with relations between treaties and customary law; 11 States said that the rule laid down in Article 38 was undesirable, but did not say whether or not it was in accordance with existing law; the remaining 2 of the 26 States advocated deletion without giving reasons. It is thus difficult to interpret the deletion of Article 38 as a clear rejection of the view that existing law allowed a treaty to be amended by subsequent practice, especially since the Vienna Convention did not exclude the possibility of termination of treaties by desuetude, and expressly allowed a treaty to be interpreted in the light of subsequent practice (Article 3(3)(b)); amendment merges into termination at one extreme and into interpretation at the other extreme. ... Subsequent practice often modifies the constituent treaties of international organizations. (Akehurst, M., 'The Hierarchy of the Sources of International Law', *British Year Book of International Law*, 47 (1974-5), p.275 at p.277.) Cf., however, the strong opposition to the operation of subsequent practice as a means of modifying a constituent treaty by Judge Spender in the Expenses case when in his separate opinion he stated: 'The Charter establishes an Organization. The Organization must function through its constituted organs. The functions and authorities of those organs are set out in the Charter. However the Charter is otherwise described the essential fact is that it is a multilateral treaty. It cannot be altered at the will of the majority of the Member States, no matter how often that will is expressed or asserted against a protesting minority and no matter how large be the majority of Member States which assert its will in this manner or how small the minority.' (*Expenses case*, *ICJ Reports* (1962), p.196.)

<sup>56</sup> See the *Namibia* case, *ICJ Reports* (1971), p.22; and for the view that the International Court went beyond the ordinary meaning of the terms in Article 27(3) see Saarbrücken, G., 'The Interpretation of the Charter', in Simma, *supra* n.6, p.25 at p.41.

of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.<sup>57</sup>

Let us, however, be clear: it was not the subsequent practice *per se* that the Court relied upon in the *Namibia* case as the legal basis for the *de facto* amendment of the Charter, but rather it was the tacit acceptance of this practice by the generality of Members that conferred the mantle of legality on the practice.<sup>58</sup> More accurately, the Court considered that the failure by UN Member States to object to the practice of the Security Council meant they had acquiesced – that is, given their implied consent – to the *de facto* amendment of the Charter that was purportedly being effected by the Council's practice. This represents a specific application of the doctrine of acquiescence which provides more generally that the failure by States to protest in circumstances that would otherwise call for a protest in order to preserve their legal rights<sup>59</sup> leads to the States in question having acquiesced in – implicitly consented to – the change to their legal rights and duties.<sup>60</sup>

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<sup>57</sup> *Namibia case, ICJ Reports* (1971), p.22.

<sup>58</sup> As Thirlway states in respect of the *Namibia* case: 'The Court's reference to the practice as being 'of' the Organization is presumably intended to refer, not to a practice followed by the Organization as an entity in its relations with other subjects of international law, but rather a practice followed, approved or respected throughout the Organization. Seen in this light, the practice is not so much a set of acts of abstention by the permanent members, with the intention of neither blocking the proposed resolution, nor going on record as endorsing it, as rather a recognition by the other members of the Security Council at the relevant moment, and indeed by all member States by tacit acceptance, of the validity of such resolutions. ... One way of looking at the matter is to regard the Charter as having been in effect amended by the subsequent practice of the parties to it. Fitzmaurice himself in his series of articles referred specifically to the abstention question as an example of a 'common principle on the part of parties to a treaty' which 'may constitute a means whereby the strict effect of the treaty can be modified', or of 'an amendment to the treaty by a tacit unwritten consensus.' (Thirlway, H., 'The Law and Procedure of the International Court of Justice 1960-1989, Part Two', *British Year Book of International Law*, 61 (1990), p.3 at pp.76-77.) Greig, moreover, states 'The interesting part of this pronouncement is that it did not go so far as to identify definitively how the practice was given legal effect. On one view it is tantamount to a modification or amendment of the Charter. Certainly the Court was at pains to emphasise evidence suggesting the universal acceptance of the practice, so that the 'consent' of the parties could be said to have existed. For those who regarded Article 27.3 as having a clear meaning which required a concurring vote of *all* permanent members, the practice of UN members must be taken to have constituted a *de facto* revision of the Charter the *de jure* effect of which the Court has now recognised.' (Greig, D., 'The interpretation of treaties and Article IV.2 of the Nuclear Non-Proliferation Treaty', *Australian Yearbook of International Law*, 6 (1978), p.77 at p.98.)

We also recall that in the *Air Transport Services Agreement (USA v. France)* case the Arbitral Tribunal placed similar importance on the implicit acceptance by States of a practice in order for it to modify the juridical situation of the parties. See *supra* n.55.

<sup>59</sup> See the following cases, *Delagoa Bay Arbitration (Great Britain v. Portugal)*, the *Guatemala-Honduras Boundary Arbitration*; the *Island of Palmas Arbitration (United States v. Netherlands)*, and the ICJ case of *Anglo-Norwegian Fisheries (United Kingdom v. Norway)*, as discussed in MacGibbon, I., 'The Scope of Acquiescence in International Law', this *Year Book* 31 (1954), p.143 at pp.157-162; and the *Temple of Preah Vihear* case, *ICJ Reports*, (1962), p.23. See also on this point the record of practice of States as evidenced by statements in pleadings and other official pronouncements contained in MacGibbon, *ibidem*, pp.162-166.

<sup>60</sup> As MacGibbon has stated: 'The failure of one party to a treaty to protest against acts of the other party in which a particular interpretation of the terms of the treaty is clearly asserted affords cogent evidence of the understanding of the parties of

Let us now turn to consider to what extent the doctrine of subsequent practice of an organization together with acquiescence by Member States can provide a basis for an international organization being able to accept and utilize conferred powers using a process of decision-making different from that specified in its constituent treaty. This in turn requires consideration of two key issues. First, how many instances of practice by an organ are required before a *de facto* amendment of the constituent treaty can be said to have occurred? Second, what degree of acceptance by States Parties is necessary for an amendment to take place?

In examining this first issue, it is instructive to ask the related, but slightly different, question: can acquiescence by Member States of an organization to a single decision of an organ constitute a basis for effecting modification of the organization's constituent treaty? Sir Ian Sinclair, for example, defines the word 'practice' as 'a sequence of facts or acts ... [that] cannot in general be established by one isolated fact or act, or even by several individual applications.'<sup>61</sup> This is surely correct in the abstract, but it does not take into account that acquiescence is the basis for the subsequent practice of an international organization being able to modify a treaty. As such, there is no reason to require that a practice extend, in the words of the International Court in the *Namibia* case, 'over a long period': one instance of practice may be sufficient to justify a *de facto* amendment of the constituent treaty rendering as lawful the organization's act or decision.<sup>62</sup> The argument here is that if the failure by States to protest – when such a protest is required in order to preserve their rights – against repeated instances of practice by an organ can amount to acquiescence, then logically it should not matter how many times States are given the opportunity

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their respective rights and obligations under the treaty. The influence of acquiescence may similarly be observed in the assumption by international organizations of functions for which their constituent instruments provide no warrant.' (MacGibbon, *ibidem*, pp.146-147.)

<sup>61</sup> Sinclair, I., *The Vienna Convention on the Law of Treaties* (1984, 2<sup>nd</sup> ed.), p.137. See also Yasseen, 'L'Interpretation des traités d'après la Convention de Vienne sur le droit des traités', *Recueil des cours*, 151 (1976-III), p.48.

<sup>62</sup> There have been cases where the decision of an organ of an organization has modified substantive provisions of an organization's constituent treaty. Consider, for example, the case of NATO where two decisions of the NATO Council on the 2<sup>nd</sup> and 9<sup>th</sup> of August 1993 were the subsequent basis for NATO enforcement action, under the auspices of the UN Security Council,

to prevent the change in their juridical position under a constituent treaty and that once is enough.<sup>63</sup> Put differently, the first failure to object to the practice of the organ of an organization may be considered as acquiescence by Member States to a change in their juridical position under the constituent treaty.<sup>64</sup> In our context of the purported change by an organ of its decision-making processes in order to exercise a conferred power, the argument thus runs that it is the failure by the States Parties to object to the organ's decision accepting the conferred power that is the source of their acquiescence to the new process.<sup>65</sup>

There are, however, at least two valid concerns against attributing too much importance to an one-off failure by Member States to object to an act or decision of an organization such that they can be said to have acquiesced in a change to the constituent treaty.

The first centres on whether the representatives of States to an organization are vested with the competence under their domestic law to express the consent on behalf of their States to be

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in Bosnia, an area well outside its original area of operations as specified in NATO's constituent treaty. See Sarooshi, *supra* n.7, p.251.

<sup>63</sup> The point has also been made in the analogous case of the formation of customary international law and the concept of the persistent objector. As Mendelson states: 'If one believes that States are bound by customary rules because (and to the extent that) they individually consent to them, then it is obvious why a persistent objector is not obliged. Indeed, the question might be posed why the objection needs to be *persistent*: one refusal should be enough.' (Mendelson, M., 'The Formation of Customary International Law', *Recueil des cours*, 272 (1998), p.239.)

<sup>64</sup> This approach is supported by Lauterpacht's review of the case-law of international courts: 'It might have been expected that the courts would have been reluctant to rely upon practice as an element in interpretation unless it were sufficiently often repeated to justify the view that it was pursued out of a sense of conformity with the law. Any such expectation is not, however, supported by a consideration of the relevant decisions. It is impossible to extract from them either any statement of principle or any consistent method from which one might imply a principle. In the *ILO-Agricultural Labour* case, reference was made to repeated discussion of the subject. In the *European Commission of the Danube* case, the practice relied upon occurred on only one occasion. The same was true in the *UNESCO* case and in the Advisory Opinion on *Conditions of Admission*. In the *Reparation for Injuries* case reference was made to the conclusion of international agreements constituting the acknowledgement in practice of the treaty-making capacity of the United Nations. When the International Court spoke in the *ILO Administrative Tribunal* case of a "body of practice" it cited, in fact, two instances of the practice in question. Each instance of the practice relied upon in the *IMCO* case had occurred only once, but, equally, had occurred on every relevant occasion. However, the Court did not mention either of these facts. The one exception seems to be the *Namibia* Opinion, where the Court referred to the provision in question as having been "consistently and uniformly interpreted" in a particular way.' (Lauterpacht, E., 'The Development of the Law of International Organizations by the Decisions of International Tribunals', *Recueil des Cours*, 152 (1976, IV), p.377 at p.457.)

<sup>65</sup> Moreover, in the case where a State may have objected to the decision of the organ, but subsequently accepts the decision by, for example, participating in subsequent action that may arise from the decision then the State may be deemed to have withdrawn its earlier objection and retroactively accepted the legality of the decision. Consider, for example, a case where a State may object to the inclusion by the General Assembly of different items within the regular budget of the Organization under Article 17(2), but where the objecting State subsequently acquiesces in the decision by paying their contributions under Article 17(2) without re-stating their earlier objection: cf. the separate opinion of Judge Sir Percy Spender in the *Expenses* case, *ICJ Reports* (1962), at p.188.

bound by new, modified, obligations under the constituent treaty. However, the immediate response to this concern is that if a State's representative does not possess the competence to express the consent of its State to a *de facto* modification of a treaty obligation then surely it is precisely in these types of cases that the State must make a protest against the proposed act or decision of the organization in order, *inter alia*, to alert other States to this fact. As such, the failure by a State to object can, from the standpoint of both the organization and other Member States, be considered as cogent evidence of the State's acquiescence to the decision. Moreover, there is the additional counter-response that is well-summarised by Lauterpacht:

The question, therefore, is whether the law of international organizations takes any note of the fact that when States participate in the formation of a practice not in literal conformity with the terms of the constitution originally accepted they are participating in a modification of their international obligations without appropriate municipal law approval. ... The reliance placed by the courts upon practice suggests that the proper view of the matter may be that when a State by appropriate internal constitutional processes becomes a party to a constituent instrument, its executive organs are vested (at least from the point of view of international law) with all appropriate authority to bind that State by participation in the activities of that organization.<sup>66</sup>

The second main concern against attributing too much importance to an one-off failure by States to object to an act or decision of an organization is that the two essential preconditions for the operation of the doctrine of acquiescence in international law may not necessarily be fulfilled in the case of different international organizations. The two preconditions that must be fulfilled before a State can be said to have acquiesced to a change in its rights or duties under international law – *in casu*, to the *de facto* modification of a constituent treaty – are that a State must have knowledge of the purported change that is taking place in its legal rights or duties, and, secondly, that the State must have an appropriate forum to express any protest that it may wish to make.

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<sup>66</sup> Lauterpacht, *supra* n.64, pp.459-460. The first element of this approach is borne out in practice in the case of, for example, the Universal Postal Union where 'many members empower their delegates to sign [UPU Acts that are binding on member States, unless a member expressly reserves its position] without requiring ratification.' (Schermers and Blokker, *supra* n.10, p.816.)



Central to the notion of acquiescence under international law is that a State has knowledge of the specific act whose failure to protest against may lead to the change in its legal rights or duties. Put differently, a State cannot be said to have acquiesced in a decision or action if it was not in the first place aware of the decision or action that was purporting to change its legal rights or duties. This does not mean, however, that a State must necessarily be aware of the legal implications of its failure to protest in a particular case: this is a matter for each State to ascertain for itself as a matter of self-interest. The knowledge threshold for acquiescence to be able to take place is more factual in nature: was the State aware, or should have been aware, of the particular act, or, in our case, decision of the international organization purporting to accept a conferral of power. In the case of international organizations, this issue of sufficient knowledge may be an issue of real concern to a number of smaller States who due to limited resources cannot monitor, let alone analyze, decisions of a number of international organizations to which they are a party. It is precisely in such cases that repeated instances of practice by an organization may be necessary to evidence that Member States of an organization had knowledge of the particular decision (set of decisions) that purports to change their legal rights or duties. This issue of knowledge in the case of Member States of an international organization will of course depend on the type, and thus membership, of the organ that is taking the decision to accept an *ad hoc* conferral of powers. If, for example, it is a plenary organ taking the decision, then there is a strong presumption that a Member State had knowledge of, and could thus have protested against, the decision. If, however, it is a non-plenary organ then it may depend on other factors such as whether the secretariat of the organization notified all Member States of the proposed – and taken – decision. This largely factual matter will depend accordingly on the specifics of the particular organization.

The second precondition for the operation of acquiescence is that a State must have an appropriate forum to express its protest against a purported change in its rights or duties – in our

case the *de facto* modification of the constituent treaty. Difficulties concerning this precondition do not usually arise in the case of acquiescence outside the context of international organizations, since a State can of course protest directly to the other State whose actions are purporting to change its legal rights or duties. Where, however, the contested decision is that of an organ of an international organization then direct protest to other States will be of no legal consequence: what is necessary is that States have the facility to object to the decision within the confines of the organization. This precondition is nonetheless satisfied in the case of international organizations. In the case where the decision is by the plenary organ of the organization then the position is clear: Member States will have a direct opportunity to object to the decision being taken by the organ and their failure to do so will have the consequence, as previously explained, that they can be said to have acquiesced in the decision.<sup>67</sup> Where the decision is by a non-plenary organ, then States who are members of the organization but not of the specific organ can still lodge their protest by making a statement or sponsoring a resolution to this effect in a plenary or other deliberative organ<sup>68</sup> of the organization or it may protest to the chief administrative officer or the secretariat of the organization asking that its protest be communicated to the other Members of the organization.<sup>69</sup> The existence of these fora for protest even in the case of a non-plenary organ is

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<sup>67</sup> There is a healthy practice of member States of organizations objecting to decisions of, for example, the plenary organ of the organization when casting their vote on a variety of issues both institutional and substantive in nature. A good example, albeit not in the context of institutional change, is provided by the objections by developed nations to the series of UN General Assembly resolutions purporting to establish a New International Economic Order.

<sup>68</sup> An example of this is where a majority of UN Member States passed a resolution in the General Assembly that in effect constituted an objection against action taken by the UN Security Council when it imposed an arms embargo against all of the constituent republics of the Federal Republic of Yugoslavia in 1992. Paragraph 17 of GA resolution 48/88 of 20 December 1993 provides: 'Also urges the Security Council to give all due consideration, on an urgent basis, to exempt the Republic of Bosnia and Herzegovina from the arms embargo as imposed on the former Yugoslavia under Security Council resolution 713 (1991) of 25 September 1991'.

This does not of course prevent other organs of the organization protesting against action by an organ either on the basis that action is *ultra vires* or that the action is in violation of the delimitation of powers that exists between the organs as specified by the organization's constituent treaty. Consider, for example, the case where the UN General Assembly protested against the way in which the Security Council established the UN International Criminal Tribunal for the Former Yugoslavia (ICTY). The GA refused to approve budget of ICTY since SC resolution 827 establishing the ICTY purported to state that the ICTY's budget would come from the regular UN budget, in effect a decision solely reserved for the GA pursuant to Article 17(2) of the UN Charter. For further discussion of this case, see Sarooshi, *supra* n.44, pp.473-477.

<sup>69</sup> A potential example of such a protest – that was not *in casu* expressed – may have usefully been made by the former Yugoslavia to the UN Secretary-General in relation to the General Assembly's suspension of its membership. On this suspension,

important since it means that the failure by States who are not Members of the organ to object to its practice may constitute acquiescence to the practice in question. This was certainly the approach adopted by the International Court in the *Namibia* case when it held that the lack of objection by UN Member States to the practice of the Security Council meant that they had acquiesced to the practice.

In discussing the *de facto* amendment of a constituent treaty through subsequent practice, the remaining unresolved issue is what degree of acceptance by Member States is considered necessary for an amendment to occur. The International Court in the *Namibia* case held that the practice of an organ must be ‘generally accepted’ by the Member States of the organization in order to effect a *de facto* modification of the constituent treaty.<sup>70</sup> This far from resolves the issue, however, as it only raises the question what does ‘generally accepted’ mean? Nonetheless, the use of such ambiguous language it would seem was on purpose. As Elihu Lauterpacht has stated:

Neither the courts nor the organizations themselves have shown any marked inclination to lay down any general theory as to the identity or number of the parties whose conduct is relevant for the purpose of establishing any particular practice. In some cases, the courts make no reference to the point at all; in others they do so only obliquely. For instance, in the *European Commission of the Danube* reference was made to “the majority of the European Commission”; in the *UNESCO* case, to the practice of “every one” of the States affected; in the case of *Certain Expenses of the United Nations* to the fact that certain decisions of the General Assembly and the Security Council were adopted “without dissent”; and in the *Namibia* Opinion to the fact that the practice had been reflected in “presidential rulings and the position taken by members of the Council, in particular its permanent members” and “has been generally accepted by Members of the United Nations”. Generally, no special emphasis has been laid on the character of the vote – whether unanimous or majority – which has occasioned the conduct in question.<sup>71</sup>

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see Wood, M., ‘Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties’, *Max Planck Yearbook of United Nations Law*, 1 (1997), p.231; & ‘UN Membership of the Former Yugoslavia’ (various authors), *AJIL* 87 (1993), pp.240-251.

<sup>70</sup> See also Saarbrücken, G., ‘The Interpretation of the Charter’, in Simma, *supra* n.6, p.25 at p.41.

<sup>71</sup> Lauterpacht, *supra* n.64, p.458.

Akehurst proposes that it would seem appropriate to require for *de facto* amendment the same degree of acceptance among Member States as would be required for formal amendment under the constituent treaty. He states:

Subsequent practice often modifies the constituent treaties of international organizations. Some authorities maintain that such modifications need the consent of all member States of the organization; others argue that a majority is sufficient. The true solution would appear to be to apply by analogy any amendment clause which exists in the constituent treaty; thus, the United Nations Charter can be amended by a practice supported by two-thirds of the member States, including the five permanent members of the Security Council. If the treaty does not provide for amendment by a majority of the members, subsequent practice can amend the treaty *erga omnes* only if it is unanimous, or, to be more precise, unopposed.<sup>72</sup>

Akehurst's approach is useful, since to require in the case of *de facto* amendment a majority of States greater than that specified for formal amendment does seem to be overly formalistic.<sup>73</sup> In practice, however, the majority requirement for formal treaty amendment will not be that relevant to the case of *de facto* amendment by acquiescence, since in the case of the latter it is the failure by States to object to the decision of an organ rather than their positive vote in favour of a change which indicates their consent to the amendment.<sup>74</sup> This is well illustrated by the example of the *de facto* modification effected by the practice of the Security Council relating to Article 27(3) of the Charter as recognised in the *Namibia* case where it was the lack of objection by other UN Members to the Council's decisions that constituted the basis for the Charter amendment rather than the practice being supported *per se* by two-thirds of UN member States, the majority requirement for formal amendment of the Charter.

To summarize, the subsequent practice of an organization when combined with acquiescence by Member States to the practice can provide a basis for an international organization being able to accept and utilize conferred powers using a process of decision-making

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<sup>72</sup> Akehurst, *supra* n.55, pp.277-278.

<sup>73</sup> See Schwelb, E., 'The Amending Procedure of Constitutions of International Organizations', *British Year Book of International Law*, 31 (1954), p.49 at pp.51-52.

different from that specified in its constituent treaty. This requires, however, that the decision of the organ accepting the conferral of power is acquiesced in by the majority of Member States required for formal amendment of the constituent treaty to take place.<sup>75</sup> It should be emphasised that this does not constitute an amendment of the decision-making processes of the organ of the organization more generally, but only while the organ is exercising conferred powers. A more permanent and broader change is possible, but this would require acquiescence by Member States to a decision of the organ effecting such a change while it was exercising its own powers under the constituent treaty – as opposed to powers conferred by States on an *ad hoc* basis.

### III. A TYPOLOGY OF TERMS USED TO DESCRIBE A CONFERRAL BY STATES OF POWERS ON INTERNATIONAL ORGANIZATIONS

There is a considerable lack of both clarity and consistent usage in the terms that are used to refer to the conferral by States of sovereign powers on international organizations. Such terms as ‘ceding’, ‘alienation’, ‘transfer’, ‘delegation’, and ‘authorization’ are used interchangeably by international and domestic courts as well as by commentators often to refer to the same conferral of power<sup>76</sup> or the same term is used in a general way to refer to different types of conferrals.<sup>77</sup>

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<sup>74</sup> The consequence of this being that in the case of *de facto* amendment the majority requirement for the adoption of decisions by an organ will be far more important in practice than the majority requirement for formal treaty amendment.

<sup>75</sup> On the conditions necessary for acquiescence, see text following *supra* n.66.

<sup>76</sup> See, for example, just in the case of the conferral of powers by States onto the European Community the wide variety of terms used: Martin Martinez, M., *National Sovereignty and International Organizations*, (1996); Cassese, A., ‘Modern Constitutions and International Law’, *Recueil des cours*, 192 (1985-III), p.331 at p.415; Denza, E., ‘Two Legal Orders: Divergent or Convergent?’, *ICLQ*, 48 (1999), p.257 at pp.259-260; Ku, C., and Jacobson, H., ‘Using military forces under international auspices and democratic accountability’, *International Relations of the Asia-Pacific*, 1 (2001), p.21; Bradley, C., ‘The Treaty Power and American Federalism’, *Michigan Law Review*, 97 (1998), p.412; Schilling, T., ‘The Anatomy of the Community Legal Order: An Analysis of Possible Foundations’, *Harvard International Law Journal*, 37 (1996) 389; Lindseth, P., ‘Democratic Legitimacy and the Administrative Character of Supranationalism: the example of the European Community’, *Columbia Law Review*, 99 (1999), p.628 at pp.631, 633, 637, 639, & 645; Kingston, J., ‘External Relations of the European Community - External Capacity Versus Internal Competence’, *ICLQ*, 44 (1995), p.659; de Areilza, J., ‘Sovereignty or Management? The Dual Character of the EC’s Supranationalism – Revisited’, Harvard Jean Monnet Working Paper No.2/95, <http://www.law.harvard.edu/programs/JeanMonnet/papers/95/9502ind.html>, p.4; and Tangney, P., ‘The New Internationalism:

However not all conferrals of power are the same, and there are important differences that flow from the type of conferral for the legal relationship established between a State conferring power and an organization. The failure to distinguish between the different types of conferrals of power undermines analysis of the differing legal consequences of these conferrals<sup>78</sup> as well as obscuring the domestic policy debates that surround the conferral of powers.<sup>79</sup> It is for these reasons that this section provides a typology of the terms that can be used to describe conferrals by States of powers on international organizations.

In order to provide this typology it may be useful to consider these conferrals of power as being on a spectrum that has at one end a conferral that establishes an agency relationship between the State and the organization and at the other extremity a conferral that involves the ceding of power to the organization. In between these two positions lies the category of a delegation of power that is closer to the agency position on the spectrum and the separate category of a transfer of power that is closer to a ceding of power. The locus of a particular conferral of power on this spectrum depends on the degree to which a State has given away the power to the organization. There are three indicia, or characteristics, of a conferral that can be used to ascertain the degree to which a power has been given away by a State, and thus within which of our categories a particular conferral of power can be placed. First is the question of revocability. To what extent, if at all, is the conferral of powers revocable by the State? The second is the degree to which a State

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The Cession of Sovereign Competences to Supranational Organizations and Constitutional Change in the United States and Germany', *Yale Journal of International Law*, 21 (1996), p.395.

See also, more generally, the confusion in the terms that are used to describe the conferral of sovereign powers between States: e.g., *Customs Régime between Germany and Austria*, *PCIJ Reports, Series A/B No.41* (1931), p.37 at pp.46, 58-59, 77.

<sup>77</sup> See, for example, Seyersted, F., 'Is the International Personality of Intergovernmental Organizations valid *vis-à-vis* Non-members?', *Indian Journal of International Law*, 4 (1964), p.233 at p.247; Denza, E., 'Two Legal Orders: Divergent or Convergent?', *ICLQ*, 48 (1999), p.257 at pp.259-260; and Zemanek, K., 'The Legal Foundations of the International System: General Course on Public International Law', *Recueil des Cours*, 266 (1997), p.9 at pp.90-91.

<sup>78</sup> As Holland has stated more generally: 'If the expression of widely different ideas by one and the same term resulted only in the necessity for ... clumsy periphrases, or obviously inaccurate paraphrases, no great harm would be done; but unfortunately the identity of terms seems irresistibly to suggest an identity between the ideas expressed by them.' (Holland, *Jurisprudence* (1906, 10<sup>th</sup> ed.), p.83 as quoted in Hohfeld, W., 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', *Yale Law Journal*, 23 (1913-1914), p.16 at pp.33-34.)

has retained control over the exercise of power by the organization. Finally, does the organization possess the sole right to exercise the power being conferred on it by a State or has the State retained the right to exercise the power concurrently with the organization? Accordingly, the degree to which a power has been given away to an organization does not depend on the nature of a particular power – whether it is, for example, a legislative, executive, or judicial power or even whether the power is discretionary or non-discretionary in nature.

The classification of all conferrals of power within one of our categories cannot, however, be precise since the boundaries between these categories are not definitively fixed and there may be cases that contain elements common to two categories that are adjacent on our spectrum. These categories do provide, however, a useful analytical tool since moving along the spectrum there are positions which produce differing legal consequences and thus the classification of a particular conferral of power as mainly being at one of these positions, within one of our categories, helps clarify the legal consequences that result from the type of conferral of power. These legal consequences include the following: In whose interest is the power being primarily exercised: the State's or the organization's? Put differently, is the organization exercising the power in its own right or on behalf of the State? Whose legal relations are changed as a consequence of the exercise of the power: the State's or the organization's? In the case where the State has retained the right to exercise the power being conferred on an organization, whose interpretation of the power will prevail in the case of a conflict that arises from the concurrent exercise of the power? And, finally, who is responsible for breaches of international law that may occur as a result of the organization's exercise of the conferred power: the State or the organization or both?

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<sup>79</sup> There is a need for what Jeremy Bentham has called the 'nettoyage de la situation verbale'. (Jeremy Bentham, as quoted in Hart, H.L.A., *Essays on Bentham: Jurisprudence and Political Theory* (2000), p.2.)

The starting point on our spectrum - and the first category in our typology - are those conferrals that establish an agency relationship between the State and the organization. Due to considerations of length this is the only category to be discussed in this present work.<sup>80</sup>

#### IV. AN AGENCY RELATIONSHIP BETWEEN AN ORGANIZATION AND STATES

##### CONFERRING POWERS

An agency relationship is the only category in our typology that also exists as a distinct legal concept under international law.

The existence of agency relationships between international legal persons has been recognized by the International Court of Justice,<sup>81</sup> the International Law Commission,<sup>82</sup> and authoritative commentators<sup>83</sup> in a number of different cases.<sup>84</sup> What emerges from these cases is that international law requires three preconditions to be fulfilled before an agency relationship can be said to exist between legal entities. The first is that the purported principal and agent must be separate legal entities. The second is a consent requirement: that a purported principal must have

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<sup>80</sup> All categories will be considered in a forthcoming monograph that is currently under preparation.

<sup>81</sup> See *infra* nn.84-85, and *infra* nn. 98, 105 and corresponding text.

<sup>82</sup> See *infra* nn.95-97, 103-104 and corresponding text.

<sup>83</sup> See, e.g., *infra* n.86.

<sup>84</sup> A good example is where one State exercises diplomatic protection on behalf of the interests of the citizens of another State in accordance with a mandate conferred upon it by the latter State. For examples of this type of international agency, see Sereni, *supra* n.11. Moreover, there is, for example, the broader case of international agency that exists between Switzerland and Liechtenstein where, under a series of treaties concluded after World War I, Switzerland assumed responsibility for the diplomatic and consular representation of Liechtenstein, the protection of its borders, and the regulation of its customs (1923 Treaty contained in *League of Nations Treaty Series*, Vol.XXI, p.243.) As Professor de Aréchaga, as he was then, stated in the ILC: 'The 1923 Treaty between Switzerland and Liechtenstein ... seemed to constitute a case of agency, in which one State entrusted another with the power to represent it not only for the purpose of concluding certain treaties, but also for the purpose of claiming rights under those treaties.' (*YBILC*, vol. I, 1964, 732<sup>nd</sup> mtg., p.56 (para.37).) Cf. the amendment on 2 November 1994 of the Customs Treaty dated 29 March 1923 between Liechtenstein and Switzerland in order to allow the participation of Liechtenstein in the EEA. (see Decision of the EEA Council No 1/95 of 10 March 1995 on the entry into force of the Agreement on the European Economic Area for the Principality of Liechtenstein, *Official Journal L 086*, 20/04/1995 pp.0058 - 0084.)

Similarly, the International Court of Justice in the *Rights of United States Nationals in Morocco* case found the existence of international agency as a result of a conferral of powers. The Court held: 'The rights of France in Morocco are defined by the Protectorate Treaty of 1912 ... Under this Treaty, Morocco remained a sovereign State, but it made an arrangement of a contractual character whereby France undertook to exercise certain sovereign powers in the name and on behalf



consented to the conferral on a purported agent of a power to act on the purported principal's behalf. The third is that a purported principal must exercise control over the acts of its purported agent. These three preconditions for the establishment of an agency relationship in international law usefully correspond to the three indicia in our typology system that are used to determine the degree to which a power has been given away. As such, the concept of agency – and its preconditions for establishment in a particular instance – require further consideration in order to understand the extent to which an agency relationship can be said to exist between an organization and a State that has conferred powers on the organization.

Importantly, for present purposes, the concept of agency has been held generally applicable in the context of international organizations,<sup>85</sup> and, more specifically, a number of authoritative commentators have argued that an organization can act as an 'agent' on behalf of its Member States and other States.<sup>86</sup> In order, however, to ascertain when such an agency relationship can be said to exist, it is necessary to consider our three preconditions for agency in more detail.

## 1. The precondition that principal and agent are separate legal entities

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of Morocco, and, in principle, all the international relations of Morocco ...' (*ICJ Reports* (1952), p.176 at pp.185, 188.) See also Chinkin, *supra* n.14, p.65.)

For other examples where a State has acted as an agent for another State see Sereni, *supra* n.11.

<sup>85</sup> In the *Expenses* case, the International Court of Justice when discussing the consequences of action that was possibly *ultra vires* stated in its famous passage in the case: 'If the action was taken by the wrong organ [of the UN], it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent.' (*Expenses case, ICJ Reports* (1962), p.151 at p.168.) See also Judge Bustamante in the *Expenses* case who applied the concept of agency to the United Nations: *Expenses case, ICJ Reports* (1962), p.151 at pp.292-293.

<sup>86</sup> James Crawford, for example, states: 'Plainly an international organization *can* act as the agent of one or more members.' (Crawford, J., as part of the work of the Commission of the Institut de Droit International, contained in *Annuaire de l'Institut de Droit International*, (66-I, 1995), p.334 (original emphasis).) Moreover, Ian Brownlie states 'By agreement between the states and the organization concerned, the latter may become an agent for member states, and others, in regard to matter outside its ordinary competence.' (Brownlie, *supra* n.4, p.690.) Similarly, Chinkin states: 'Just as a State may act on behalf of

An important precondition for the existence of an agency relationship in both international and domestic law is that the principal and agent are separate legal entities.<sup>87</sup> This flows from the principle of representation inherent in an agency relationship: that an agent acts on behalf of its principal to change certain of its rights and obligations. In our case of a potential relationship of agency between an international organization and a State, if the organization did not possess a separate legal personality then the organization constitutes nothing more than an extension of the States concerned and thus when the organization acts it is nothing more than the States themselves acting.<sup>88</sup> The likelihood of this scenario is not as remote as may at first appear the case for the reason that relatively few constituent treaties provide explicitly for the international legal personality of organizations,<sup>89</sup> and that even where they do, as Klabbers notes, ‘[a]t best, the provisions are ambiguous, providing quite simply that the organization concerned “shall have

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another State or other legal entity, so too an organization might be seen as acting as agent for its member States. (Chinkin, *supra* n.14, p.115.) See also Amerasinghe, C.F., 66-*I AIDI*, (1995), p.353.

<sup>87</sup> For example, the Israeli Supreme Court in the case of *Attorney-General of Israel v. Kamiar* stated: ‘The conferring of powers, to which section 2(d) refers, merely has as its object the delimitation of the sphere in which a given Minister is empowered to work, not ‘on behalf’ of the Government, but as the Government. This is not a question of the delegation or transfer of powers, or of the authorization of an agent by his principal; but merely of a division of the functions of the Government between its members in such a manner that even after this division the functions remain the functions of the Government and the powers remain the powers of the Government.’ (*The Attorney-General of Israel v. Kamiar*, Supreme Court of Israel sitting as the Court of Criminal Appeal, 9 June 1968, 44 *ILR*, p.197 at p.249.) Similarly, the US Foreign Sovereign Immunities Act of 1976 in Section 1603(b) defines an “agency or instrumentality of a foreign state” as constituting any entity: ‘(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof ... .’ Concerning this first criterion of independence, a US District Court in the case of *Williams v. The Shipping Corporation of India* adopted the House of Congress report on the Foreign Sovereign Immunities Act when it stated: ‘The first criterion, that the entity be a separate legal person, is intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name.’ (*Williams v. The Shipping Corporation of India*, US District Court, Eastern District Virginia, 10 March 1980, 63 *ILR*, p.363 at p.369.) See also the cases of *Edlow International Co. v. Nuklearna Elektrarna Krsko*, District Court of Columbia, 7 December 1977, 63 *ILR*, p.101 at p.103; and *Dayton v. Czechoslovak Socialist Republic*, US District Court of Columbia, 19 December 1986, 79 *ILR*, p.590 at p.596.

<sup>88</sup> This scenario was discussed, but dismissed, in the International Tin Council [ITC] litigation in the English courts. For example, Justice Millet stated: ‘The ITC was able to enter into the contracts in question, incur liabilities and suffer the arbitration award against it because paragraph 5 of the Order of 1972 provides that it shall have the legal capacities of a body corporate. If, however, as a matter of English law it has no sufficient legal personality of its own distinct from that of its members, then the liabilities which have resulted from those contracts may be the liabilities of its members enforceable directly against them. If, on the other hand, the ITC has a sufficient legal personality of its own, distinct from that of its members, not merely in international law but in English domestic law also, then the contracts in question were entered into by the ITC and not by its members, and the resulting liabilities were the liabilities of the ITC and not of its members.’ (*Maclaine Watson v. International Tin Council, Chancery Division*, [1988] Ch. 1 at pp.15-16.) See also the House of Lords in *J.H. Rayner v. Department of Trade and Industry and Others and Related Appeals*, [1990] 2 A.C. 418 at p.503, per Lord Oliver.

<sup>89</sup> Klabbers, *supra* n.10, p.53.

legal personality” or similar terms.’<sup>90</sup> In cases where there is no express provision for the legal personality of an organization then it will be necessary to employ the functional test adopted by the International Court in the *Reparations* case where it ascertained the existence of the UN’s separate legal personality from that of its Member States.<sup>91</sup>

## 2. The precondition of consent

The necessity for, and emphasis on, consent as a prerequisite for the establishment of an agency relationship exists to a much greater extent in international law than it does in domestic legal systems.<sup>92</sup> In domestic legal systems, the operation of the law may remove the need for the consent of the principal to the establishment of certain agency relationships.<sup>93</sup> However,

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<sup>90</sup> Klabbers, *supra* n.10, p.53. Klabbers continues on to state: ‘Thus, e.g., Art. 281 (formerly Art. 210) TEC. Also not devoid from ambiguity is Art.XVI (1) of the FAO constitution, which holds that the FAO “shall have the capacity of a legal person to perform any legal act appropriate to its purpose which is not beyond the powers granted to it by this Constitution”. Clearly limited to domestic legal personality are, *inter alia*, Art. 39 ILO, Art. 66 WTO, Art. 47 ICAO and Art. 95(2) Benelux.’ (*Ibidem.*)

<sup>91</sup> *Reparations for Injuries Suffered in the Service of the United Nations* case, *ICJ Reports* (1949), p.174. For discussion of the test used in this case, see, among others, Klabbers, *supra* n.10, pp.52-57.

<sup>92</sup> There are similarities between the international law concept of agency and its domestic law counterpart, but agency in international law cannot solely be equated with, or constructed by analogy from, its domestic counterpart for two main reasons.

First, the domestic law of agency is in the main concerned with the conferral of private law power; while in the context of international organizations it is a public law power being conferred by a State on an organization. This limitation of the use of private law analogies has also been recognised by some domestic public law systems. For example, in the English Courts it was held in the case of *Town Investments Ltd. v. Environment Secretary* that the relationship between ‘the Crown’ and ‘Ministers of the Crown’ had to be analysed in public law terms and not by using private law concepts of agency and trust. (*Town Investments Ltd. v. Environment Secretary*, [1978] AC 359.)

Second, the domestic law of agency is largely directed at allocating, or rather balancing, commercial risk between business actors and thus its transplantation to public international law which concerns relations between sovereign States is problematic. (I am grateful to Professor James Crawford for this point.)

These problems do not, however, prohibit in general terms recourse to the domestic law of agency, but they do mean that the concept as it appears in public international law may differ in content. For example, the notion of an undisclosed principal in the domestic law of agency has no application in the context of public international law, since, as Chinkin states, ‘any such claim should be dismissed as contrary to the principle of openness in international relations, and the right of States to select their treaty partners.’ (Chinkin, *supra* n.14, p.66.) Moreover, Sereni states ‘Since international agency is intended to function with relation to third parties, it is necessary that they be informed of the extent of the authority conferred upon the agent. No special form is provided as to the way in which an agency relationship is to be made known to the third parties. ... Every international transaction is so closely connected with the special characteristics and qualities of each subject involved that each of them must necessarily know the other parties to whom rights and duties are to be assumed. There is no place in international law for the doctrine of the undisclosed principal.’ (Sereni, *supra* n.11, p.649.) Cf. also the caution espoused in this context by Shabtai Rosenne: *Yearbook of the International Law Commission*, vol.1, (1964), p.55 at para.26.

<sup>93</sup> As Sereni states: ‘... this relationship [of agency in international law] must necessarily be based on an agreement between principal and agent. The consent of both parties is indispensable: without the principal’s consent the agent has no authority, without the agent’s consent the principal is unrepresented. Some domestic law systems have established, besides

international law by contrast does not presume the acceptance by States of obligations without their consent. This has the consequence that agency involving a State must be consent based, since otherwise international law will not recognize the capacity of the agent to incur obligations on behalf of its principal (the State).<sup>94</sup>

The essential role that a State's consent plays in establishing an agency relationship was highlighted by the work of the International Law Commission (ILC) on the Law of Treaties when it considered the possibility of one State acting as agent for, and concluding a treaty on behalf of, another State. This agency approach attracted criticism from within the ILC by Professor Grigory Tunkin who argued that the concept of agency 'had in fact been used mainly in colonial practice, in connexion with protectorates',<sup>95</sup> and as such should be omitted from the ILC's Draft. There was, however, strong opposition voiced by a number of ILC members in response to this critique.

The ILC Chairman, Professor Roberto Ago, held an opposing view:

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consensual agency, several types of agency immediately derived from law, independent of the consent of the parties or at least of the principal. These types of agency *ex lege* have been provided in order to allow certain individuals without the natural or legal capacity of acting, to enter into legal relations: *e.g.* the father's agency for the minor child or the guardian's for the insane. In international law there is no need for these types of so-called legal agency. By the mere fact of existence, every subject of international law is privileged to participate in international transactions in person, through its own organs. The principle is assumed that every international subject has the capacity to enter directly into international intercourse.' (Sereni, *supra* n.11, p.645.)

Also in domestic law, however, it is generally the case that both the agent and the principal must consent to the establishment of the agency relationship. See Reuschlein, H., and Gregory, W., *The Law of Agency and Partnership*, (2<sup>nd</sup> ed., 1990), p.86; Reynolds, F., *Bowstead and Reynolds on Agency*, (16<sup>th</sup> ed., 1996), Article 1; Fridman, G., *The Law of Agency*, (7<sup>th</sup> ed., 1996), pp.14-21; and Seavey, W., 'The Rationale of Agency', *Yale Law Journal*, 29 (1919-1920), p.868.

<sup>94</sup> Cf., for example, the requirement for, and formalities relating to, the issuance by a State to an individual of 'full powers' in order for a person to represent the State in the conclusion of treaties (see Article 7 of the 1969 Vienna Convention on the Law of Treaties).

Brownlie, moreover, emphasises the importance of state consent by way of agreement to a situation of agency when he states: 'States may act on behalf of other states for various purposes, provided that authority to do so exists and is not exceeded. States may appoint other states as agents for various purposes, including the making of treaties. This agency may arise from the existence of a relation of federation or dependence or protection or other wise. By agreement an organization may become an agent for member states, and others, in regard to matters outside its normal competence and a state may act as agent for an organization.' (Brownlie, I., *Principles of Public International Law*, (1990, 4<sup>th</sup> ed.), p.678.)

Cheng states the more general point after reviewing relevant case-law: 'There is, therefore, a general legal principle applicable between States as well as between individuals to the effect that a person is only responsible for his own acts. The application of this principle – the principle of individual responsibility – in international law is fully demonstrated by the fact that States are only responsible for those acts which are, according to international law, imputable to them. *Any exception to this principle ... cannot be presumed but must result from an express and unequivocal treaty stipulation or a clear legal provision.* Moreover ... juridically such exceptions are mere obligations derived either from treaty stipulations or from positive law. They are modelled upon responsibility properly so-called, and are supplementary thereto. They in no way affect the nature or the validity of the principle of individual responsibility.' (B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1987), pp.213-214. Emphasis added.)

45. ... as the agency relationship was freely established between two States, the Commission should not express a favourable or an unfavourable opinion on that practice. Such relationships could be formed between any countries, not only in Europe, for reasons of mutual assistance.<sup>96</sup>

Moreover, Professor Jimenez de Arechaga also in the ILC stated:

The Commission should not adopt a negative attitude to the legitimate institution of agency merely because it might have been used in the past to set up protectorates. ... It should be remembered that representation by the operation of law did not exist in international law; the only form of representation was by virtue of a treaty. Any agency relationship which might be established would therefore be subject to the rules in Parts I and II of the draft articles. Such rules as those relating to free consent, nullity on grounds of coercion, *jus cogens*, the power of denunciation in certain circumstances, and determination for change of circumstances would apply in all cases. There would thus be ample safeguards to ensure that no State would in future, as had happened in the past, use the method of agency by treaty to set up a protectorate regime against the free will of the State represented.<sup>97</sup>

Both these statements emphasise the necessity of State's being able to consent freely to an agency relationship in international law. This is the context within which the statement by Professor de Arechaga – that agency was only possible by treaty – must be read. He was emphasising that an agency relationship could only be created with State consent – he says expressed in 'a treaty' because that was the specific focus of the ILC's work – as opposed to the creation of an agency

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<sup>95</sup> *Yearbook of the International Law Commission*, 1964, vol.1, 732<sup>nd</sup> meeting, p.58 at para.53.

<sup>96</sup> *Yearbook of the International Law Commission*, 1964, vol.1, 732<sup>nd</sup> meeting, p.57 at para.95. (Emphasis added.) Moreover, Professor Roberto Ago continued on in the same meeting to state: '69. But he could not agree with Mr Tunkin ... the Commission's draft would be incomplete if the idea expressed in that paragraph was omitted. It would seem strange if the Commission decided to rule out the possibility of concluding a treaty by agency. Agency could be a stable and permanent arrangement, as in the case of the Belgium-Luxembourg Economic Union; indeed, that was an example that could well be followed as an intermediate solution between independence and federation. Agency could also be occasional, and that was the case contemplated in paragraph 1 of article 60. Agency of that kind had always existed and had always been regarded as legitimate; the Commission could not overlook it.' (*Yearbook of the International Law Commission*, 1964, vol.1, 732<sup>nd</sup> meeting, p.59 at para.60.)

Professor Ago went on to conclude in the following meeting of the ILC: '33. First, with regard to paragraph 1 of article 60, it was quite true that the institution of agency was not so common in international law as it was in private law. Still, it existed in international law and its use was more widespread than was generally recognized. It was not the Commission's practice to consider only matters of common occurrence. At its last session it had even adopted an article on fraud, and cases of fraud in international practice were certainly much rarer than cases of agency. The Commission should therefore deal with the case of one State acting as agent for another, taking care, of course, to draft the article and the commentary in such a way as to avoid giving the impression that it approved of obsolete institutions.' (*Yearbook of the International Law Commission*, 1964, vol.1, 733<sup>rd</sup> meeting, p.63 at para.33.)

<sup>97</sup> *Yearbook of the International Law Commission*, 1964, vol.1, 733<sup>rd</sup> meeting, p.60 at para.5.

relationship ‘by the operation of law’. However, the role of State consent in establishing an agency relationship can be guaranteed by means other than requiring the conclusion of a treaty.

A State’s consent may be implied from its statements or actions: the *Iran – US Hostages* case before the International Court provides an example of a case where a State’s consent to an agency relationship was implied from its statements. Moreover, this case also emphasises the necessity for State consent in order to establish an agency relationship, since the International Court resisted basing its finding of Iranian responsibility for the clearly illegal and heinous acts relating to the occupation of the US Embassy in Iran on an agency argument without evidence of Iranian consent to the establishment of such a relationship. As the Court stated:

58. No suggestion has been made that the militants, when they executed their attack on the Embassy, had any form of official status as recognized “agents” or organs of the Iranian State. Their conduct in mounting the attack, overrunning the Embassy and seizing its inmates as hostages cannot, therefore, be regarded as imputable to that State on that basis. Their conduct might be considered as itself directly imputable to the Iranian State *only if it were established that, in fact, on the occasion in question the militants acted on behalf of the State, having been charged by some competent organ of the Iranian State to carry out a specific operation.* The information before the Court does not, however, suffice to establish with the requisite certainty the existence at that time of such a link between the militants and any competent organ of the State.<sup>98</sup>

However, the Court did go on to find the existence of the requisite consent for the establishment of an agency relationship from the subsequent statements by the Iranian Government that adopted the unlawful acts in question. The Court held:

74. The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. *The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the*

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<sup>98</sup> *United States Diplomatic and Consular Staff in Tehran case, Judgment, ICJ Reports (1980), p.3 at p.29.* Emphasis added.

*hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible.*<sup>99</sup>

In other words, the Court posited that the necessary consent of the Iranian State for the establishment of an agency relationship with the militants was provided by the ‘approval given to these facts by the Ayatollah Komeni and other organs of the Iranian State, and the decision to perpetuate them’.

To conclude, the importance that international law places on States being able to consent to their obligations has the consequence that consent is a prerequisite for the establishment of an agency relationship in international law. There is, however, no specific form that is required for the expression of this consent: consent may be implied from a State’s actions or statements.

### **3. The precondition of control**

The third precondition for an agency relationship is that the principal is able to exercise control over the acts of its agent. This is generally recognized as being an essential element of an agency relationship,<sup>100</sup> and is certainly the element that has received the most attention in international law discussion of a concept of agency. The reason for the latter is the defining role that control also plays in determining whose acts are attributable to a State under the law of State

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<sup>99</sup> *United States Diplomatic and Consular Staff in Tehran case, Judgment, ICJ Reports* (1980), p.3 at p.35. Emphasis added.

<sup>100</sup> See also Reynolds, *supra* n.93, pp.175-176; Reuschlein and Gregory, *supra* n.93, pp.12-13; Seavey, *supra* n.93, pp.863, 867, 884; and Ho, B., *Hong Kong Agency Law*, (1991), p.3. Moreover, the US Foreign Sovereign Immunities Act of 1976 in Section 1603(b) defines an ‘agency or instrumentality of a foreign state’ as constituting any entity: ‘(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, ...’ The US District Court of Columbia stated in the case of *Edlow International Co. v. Nuklearna Elektrarna Krsko* concerning Section 1603(b): ‘Two more precise indices of an entity’s status as state agency or instrumentality focus on the degree to which the entity discharges a governmental function, and the extent of state control over the entity’s operations.’ (*Edlow International Co. v. Nuklearna Elektrarna Krsko*, 7 December 1977, District Court of Columbia, 63 *ILR*, p.101 at pp.103-104.)

responsibility.<sup>101</sup> However it is important not to misinterpret this approach and conclude that control by a State over the acts of another entity is *per se* an adequate basis for establishing an agency relationship, independent of, and without the need to establish, the other two agency preconditions. Control is necessary but not sufficient to establish an agency relationship, as opposed to establishing attribution,<sup>102</sup> and the concepts of attribution and agency should not be conflated. An agent can act more broadly on behalf of a principal to change the legal rights and duties of a State whereas attribution is more limited and only concerned with deciding whose acts can a State be held responsible for under international law.

A distinction between the concept of attribution and the broader concept of agency was hinted at early on in the work of Professor James Crawford, the final ILC Special Rapporteur on State Responsibility, when he acknowledged that agency may not necessarily follow from control (the sole determinant of attribution). In his ‘First Report on State Responsibility’, Crawford stated concerning Draft Article 5 of the ILC Draft Articles: ‘ “agents” for this purpose are persons or entities in fact acting on behalf of the State by reason of some mandate or direction given by a State organ, or (*possibly*) who are to be regarded as acting on behalf of the State by reason of the control exercised over them by such an organ.’<sup>103</sup> In the event, the word ‘agent’ was not used in the final ILC Articles on State Responsibility, Article 8 of which provides:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.<sup>104</sup>

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<sup>101</sup> As Higgins has stated more generally ‘the concept of attributability in international law is to an extent matched by notions of what we may term “factual agency” in domestic legal systems (so far as contractual matters are concerned)’. (Higgins, R., ‘Final Report of the Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations Towards Third Parties’, *Annuaire de l’Institut de Droit International*, 66-I (1995), p.251 at p.283.)

<sup>102</sup> It is clear from Article 8 of the ILC Articles that control is sufficient to establish attribution for the purposes of State responsibility: see *infra* n.104 and corresponding text *et sequentia*. For the historical antecedent to this approach in international law, see the statement by Professor Roberto Ago, *YBILC*, 1979, vol.I., p.7, and Eagleton, C., *The Responsibility of States in International Law*, (1928), p.43.

<sup>103</sup> ‘First Report on State Responsibility’, A/CN.4/490/Add.5, 22 July 1998, para.166. (Emphasis added.)

<sup>104</sup> Crawford, J., *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2002), pp.110-113.



As such, Article 8 provides that *de facto* control is the sole determinant of attribution, but the sole objective of this provision is to resolve the issue of attribution for the purposes of establishing a State's responsibility and not, as contended above, to resolve the broader issue of determining when an entity acts as an agent for a State. However, it is recognized that Article 8 does admit of a different interpretation, one that conflates the concepts of agency and attribution with the consequence that control appears sufficient to establish an agency relationship. Even if, however, this different interpretation is preferred, when one examines the degree of *de facto* control that is required by Article 8 then it becomes clear that even in this scenario the role of consent as a precondition for the establishment of an agency relationship is guaranteed.

The International Court of Justice in the *Nicaragua* case provided the test of 'effective control' as the test for the degree of control that is required for attribution of the acts of individuals (*in casu*, the contra rebels) to a State (the USA). The Court stated in its famous passage:

Despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf ... All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed.<sup>105</sup>

Professor Crawford elucidated further on the Court's 'effective control' test in his Commentary on Article 8 of the ILC Articles when he stated:

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<sup>105</sup> *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports (1986), p.14 at pp.62, 64-65. (Emphasis added).

Thus while the United States was held responsible for its own support for the *contras*, only in certain individual instances were the acts of the *contras* themselves held attributable to it, *based upon actual participation of and directions given by that State*.<sup>106</sup>

Accordingly, what the ‘effective control’ test requires for attribution of a particular act to a State is evidence that specific instructions concerning the commission of the particular act had been issued by the State to the individual or group in question. Put differently, by requiring evidence of a specific instruction from a State, the ‘effective control’ test in effect requires evidence that a State has impliedly consented to an individual or group being able to act on its behalf. As such, the precondition of State consent for an agency relationship continues to be guaranteed even if the concepts of agency and attribution are conflated.

However, the ‘effective control’ test has been the subject of criticism by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadic* case. The test of ‘effective control’ was in fact adopted and applied by a Trial Chamber of the ICTY in the *Tadic* case,<sup>107</sup> but the Appeals Chamber overruled the decision when it formulated a different test to determine the degree of control necessary for the acts of military or paramilitary groups to be attributed to the State. The Appeals Chamber stated:

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<sup>106</sup> Crawford, J., *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2002), p.111. (Emphasis added.)

<sup>107</sup> A Trial Chamber of the Tribunal stated in the *Tadic* case: ‘... the Trial Chamber must consider the essence of the test of the relationship between a de facto organ or agent, as a rebel force, and its controlling entity or principal, as a foreign Power, namely the more general question whether, even if there had been a relationship of great dependency on the one side, there was such a relationship of control on the other that, on the facts of the instant case, the acts of the VRS, including its occupation of opstina Prijedor [a district in Bosnia], can be imputed to the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro). ... It remains the task of the Prosecution to prove that the nature of the relationship between the VRS and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), and between the VRS [the army of *Republika Srpska*] and VJ [the armed forces of the Federal Republic of Yugoslavia (Serbia and Montenegro)] in particular, was of such a character. In doing so it is neither necessary nor sufficient merely to show that the VRS was dependent, even completely dependent, on the VJ and the Federal Republic of Yugoslavia (Serbia and Montenegro) for the necessities of war. It must also be shown that the VJ and the Federal Republic of Yugoslavia (Serbia and Montenegro) exercised the potential for control inherent in that relationship of dependency or that the VRS had otherwise placed itself under the control of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro).’ (*Prosecutor v. Dusko Tadic, Judgment*, 7 May 1997, IT-94-1-T., para.588.) A majority of the Trial Chamber found that there had not been sufficient evidence adduced in the case to allow for the determination requested by the Prosecution that the degree of control was such that the acts of the rebel forces in question could be attributed to the Federal Republic of Yugoslavia (Serbia and Montenegro). (*Prosecutor v. Dusko Tadic, Judgment*, 7 May 1997, IT-94-1-T.,

The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.<sup>108</sup>

The Appeals Chamber continued on to state:

the Appeals Chamber holds the view that international rules do not always require the same degree of control over armed groups or private individuals for the purpose of determining whether an individual not having the status of a State official under internal legislation can be regarded as a *de facto* organ of the State. The extent of the requisite State control varies. Where the question at issue is whether a *single* private individual or a *group that is not militarily organised* has acted as a *de facto* State organ when performing a specific act, it is necessary to ascertain whether specific instructions concerning the commission of that particular act had been issued by that State to the individual or group in question; alternatively, it must be established whether the unlawful act had been publicly endorsed or approved *ex post facto* by the State at issue. By contrast, control by a state over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. ... The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.<sup>109</sup>

The Appeals Chamber thus replaced the ‘effective control’ test with an ‘overall control’ test for the purposes of determining the attribution of acts of armed forces or militia units to a State, since it did not see why international law should in general require a high threshold for the test of control. However, it is precisely at this point that the precondition of consent for the establishment

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para.605.) Cf., however, the dissenting opinion on this point by Judge McDonald: *Separate and Dissenting Opinion of Judge McDonald regarding the applicability of Article 2 of the Statute*, 7 May 1997, IT-94-1-T.

<sup>108</sup> *Prosecutor v. Tadic*, 15 July 1999, para.117.

<sup>109</sup> *Prosecutor v. Tadic*, 15 July 1999, para.137. The conclusion of the Appeal Chamber concerning the organized Bosnian Serb military force was that: ‘given that the Bosnian Serb armed forces constituted a “military organization”, the control of the FRY [Federal Republic of Yugoslavia] authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations. By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law.’ (*Prosecutor v. Tadic*, 15 July 1999, para.145). The Appeals Chamber held that the Yugoslav Army did exercise overall control over the Bosnian Serb armed forces such that their acts were attributable to the Federal Republic of Yugoslavia, (*Prosecutor v. Tadic*, 15 July 1999, paras.156, 160) and thus that the armed conflict in Bosnia and Herzegovina between the Bosnian Serbs and the central authorities of Bosnia and Herzegovina must be classified as an *international* armed conflict. (*Ibidem*, para.162).

of an agency relationship plays an important role where the concepts of agency and attribution are being conflated.<sup>110</sup> The role of consent provides an answer to the question posed by the Appeals Chamber as to why should international law require a high threshold for the test of control. An answer here may be that specific instructions or directions by a State – as part of the high threshold ‘effective control’ test – are necessary since they provide evidence of a State’s consent to an entity being able to act as its *de facto* agent, and that this consent cannot be lightly presumed by the existence of a general or ‘overall’ degree of control – that is, in the absence of specific instructions or directions from a State. As such, the necessary role of consent in the establishment of an agency relationship affirms the ‘effective control’ test espoused by the *Nicaragua* case – to the extent that this test of attribution is the sole determinant of an agency relationship –<sup>111</sup> as the degree of control that will be necessary to establish a *de facto* agency relationship. This preference for the ‘effective control’ test of the International Court is of practical importance for our main question of when can an international organization be said to be acting as an agent for its Member States.

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<sup>110</sup> This of course is based on the alternative interpretation of Article 8 of the ILC Draft Articles discussed above that conflates the concepts of attribution and agency: see text following *supra* n.104.

<sup>111</sup> Cf. *supra* n.104 and corresponding text *et sequentia*.

#### **4. The establishment of an agency relationship between an international organization and States conferring powers**

The establishment of an agency relationship in international law depends, as explained above, on the principal and agent being separate entities, the relationship being consensual, and the principal being able to exercise control over the acts of its agent. The germane question for our present discussion is to consider the extent to which these preconditions can be satisfied in the relationship that exists between an organization and a State or States that have conferred powers on the organization. In considering this question, it is important to distinguish, analytically, between two categories of States that may potentially have an agency relationship with an international organization: Member States and non-Member States. In both cases there is a presumption against the establishment of an agency relationship between a State and an organization for the reasons set out below, but in the case of Member States the presumption may in practice be stronger.

##### **(a) Member States of an international organization**

There is a general presumption against the establishment of an agency relationship between an international organization and its Member States.<sup>112</sup> The reason for the existence of this presumption is that two of the preconditions for establishment of an agency relationship – consent and control – are not fulfilled on a *prima facie* basis. This does not mean that an

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<sup>112</sup> For statements in support of this presumption, see the following: the decision of the English Court of Appeal in *Maclaine Watson v. Department of Trade and Industry*, England court of Appeal, 80 *ILR*, (1989), p.39 at p.114; the opinion of Lord Oliver (with whom the other Lords agreed) in the International Tin Council case of *J.H. Rayner Ltd v. Department of Trade and Industry*, [1989] 3 W.L.R. 969 at 1016-1017; the opinion of Justice Millet in *Maclaine Watson & Co. v. the International Tin*

international organization can never be an agent for its Member States when exercising conferred powers under the terms of its constituent treaty.<sup>113</sup> It is just that there is a presumption against this being the case.

When Member States ratify a constituent treaty that confers powers on an organization they are consenting thereby to the organization exercising the power in question, but they are not necessarily consenting to the organization exercising the power on their behalf (as an agent) such that it can change their legal rights and obligations.<sup>114</sup> More specifically, an international organization with separate legal personality acts on its *own* behalf and not on behalf of its Member States when exercising powers under its constituent treaty, and as such there is a general presumption against considering Members as having consented to the establishment of an agency relationship simply by virtue of their membership in the organization. It was this approach that was adopted by the English courts in the litigation following the financial collapse of the International Tin Council (ITC), an international organization headquartered in the UK with separate international legal personality from its Member States.

In the ITC cases, one of the arguments made in favour of ITC Member States being liable for the ITC's financial liabilities was that the organization had entered into transactions with third

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*Council*, [1988] Ch. 1; and Crawford, *Annuaire de l'Institut de Droit International*, (66-I, 1995), p.334, Shihata, *ibidem*, p.312, and Zemanek, *ibidem*, p.327.

<sup>113</sup> As Shihata has stated in response to the questions – posed by the Institut's Rapporteur `Rosalyn Higgins – whether an international organization does act as the agent of its members and if so in what circumstances: 'The relationship between a state and an international organization of which it is a member cannot be characterised as a principal-agent relationship in the absence of a strong evidence to this effect or an explicit agreement by virtue of which the member requests the organization to act as its agent for a certain purpose (*e.g.*, under the IBRD loan agreements, for the purpose of purchasing and converting currencies on behalf of a borrower state, and under agreements with the IBRD authorizing it to administer funds provided by a member state for a special purpose).' (Shihata, I., *Annuaire de l'Institut de Droit International*, (66-I, 1995), p.312.)

<sup>114</sup> Brownlie goes on to state: 'In practice the United Nations has accepted responsibility for the acts of its agents. However, in the case of more specialized organizations with a small number of members, it may be necessary to fall back on the collective responsibility of the member states. There is a strong presumption against a delegation of responsibility by a state to an organization arising simply from membership therein. Evidence must be sought of the intention of the states establishing the particular organization. In certain cases the organization may be conceived of as incurring liabilities in the course of its activities and as a vehicle for the distribution of costs and risks.' (Brownlie, *supra* n.94, p.688.)

parties as an agent acting on behalf of the Member States who were an undisclosed principal.<sup>115</sup> A useful distinction was drawn in the cases between ‘constitutional’ agency which would arguably derive directly from the ITC’s constituent treaty [the 6<sup>th</sup> International Tin Agreement (I.T.A.6), the treaty most recently constituting the International Tin Council] and ‘factual’ agency for which express authority given by the Members to the Council would have to be established.

The ‘constitutional’ agency argument was dismissed by the English Courts on the basis that the I.T.A.6 was a membership agreement, not one forming an agency relationship. Put differently, Member States could not be considered as having consented to the establishment of an agency relationship when ratifying I.T.A.6. The I.T.A.6 established the rights of Members as Members of the ITC, not as principals to the transactions of the ITC. As, for example, Justice Millet in *Maclaine Watson v. International Tin Council* stated: ‘the treaty [I.T.A.6] is not a contract of partnership or agency but of membership. The relationships it creates are not those of partners or of principal and agent but of an organisation and its members.’<sup>116</sup> This approach was upheld on appeal by the English Court of Appeal.<sup>117</sup>

The English courts also considered whether participation by ITC Member States in the decision-making processes of the ITC Council, as provided for by I.T.A.6, could be equated to control of the organ for the purposes of establishing an agency relationship. The English Court of Appeal in the separate action brought by the ITC’s creditors directly against the UK Department

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<sup>115</sup> *J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry* [1987] BCLC 667, *Maclaine Watson & Co. v. International Tin Council* [1988] Ch.1, and *Maclaine Watson v. Department of Trade and Industry*, England court of Appeal, 80 ILR, (1989), p.39. Chinkin usefully summarizes the conclusion of the English Courts: ‘On appeal the agency argument was rejected. The Court of Appeal found that no express authority had been given to the Council by its members, thus negating any factual agency. It also held that the 6<sup>th</sup> International Tin Agreement did not establish a principal/agent relationship between the Council and its members. In the House of Lords, Lord Oliver emphasized that the law which was relied upon as creating an agency situation was the 6<sup>th</sup> International Tin Agreement, which was not justiciable in the English courts. His Lordship indicated that even if this were not the case he would have rejected any agency argument on the same grounds as Staughton J, and the Court of Appeal.’ (Chinkin, *supra* n.14, pp.116-119.)

<sup>116</sup> *Maclaine Watson v. International Tin Council, Chancery Division*, [1988] Ch. 1 at p.23.

<sup>117</sup> *Maclaine Watson v. International Tin Council, Chancery Division*, [1989] Ch. 253 at p.257.

of Trade and Industry (*Maclaine Watson v. Department of Trade and Industry*)<sup>118</sup> rejected the argument that the control being exercised by Member States over the ITC through the ITC Council was sufficient to establish an agency relationship between the ITC and its Members. In so doing, the Court of Appeal in *Maclaine Watson v. Department of Trade and Industry* applied the earlier House of Lords decision in *Salomon v. Salomon* which rejected the notion that the existence of control was sufficient to allow the piercing of the corporate veil so that a corporation can be considered as an agent for the controlling shareholders.<sup>119</sup> The Court of Appeal stated in *Maclaine Watson v. Department of Trade and Industry* concerning the *Salomon* case: ‘The crucial point on which the House of Lords overruled the Court of Appeal in that landmark case was precisely the rejection of the doctrine that agency between a corporation and its members in relation to the corporation’s contracts can be inferred from the control exercisable by the members over the corporation or from the fact that the sole objective of the corporation’s contracts was to benefit the members.’<sup>120</sup> This approach by the Court of Appeal was affirmed on appeal by the House of Lords which stated:

Once given the creation of a separate legal personality by the Order in Council [that established the ITC as a UK corporation], there appears to me to be no escape from the principle established by this House in *Salomon v. A. Salomon and Co. Ltd.* [1897] A.C. 22, where the suggestion that Salomon and Co. Ltd. carried on business as agent for the incorporators was firmly and decisively rejected. Mr Sumption has sought to distinguish the case on the ground that the I.T.C. was brought into existence to carry out the purposes of its members and not for its own purposes and that it is “composed” of its members and operates under their immediate direction. An analysis was made of ... the I.T.A.6 in order to support the suggestion that, unlike a board of directors, the council owes no duties to the I.T.C. but acts entirely for its own benefit. From this it was argued that the I.T.C., as a body, was simply the agent of the members. It is, perhaps, enough for me to say that ... I can find no relevant distinction here between the governance of a limited company and the governance of the I.T.C. That they are differently constituted is irrelevant. As Kerr L.J. [1989] Ch. 72, 189, pointed out in the course of his judgment [in the Court of Appeal], whether a corporation acts directly on the instructions of its members, who constitute the directorate, or indirectly

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<sup>118</sup> *Maclaine Watson v. Department of Trade and Industry*, England Court of Appeal, 80 ILR, (1989), p.39.

<sup>119</sup> The Court of Appeal stated: ‘The correct analysis of I.T.A.6 is in line with the decision of the House of Lords in *Salomon v. A. Salomon & Co. Ltd.* [1897] A.C. 22 and not with any contract of agency between the members as principals and the council as the members’ agent.’ (*Maclaine Watson v. Department of Trade and Industry*, England Court of Appeal, 80 ILR, (1989), p.39 at p.114.)

<sup>120</sup> *Maclaine Watson v. Department of Trade and Industry*, English Court of Appeal, 80 ILR, (1989), p.39 at p.113.



because of the members' control in general meeting, makes no difference in principle. The existence of a board of directors in Salomon's case played no part in the decision. An examination of the constitution of the I.T.C., even if permissible, does not support the suggestion of "constitutional agency".<sup>121</sup>

The House of Lords thus dismissed the argument that the control being exercised by ITC Member States acting collectively through the decision-making processes of the ITC Council was sufficient to establish a relationship of 'constitutional agency', that is agency established by the ITC's constituent treaty (I.T.A.6).<sup>122</sup> This decision has two broader implications.<sup>123</sup>

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<sup>121</sup> *J.H. Rayner v. Department of Trade and Industry and Others and Related Appeals*, [1990] 2 A.C. 418 at 515, per Lord Oliver. Lord Oliver went on to dismiss the agency claim on the further ground that was 'accepted by Staughton J. and upheld by the Court of Appeal, that the terms of the standard form B contract of the London Metal Exchange, which governs the transactions sued upon, preclude any suggestion of agency. These terms unambiguously specified that the contract is between "ourselves and yourselves as principals" and the words which follow – "we along being liable to you for its performance" – cannot reasonably be construed as importing that the words "as principals" refer only to the "ourselves" (the brokers) and not also to the "yourselves" (the I.T.C.).' (*J.H. Rayner v. Department of Trade and Industry and Others and Related Appeals*, [1990] 2 A.C. 418 at 516, per Lord Oliver.)

Moreover, Gordon Pollock QC in the ITC case before the House of Lords made the persuasive argument on behalf of the government of India (intervening in the case) that: 'It is impossible to construe I.T.A.6 so as to conclude that the I.T.C. was automatically acting as agent for each and every member whenever it exercised its capacities to contract. So there is a presumption there is no agency. So in the absence of clear and express statement I.T.A.6 would not be construed to imply an agency: *Salomon v. A. Salomon and Co. Ltd.* [1987] A.C. 22 ...

In this connection two short points are made in respect of I.T.A.6. First, one is concerned with the relationship of each member vis-à-vis the ITC. "The members" are not simply one person. I.T.A.6 is not an agreement which is simply brought into existence to provide a mechanism whereby the members can harmonise their individual activities. It is to bring into being an organisation which can act against the interests of individual members or groups of members from time to time. The members, by joining it, give up their freedom of action and agree to be bound by the ITC's decisions. For these purposes the ITC is composed of the council and there has to be a certain majority [to make decisions]. ... As a result of vote [sic] decisions become decisions of the body which can be enforced on individual members, including those who voted against it. Secondly, the ITC has a number of executives. The chairman has to be of complete independence, as do all the rest of the officers of the organisation. The officers are only answerable to the council. They cannot reveal information to any of the members ... . Articles 27, 28 and 29 read together impose duties and grant powers to the buffer stock manager. That executive is under an obligation by virtue of the constitution [I.T.A.6] to exercise those powers as his rights unless and until the decision making organ of the ITC decides otherwise. ... Those are not indications of an agency.' (Submissions contained in *J.H. Rayner v. Department of Trade and Industry and Others and Related Appeals*, [1990] 2 A.C. 418 at pp.458-459.)

<sup>122</sup> The existence of such a presumption against agency is further supported by the independence of international organizations (embodied usually in the secretariat of an organization) from States: see also Pollock, *supra* n.121) An expression of this independence is contained in the obligation on States not to give - and the concomitant obligation on organs of an international organization not to act on - direct instructions to an organization such that its organs do not act in accordance with their stipulated decision-making processes, even when exercising conferred powers. An example here is the UN Secretary-General and his/her staff who under Article 101 of the UN Charter are prohibited from seeking or receiving instructions from any UN Member State in the exercise of their powers. On this independence of, for example, the UN Secretariat, see also *Reparation for injuries suffered in the service of the United Nations* case, *ICJ Reports* (1949), p.174 at p.183; and on the importance of this independence in other cases, see Sarooshi, D., 'The Role of the UN Secretary-General in UN Peace-Keeping Operations', *Australian Yearbook of International Law* 20 (1999), pp.285-286, 290-291.

Moreover, as Chinkin has stated in the context of the secretariat of the International Tin Council: 'The International Tin Agreement also provided for executive staff who in the performance of their duties were prohibited from receiving instructions from any source other than the Council. Each member State was under a duty to respect the international and independent character of the responsibilities of these staff. Although the member States had created the Council, once established it became a separate entity with its own international executive. The member States were external to the Council, and were included in the prohibition against taking instructions from external governments or powers. This could be a persuasive argument against agency. An agent cannot be prohibited from taking further instructions from the principal, and a principal cannot be prevented from giving

First, it means that the nature of the control that is necessary to establish an agency relationship between an organization – possessing its own legal personality – and its Member States must be *de facto* control: that is, control being exercised by Member States over an organization which is outside the confines of the decision-making processes of the organization.

Second, it provides further support to the approach set out above that both State consent and the exercise of control are preconditions for the establishment of an agency relationship in international law: control is necessary but not sufficient in order to establish an agency relationship.

To summarise, there is a general presumption against Member States of an organization having established an agency relationship with the organization by virtue of their ratification of a constituent treaty and participation in its decision-making organs. This presumption may, however, be rebutted where a case of *de facto* agency can be established.<sup>124</sup>

The establishment of a case of *de facto* agency will require evidence in a particular case that Member States have consented – either expressly or impliedly – to the organization acting on their behalf on an individual or collective basis as well as evidence that the Member States in question have exercised *de facto* control over the organization. There is an important distinction that needs to be made at this point in our analysis between the case where Member States have

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instructions to the agent. While the members may be delegates of the member States, the administrative officers were independent and exclusively international employees of the Council.’ (Chinkin, *supra* n.14, pp.116-117.)

<sup>123</sup> The general importance for international law of these domestic court pronouncements in the ITC cases has been widely accepted: see, for example, ‘Responsibility of International Organizations’, ILC Report of its 54<sup>th</sup> Session (2002), Chapter VIII, para.487.

<sup>124</sup> As Amerasinghe has stated ‘The issue of factual agency could arise in any situation. It does not hinge specifically on the nature of the personality of the organization nor does it flow from the constitutional relationship between the organization and its members, since it rests entirely in the factual position which prevails between the organization and its members and on whether such position according to the law of agency warrants the inference that the organization was not acting on its own behalf but on behalf of an undisclosed principal, namely the members. Factual agency is, therefore, not intrinsic to the law of international personality which flows from the agreement creating the organization. [Nonetheless,] [i]t is entirely possible that in a given factual situation the agency relationship between the organization and its members could be established.’ (Amerasinghe, C.F., 66-I *AIDI*, (1995), p.353.) For possible examples of factual agency between an organization and its Member States, see Chinkin in the context of the International Tin Council (Chinkin, *supra* n.14, p.115); and Shihata who contends that in certain limited instances the International Bank for Reconstruction and Development acts as an agent for its Member States (Shihata, I., 66-I *AIDI*, (1995), p.312.)

expressly consented to an organization acting on their behalf from the case where consent has arguably been implied. This distinction is of practical importance, since where Members have consented in express terms then the degree of control necessary to provide evidence of an agency relationship will be different from the case where consent has arguably been implied. This distinction and its important consequence can be illuminated by considering the two different consent scenarios in the case, for example, of the possible establishment of an agency relationship between the North Atlantic Treaty Organization (NATO) and its Member States.

Consider if, for example, NATO Member States expressly stated that NATO was acting on their behalf on an individual and collective basis in a particular case, then notwithstanding NATO's separate legal personality<sup>125</sup> the requirement for consent would arguably be fulfilled. The express consent operates here to rebut the general presumption that an international organization with separate legal personality does not act on behalf of its Member States on an individual or collective basis. The remaining question in such a case is what degree of control would need to be proved to evidence the establishment of an agency relationship? In the case of NATO Member States the cogent argument may be made that evidence of 'overall control' by the States concerned is sufficient to establish a *de facto* agency relationship. The reasoning for this approach is provided by the ICTY Appeals Chamber in the *Tadic* case, but it is strictly limited, it should be emphasised, to international organizations of a military nature such as NATO and, once again, to the case where Member States have expressly consented to an organization acting on their behalf on an individual or collective basis.

We recall that the reason why the ICTY Appeals Chamber adopted and used an 'overall control' test as opposed to the 'effective control' test was the degree of military organization of the individuals concerned. The greater the degree of military organization, the argument runs, the

lower the degree of actual control that a State will have to exercise in order for the individuals concerned to be said to be acting on behalf of the State. The reason for this is an implicit – unstated – presumption the Appeals Chamber is applying that says when a military force is organized then the members of the force will only act pursuant to, and when there are, orders that emanate from its chain-of-command. Where, accordingly, it has been established in a particular case that a military force is under the overall control of a State the operation of the presumption is such that when the force acts it can be said to be acting on instructions from the State. It is this mechanism of control – the chain-of-command – that allows dispensing with the requirement to prove the existence of specific instructions from a State concerning the commission of a particular act. In the case of NATO there is a clear chain-of-command that flows from the NATO Council to NATO commanders, and this allows the Council to exercise command and control over NATO forces.<sup>126</sup> As such, the Appeals Chamber reasoning in the *Tadic* case would seem applicable to NATO with the consequence that it is the ‘overall control’ test that should be used to determine whether the degree of *de facto* control by Member States over NATO is such that it establishes an agency relationship between NATO and the Member States that have expressly consented to such a relationship.

Where, however, there is no such express consent, but consent is arguably implied, then the test for the degree of *de facto* control that will be necessary to establish *de facto* agency is, as explained above, the International Court’s ‘effective control’ test and not the ICTY’s ‘overall control’ test.<sup>127</sup> This has the important practical consequence in such cases that in order to establish *de facto* control by Member States over an organization it will be necessary to provide

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<sup>125</sup> Cf. *infra* n.133.

<sup>126</sup> For a useful description of the NATO chain-of-command, see the NATO web-site, in particular at: <http://www.nato.int/structur/struc-mcs.htm>.

<sup>127</sup> See *supra* n.111 and corresponding text.

evidence of the following:<sup>128</sup> First, an actual instruction or direction by Member States that is subsequently followed by the organization; and, second, that the instruction or direction in question is not envisaged by the organization's constituent treaty. Where these two elements of *de facto* control can be proved there will be obvious issues of *vires* for the organization, but this does not detract from the *de facto* control position that would be established if the existence of such an instruction or direction was proved. In our example of NATO, this means that evidence of a direct instruction by a NATO Member State to a NATO General or Commander outside the NATO chain-of-command would be required to establish an agency relationship between the Member State concerned and NATO. The likelihood of such an occurrence may not be as remote in practice as may at first seem the case, especially since NATO military commanders continue to serve as part of the armed forces of their Member States concurrent with their NATO position.<sup>129</sup>

The question of a possible agency relationship between NATO and its Member States was raised by the Federal Republic of Yugoslavia (FRY) before the International Court in the case brought against NATO Members. The FRY brought this case in response to the NATO bombing of its territory that was carried out in an attempt to stop the widespread human rights violations that were said to be occurring in the FRY province of Kosovo. One of the arguments made by the FRY in the preliminary measures phase of the case was that '[t]he command structure of NATO

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<sup>128</sup> See text following *supra* n.124 and corresponding text.

<sup>129</sup> It is precisely this type of dual function that gave rise to a possible example of an agency relationship between the UN peace-keeping operation in Somalia (UNOSOM II) and a UN Member State, Italy, that was participating in UNOSOM II. It has been explained in detail elsewhere that UNOSOM II was given by the UN Security Council a military enforcement mandate by Council resolutions 814 and 837. (Sarooshi, *supra* n.7, pp.81-82.) This was subject, however, to the condition that UNOSOM II operate under the command and control of the Secretary-General's Special Representative and the UN Force Commander. (*Ibidem.*) Despite this requirement, it seems the Italian contingent that was part of UNOSOM II obtained and followed orders from Rome rather than those issued by the UN chain-of-command. (For a description of such cases, see: S/1994/653, pp.28-29, 45; and Hirsh, J., and Oakley, R., *Somalia and Operation Restore Hope: Reflections on Peacemaking and Peacekeeping*, (1995), p.119.) In such a case – to the extent that evidence of these orders can be established – it would seem that the Italian contingent was acting as an agent of Italy and as such that any responsibility arising from these acts are to be attributed to Italy and not the UN. This is a case of agency and not simply a case where the Italian contingent is operating as part of the Italian armed forces *per se*, because the sole legal basis for the contingent being in Somalia and carrying out an enforcement mandate is the fact that it was part of UNOSOM II. The fact that the contingent may have obeyed orders issued directly from Rome – orders that were clearly outside the UN chain-of-command – does not alter the legal position that the Italian contingent was still part of UNOSOM II.

constitutes an instrumentality of the respondent States, acting as their agent'<sup>130</sup> and thus that 'the respondent States are jointly and severally responsible for the actions of the NATO military command structure'.<sup>131</sup> This issue was not argued at length before the International Court at this interim measures phase of the case, since it is a matter going more to the merits. Nonetheless, Canada did briefly respond in oral argument – although not directly addressing the issue of agency – when it stated before the Court:

Joint and several liability for acts of an international organization, or for the acts of other States acting within such an organization, cannot be established unless the relevant treaty provides for such liability. Article 5 of the 1994 NATO Convention ... provides no such indication of an assumption of joint and several liability, and neither do the provisions of the Handbook respecting the integrated military structure of the organization. The separate liability of Australia in *Nauru* was of course based on the specific terms of the trust instruments in issue in that case, not on general principles on international organizations. The work of the ILC on State Responsibility provides no more support for the joint and several concept. I note as well that these concepts were canvassed in the Tin Council litigation in the United Kingdom, and the outcome would not support the Applicant in the present case.<sup>132</sup>

Based on our detailed analysis above, there are several propositions that are applicable in the context of this case. First, there is a clear presumption against the establishment of an agency relationship between NATO and its Member States, assuming that NATO does indeed possess separate legal personality from its Members.<sup>133</sup> Second, in order to rebut this presumption the FRY must provide evidence of *de facto* control being exercised by Canada over NATO forces, and, moreover, prove that this control is outside the confines of Canada's participation in the NATO Council. Moreover, the degree of control necessary to establish *de facto* control in this

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What our previous analysis does illustrate though is that to the extent that the Italian contingent obeyed orders that were outside the UN chain-of-command and where these orders can be proved, then they were acting as agent for the Italian Government.

<sup>130</sup> Oral argument in the case *Yugoslavia v. Canada*, CR 99/14, 10 May 1999, p.33 (from ICJ web-site: [www.icj-cij.org](http://www.icj-cij.org)).

<sup>131</sup> Oral argument on behalf of Yugoslavia in the case *Yugoslavia v. Canada*, CR 99/14, 10 May 1999, p.38 (from ICJ web-site: [www.icj-cij.org](http://www.icj-cij.org)).

<sup>132</sup> Oral argument on behalf of Canada in the case *Yugoslavia v. Canada*, CR 99/27, 12 May 1999, p.7 (from ICJ web-site: [www.icj-cij.org](http://www.icj-cij.org)).

<sup>133</sup> This, however, may be a contentious issue that will require the International Court to determine whether NATO does in fact possess a separate legal personality from its Member States such that the presumption against agency operates. Suffice to note that a number of commentators have regarded NATO as a collective self-defence pact rather than as a regional organization

case is ‘effective control’ and not ‘overall control’ since Canada does not – on a *prima facie* basis – appear to have consented expressly to NATO acting on its behalf on an individual or collective basis. Accordingly, the FRY in order to establish an agency relationship will need: (i) to provide evidence of an actual instruction or direction by Canada that is subsequently followed by NATO forces; and (ii) to establish that this instruction or direction is outside the confines of NATO’s decision-making processes, that it is not envisaged by NATO’s constituent treaty. These will likely prove difficult to establish in practice.<sup>134</sup>

### **(b) Non-Member States of an international organization**

The establishment of an agency relationship between an organization and a State does not in theory depend on whether the State in question is a Member or not. As established above, there is no ‘constitutional agency’ that derives from the legal link established between a Member State and an organization, and as such the position of Member State and non-Member State would seem identical. However, the conferral of power on an organization by a non-Member State by contractual treaty may in practice provide much clearer evidence of a State’s express consent to an organization being able to act on its behalf than in the case of a Member State where such a separate treaty will likely not exist. As such, the presumption against agency may in practice be stronger in the case of the relationship between Member States and an organization than in the case where non-Member States have conferred powers on an organization. Moreover, in the case of a military organization – such as NATO – the existence of consent to an agency relationship

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with a separate legal personality. (See Kelsen, H., *The Law of the United Nations*, (1951), p.327; Simma, *supra* note 6, p.731, and Gazzini, T., ‘NATO Coercive Military Activities in the Yugoslav Crisis (1992-1999)’, *EJIL* 12 (2001), p.391 at p.425.)

<sup>134</sup> Gazzini, in his descriptive review of NATO military activities in FRY, states that: ‘Throughout the crisis, the NAC [North Atlantic Council] exercised political control – up to August 1995 jointly with the Security Council – and strategic direction over the operations, while the troops were under exclusive NATO command and control. Thus, no military activity was

contained in a contractual treaty would have the additional consequence, as explained above, that it reduces the degree of control necessary to establish an agency relationship between a non-Member State and the organization.<sup>135</sup>

### **(c) Consequences of the establishment of an agency relationship**

Where an agency relationship can be established between an international organization and a State, this will have four main consequences for our typology of conferrals of power. The first is that it determines the issue of revocability of the relationship. Second, it makes clear whose legal relations are changed as a consequence of the exercise of conferred power. Third, it determines the issue of who is responsible for breaches of international law that may occur as a result of the organization's exercise of the conferred power. Finally, it resolves the issue in whose interest is the power being primarily exercised: the State's or the organization's.

#### **(i) The revocability of an agency relationship**

The consensual basis of an agency relationship has the important consequence that it is revocable by the principal at any time. In this respect, agency in international law is the same as it appears in domestic law.<sup>136</sup> This similarity is not surprising since the rationale for unilateral

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undertaken by NATO forces without a formal decision by the NAC.' (Gazzini, T., 'NATO Coercive Military Activities in the Yugoslav Crisis (1992-1999)', *EJIL* 12 (2001), p.391 at p.415.)

<sup>135</sup> On this consequence of a State expressly consenting to an organization acting as its agent, see text following *supra* n.124.

<sup>136</sup> Similarly in domestic law a principal will in general be able to revoke at any time with immediate effect its agent's authority to act on its behalf. In the domestic law context of England and the US, see, e.g., Reynolds, *supra* n.93, pp.657, 673; Fridman, *supra* n.93, p.389; Reuschlein and Gregory, *supra* n.93, pp.86-87; and in the case of France, see Guyénot, *supra* n.136, p.67; and in Germany, see Staubach, F., *The German Law of Agency and Distributorship Agreements*, (1977), p.24. Cf. the *sui generis* case of an irrevocable agency: Fridman, *supra* n.93, p.389-391; and Reynolds, *supra* n.93, pp.660-668; Reuschlein and Gregory, *supra* n.93, pp.98-100.



revocability in both cases is the same. As Reuschlein and Gregory put it: ‘agency is a consensual relationship and a principal, therefore, cannot be compelled to retain another as his agent.’<sup>137</sup> This rationale is arguably applicable with a greater degree of cogency to the case of agency under international law. The importance that international law places on States being able to express freely their consent to the acceptance of obligations means that where these obligations are being entered into on their behalf by an agent, then a State should have the right to terminate this agency relationship at will in order to be able to ensure that the assumption of its obligations represents at all times the true expression of its will.

This right of termination of an agency relationship exists independent of the underlying treaty or other agreement that may have provided for the establishment of the agency relationship. Put differently, the principal has the power to decide at any time whether an agent should be able to continue to act on his or her behalf regardless of the existence of any contractual agreement that may exist between the principal and agent.<sup>138</sup> As Sereni states in the context of international law, a way ‘in which agency may be terminated is the *revocation by the principal* or the *renunciation by the agent*. It is correct to assume that in international law the principal has power to revoke, and the agent to renounce the authority, although doing so is a violation of an agreement between the parties expressly denying the right to revoke or to renounce. The only effect of a provision in a treaty that the authority cannot be terminated by either party is to create liability for its wrongful termination.’<sup>139</sup> As such, where there is, for example, an agency relationship between a group of States and an international organization that is exercising conferred powers on their behalf, then

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This is subject to the important caveat, even in the domestic sphere, that the termination may not affect the position of a third party in his dealings with the agent who has had no notice of such termination (see Reynolds, *supra* n.93, p.656.)

<sup>137</sup> Reuschlein and Gregory, *supra* n.93, p.86.

<sup>138</sup> As Reynolds states in the context of domestic law: ‘The general rule, which is perhaps not widely understood, is that the authority of an agent ... whether or not expressed to be irrevocable, is revocable, without prejudice to the fact that such revocation may be wrongful as between principal and agent.’ (Reynolds, *supra* n.93, p.673. See also, e.g., Reuschlein and Gregory, *supra* n.93, p.86.)

the conferral is revocable by the States with immediate effect, even in the case where the treaty providing for the conferral of power stipulates that the conferral is irrevocable. In the case of the latter, a unilateral revocation would provide a basis for allegation of breach of treaty by a third party or even by the agent itself, but these are separate issues from the right of termination of the agency relationship.<sup>140</sup>

## **(ii) An agent can change certain legal relations of its principal**

One of the most important consequences of an agency relationship is that an agent when exercising conferred powers can change the principal's legal relations with third parties. But the acts of an agent do not *per se* change the legal relations between the agent and a third party.<sup>141</sup> As Chinkin, for example, has observed in relation to international agency: '[When] [a]n agent enters into a contractual relationship with a third party on behalf of a principal; the legal relationship is established between the principal and the third party, not the third party and agent.'<sup>142</sup> As such, where an agency relationship can be established between an organization and States that have conferred powers on the organization, then the acts of the organization within the scope of conferred powers change only the legal relations of the States in question and not those of the

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<sup>139</sup> Sereni, *supra* n.11, p.660. (Original emphasis.) On revocability being an important part of international agency, see also Bartos in the International Law Commission debates: *YBILC*, vol.I, 1964, 732<sup>nd</sup> mtg., p.57 (para.42).

<sup>140</sup> In any case this right of unilateral termination is arguably envisaged by Article 56(1)(b) of the 1969 Vienna Convention on the Law of Treaties which provides in effect – reversing for present purposes the onus in the text – that a State can terminate a treaty that does not expressly provide for termination where the right of termination 'may be implied by the nature of the treaty.' (I am grateful to Professor M. Fitzmaurice for this point. This right would still, however, be subject to Article 56(2) of the 1969 Vienna Convention which provides that 'A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.')

The argument runs – in the case of a treaty establishing an agency relationship – that the consent based nature of the relationship which the treaty establishes means that the treaty should be revocable at the discretion of the State or States concerned (the principal).

<sup>141</sup> This is subject in international law to the third party knowing the identity of the agent: see *supra* n.92 and corresponding text.

For this position in domestic law, see Reuschlein and Gregory, *supra* n.93, pp.33, 101; in German law see Markesinis, B., Lorenz, W., and Dannemann, G., *The German Law of Obligations: The Law of Contracts and Restitution: A Comparative Introduction*, (1997), p.72, and Staubach, *supra* n.136, p.11; and in French law see Guyénot, *supra* n.136, p.181.

organization. This question of whose legal relations are changed as a consequence of the exercise by an agent of conferred power is, however, distinct from the question of responsibility for breaches of international law that may occur as a result of the agent's (*in casu*, the organization's) exercise of conferred power.

### **(iii) The responsibility of a principal for the acts of its agent**

An important consequence of an agency relationship is that the principal is responsible for the acts of its agent that are within the scope of conferred power.<sup>143</sup> Accordingly, where an organization acts<sup>144</sup> as an agent for certain States then the States concerned are responsible for any unlawful acts committed by the organization in the exercise of conferred powers.<sup>145</sup> This consequence of agency flows, more specifically, from the control that a principal (the State) exercises over its agent (the organization), since, as explained above, control is a sufficient criterion for establishing attribution in international law.<sup>146</sup>

Where an organization does act as an agent for a State, then the control that exists in such a relationship may seem to militate against the organization having a secondary responsibility for unlawful acts committed in the exercise of the conferred powers. However, this is not the correct

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<sup>142</sup> Chinkin, *supra* n.14, p.65. Moreover, Sereni contends: 'The acts performed by the agent within the limits of its authority bind the principal as if they had been personally performed by the latter. When acting within its power, the agent assumes no personal responsibility towards either the principal or the third parties.' (Sereni, *supra* note 11, p.655.)

<sup>143</sup> As Sereni states: 'The acts performed by the agent within the limits of its authority bind the principal as if they had been personally performed by the latter. When acting within its power, the agent assumes no personal responsibility towards either the principal or the third parties.' (Sereni, *supra* note 11, p.655.)

<sup>144</sup> On the separate issue of whose acts can be attributed to the organization, see Klabbbers, *supra* n.10, pp.307-310 (and see references contained therein).

<sup>145</sup> As Amerasinghe states: 'It is entirely possible that in a given factual situation the agency relationship between the organization and its members could be established. In that case there would be a direct liability on the part of members for the obligations incurred. But then the organization itself would not be primarily liable, unless it has exceeded its powers under the law of agency.' (Amerasinghe, C.F., 66-*I AIDI*, (1995), p.353.)

As a general matter, where acts are committed outside the scope of the agent's conferred powers then the principal is not liable for these acts. As Sereni states: 'As to the legal effects of international agency ... the agent's acts bind the principal only in so far as they are within the authority conferred. Beyond these limits the agent's acts do not bind the principal, unless subsequently ratified by the latter.' (Sereni, *supra* n.11, p.655.) For the similar position in the domestic law context, see, for example, Reynolds, *supra* n.93, p.1.

general approach that should be adopted. It is contended, to the contrary, that there is a general presumption that an international organization when acting as an agent for a State retains a joint, but secondary,<sup>147</sup> responsibility for its unlawful acts.<sup>148</sup> The reason for this is that where an international organization possesses a separate legal personality, then in the absence of an express provision in its constituent treaty to the contrary the international organization always possesses constitutional control over its actions – even in the case where a State is exercising *de facto* control over the organization – such that the organization could seek to prevent the commission of the unlawful act by issuing an order to override the instruction or other *de facto* control being exercised by the State. In such a case the failure by the organization to exercise its constitutional control can be said to be an omission that engages a secondary responsibility of the organization.<sup>149</sup> Where, however, an organization has in good faith sought to exercise its constitutional control to prevent the commission of an unlawful act, then the presumption against its secondary responsibility may be rebutted in a particular case.

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<sup>146</sup> See *supra* n.102 and corresponding text.

<sup>147</sup> The consequence in practice of the responsibility being secondary in nature is that any claims for redress should in the first instance be made to the State who bears primary responsibility in the case where there is an agency relationship between a State and an organization.

<sup>148</sup> This issue of a potential secondary responsibility of an organization's Member States arose in the *Westland Helicopters* case. The court of arbitration set up by the International Chamber of Commerce held in the case the following: 'In the absence of any provision [in the AOI's founding documents] expressly or impliedly excluding the liability of the four States, this liability subsists since, as a general rule, those who engage in transactions of an economic nature are deemed liable for the obligations which flow there from. In default by the four States of formal exclusion of their liability, third parties which have contracted with the AOI could legitimately count on their liability.' (*Westland Helicopters Ltd and Arab Organization for Industrialization, United Arab Emirates, Kingdom of Saudi Arabia, State of Qatar, Arab Republic of Egypt and Arab British Helicopter Company*, award of 5 March 1984, in 80 *ILR* 600, p.613). This general reasoning is, however, very different from the rationale for the existence of a secondary responsibility of an international organization in the case of an agency relationship (which was not the position in the *Westland Helicopters* case) as provided in the text.

<sup>149</sup> What I have termed secondary responsibility, Professor Ago, in the context of his ILC Reports on State responsibility, called 'indirect responsibility'. The basis for the concept is, however, the same whether in the context of State or, in our case, organizational responsibility: as Morelli has put it: 'Indirect responsibility presupposes, in the international juridical order, the existence of a certain relationship between the subject responsible for the wrongful act and the subject which committed it, that relationship being characterized by the fact that the former has the possibility of controlling the conduct of the latter or, in other words, of guiding that conduct in a certain direction.' (G. Morelli, *Nozioni di diritto internazionale*, (7<sup>th</sup> ed., 1967), p.364, as translated and quoted in ILC Eighth Report on State Responsibility by Professor Roberto Ago, A/CN.4/318 and Add.1-4, *Yearbook of the ILC*, 1979, vol.II, Part One, Documents of the thirty-first session, p.14.)

Klabbers suggests a different, though related, basis of liability: 'if the member-states fail to exercise proper control over the acts of the organization, then they may be held responsible for negligence.' (Klabbers, *supra* n.10, p.302.)

#### **(iv) The fiduciary duty of the agent to act primarily in the interests of its principal**

The existence of an agency relationship imposes an obligation on the agent to act primarily in the interests of its principal.<sup>150</sup> As Crawford has stated in the context of an agency relationship between two States: *'The exercise of governmental competence on a basis of agency. It is clear that the exercise of governmental competence by another international person or persons on behalf of and by delegation from a State is not inconsistent with formal independence. The foreign affairs and defence powers are quite often so delegated; as are certain economic or technical facilities. The important element is always that the competence is exercised not independently but in right of the State concerned.'*<sup>151</sup> This fiduciary element of an agency relationship means that where an organization acts as an agent for a State then the organization must exercise conferred powers in the interests of the conferring State. Such a situation may well, however, raise an issue of *vires* for the organization, since it may have its own organizational interest specified by its constituent treaty in pursuit of which it is always bound to act. This may provide a cause of action for a Member State to claim that the organization is not acting in conformity with its constitutional obligation to act primarily in its own interest.<sup>152</sup> In practice, however, the subjective nature of an 'organization's interest' is such that it may be difficult to prove that its content is substantially different from that of the conferring State in a particular case.

Sereni draws an interesting conclusion from the fiduciary nature of the agency relationship in the context of international law when he states:

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<sup>150</sup> See also in US law, Reuschlein and Gregory, *supra* n.93, p.11, and Seavey, *supra* n.93, p.863; in German law see Staubach, *supra* n.136, p.7; in the context of French law see Guyénot, *supra* n.136, p.171; and in English law see Reynolds, *supra* n.93, p.191 *et sequentia*, and Fridman, *supra* n.93, p.157 (see also Ho, *supra* n.100, p.3).

<sup>151</sup> Crawford, *supra* n.10, p.54. (Emphasis added.) Moreover, Sereni in his discussion of the way in which a State must act as an agent pursuant to an authority to exercise diplomatic protection on behalf of the citizens of another State, stipulates 'it [the State acting as agent] must perform it in the interest of the state to which the citizens belong.' (Sereni, *supra* n.11, p.644.)

<sup>152</sup> A case where this precondition would be fulfilled is, for example, when States confer powers on an organization on an *ad hoc* basis and an express condition of the conferral is that the power be exercised primarily in the interests of the conferring

No principle or rule of international law forbids that the agent be granted the power of appointing a sub-agent for the purpose of the agency. However, the authority of the agent does not necessarily include the power of sub-delegation. This power exists only if it has been granted by the principal. ... In international law even more than in any system of national law, the relationship of principal and agent is a fiduciary one. Since every international transaction includes some element of discretion, the principal ordinarily relies upon the personal qualities of the agent. It is, then, to be presumed that the subject appointed to perform some functions cannot sub-delegate another subject to fulfill them on behalf of the principal, unless expressly authorized. This presumption applies even when international agency is established in the interest of the principal.<sup>153</sup>

This position is certainly different from that in our next category of ‘delegation’ where the delegatee – *in casu*, the organization – does arguably possess a limited general competence to sub-delegate conferred powers without an express authorization to do so being necessary.<sup>154</sup>

To conclude more generally on our discussion of agency, there are three preconditions for the establishment of an agency relationship in international law: First, that the principal and agent are separate legal entities. Second, that both the principal and agent consent to the relationship. And finally that a principal exercises control over the acts of its agent. The greater the degree of their application in a case the more cogent an argument that what is being considered is a relationship of agency. There is, however, a presumption against the establishment of an agency relationship between an international organization and States that have conferred powers on the organization. It is only a presumption against agency and not a rule since there are cases where an international organization may possibly act as an agent for a State or group of States that have conferred powers on an organization. Where such cases of agency can be established then it has the following consequences for the State (principal) – organization (agent) relationship: the State concerned will be able to terminate unilaterally the agency relationship; the organization can change the legal relations of the State in question but it does not change its own legal relations

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States. Such a case may, however, raise an issue of *vires* for the organ, since it may require it to act contrary to its constituent treaty.

<sup>153</sup> Sereni, *supra* n.11, p.653.

<sup>154</sup> This issue will be discussed in more detail in the forthcoming monograph by this author.

when exercising conferred powers; the acts of the organization in the exercise of conferred powers can be attributed to the conferring State for the purposes of State responsibility, and there is a presumption that an organization possesses a secondary responsibility for unlawful acts committed in the exercise of conferred powers; and, finally, the organization is under a fiduciary duty to act primarily in the interest of the State concerned in the exercise of the conferred power, even though this may raise an issue of *vires* for the organization under its constituent treaty.