The Sarooshi Typology and the Sub-Conferral and Exercise of Powers between Intergovernmental Organizations: Contestation and Responsibility

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ABSTRACT

With the spread of globalization, States recognized the necessity of increased cooperation and coordination of global activities, and have used intergovernmental organizations (IGOs) increasingly, as a means of cooperating internationally.

In his book *International Organizations and their Exercise of Sovereign Powers*¹, Professor Dan Sarooshi, proposed a Typology (the Sarooshi Typology), which classified the types of conferrals of powers from States to IGOs on a continuum, with each of the categories characterised according to three elements, namely the ability or lack of ability of conferror States to revoke the conferred powers, whether States have direct control over the IGOs’ exercise of the conferred powers, and whether the States may exercise the conferred powers concurrently with the IGOs. The categories relate to different degrees of conferrals of powers, and reflect the degree of sovereign contestation between the States and IGOs.

On one end of the continuum are agency relationships, through delegations of powers, with transfers of powers on the other end. There are accordingly, consequences that may occur as a result of these conferrals of powers, such as the incurrence of fiduciary duties and the attribution of responsibility to conferror States for the wrongful acts of conferee IGOs. Consequently, the Sarooshi Typology can be useful in the identification, classification and analysis of the type of powers conferred on IGOs, and can help in understanding better the legal relationships between States and IGOs.

Increasingly there has been a degree of overlap or duplication in the activities of IGOs internationally. Professor Sarooshi suggested in his book that we need to consider the legal issue of “the relationship and interaction between international organizations that exercise sovereign powers”.2

This thesis examines the application of the Sarooshi Typology to the sub-conferral and exercise of sovereign powers between IGOs, by discussing three case studies: the sub-conferral of peacekeeping powers from the United Nations to the North Atlantic Treaty Organization in Kosovo, the sub-conferral of disarmament powers from the United Nations to the International Atomic Energy Agency in seeking to disarm Iraq of possible weapons of mass destruction, and the sub-conferral of powers in international trade from the European Union to the World Trade Organization in relation to trade in bananas.

It finds that the categories of conferrals of powers in the Sarooshi Typology can be applied to sub-conferrals of powers between IGOs, and that issues of sovereign contestation and responsibility can similarly be identified.

The thesis therefore concludes that the Sarooshi Typology relating to the conferral of sovereign powers from States to IGOs, is applicable to the sub-conferral of sovereign powers between IGOs.

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2 Sarooshi, Dan, *International Organizations and their Exercise of Sovereign Powers* (Oxford University Press, 2005), 122
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Statement of candidate contribution

This thesis does not contain work that I have published, nor work under review for publication.
ABBREVIATIONS

ACP    African, Carribean and Pacific
AETR   European Agreement concerning the Work of Crews of Vehicles Engaged in International Road Transport
ARSIWA Articles on Responsibility of States for Internationally Wrongful Acts
CCP    Common Commercial Policy
DARIO Draft Articles on the Responsibility of International Organizations
DSB    Dispute Settlement Body
DSU    Dispute Settlement Understanding
EBRD   European Bank for Reconstruction and Development
EC     European Community
ECHR   European Convention on Human Rights
ECtHR  European Court of Human Rights
ECJ    European Court of Justice
ECOSOC Economic and Social Council (United Nations)
EC Treaty Treaty Establishing the European Community
EEC    European Economic Community
EU     European Union
EUMM   European Union Monitoring Mission
FAO    Food and Agriculture Organization
FRY    Federal Republic of Yugoslavia
GATS   General Agreement on Trade in Services
GATT   General Agreement on Tariffs and Trade
IAEA   International Atomic Energy Agency
ICJ    International Court of Justice
ICTY   International Criminal Tribunal for the former Yugoslavia
IGO    Intergovernmental Organization
ILA    International Law Association
ILC    International Law Commission
IMCO   Intergovernmental Maritime Consultative Organization
IMF    International Monetary Fund
ITLOS  International Tribunal for the Law of the Sea
KFOR   Kosovo Force
MFN    Most-favoured-nation
MTA    Military-Technical Agreement
NAT    North Atlantic Treaty
NATO   North Atlantic Treaty Organization
NGO    Non-governmental Organization
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<td>NPT</td>
<td>Treaty on the Non-Proliferation of Nuclear Weapons</td>
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<td>OPEC</td>
<td>Organization of the Petroleum Exporting Countries</td>
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<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
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<td>SFOR</td>
<td>Stabilization Force</td>
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<td>TEC</td>
<td>Treaty Establishing the European Community</td>
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<td>TEAEC</td>
<td>Treaty Establishing the European Atomic Energy Community</td>
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<td>Transnational corporation</td>
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<td>UNMOVIC</td>
<td>United Nations Monitoring, Verification and Inspection Commission</td>
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<td>UNSCOM</td>
<td>United Nations Special Commission</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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<td>WMD</td>
<td>Weapons of mass destruction</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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CHAPTER ONE

INTRODUCTION

1.0 INTRODUCTION

As international activities have increased, so too have global issues and challenges both in complexity and spread. Alongside this development, there has been a growing recognition of the need to cooperate in matters affecting common global activities. Discrete societies that had evolved over time to become nation States\(^1\) began to form alliances and formal international organizations which permitted a cooperative response of orderly and effective management of global issues and challenges. The international organizations\(^2\) which are the subject of this thesis came into existence from the late 19\(^{th}\) century.\(^3\) These international organizations, called intergovernmental organizations\(^4\) (IGOs), have a membership consisting primarily of States which have combined to confer collective authority on the IGOs to perform a wide variety of tasks globally on their behalf. IGOs therefore, reflect the collective will of their member States, and the purposes or functions for which they have been created by those States.

\(^{1}\) States are distinguished from nation-states by some authors. Goldman, for example, describes the state as “a political construct which is more in the nature of a posited, invented, contracted collectivity rather than being an emanation from the cultural subconscious…The nation, on the other hand, is more of an organic outgrowth, inspired by affinities such as appearances, religion and culture including language…” in Goldman, David B., \textit{Globalisation and the Western Legal Tradition : Recurring Patterns of Law and Authority} (Cambridge University Press, 2007), 202. He defines at p203, the nation-state therefore, as “a nation governed by the state or a state which seeks to draw upon nationalism to govern. As expressed by Philip Allott, a ‘nation organized as a state is thus a nation in which a government conducts the social willing and acting of the society with the authority of the whole of society…in which the members of society have taken on a second existence as \textit{citizens}.”.

\(^{2}\) Klabbers, Jan, \textit{An Introduction to International Institutional Law} (Cambridge University Press, 2\(^{nd}\) ed, 2009), 16: ‘modern international organizations’ for example, the International Telegraphic Union, the Universal Postal Union, the International Office of Public Health, the International Copyright Union.


\(^{4}\) See below Section 2.0 for a definition of IGOs. Some writers also refer to IGOs as, for example, international institutions or international organizations. Although these other terms may be used interchangeably in this thesis depending on the usage of different authors quoted or referenced, the organizations referred to on all occasions are intergovernmental organizations, which have a membership consisting predominantly of States.
The spread of globalization in the latter part of the twentieth century, largely through advances in technology, communications and transportation which facilitated interconnectedness and transborder global activities, brought with it new global challenges which went beyond the capabilities or efforts of single States. Consequently, the latter part of the twentieth century has seen a proliferation of IGOs, both in terms of numbers and the variety of purposes for which they have been formed.

The effects of interdependence and the need for a cooperative approach, as well as the part played by IGOs were evident, for example, during the Global Financial Crisis (GFC) of 2008, in which the International Monetary Fund played a major role in the crisis, with an initial response of $250 billion in credit lines. Similarly, when the swine flu pandemic of 2009 took hold globally, the World Health Organization took responsibility for global monitoring and management of the pandemic.

The variety of global problems and the cooperative responses to what may be called global governance however, are not restricted only to major global events. Today much of our daily lives is regulated or influenced in some way by one or more IGOs, overseeing the orderly and effective functioning of global activities. Postal services, transport, telecommunications including the internet, peace and security, health, trade, the products we buy in the supermarket and so on, are the result of global cooperation and global governance. Such is the pervasiveness of IGOs in our everyday activities,
that they are said to exceed States in number.\textsuperscript{10} In 2008 to 2009, there were an estimated 240 IGOs in existence\textsuperscript{11}, more than the current estimation of around 190 sovereign states\textsuperscript{12}. Consequently, the study of IGOs is an important one, particularly in relation to their accountability and responsibility for consequences arising from their exercise of conferred powers.

Much of the research on IGOs has focused on the functional nature of international organizations.\textsuperscript{13} According to Klabbers, whilst a functionalist approach to understanding international organizations law “has proved highly instrumental in analysing what organizations do and why they do it...[it] has, however, been less helpful in trying to come to terms with international organizations as political actors...[and]...issues of institutional autonomy, of control, of checks and balances, have remained under-illuminated.”\textsuperscript{14}

In 2005, Professor Dan Sarooshi published a typology (Sarooshi Typology) of three predominant types of powers conferred on IGOs by their member States and the consequent exercise of those powers by the IGOs.\textsuperscript{15} The powers conferred exist on a spectrum of conferrals, with agency relationships at one end of the spectrum, delegation of powers in between, and transfers of powers at the other end of the spectrum.\textsuperscript{16} The smallest degree of conferral of powers is vested in agency relationships, and the greatest

\begin{flushleft}
\textsuperscript{10} Klabbers, above n 3, 1.
\textsuperscript{11} Karns and Mingst, above n 5, 5. cf Harris, D. J., \textit{Cases and Materials on International Law} (Sweet & Maxwell, 6\textsuperscript{th} ed, 2004), 139, which states that there are over 2,000 IGOs. The different estimates may be due to their definitions of IGOs, and the types of organizations included in the estimates.
\textsuperscript{12} Scott, Shirley V., \textit{International Law in World Politics : An Introduction} (Lynne Reinner, 2\textsuperscript{nd} ed, 2010), 20; Whitman, Jim, \textit{The Fundamentals of Global Governance} (Palgrave Macmillan, 2009), 29; Karns and Mingst, above n5, 15.
\textsuperscript{13} Klabbers, Jan, ‘Checks and Balances in the Law of International Organizations’, [2] \url{http://www.helsinki.fi/eci/Publications/JKChecks_and_Balance.pdf}. See also for example, comments in Alvarez, above n 9, x-xx.
\textsuperscript{14} Klabbers, above n 13, [2].
\textsuperscript{15} Sarooshi, Dan, \textit{International Organizations and Their Exercise of Sovereign Powers} (Oxford University Press, 2005).
\textsuperscript{16} Ibid 29.
\end{flushleft}
degree of conferral of powers is to be found in transfers of powers. Each type of
conferral may result in consequences such as international responsibility, and in the case
of agency powers and transfers of powers, those consequences may also include
fiduciary duty. Where States disagree with the IGOs’ exercise of the conferred
powers, there are measures that States can use to address their concerns.

Underlying the Sarooshi Typology is the concept of sovereign contestation between the
member States of the IGOs, as they contest decision-making in IGOs to influence
outcomes that are in their best interests. The degree of powers conferred determines
the degree of contestation of sovereignty. The greater the degree of powers conferred
on the IGO, the greater the degree of powers given away by a State to the IGO, and as a
result, the greater the degree of sovereign contestation amongst member States.

At the conclusion of his book, Professor Sarooshi identified a growing issue with “the
relationship and interaction between international organizations that exercise sovereign
powers“.

Increasing complexities and scope in international activities can sometimes
result in an overlap in the activities and jurisdictions belonging to different IGOs.
This raises questions on the nature of interrelationships or interactions between IGOs
themselves in their exercise of conferred powers. Just as States have had to cooperate
to facilitate orderly and effective global management, it has been suggested that IGOs

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17 Ibid chapters 4, 5 & 6.
18 Ibid 50-52, 62-64, 100-107.
19 Ibid chapter 7.
20 Ibid 12.
21 Ibid 13 & 65.
22 Ibid 122.
24 Sarooshi, above n 15, 122.
too, have a duty to cooperate with other IGOs as part of global governance.\textsuperscript{25} One form of cooperation exists where IGOs sub-confer their powers to other IGOs for them to exercise those powers.

Professor Sarooshi has said that central problems of sovereignty are similar at different levels of contestation of sovereignty.\textsuperscript{26} This suggests that the principles of the Sarooshi Typology may similarly be applicable to the relationships between IGOs in their sub-conferral and exercise of the powers.

This thesis therefore examines the possible application of the Sarooshi Typology to the sub-conferral and exercise of powers between IGOs. In doing so, it will examine the elements of the different categories of sub-conferrals of powers between IGOs, the dynamics of the relationships between the IGOs such as the contestation between sub-conferrors and sub-conferees in the exercise of sub-conferred powers, and the legal consequences arising from sub-conferrals of powers such as fiduciary duty and international responsibility for wrongful acts.

Section 2 below is a brief description of the characteristics of IGOs. Section 3 discusses the research question and methodology in this thesis, in examining the applicability of the Sarooshi Typology to sub-conferrals of powers between IGOs.

\textbf{2.0 \hspace{9pt} INTERGOVERNMENTAL ORGANIZATIONS}

IGOs have been described as the tools or instruments for carrying out the purposes of their members\textsuperscript{27}, forums\textsuperscript{28} in which their members can “discuss, argue, co-operate or

\textsuperscript{26} Sarooshi, above n 15, 7.
\textsuperscript{27} Archer, Clive, \textit{International Organizations} (Routledge, 2\textsuperscript{nd} ed, 1992), 135.
disagree”\(^{29}\), and independent legal entities with their own decision-making systems\(^{30}\). According to Abbott and Snidal, States prefer to act through IGOs internationally for two main reasons. IGOs can provide a centralized and stable organizational and administrative structure which is more efficient.\(^{31}\) In addition, the participation of an independent and neutral IGO can, for example, legitimize individual and collective actions.\(^{32}\)

Although IGOs exist in different forms\(^{33}\), it is generally agreed that they contain the following elements. First, their membership consists predominantly of States, but can also include other IGOs.\(^{34}\) IGOs are entities created by States (and other IGOs) to fulfill certain purposes and functions\(^{35}\). As such, IGOs do not have any natural or sovereign rights, obligations or powers, and they therefore only have the competence to act within the powers conferred on them by their member States.\(^{36}\) Consequently, their actions must always reflect the will and intent of their members as expressed in or implied from, their constituent treaty or agreement.\(^{37}\)

Second, IGOs are established by treaty or by other international legal instruments.\(^{38}\) The constituent treaty is an express agreement by member States to create the IGO, and is usually referred to as its constitution.\(^{39}\) A treaty is a “written agreement…governed

\(^{28}\) Muldoon, above n 23, 212.

\(^{29}\) Archer, above n 27, 141.

\(^{30}\) Ibid 147.


\(^{32}\) Ibid 5.

\(^{33}\) Sands and Klein, above n6, 15.

\(^{34}\) Ibid; Amerasinghe, above n 3, 10; Klabbers, above n 2, 7-8.

\(^{35}\) Schermers and Blokker, above n 23, 11.

\(^{36}\) Schermers, and Blokker, above n 23, 155.


\(^{38}\) Schermers and Blokker, above n 23, 27; Sands and Klein, above n 6, 15; Amerasinghe, above n 3, 10; Klabbers, above n 2, 9.

\(^{39}\) Schermers and Blokker, above n 23, 723.
by international law”, and consequently, IGOs are also governed by international law.  

The constitution defines the legal order of the IGO, and is the authority from which a framework of rules is derived by the organization. Consequently, the powers exercised by the IGO are defined as well as delimited by their constitution, and if not, they are implied through the intentions of the members as reflected in the purposes or functions of the IGO.

According to Schermers and Blokker, IGOs may also be formed without using a treaty, by State representatives in a conference, as was the case in the formation of the Organization of the Petroleum Exporting Countries (OPEC). Furthermore, an IGO can sometimes be created without an express decision, for example in the case of the Commonwealth Agricultural Bureau, where an “international agreement gradually emerged when the members of the British Commonwealth became independent…[with] their continued membership of the organization being taken as proof of their agreement”.

Third, IGOs have international legal personality and a will or organ distinct from their members. As will be seen in Chapter Three, the International Court of Justice (ICJ) in the *Reparation for Injuries Suffered in the Service of the United Nations* [1949] ICJ Rep 174, found that the UN had international legal personality because it comprised certain characteristics.

40 Klabbers, above n 2, 9; Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 5: “The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.”
41 Schermers and Blokker, above n 23, 722.
42 Currie, above n 37, 70.
43 Schermers and Blokker, above n 23, 27.
45 Schermers and Blokker, above n 23, 34; Sands and Klein, above n 6, 15; Amerasinghe, above n 3, 10; Klabbers, above n 2, 11.
47 Below Chapter 3, Section 2.1.
According to Dixon, the ICJ found that member States had conferred objective personality on the United Nations (UN), and consequently the UN was a subject of international law.\textsuperscript{48} Subjects of international law are “capable of possessing and exercising rights and duties under international law”\textsuperscript{49}. As a consequence, an IGO with international legal personality not only has the right to exercise legal rights, but it may also be subject to obligations under international law.\textsuperscript{50}

Other elements that define IGOs mentioned by legal writers include the possession of a constitution\textsuperscript{51}, the capacity to conclude treaties\textsuperscript{52}, and the capability of “adopting norms…addressed to its members”\textsuperscript{53}. As mentioned above, the constituent treaty of an IGO is usually referred to as its constitution. It is also generally accepted that IGOs have the capacity to conclude treaties, with Klabbers stating that “[t]he majority of observers nowadays accept that organizations can and do conclude treaties, and that the specific sorts of treaties they can conclude depend on their constitution”.\textsuperscript{54}

The IGOs’ capability of adopting norms may be reflected for example, in their law making capacity.\textsuperscript{55} Norms are reflected in the decisions, rules, and judicial decisions of IGOs, hence in that sense, IGOs may be considered to be law makers.\textsuperscript{56} As IGOs are created by States and consist predominantly of States as members, they represent the collectively agreed will or norms of their member States.\textsuperscript{57} According to Muldoon

\begin{footnotesize}
\begin{itemize}
\item Ibid 111.
\item Ibid 112.
\item Amerasinghe, above n3, 10.
\item Ibid.
\item Sands and Klein, n 6, 16.
\item Klabbers, above n 2, 252. Examples of international agreements concluded by IGOs include the Agreement Establishing the World Trade Organization of which the European Union (formerly the European Communities) is a party; the Agreement Governing the Relationship between the United Nations and the International Atomic Energy Agency; the Agreement between the International Labour Organisation and the Food and Agriculture Organisation of the United Nations 1947.
\item For example, see Alvarez, above n 9.
\item Scott, above n 12, 32-33.
\item Currie, above n 37, 68.
\end{itemize}
\end{footnotesize}
therefore, IGOs through their activities “have operationalized the many norms of the international legal order”.  

2.1 Accountability, Responsibility and Fiduciary Duty in the Exercise of Conferred Powers by IGOs

The powers of IGOs to exercise conferred powers as well as their international legal personality with attributed rights and obligations under international law, raise questions about the accountability and responsibility of IGOs for their actions.

According to Whitman:

> It is becoming clear that as the number of significant governance actors increases and as sources and forms of considerable power and authority move ‘outward’ from states and the international system, the regulatory burden is likely to increase – at the very least in terms of confronting these new sources of power, holding them to account and dealing with the direct and indirect consequences of their activities.

IGOs are frequently not subject to the domestic legal jurisdictions of States, and international law may sometimes be insufficiently strong to provide adequate restraints on the actions of IGOs. According to Reinisch, States that confer powers on an IGO have a duty to control the exercise of those powers, and they can obtain accountability from the IGO for example, through the decision-making process, through their control

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38 Muldoon, above n 23, 216-218.
60 Reinisch, August, ‘Securing the Accountability of International Organizations’ (2001) *7 Global Governance* 131, 133.
61 Ibid 143.
of funding, and through limiting the IGO’s powers in its constituent treaty. Accountability however, is a broad concept which can include for example, political and administrative accountability, and it is therefore beyond the scope of this thesis.

The international responsibility of both States and IGOs on the other hand, has been recognized by the International Law Commission (ILC). In 2001, the ILC adopted its Articles on Responsibility of States for Internationally Wrongful Acts (2001) (ARSIWA). Under these Articles, the international wrongful act of an IGO may be attributed to its conferring States, for example pursuant to Art 5 of the Articles, which provides that the conduct of an entity which is not an organ of the State but is empowered to exercise elements of governmental authority, is considered an act of the State. On 9 December 2011, the UN General Assembly adopted Draft Resolution III, taking note of the Draft Articles on the Responsibility of International Organizations (2011) (DARIO) which had been adopted by the ILC and annexed to the draft resolution, and decided to include it in the provisional agenda for its sixty-ninth session in 2014. DARIO relates to the international responsibility of IGOs, and it is therefore applicable to sub-conferrals of powers between IGOs.

In addition to responsibility, as discussed in subsequent chapters of this thesis, in conferrals of powers from States to IGOs and also in sub-conferrals of powers between IGOs, some IGOs may have a fiduciary duty to act in the interests of either the

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62 Ibid 134.
66 UN GAOR, 6th Comm, 66th sess, 82nd mtg, UN Doc A/66/PV.82 (9 December 2011), 7.
67 UN GAOR, 6th Comm, 66th sess, 82nd mtg, UN Doc A/66/PV.82 (9 December 2011), 3.

10
It can be seen from the discussion in this section, that whilst IGOs are not States, they have many of the qualities, rights and obligations that States have. First, IGOs have international legal personality and are subjects under international law like States are. However, the quality and degree of an IGO’s legal personality and subjecthood are not the same as that of a State’s. Second, whilst States have natural sovereign powers, IGOs exercise sovereign powers conferred by States. Although IGOs may be said to be exercising sovereign powers in the sense that they must exercise their conferred powers in accordance with the sovereign values of their conferring States, they are nevertheless not sovereign entities. Consequently, whilst chapter 2 of this thesis discusses the Sarooshi Typology in relation to the conferral of sovereign powers from States to IGOs, the remaining chapters of the thesis refer to the sub-conferrals of powers between IGOs, rather than to the sub-conferrals of ‘sovereign powers’ between IGOs. Finally, like States, IGOs are also subject to obligations such as fiduciary duty and international responsibility for internationally wrongful acts.

3.0 RESEARCH QUESTION AND METHODOLOGY

The Sarooshi Typology is a conceptual tool for analyzing the conferrals of powers from States to IGOs. Given the prominence and proliferation of IGOs in global and domestic activities, the issue of sub-conferrals of powers between IGOs becomes more significant. As discussed earlier in this chapter, much of the research on IGOs has been on the functional nature of the organizations. Whereas the concept of delegation of powers is often used in a broad or general manner, the Sarooshi Typology distinguishes
between different types of conferrals of powers and offers a framework in which to analyse these types of conferrals in relation to several aspects of those conferrals.

First, it identifies the elements of each type of conferral, making the categorizing of conferrals of powers more precise and consistent. Second, the typology analyses the relationship between a conferror and conferee within the context of a dynamic of contestation between the conferror and conferee, in the conferee’s exercise of those powers. Third, the typology examines the legal consequences of fiduciary duty and international responsibility, which may arise in a conferral of powers. Fourth, it suggests measures which may be available to the conferror where it disagrees with the conferee’s exercise of conferred powers.

The Sarooshi Typology is therefore useful in its differentiation between the types of conferrals of powers, in its identification of the dynamic nature of contestation in the relationship between States and IGOs, in its analysis of the legal consequences that may arise from the conferrals of powers, and in its suggestion of measures available to conferrors of powers. As such, extending its applicability to the sub-conferrals of powers between IGOs may similarly be useful in categorizing more clearly the types and characteristics of sub-conferrals of powers, the nature of the relationships between IGOs in those sub-conferrals, the measures that are available to sub-conferror IGOs, and importantly, the legal consequences that may arise for both sub-conferror and sub-conferee IGOs in a sub-conferral of powers.

Chapters 2 and 3 of the thesis are the conceptual chapters in which the concepts underlying the case studies in the thesis are discussed. Chapter 2 discusses firstly the three main categories of conferrals of powers in the Sarooshi Typology. Those
categories are agency powers, delegations of powers, and transfer of powers, which are situated on a continuum, with agency powers on one end, delegation of powers in between, and transfers of powers on the other end of the continuum. Each category is defined and differentiated by three elements: (1) whether the conferred powers are revocable, (2) whether the conferror can exercise direct control over the conferee’s exercise of the conferred powers, and (3) whether the conferror can exercise the conferred powers concurrently with the conferee. Chapter 2 also discusses the processes by which powers can be conferred on IGOs as well as other features of the typology, namely the contestation of sovereign values between States in the exercise of the conferred powers, the consequences arising from those conferrals of powers and the measures available to States where they disagree with the IGO’s exercise of those powers. In addition, chapter 2 clarifies the nature of sovereignty and sovereign values, in the contestation of those values between member States in IGOs.

Chapter 3 discusses the international legal personality and subjecthood of IGOs, which vests IGOs with rights as well as obligations under international law. It discusses the types of powers that IGOs can have, such as express, implied and inherent powers, as well as the ability of IGOs to sub-confer those powers. Given that at times there could be inevitable overlaps between the jurisdictions of some IGOs, it is suggested that IGOs contest the priority of their powers in relation to those jurisdictions. As discussed above, whilst IGOs exercise powers that originate from States, IGOs are not sovereign, and consequently chapter 3 and subsequent chapters discuss the powers of IGOs, and not their sovereign powers. Chapter 3 also discusses the legal consequences of sub-conferrals of powers in relation to the fiduciary duty and international responsibility of both sub-conferror and sub-conferree IGOs that may result from a sub-conferral of powers.
Chapters 4, 5 and 6 contain the three case studies in this thesis. Chapter 4 discusses the sub-conferral of agency powers in the maintenance of international peace and security from the UN to the North Atlantic Treaty Organization (NATO). Chapter 5 discusses the sub-conferral of delegated peace and security powers from the UN to the International Atomic Energy Agency (IAEA), to carry out inspections in Iraq for weapons of mass destruction. Chapter 6 discusses the sub-conferral of transferred powers from the European Union (EU) to the World Trade Organization (WTO) in relation to international trade, which in this case is the trade in bananas.

These case studies are analysed in relation to the applicability of the elements of the relevant categories of conferrals of powers in the Sarooshi Typology. The sub-conferrals are discussed within the context of the relevant rules and procedures of each IGO, to determine which category of sub-conferrals they belong to. Each chapter also discusses the sub-conferrals in relation to the contestation between the IGOs in the exercise of the sub-conferred powers, as well as the legal consequences such as fiduciary duty and international responsibility which may arise. Finally, the case studies discuss the measures that are available to sub-conferror IGOs which disagree with the way in which the sub-conferees exercise their sub-conferred powers.

The analyses in these three chapters highlight unique characteristics of each type of sub-conferral within these themes. For example, in chapter 4, the contestation between the UN and NATO relates to a deep-seated contest for autonomy by NATO. In Chapter Five, the exercise of the sub-conferred powers concurrently by the UN and the IAEA led for example, to a possible undermining of the IAEA’s relationship with Iraq, when the UN Security Council conducted its own negotiations with Iraq for it to cooperate
with the inspection teams. In addition, there were tensions in the working relationship between UNSCOM and the IAEA, arising from UNSCOM’s focus on the maintenance of peace and security in Iraq and the IAEA’s focus on cooperation and consent-based inspections. In chapter 6, the elements of a transfer of powers, particularly that of the binding nature of the decisions of the WTO on the EU, the EU’s inability to control the WTO’s exercise of the sub-conferring powers, as well as the EU’s inability to exercise those powers concurrently with the WTO, arguably led to a greater degree of contestation by the EU in the banana dispute which lasted almost two decades.

The case studies in chapters 4, 5 and 6 were selected for a number of reasons. First, the sub-conferrals discussed in those case studies fitted readily into the typology, and were a natural starting place from which to examine the typology. Second, the circumstances in the case studies, for example peacekeeping in Kosovo, disarming Iraq of weapons of mass destruction, and the long drawn out dispute in the international trade in bananas, are topical, relevant and important world events. Third, the IGOs in these case studies were varied in terms of size, characteristics and functions. The UN for example is a universal IGO, the EU is considered by some to be a supranational organization with features of IGOs, whilst NATO is a military alliance and the IAEA is an organization for facilitating and monitoring the peaceful use of atomic energy. Furthermore, the EU is the main example given by Professor Sarooshi of a transfer of powers in his book, and therefore an examination of the sub-conferral of powers from the EU to the WTO is the best example of a case study of a sub-conferral of transferred powers.

Finally, this thesis concludes that the Sarooshi Typology for the conferrals of powers from States to IGOs is also applicable to the sub-conferrals of powers between IGOs, in the three case studies. Nevertheless, although the IGOs selected for the case studies are
diverse, it is not possible to generalize on the basis of three case studies, the applicability of the typology to a broader spectrum of sub-conferrals of powers between IGOs. However, if the typology was found to be more broadly applicable, it could provide a useful tool for identifying, categorizing and analyzing the sub-conferrals of powers between IGOs.

In addition, given the importance of legal consequences arising from sub-conferrals of powers, the typology provides a useful framework for examining the fiduciary duty and international responsibility of sub-conferror and sub-conferee IGOs. For example, in a sub-conferral of agency powers, the sub-conferee IGO owes a fiduciary duty to the sub-conferror to act in the sub-conferror’s best interest, whilst in a sub-conferral of transferred powers, the sub-conferror owes the fiduciary duty to the sub-conferee not to affect the sub-conferee’s exercise of the sub-conferred powers. Furthermore, whilst the sub-conferee IGO is responsible for its own wrongful acts, the sub-conferror IGO may also be responsible for the sub-conferee’s wrongful acts, in its own right or jointly with the sub-conferee. Consequently, the typology provides the framework for a clearer and more precise analysis of the legal consequences arising from sub-conferrals of powers between IGOs.

4.0 CONCLUSION
Globalization has resulted in the need for increased cooperation globally, and a form of global governance has been evolving which has resulted in the erosion of traditional concepts of State sovereignty and sovereign equality. Nevertheless, States remain the primary authority in international governance, and they collectively confer aspects of their powers on IGOs to carry out specific purposes and functions. As such, IGOs carry out the will of their member States. IGOs offer the benefits of centralization and
therefore greater efficiency and coordination in carrying out international activities
which can also influence activities within domestic jurisdictions.

The proliferation of IGOs and the increasing volume and complexity of international
activities can sometimes require the IGOs themselves to cooperate in certain activities,
as they exercise the powers that have been conferred on them. The cooperation between
IGOs could include the sub-conferral of powers from one IGO to another. According to
Professor Sarooshi, the central issues of sovereignty are similar at different levels of
contestation of sovereignty. This suggests that his typology on the powers conferred by
States on IGOs may similarly be applicable to the sub-conferral of powers between
IGOs. This thesis therefore examines the applicability of the Sarooshi Typology to the
sub-conferral and exercise of powers between IGOs.
CHAPTER TWO
THE SAROOSHI TYPOLOGY

1.0 INTRODUCTION

This chapter describes the Sarooshi Typology and critiques of the typology. The typology consists of three major categories of conferrals of sovereign powers from States to IGOs, each category relating to a degree of conferred power determined by the elements of revocability, control and the ability of the IGO to exercise the powers concurrently with the State or exclusively. Each category of conferrals of powers can incur international responsibility, and in the case of agency powers and transfers of powers, it can also attract fiduciary duty. Where States disagree with the IGO’s exercise of conferred powers, there are measures that States may use against IGOs on which they have conferred powers. Underlying the typology is the dynamic of contestation of sovereign values between the member States of the IGOs.

2.0 THE SAROOSHI TYPOLOGY ON THE EXERCISE OF SOVEREIGN POWERS BY INTERNATIONAL ORGANIZATIONS

In International Organizations and Their Exercise of Sovereign Powers\(^1\), Professor Dan Sarooshi examines the conferral of powers by States on IGOs, and the exercise of those powers by the IGOs. According to Professor Sarooshi, States confer varying types of powers on IGOs, and those conferrals of powers can be categorized on a continuum, depending on the degree of power conferred.\(^2\) Since conferrals of powers establish legal

\(^1\) Sarooshi, Dan, International Organizations and Their Exercise of Sovereign Powers (Oxford University Press, 2005).

\(^2\) Ibid 29.
relationships between those conferring powers and those who assume the conferred powers, clarity and consistency in describing those powers are important.\(^3\) Categories of conferrals of powers are not always precise however, because they exist on a continuum, and therefore adjacent categories on the spectrum may share some common elements.\(^4\) Nevertheless, Professor Sarooshi suggests that the classification of conferrals of powers primarily within one of the three categories in his typology can provide a useful tool for analysing the legal relationships and consequences arising from conferrals of powers by States on IGOs.\(^5\)

Supported by the premise that States engage in a contestation of their respective sovereign values in the process of conferring those powers, and subsequently in the exercise of those powers by IGOs, Professor Sarooshi describes a typology categorizing the types or degrees of powers that States confer on IGOs as agency powers, delegated powers and transferred powers.\(^6\) The extent of a State’s contestation of its sovereign values within the IGO depends on the degree of powers it has conferred on the IGO.\(^7\) According to Professor Sarooshi, the greater the degree of conferral of powers, the greater will be the demand to engage in contestations of sovereign values within the IGO.\(^8\)

### 2.1 Contestation of Sovereign Values

According to Professor Sarooshi, there is no objective concept of sovereignty that can be applied universally.\(^9\) There are different approaches to sovereignty, and the content or use

\(^{3}\) Ibid 28.
\(^{4}\) Ibid 32.
\(^{5}\) Ibid 32.
\(^{6}\) Ibid 29.
\(^{7}\) Ibid 13.
\(^{8}\) Ibid 65.
\(^{9}\) Ibid 3.
of the concept of sovereignty is diverse. Krasner for example, has identified four ways in which the concept of sovereignty is used, namely ‘domestic sovereignty’, ‘interdependence sovereignty’, ‘Westphalian sovereignty’ and ‘international legal sovereignty’.11

Domestic sovereignty relates to the system of public authority within a State, for example, whether the authority resides in an individual, or among institutions, or whether it is a federal or central government.12

Interdependence sovereignty relates to the State’s ability to regulate transnational activities, such as “the flow of goods, persons, pollutants, diseases, and ideas across territorial boundaries”. New issues such as terrorism and currency crises, resulting from new technologies or interdependence in a globalized world, have eroded the State’s ability to control such activities.14

Westphalian sovereignty is a model of domestic sovereignty, based on the principles of territoriality and non-intervention by external actors in a State’s domestic authority. According to Krasner, the rule of non-intervention, which is violated by acts of “coercion or imposition” by external sources or which may be waived voluntarily by invitation, is considered to be “the key element of sovereign statehood”.16

10 Ibid 4.
11 Ibid 3-4.
13 Ibid 12.
14 Ibid.
15 Ibid 20.
16 Ibid 20.
International legal sovereignty relates to the establishment of a State’s status in the international arena, evidenced for example in its recognition by other States, or through its ability to conclude agreements with other States.\(^{17}\) Under this model, States are considered to be equal in the international arena, in the same way that individuals are considered equal within a State.\(^{18}\) This model of sovereignty is the one used most frequently by international legal scholars.\(^{19}\)

According to Professor Sarooshi however, the concept of sovereignty can be further analysed in terms of its “contested elements”, such as ‘legal or political sovereignty’, ‘external or internal sovereignty’, ‘indivisible or divisible sovereignty’, and ‘governmental or popular sovereignty’.\(^{20}\)

Besson describes the relationship between legal and political sovereignty as the paradox of ‘rule sovereignty’ and ‘ruler sovereignty’.\(^{21}\) Rules are required to regulate and constrain the exercise of political sovereignty, and yet, it is political power which has established those legal rules.\(^{22}\)

External and internal sovereignty describe the “two distinct ways” in which sovereignty has traditionally been exercised - in relation to the State’s internal matters and in relation to its

\(^{17}\) Ibid 14.
\(^{18}\) Ibid.
\(^{19}\) Ibid.
\(^{20}\) Sarooshi, above n 1, 4.
\(^{22}\) Ibid.
external matters. 23 Whereas internal sovereignty is usually ultimate or final, external sovereignty is only “equally ultimate” with other sovereign States. 24

Absolute and limited sovereignty are concepts of sovereignty which are closely linked to the concepts of indivisible and divisible sovereignty. 25 Whilst a State has traditionally been considered to have absolute internal sovereignty, external or international agreements entered into by the State for example, have had the effect of limiting the State’s sovereignty internally. 26 Besson distinguishes between absolute sovereignty and the indivisibility or divisibility of sovereignty, in the sense that the latter relates to whether or not sovereignty is ‘shared’ or ‘divided’, rather than to whether it is absolute or limited. 27

Finally, governmental and popular sovereignty describe the exercise by a “constituted institutional sovereign” of sovereignty transferred to it by the people of the State, who are the “original sovereign” of that State. 28 In other words, it is the distinction between governmental sovereignty and the sovereignty of its people.

In addition, other writers have similarly argued for different approaches to the concept of sovereignty. According to Haas for example, a sovereign State should have four attributes: first, it should have “supreme political authority and a monopoly of the use of legitimate force within its borders”; second, it should have control over its borders; third, it should be free to choose its own policies; and fourth, it should be recognized and respected as an

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23 Ibid 9 para 3.2.1.2.
24 Ibid.
25 Ibid 11 para 3.2.1.4.
26 Ibid 10 para 3.2.1.3.
27 Besson, above n 25.
28 Ibid 11 para 3.2.1.5.
“independent entity”, free from external intervention in its internal affairs. However, he suggests that “non-sovereign actors” have become more significant, and States today no longer fully reflect the traditional attributes of absolute sovereignty. Similarly, sovereignty can also be suspended, for example during foreign occupations of territories and where States come under mandates and UN trusteeships or subject to international administration. Other writers like Nijman for example, argue instead for a focus on international legal personality rather than sovereignty, as it “bestows the capacity to participate”. In a similar manner, Mannens suggests that minority claims to “existence and identity” are bringing about change in State behaviour. According to him, “[t]he fact that certain minority groups can make claims at all indicates a loosening of the tight grip called State sovereignty”.

According to Professor Sarooshi, rather than focusing on the various contested concepts of sovereignty, his approach in the typology is based instead on the idea of sovereignty “as an

29 Haas, Richard N., ‘Rethinking Sovereignty’ (George Herbert Walker, Jr. Lecture, 29 January 2004), 1
30 Ibid 3.
32 Ibid 1039-1042.
33 Ibid 1043-1052.
34 Nijman, Janneke, ‘Sovereignty and Personality: A Process of Inclusion’ in Kreijen, Gerard et al (eds), State, Sovereignty, and International Governance (Oxford University Press, 2002), 144: “ILP is thus the conceptual link between (the legitimacy of) international law and democratic governance. ILP finds its source in the people. ILP becomes a right of every individual to be heard, especially if victim of exclusion. Ultimately, the individual constitutes the source of the legitimacy of international law. ILP bestows the capacity to participate, and this capacity finds its roots in the individual. If certain groups are not represented at the international level this does not mean that the capacity is lost. Fairness and conceptual logic demand that ultimately the individual has the right to participate. This shift of perspective from State sovereignty to ILP as the appropriate paradigm for international law research would contribute to the objective of making the global order more fair, or to paraphrase Kooijmans’ words, to make international law more just.”.
36 Ibid.
essentially contested concept”.\textsuperscript{37} As a result of its contested nature, there is no single or authoritative definition of sovereignty.\textsuperscript{38} Therefore, he suggests firstly that the concept of sovereignty can thus be contested legitimately within other fora, for example in IGOs which exercise powers conferred on them by member States, and secondly that concepts of sovereignty decided within States are thus not privileged over those decided within IGOs.\textsuperscript{39} In this sense then, member States which have conferred some of their sovereign powers on IGOs may contest their individual concepts of what sovereignty is, within IGOs.\textsuperscript{40} IGOs thus act as fora within which member States contest their individual concepts of sovereignty and in particular “the content of sovereign values”, on the international stage.\textsuperscript{41} These sovereign values, according to Professor Sarooshi, are “values that underlie the sovereign powers being conferred by States on organizations”.\textsuperscript{42}

### 2.1.1 Sovereign Values or Norms

In ‘Sovereignty in Conflict’, Besson states that “[a]s a normative concept, the concept of sovereignty expresses and incorporates one or many values that it seeks to implement in practice and according to which political situations should be evaluated”.\textsuperscript{43} In the international arena, norms have become increasingly influenced by non-State actors, and this has impacted on domestic decision-making by States.

According to Peters, although many domestic constitutional orders reject the unconditional supremacy of international law in their domestic legal systems, international law has

\textsuperscript{37} Sarooshi, above n1, 3.  
\textsuperscript{38} Ibid 6-7.  
\textsuperscript{39} Ibid 7.  
\textsuperscript{40} Ibid  
\textsuperscript{41} Ibid 12.  
\textsuperscript{42} Ibid 12-13.  
\textsuperscript{43} Besson, above n 21, 7 Section 3.1.
nevertheless had some influence in shaping domestic constitutions, for example in relation to the norms of human rights, the rule of law and democracy. One reason for this is the political motive of attaining membership of an IGO. Accession to membership of the EU and NATO for example, includes the requirement that the State implements human rights and democracy norms in its constitutional order.

In addition, some international law regimes have also evolved, in response to collective influences internationally. The Law of the Sea for example, was originally a demarcation between territorial seas and the high seas which were common to all, but now includes “the recognition and development of new zones of functional and resource-oriented jurisdiction, accompanied by complex realignments of jurisdictional competences which cut across, and in the eyes of some threaten to undermine, the traditional principles of governance at sea”. These changes, according to Evans, were brought about by technological advances, changing strategic interests, increasing demands for resources from the sea, and complicated by factors such as an expanding international community, shifting political balance of powers and a growing awareness of conservation and environmental issues.

Additionally, according to Gearey, there is an evolution in global law which is no longer “value independent and strictly separate from politics”, and which whilst still largely

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46 Ibid.
48 Ibid 624.
State based, does not fit fully with models of domestic or international law.\textsuperscript{50} \textit{Lex mercatoria}, according to Geary, is an example where norms and laws can develop independently of sovereign States:

\textit{Lex mercatoria} appears to develop without a sovereign state power. This body of law has become one of the primary sites for the globalization debate within legal theory. We need to see that “private orders” (and not just states) can produce valid law. \textit{Lex mercatoria} provides a clue to an articulation of global law because it suggests that sovereignty is only one of the many ways in which normativity operates.\textsuperscript{51}

Other examples in which traditional sovereign norms have been challenged by non-State actors may include transnational law which “regulate[s] the conduct of private associations, such as multinational corporations, in their interaction with states”\textsuperscript{52}, humanitarian law in which States “cannot use claims to sovereignty as a way of preventing international assistance for those in the midst of internal conflict”,\textsuperscript{53} and international environmental law, in which according to Redgwell, “[c]oncern transcends individual States, with certain global problems now considered the common concern of humankind”.\textsuperscript{54} Finally, some IGOs such as the WTO have dispute settlement systems which can hand down binding decisions which member States are obliged to comply with.\textsuperscript{55}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{50} Ibid.
  \item \textsuperscript{51} Ibid 9-10.
  \item \textsuperscript{52} Kratochwil, Friedrich V., \textit{Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs} (Cambridge University Press, 1989), 253.
  \item \textsuperscript{53} Ibid 21.
  \item \textsuperscript{54} Redgwell, Catherine, ‘International Environmental Law’ in Evans, Malcolm D. (ed), \textit{International Law} (Oxford University Press, 2\textsuperscript{nd} ed, 2006), 657.
  \item \textsuperscript{55} Gearey, above n 49, 77.
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\end{footnotesize}
According to Professor Sarooshi, the exercise of conferred sovereign powers by IGOs can only exist when those powers are exercised in accordance with the sovereign values of conferror States. In the IGO’s exercise of conferred powers therefore, the central issue relates to which sovereign values the IGOs should ‘achieve and use’ in the exercise of those powers. Sovereign values thus provide both objectives for IGOs in their exercise of conferred powers, as well as normative constraints on that exercise of powers.

2.1.2 Dynamics of Contestation

In addition to the legal analysis of the contestation of the concept of sovereignty and of sovereign values, there is arguably a political dimension to Professor Sarooshi’s concept of sovereign contestation in IGOs, related to the notion of ‘powerfulness’.

A political system is “any persistent pattern of human relationships that involves, to a significant extent, control, influence, power, or authority”. Power determines issues such as the allocation of resources, and inclusiveness and exclusiveness in decision-making.

As discussed above, the interconnectedness and interdependence brought about by globalization has led to a higher degree and need for global cooperation, and systems or structures of global governance are required to facilitate the effective, ordered and

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56 Sarooshi, above n 1, 10-11.
57 Ibid.
58 Ibid.
organized functioning and management of collective global activities. Such systems or structures require authority or power, in order for their rules and directives to be complied with. According to Goldman, “[t]he chief pattern of authority is the requirement to have a core legitimating principle at the center of the normative system.” Authority therefore flows from legitimacy, which in turn flows from collective acceptance of norms on which that legitimacy has been based.

Norms are values or “shared expectations or understandings regarding standards of appropriate behavior for various actors, particularly states”. Norms can be strong or weak or emerging and are often contested in the process of being internalized into a political or legal system. According to Scott, “[t]hose producing, shaping, and disseminating norms wield great power”. Norms are often incorporated into politics and international law, and it is the ‘belief in the rightness and obligation’ of those norms that results in the compliance and cooperation of States and other international entities. The normative framework therefore, is also the structure within which competition for power and influence takes place and within which international behavior is shaped. Thus, according to Bederman, “the legitimacy of the entire international legal order turns on the selection of

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61 Chapter 1, Section 1.0.
62 Kirby, Michael, ‘Globalizing the rule of law? Global challenges to the traditional ideal of the rule of law’ in Zifcak, Spencer (ed), Globalisation and the Rule of Law (Routledge, 2005), 65.
63 Goldman, David B., Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority (Cambridge University Press, 2007), 20.
64 Scott, above n 60, 30.
65 Karns and Mingst, above n 60, 10.
66 Karns and Mingst, above n 60, 10; Scott, above n 60, 129-130; Goldman, above n 63, 19.
67 Scott, above n 60, 130.
68 Ibid 129.
70 Scott, above n 60, 30.
the values and principles we care most to protect and preserve in the face of globalizing developments”\(^{72}\), and that selection process involves a dynamic process of contestation of power.

3.0 STATE SOVEREIGNTY AND THE CONFERRAL OF POWERS ON IGOS

As mentioned above, the concept of international legal sovereignty is the most commonly used concept of sovereignty in international legal scholarship.\(^{73}\) The Peace of Westphalia, according to Cutler, is considered by international lawyers to be the basis of international law.\(^{74}\) Under that Treaty, borders or territoriality is the determining factor for the legitimate exercise of sovereign authority.\(^{75}\)

In modern legal usage, sovereignty has been called a descriptive term and a ‘catch-all’ of “the collection of rights held by a state, first in its capacity as the entity entitled to exercise control over its territory and second in its capacity to act on the international plane, representing that territory and its people”.\(^{76}\)

A State’s competence within its territory, that is, its full rights and duties as a State within its territory, is its sovereign right or sovereignty.\(^{77}\) It follows therefore, that in terms of

\(^{73}\) Above Section 2.1.
\(^{75}\) Inoguchi, and Bacon, above n 74, 289.
\(^{76}\) Crawford, James, *Brownlie’s Principles of Public International Law* (Oxford University Press, 8th ed, 2012), 448
statehood, each State is equal to other States - there is a sovereign equality amongst States.\textsuperscript{78} Sovereign equality amongst States therefore relates to the dynamics of relations between States.\textsuperscript{79} Under State sovereignty, a State has (1) jurisdiction over its territory and its permanent population, (2) a duty not to intervene in the jurisdiction of other States, and (3) the right to only be bound by international law if it has given its consent.\textsuperscript{80}

The territorial principle in State sovereignty was confirmed for example, in the \textit{Lotus} case and the \textit{Island of Palmas} case. In the \textit{Lotus} case, the Permanent Court of International Justice (PCIJ) held that:

\begin{quote}
…the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.\textsuperscript{81}
\end{quote}

Similarly, in \textit{Island of Palmas}, Arbitrator Max Huber affirmed the exclusive territorial competence of States, even in the context of collective sovereignty:

\begin{quote}
The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that
\end{quote}

\textsuperscript{78} Ibid 290.
\textsuperscript{79} Ibid 289.
\textsuperscript{80} Ibid.
\textsuperscript{81} \textit{S.S. “Lotus” (France v Turkey) (Judgment)} [1927] PCIJ (ser A) No 10, 18-19.
concern international relations. The special cases of the composite State, of collective sovereignty, etc., do not, for that matter, throw any doubt upon the principle which has just been enunciated.\textsuperscript{82}

In relation to the second principle, that of non-intervention, the ICJ in \textit{Nicaragua}, held that “[t]he principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference...[as]...part and parcel of customary international law”.\textsuperscript{83} The Court defined the “content of the principle of non-intervention” that was relevant to this case as follows:

\begin{quote}
...in view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones...\textsuperscript{84}
\end{quote}

Finally, with regard to the third principle, the requirement of consent in order to be bound under international law, the PCIJ in the \textit{Lotus} case referred to a State’s independence under international law, as a consequence of which, States are bound by international law of their own free will:

\textsuperscript{82} \textit{Island of Palmas (Netherlands v US)} (1928) 2 RIAA 829, 838.
International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.  

In practice however, the concept of sovereign equality of States in international politics and international law may not always reflect reality. According to Scott, powerful States usually have more influence in the creation and enforcement of international law, for example stronger States may be able to override weaker States and dictate agendas for global issues. In addition, debates such as the one on the legality of interventions into the territories of other States for humanitarian purposes for instance, further illustrate the challenges to the traditional or legal view of sovereign equality.

3.1 Conferral of Powers on IGOs by States – Consent to be Bound

When States confer sovereign powers on IGOs, they are agreeing to be bound by decisions which are sometimes made without the express consent of all members, for example where only a majority vote is required as opposed to a requirement of unanimity. In this case according to Crawford, the member State’s consent is given in advance when joining the

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85 S.S. “Lotus” (France v Turkey) (Judgment) [1927] PCIJ (ser A) No 10, 18.
86 Scott, above n 60, 14.
87 Karns, and Mingst, above n 60, 15.
89 Crawford, above n 76, 452.
IGO, and therefore the obligations that bind the State arise from its consent, thereby satisfying the principle of sovereign equality. 90

3.2  Types of Conferred Powers

According to Professor Sarooshi, the extent of a State’s ability to contest its sovereign values in an IGO will depend on the degree or type of power conferred on the IGO. 91 The competence to confer powers on another entity is part of a State’s sovereignty 92, and States have the competence to confer “the full range of executive, legislative and judicial powers” on IGOs under international law 93.

Professor Sarooshi’s typology categorizes the powers conferred by States on IGOs on a continuum, ranging from agency powers on one end, with delegated powers in between, and transferred powers at the other end. 94 The location of a category of conferred powers on the continuum depends on the degree of power that the State has conferred on the IGO. 95 The degree of power conferred can be determined by (1) the revocability of the conferral, (2) the degree of control that the State has over the exercise of the conferred powers, and (3) whether the State has exclusive or concurrent rights to exercise those powers with the IGO. 96

90 Ibid 452.
91 Sarooshi, above n 1, 13.
92 Ibid 18.
93 Ibid 10.
94 Ibid 29.
95 Ibid.
96 Ibid 29-32.
Agency powers and delegated powers are revocable, whilst transfers of powers are generally irrevocable.\(^97\) The degree to which a State can exercise direct control over the IGO’s exercise of conferred powers decreases significantly along the spectrum, such that a State can exercise direct control over an IGO exercising agency powers, but cannot exercise such control where powers have been delegated or transferred.\(^98\) States have the right to exercise conferred powers concurrently with and independently of IGOs where the powers conferred are agency powers or delegated powers\(^99\), whilst in transfers of powers, the IGOs have exclusive rights to exercise those powers.\(^100\)

The extent to which States have rights to exercise conferred powers concurrently and independently reflect the degree to which States have ceded and retained those powers.\(^101\) It gives an indication of the degree to which States have agreed to be bound by obligations resulting from the IGOs’ exercise of those conferred powers, both within the States and in the international legal order.\(^102\)

In conclusion, the three categories of conferrals of powers on the Sarooshi Typology can be identified by the quality or degree of three elements, namely the revocability of the conferred powers, the ability of the conferror to control the exercise of the conferred powers, and the right of the conferror to exercise the conferred powers concurrently with the conferee. In conferrals of agency powers, the conferror can revoke the powers at any time, it has the right to exercise direct control over the conferee’s exercise of those powers,

\(^{97}\) Ibid 29.  
\(^{98}\) Ibid 31.  
\(^{99}\) Ibid 32.  
\(^{100}\) Ibid.  
\(^{101}\) Ibid.  
\(^{102}\) Ibid.
and it may exercise the conferred powers concurrently and independently of the conferee. In delegations of powers, the conferror can revoke the conferred powers, it has no direct control over the exercise of those powers, and it may exercise those powers concurrently with the conferee. Finally, in the transfer of powers, the conferred powers are generally irrevocable, the conferror cannot directly control the exercise of those powers by the conferee, and the conferee has the right to exercise the conferred powers exclusively.

3.3 The Process of Conferral of Powers from States to IGOs

According to Professor Sarooshi, powers can be conferred on IGOs by States either by constituent treaty or on an ad hoc basis. In the *WHO Advisory Opinion*, the ICJ held that powers are normally conferred on IGOs by an express statement in their constituent treaty, but IGOs may also exercise subsidiary powers, known as implied powers, which are not expressly provided for but are necessary for them to fulfill their duties.

States may also confer powers on IGOs on an ad hoc basis, whereby states may conclude a treaty conferring powers on the IGOs where the IGOs are “not usually a party to such treaties”. Such ad hoc conferrals of powers do not create obligations or rights for the

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103 Chapter 4, Section 2.1.
104 Chapter 5, Section 2.1.
105 Chapter 6, Section 2.1.
106 Chapter 3, Section 4.1.
107 Sarooshi, above n 1, 18.
111 Sarooshi, above n 1, 19-20.
IGO without its consent. According to Professor Sarooshi, the general rule in Art 34 of the 1969 Vienna Convention on the Law of Treaties (VCLT 1969), which provides that “[a] treaty does not create either obligations or rights for a third State without its consent”, is a rule of customary international law, and can therefore be applied mutatis mutandis to treaties between States in which the IGO is a third party. Similarly, Art 34 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLT 1986), provides that “[a] treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization”. This Treaty however, is not yet in force.

An IGO can express its consent to a conferral of powers in different forms, depending on the organ accepting the conferral. A deliberative organ for example, may accept the conferral by adopting a resolution, whilst a Secretariat may accept it by a unilateral act or declaration. In the Paris Peace Accords for instance, the UN Security Council was offered ad hoc powers for the internal governance of Cambodia, which it accepted in UN Security Council Resolution 745 in 1992.

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112 Ibid 20.
116 Sarooshi, above n 1, 20.
118 Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, 1663 UNTS 27 (signed and entered into force 23 October 1991) art 2; Sarooshi, above n 1, 26.
119 SC Res 745, UN SCOR, 47th sess, 3057th mtg, UN Doc S/RES/745 (28 February 1992), [2].
For an ad hoc conferral of powers to have occurred, the conferred powers accepted by the IGO must be powers which the IGO does not already possess in its constituent treaty.\textsuperscript{120} As most IGOs are not in a position to request a judicial review of their competence\textsuperscript{121}, it follows from \textit{Certain Expenses} that “each organ must, in the first place at least, determine its own jurisdiction”\textsuperscript{122}, the choice of organ depending on which organ of the IGO accepts the ad hoc conferral of powers to the IGO\textsuperscript{123}.

The distinction between ad hoc conferred powers and powers that the IGO already possesses in its constituent treaty is significant, because in the case of ad hoc conferred powers, the States conferring ad hoc powers may be able to constrain the exercise of those powers, whereas they cannot control the exercise of powers already contained in the IGO’s constituent treaty.\textsuperscript{124} Consequently, the UN Security Council for example, accepted the conferrals of powers from the States which signed the Paris Peace Accords, through UN Security Council Resolution 745 in 1992 without referring to its Chapter VII powers, hence suggesting that it was acting under the powers conferred on it by those States rather than under its own powers pursuant to Chapter VII of the UN Charter.\textsuperscript{125}

\subsection{Constituent Treaties}

According to Schermers and Blokker, treaties for the creation of IGOs are distinct from general treaties, in the sense that general treaties consist of agreed rights and obligations,
whereas constituent treaties contain the additional dimension of conferring powers on the IGO, thereby providing a framework for the creation of a “living body of law”.126

Constituent treaties therefore consist of two facets. The first facet is its ‘treaty face’, where issues of state sovereignty are agreed upon, such as processes for the conclusion and ratification of the treaty, and provisions for amendment, withdrawal and termination of the treaty.127 Member States rely on the provisions of the treaty to protect their sovereign rights and to shield themselves, for example, against ultra vires activities of the IGO.128 Art 2(7) of the UN Charter for instance, provides in part that “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state”, although without prejudice to the enforcement measures of Chapter VII.129 According to Professor Sarooshi, a member State which disagrees with the actions or decisions of an IGO may avail itself of measures which include amending or withdrawing from the treaty, as discussed below in this chapter.130

The second facet of a constituent treaty is its ‘constitution face’, relating to the objectives and functions of the IGO, and the powers conferred upon it by its member States in order for it to carry out those tasks.131 This facet of a constituent treaty is more flexible and dynamic, and supports for example, the existence of implied powers in IGOs, as necessary

126 Schermers, and Blokker, above n 121, 836.
127 Ibid.
128 Ibid.
130 Below Section 5.0.
131 Schermers, and Blokker, above n 121, 837.
for the fulfilment of their objectives and functions.\textsuperscript{132} This is discussed further in chapter 3 of this thesis.\textsuperscript{133}

### 3.4 Customary International Law

Customary law is another major source of international law, which is generally binding on all States, unless they are ‘special or local customs’, or where the State has persistently objected to those customs.\textsuperscript{134} Consequently, in the context of the Sarooshi Typology, where States confer sovereign powers on IGOs, the ability of IGOs to subsequently exercise those powers in creating not just treaty law but also possibly customary law, requires consideration.

In the \textit{Continental Shelf} cases for example, the ICJ held that Arts 1 to 3 of the Geneva Continental Shelf Convention on which Art 12 of the Convention did not permit reservations to be made, were clearly “regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law”.\textsuperscript{135} In other words, a treaty may embody established customary law, crystallize prior State practices, or the rules of the treaty may, through practice, result in the development of customary law.\textsuperscript{136}

Furthermore, the Court held in \textit{Nicaragua v USA (Merits)} that even if the content of a treaty law and a customary law are identical and both forms of law are binding on States, they nevertheless exist independently of each other and should be applied and interpreted

\begin{footnotesize}
\noindent\textsuperscript{132} Ibid.  \\
\textsuperscript{133} Chapter 3, Section 3.0.  \\
\textsuperscript{134} Thirlway, Hugh, \textquote{The Sources of International Law} in Evans, Malcolm D. (ed), \textit{International Law} (Oxford University Press, 4\textsuperscript{th} ed, 2014), 102.  \\
\textsuperscript{135} \textit{North Sea Continental Shelf (Federal Republic of Germany v Denmark) (Judgment)} [1969] ICJ Rep 3, 39 para 63.  \\
\textsuperscript{136} Thirlway, above n 134, 108.
\end{footnotesize}
separately. Hence, the content of treaties and customary law may reflect each other and yet have independent consequences.

3.4.1 The Elements of Customary Law

Customary laws are formed through established practice which is of a uniform, consistent and general nature, and which has the status of an obligation or opinio juris. In the Continental Shelf cases, the ICJ held that even if it was for a short period of time, it was “an indispensable requirement” in the formation of a new customary law, that State practice “should have been both extensive and virtually uniform in the sense of the provision invoked” and furthermore, that it should have shown “a general recognition that a rule of law or legal obligation…[was]…involved”.

In the Fisheries case, the ICJ held that the ten-mile rule had “not acquired the authority of a general rule of international law”, because although it had been adopted by some States, a different limit had been adopted by other States. In Nicaragua v USA (Merits), the Court observed that consistency in practice did not need to be absolute, stating that:

The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule.

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140 Fisheries (United Kingdom v Norway) (Judgment) [1951] ICJ Rep 116, 131.
order to deduce the existence of customary rules, the Court deems it sufficient that
the conduct of States should, in general, be consistent with such rules… \(^{141}\)

### 3.4.2 Can IGOs Create Customary Laws Binding on States?

Traditionally, it has been State practice and opinio juris, which has created customary law. In the *Continental Shelf* case of 1985 for example, the Court held that “[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States”. \(^{142}\)

Pursuant to Art 31(3)(b) of the VCLT 1969, the interpretation of a treaty shall take into account together with its context \(^{143}\), “[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” \(^{144}\). This suggests that practice can play two roles. First, as between the parties to a treaty, it can influence the interpretation of the treaty provisions. Second, it can also be practice which leads to the crystallization of a customary rule.

According to Sands and Klein, the ICJ in the *Namibia* case, had “[taken] the view that an established body of practice forms an integral part of the rules of the organisation”. \(^{145}\) The Court had ruled that:


\(^{142}\) *Continental Shelf (Libyan Arab Jamahiriya v Malta) (Judgment)* [1985] ICJ Rep 13, 29.


...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...This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.\textsuperscript{146}

According to Schermers and Blokker, the rule that the concurring votes of the permanent members in the Security Council are not affected by abstentions, is an example of a rule of customary law in an IGO.\textsuperscript{147} The following cases similarly suggest that the practice of the member States of an IGO can be evidence of actual or emerging customary law.

In the \textit{Wall} advisory opinion for example, the ICJ found that the application of Art 12(1) of the UN Charter, which had initially been interpreted and applied to the effect that the General Assembly could not make recommendations on matters of international peace and security under consideration by the Security Council, had in fact evolved in practice, such that the General Assembly and the Security Council were increasingly dealing with the same matters in parallel.\textsuperscript{148}


\textsuperscript{147} Schermers, and Blokker, above n 121, 835.

\textsuperscript{148} \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)} [2004] ICJ Rep 136, 148-149 [25] and [27].
In *Threat or Use of Nuclear Weapons*, the Court although finding that a customary rule did not exist because it lacked opinio juris\(^{149}\) and a “conventional rule of general scope”\(^ {150}\), stated nevertheless that General Assembly resolutions could indicate an emerging custom:

The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.\(^ {151}\)

In the *Tehran Hostages* case, the ICJ ruled in relation to the occupation of the United States Embassy in Tehran and the detention of its staff, that “[w]rongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship…[w]as…in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights”.\(^ {152}\) According to Sands and Klein, the Court handed down that ruling “without making any reservation as to the fact that the Declaration was in itself a non-binding instrument, thereby recognising the customary status achieved by the norms it contained”, nor did the Court “pay any attention, in that respect, to the fact that the UDHR

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\(^{149}\) *[Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 255.]*

\(^{150}\) *[Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 256.]*

\(^{151}\) *[Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 254-255 [70].]*

\(^{152}\) *[United States Diplomatic and Consular Staff in Tehran (Judgment) [1980] ICJ Rep 3, 42.]*
had not been adopted by a unanimous decision of the states which composed the General Assembly at the time".\(^{153}\)

Similarly, the Court in \textit{DRC v Uganda} cited some provisions in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, in General Assembly resolution 2625 (XXV), as being “declaratory of customary international law”\(^{154}\).

According to Alvarez, there is increasing reliance on “IO-generated forms of custom” such as treaties generated by IGOs, resolutions of plenary bodies such as the WTO Doha Declaration, the practice of IGO organs and secretariats, and judgments from international dispute settlement bodies\(^{155}\). Similarly, operational principles, instructions or standards issued by IGOs including specialized agencies, place the burden of proof on States which deny their legal status\(^{156}\). Consequently, IAEA recommendations which are widely adopted by governments and industry\(^{157}\), World Bank guidelines\(^{158}\), and codes of conduct and standards relating to food products, aviation and employment, are all examples of ‘soft norms’ developed by IGOs and adopted by States\(^{159}\).

The ability of IGOs to create binding customary law may have consequences for States which have conferred powers on IGOs through constituent treaties. First, where a State has

\(^{153}\) Sands, and Klein, above n 145, 296 fn 140.
\(^{156}\) Ibid 593.
\(^{157}\) Ibid 231.
\(^{158}\) Ibid 235.
\(^{159}\) Ibid 596.
conferred powers on an IGO by treaty, and a customary law develops subsequently from the terms of that treaty, the customary law may similarly be binding on the conferror State. Consequently, a State which may have protested the actions of an IGO by requesting an amendment of the treaty or by withdrawing from the treaty may still be bound by a customary law that evolved from that treaty, unless it has persistently objected to those actions.\(^\text{160}\)

Second, obligations and responsibilities of member States may subsequently result not just from treaty law but perhaps also from customary law. Pursuant to Art 12 *Articles on Responsibility of States for Internationally Wrongful Acts (2001)* (ARSIWA), a State breaches an obligation when it does not conform with that obligation regardless of the “origin or character” of that obligation.\(^\text{161}\) According to Crawford, sources of obligations therefore include customary international law.\(^\text{162}\)

4.0 CONSEQUENCES ARISING FROM CONFERRALS OF SOVEREIGN POWERS: FIDUCIARY DUTIES AND RESPONSIBILITY FOR INTERNATIONALLY WRONGFUL ACTS

According to Professor Sarooshi, there are legal consequences that result from the conferrals of powers from member States to IGOS.\(^\text{163}\) For example, questions may arise as to whether the IGO exercises conferred powers on behalf of the conferror State or on its own behalf, whether the exercise of conferred powers alters the legal position of the conferror State or of the conferee IGO, whether the conferror State’s interpretation or the

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\(^{160}\) Sarooshi, above n 1, 118.

\(^{161}\) *Articles on Responsibility of States for Internationally Wrongful Acts* art 12.


\(^{163}\) Sarooshi, above n 1, 1.
conferee IGO’s interpretation prevails when a conflict arises where powers are exercised concurrently, and whether it is the responsibility of the conferring State, the conferee IGO or both, for breaches of international law that arise from the IGO’s exercise of conferred powers.\textsuperscript{164}

The Sarooshi Typology considers the legal consequences arising from the different categories of conferred powers in relation to fiduciary duty and the responsibility for internationally wrongful acts.

### 4.1 Fiduciary Duty

In a conferral of agency powers, although the IGO cannot alter legal relationships between itself and third parties, it can alter the legal relationships between its conferring States and third parties.\textsuperscript{165} Consequently, the IGO has a fiduciary duty to “exercise conferred powers in the interests of the conferring State[s]”.\textsuperscript{166}

In a delegation of powers, the IGO exercises the delegated powers on its own behalf and not on behalf of the conferring States, and as such, the conferring States are not bound by the acts of the IGO.\textsuperscript{167} Therefore, the IGO does not alter the State’s legal relationships with third parties, and as a consequence, the IGO exercising delegated powers does not owe a fiduciary duty to its conferring States.\textsuperscript{168}

\textsuperscript{164} Ibid 1-2.
\textsuperscript{165} Ibid 50.
\textsuperscript{166} Ibid 52.
\textsuperscript{167} Ibid 62.
\textsuperscript{168} Ibid.
In a transfer of powers, it is the conferror State which owes a fiduciary duty to the IGO, to comply with binding obligations arising from the IGO’s exercise of transferred powers. This is because the IGO’s right to exercise the transferred powers exclusively suggests that its conferror States should refrain from actions which impinge on the IGO’s exercise of those powers.

4.2 Responsibility for Internationally Wrongful Acts

Under international law, a breach of an international obligation by a subject of international law results in an international responsibility and a duty to make reparation. This principle is well established in international case law. Judge Huber, in *British Claims in the Spanish Zone of Morocco* in 1925 for example, observed that:

> Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation.

Crawford and Olleson define it slightly differently as responsibility being “the necessary corollary of obligation...[and]...every breach by a subject of international law of its international obligations entails its international responsibility”.

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169 Ibid 101.
170 Ibid 100.
173 *Affaire des biens britanniques au Maroc espagnol (Espagne contre Royaume-Uni)* (1925) II RIAA 615.
174 English translation in Brownlie, above n 77, 435.
The PCIJ in the *Chorzow Factory* case held that “it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation”. In the *Corfu Channel* case, the ICJ found that Albania was responsible for explosions resulting in damage and loss of life for which it therefore had a duty to compensate the United Kingdom.

In addition to case law, there has been the codification of international law in relation to responsibility, in the ILC’s *Articles on Responsibility of States for Internationally Wrongful Acts* (2001). Art 1 ARSIWA encapsulates the basic principle that “[e]very internationally wrongful act of a State entails the international responsibility of that State.” The conduct resulting in an internationally wrongful act can be either an action or an omission. There are two elements in the characterization of a conduct of a State as an internationally wrongful act. First, it must be “attributable to the State under international law” and second, it “[c]onstitutes a breach of an international obligation of the State”. Hence an internationally wrongful act is defined as a breach of international obligation which is attributable to the State, and for which it is therefore responsible under international law.

Art 5 ARSIWA states that “[t]he conduct of a person or entity which is not an organ of the State…but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law.

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176 *Factory at Chorzow (Claim for Indemnity) (Merits)* [1928] PCIJ (ser A) No 17, 29.
177 *Corfu Channel (Merits)* [1949] ICJ Rep 4, 23.
178 *Articles on Responsibility of States for Internationally Wrongful Acts*.
180 *Articles on Responsibility of States for Internationally Wrongful Acts* art 2.
181 *Articles on Responsibility of States for Internationally Wrongful Acts* art 2(a).
182 *Articles on Responsibility of States for Internationally Wrongful Acts* art 2(b).
provided the person or entity is acting in that capacity in the particular instance”. This clearly applies to IGOs exercising conferred powers.\(^\text{184}\)

In a conferral of agency powers, the conferror States are responsible for the internationally wrongful acts of the IGO acting within its conferred powers, because the States are deemed to have given consent to the IGO to act on their behalf.\(^\text{185}\) Similarly, the conferee IGO is deemed to have consented to act on behalf of the States in an agency relationship, and therefore it has a joint responsibility for any internationally wrongful acts that it commits in the exercise of its conferred powers.\(^\text{186}\) Where the IGO seeks to prevent the commission of an internationally wrongful act but the wrongful act is nevertheless committed due to the control of its conferror States, the IGO may incur a joint but secondary responsibility for that act.\(^\text{187}\)

Where powers are delegated or transferred by member States to IGOs, the IGOs are acting on their own behalf in exercising the conferred powers, and consequently the responsibility for committing internationally wrongful acts belongs to those IGOs.\(^\text{188}\) States which have

\(^{183}\) Articles on Responsibility of States for Internationally Wrongful Acts art 5: “The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”.

\(^{184}\) Sarooshi, above n 1, 102.

\(^{185}\) Ibid 50-51.

\(^{186}\) Ibid 51.

\(^{187}\) Ibid.

\(^{188}\) Ibid 63 and 101.
conferred delegated or transferred powers on an IGO may however, incur responsibility for their “own acts or omissions” where the IGO commits an internationally wrongful act.189

In the case of a delegation of powers, Professor Sarooshi identifies both primary and secondary responsibilities which can be attributed to member States. Where a member State ‘participates in or implements domestically’ the internationally wrongful act committed by the IGO, the member State incurs a primary responsibility, pursuant to Art 1 ARSIWA, whereby “[e]very internationally wrongful act of a State entails the international responsibility of that State”.190 Additionally, the member State may also have a secondary responsibility for the wrongful act of an IGO pursuant to Arts 16 to 18 ARSIWA, where it ‘aids or assists’ the IGO in committing the wrongful act191, where it ‘directs and exercises control’ over the commission of that wrongful act by the IGO192, or where it ‘coerces’ the IGO into committing an act which would “but for the coercion” be wrongful193. Although Arts 16 to 18 ARSIWA apply to relationships between States, according to Professor Sarooshi, they also apply to relationships between States and IGOs mutatis mutandis.194

The Draft Articles of the Responsibility of International Organizations 2011, which have been approved by the ILC but not adopted by the UN, contain provisions relating to a State’s secondary responsibilities for the wrongful acts of an IGO.195 As discussed in Chapter Three, there are differences between the international responsibility of States and

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189 Ibid 63 and 101-107.
190 Articles on Responsibility of States for Internationally Wrongful Acts art 1: “Every internationally wrongful act of a State entails the international responsibility of that State.”.
191 Articles on Responsibility of States for Internationally Wrongful Acts art 16.
192 Articles on Responsibility of States for Internationally Wrongful Acts art 17.
193 Sarooshi, above n 1, 63 in reference to Articles on Responsibility of States for Internationally Wrongful Acts art 16.
IGOs, and whilst there is a greater acceptance of the authority of ARSIWA, DARIO is considered to be still developing.\textsuperscript{196}

In relation to a member State’s responsibility for the acts of an IGO where powers have been transferred to the IGO, Professor Sarooshi distinguishes between partial and full transfers of powers. In the case of partial transfers of powers, where a member State has the choice as to whether it implements the decision of the IGO domestically, if the member State chooses to implement the wrongful act, then it is responsible for that act pursuant to Art 1 ARSIWA.\textsuperscript{197} With regard to a full transfer of powers, where the member State has no choice as to whether it implements the decision of the IGO domestically, the member State is responsible for the wrongful acts of the IGO pursuant to Article 5 ARSIWA, which states in part that the conduct of an entity “empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law”.\textsuperscript{198}

Finally, member States which transfer powers to IGOs may also have secondary responsibilities similar to those described above in relation to delegated powers.\textsuperscript{199}

\textbf{5.0 MEASURES AVAILABLE TO STATES}

According to Professor Sarooshi, there may be circumstances where a member State may wish to invoke measures against an IGO’s exercise of conferred powers, for example where

\textsuperscript{196} Chapter 3, Section 4.3.
\textsuperscript{197} Sarooshi, above n 1, 103; Articles on Responsibility of States for Internationally Wrongful Acts art 1.
\textsuperscript{198} Sarooshi, above n 1, 104-105; Articles on Responsibility of States for Internationally Wrongful Acts art 5.
\textsuperscript{199} Sarooshi, above n 1, 104, 107.
the exercise of those powers is ultra vires or contrary to the State’s sovereign values.\textsuperscript{200} He identifies a number of practical measures available to the conferror, including (1) amending the constituent treaty, which may depend on the consent of all the member States in the treaty\textsuperscript{201}, (2) taking unilateral financial measures against the IGO, such as ‘withholding payment of assessed contributions’\textsuperscript{202}, (3) termination of the conferral of powers, which may require the member State to withdraw from the IGO\textsuperscript{203}, and (4) persistently objecting to the IGO’s act or decision\textsuperscript{204}.

\textbf{5.1 Treaty Amendments}

In addition to provisions for amendments in some treaties, the VCLT 1969 also contains provisions for the amendment of treaties at Arts 39 and 40.\textsuperscript{205} Art 39 states in part that “[a] treaty may be amended by agreement between the parties”\textsuperscript{206}, and Art 40 provides rules for the amendment of multilateral treaties, unless otherwise provided for in the treaty\textsuperscript{207}. Similarly, Arts 39 and 40 of the VCLT 1986 contain similar provisions for the amendment of treaties.\textsuperscript{208}

Treaty amendments provided for in the constituent treaty may require the consent of the parties to the treaty, which is sometimes obtained by compliance with amendment

\textsuperscript{200} Sarooshi, above n 1, 108.
\textsuperscript{201} Ibid 110.
\textsuperscript{202} Ibid 111.
\textsuperscript{203} Ibid 114-115.
\textsuperscript{204} Ibid 115-116.
\textsuperscript{205} Ibid 110-111.
provisions within the treaty, or by agreement between the parties to the treaty. Art 108 of the UN Charter for example, provides for a ‘two-step’ amendment process, wherein an amendment to the Charter will come into force for all UN members when voted for by two-thirds of the General Assembly members, and ratified by two-thirds of the UN members including all of the permanent members in the UN Security Council. Under the North Atlantic Treaty (NAT), parties to the Treaty may consult to review the Treaty at the request of any of them, after the Treaty has been in force for ten years or anytime thereafter. Art 48(1) of the Treaty on European Union (TEU) provides for both an “ordinary revision procedure” or “simplified revision procedures” to amend the Treaties.

As can be seen from these examples of provisions for amending treaties, the procedures are varied, perhaps reflecting the varying degrees of collective intent or will of the parties to the treaties. It could be difficult to fulfil the requirements for amending treaties in some of these provisions, for example the two-step amendment process of the UN described above. Consequently, Professor Sarooshi acknowledges the difficulty in achieving this measure in practice.

209 Sarooshi, above n 1, 110-111.
211 Charter of the United Nations art 108.
216 Sarooshi, above n 1, 110.
5.2 Unilateral Financial Measures

Unilateral financial measures such as withholding assessed contributions may be effective, depending on the relative contribution of the member State towards the budget of the IGO. Nevertheless, there could be legal consequences arising from this measure. In the Expenses case the ICJ held that pursuant to Art 17 (2) of the UN Charter, the General Assembly had the power to apportion expenses among UN Members, and in its exercise of that power, an obligation was created for each Member to bear the expenses apportioned to it. Art 19 UN Charter provides sanctions for arrears in payment of contributions, by suspending the member’s voting rights in the General Assembly for arrears equal to or exceeding the amount of its assessed contributions for the preceding two years, unless the arrears were beyond the member’s control. Other IGOs have similar provisions in their constitutions for assessing financial contributions from their members, with some of them also stipulating sanctions for arrears. Where there are no provisions for non-payment of contributions, general principles of law relating to treaties and state responsibility will apply.

According to Francioni, withholding financial contributions for the purposes of the member State’s own national objectives and interests is unjustifiable. Using the UN as an

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217 Ibid 111.
218 Ibid.
example, he suggests that withholding payments should be limited by three criteria or principles: (1) specific necessity, (2) integrity, and (3) consistency.\footnote{Francioni, Francesco, ‘Multilateralism a la Carte: The Limits to Unilateral Withholdings of Assessed Contributions to the UN Budget’ (2000) 11 European Journal of International Law 43, 59.} According to the principle of specific necessity, withholding financial contributions to the UN should arise through necessity and relate specifically to a violation of the UN Charter or international law by a UN activity for which the funding is disputed.\footnote{Francioni, Francesco, ‘Multilateralism a la Carte: The Limits to Unilateral Withholdings of Assessed Contributions to the UN Budget’ (2000) 11 European Journal of International Law 43, 54.} The principle of integrity is akin to good faith and the protection of the integrity of the Charter from abuse.\footnote{Francioni, Francesco, ‘Multilateralism a la Carte: The Limits to Unilateral Withholdings of Assessed Contributions to the UN Budget’ (2000) 11 European Journal of International Law 43, 54.} The principle of consistency means that the withholding member State’s attitude is not contradicted over a period of time.\footnote{Ibid 55.}

5.3 Termination of a Conferral

Termination of a conferral, which may involve a withdrawal from a treaty is, according to Professor Sarooshi, a measure that is available to conferror States, but one which may not be practical.\footnote{Sarooshi, above n 1, 114.} Withdrawal from a treaty is sometimes provided for in the constituent treaty. For example, Art 50 TEU contains the procedure for a member State to withdraw from the EU, with Art 50(1) TEU stating expressly that “[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements”.\footnote{Treaty on European Union, opened for signature 7 February 1992, [1992] OJ C 191/1 (entered into force 1 November 1993) art 50 and art 50(1).} Similarly, Art XV(1) of the WTO Agreement provides in part that “[a]ny Member may withdraw from this Agreement”, to take effect six months from the date on which the
Director-General receives written notice of withdrawal.\textsuperscript{230} The UN Charter on the other hand, does not contain any provisions for withdrawal by member States, but it is accepted from the travaux preparatoires that there is a right of withdrawal “in exceptional circumstances”.\textsuperscript{231}

According to Feinberg, there is “no presumption in favour of the right of unilateral withdrawal, and…withdrawal is therefore permitted only if it is expressly provided for or can be inferred by implication”.\textsuperscript{232} The implied right to withdraw may be inferred for example, from the contents of the treaty itself or from its preparatory work.\textsuperscript{233} In addition, Art 56 VCLT 1969 provides that withdrawals from a treaty where no provision has been made for withdrawal in that treaty, may be possible if it could be established that the parties intended to admit the possibility of withdrawal\textsuperscript{234}, or if a right to withdraw is implied by the nature of the treaty\textsuperscript{235}. Art 54 VCLT 1986 provides simply that a party may withdraw from a treaty in accordance with the provisions of the treaty\textsuperscript{236} or at any time with the consent of all the parties\textsuperscript{237}.

\begin{footnotes}
\footnotetext[230]{Marrakesh Agreement establishing the World Trade Organization, signed 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) art XV(1).}
\footnotetext[231]{Sands and Klein, above n 145, 552.}
\footnotetext[232]{Feinberg, N., ‘Unilateral Withdrawal from an International Organization’ (1963) 39 British Yearbook of International Law 189, 218.}
\footnotetext[233]{Ibid 215.}
\footnotetext[236]{Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 54(a).}
\end{footnotes}
There are significant reasons for a State to belong to an IGO. First, it can participate in decision-making within the IGO and perhaps influence the outcome of those decisions. Second, there may be a perceived stigma in withdrawing from or not complying with an international cooperative effort. Third, the benefits of continued participation in an IGO may outweigh the benefits of withdrawing from the IGO, including the various costs incurred in participating in the IGO up till the State’s decision to withdraw.

According to Hirschman in *Exit, Voice, and Loyalty*, loyalty is an important factor in a member’s decision on whether to exit the organization or stay and voice its disagreements. Exit may imply disloyalty to the organization and possibly collective ideals, whilst members staying on through loyalty may choose to increase their use of voice to bring about change. Their use of voice in these circumstances is enhanced if it is backed up by the threat of exit.

Other strategies that may be used by States that choose to stay or who are unable to exit, include ‘inactive membership’, ‘overactive membership’, or ‘selective membership’. Members may use the inactive membership or ‘empty chair strategy’ to apply pressure on other members, but whilst refusing to participate in decision-making processes within the organization, the inactive member nevertheless continues to be bound by its obligations under the Treaty, it continues for example to accrue membership fees, and it would still be

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238 Sarooshi, above n 1, 115.
239 Ibid.
240 Ibid.
242 Ibid.
243 Ibid.
bound by binding measures adopted whilst it was inactive.\textsuperscript{245} In overactive membership, the dissenting member blocks an unfavourable policy outcome, and then makes use of the lack of policy on the issue to take unilateral action.\textsuperscript{246} A possible response may be to initiate judicial review.\textsuperscript{247} Finally, in selective membership the dissenting member continues its membership whilst disregarding the provisions of the Treaty that are not to its liking.\textsuperscript{248} The weaknesses of enforcement mechanisms in international law make this an attractive strategy\textsuperscript{249}, but in addition to the possible option of judicial review, Weiler suggests that the “fear of reciprocal reprisals” is the most effective sanction.\textsuperscript{250}

5.4 Persistent Objection

Persistent objection is a doctrine which permits a State which consistently objects to a customary law being developed or changed, from being subsequently bound by that law.\textsuperscript{251} The doctrine has been acknowledged in a number of cases, the most commonly cited being the \textit{Asylum} and the \textit{Fisheries} cases. In the \textit{Asylum} case, one of the arguments that Colombia had proposed in support of its competence to unilaterally “qualify the nature of the offence” in granting asylum, was that of ‘regional or local custom’\textsuperscript{252}. The ICJ ruled that the Colombian Government had not successfully proven that such a custom existed, but even if it had, it could not have been invoked against Peru because Peru had repudiated that custom by not ratifying the Montevideo Conventions of 1933 and 1939, which

\begin{itemize}
\item \textsuperscript{245} Ibid 288-289.
\item \textsuperscript{246} Ibid 290.
\item \textsuperscript{247} Ibid 290-294.
\item \textsuperscript{248} Ibid 294.
\item \textsuperscript{251} Byers, Michael, \textit{Custom, Power and the Power of Rules: International Relations and Customary International Law} (Cambridge University Press, 1999), 180.
\item \textsuperscript{252} \textit{Asylum Case (Colombia v Peru) (Judgment)} [1950] ICJ Rep 266, 276.
\end{itemize}
contained a rule on the qualification of offences relating to matters of asylum. In the *Fisheries* case, the ICJ held that “[i]n any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast”. In the more recent case of *Roach and Pinkerton v United States*, the Inter-American Commission on Human Rights held that a customary rule is not binding on States which have protested against the norms of the rule, unless the norm had the status of jus cogens. Subsequently, the Commission confirmed in *Michael Domingues v United States*, that “[o]nce established, a norm of international customary law binds all states with the exception of only those states that have persistently rejected the practice prior to its becoming law”.

Whilst the doctrine of persistent objection is generally an established doctrine in international law, it has not been invoked often in practice. According to Byers, persistent objection may be rendered ineffective by the principle of reciprocity in which the objecting State may have to “accord the same exceptional right which they claim to other States”, or other States may exercise their advantage of ‘strength in numbers’ or of

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253 *Asylum Case (Colombia v Peru) (Judgment)* [1950] ICJ Rep 266, 277-278.
jurisdiction, to refuse to recognise the persistent objection\textsuperscript{261}. In such cases, the pressure to conform may be considerable\textsuperscript{262}.

The measure of persistent objection may be particularly important in transfers of powers, as the member State will have conferred exclusive competence to the IGO to exercise the conferred powers, and consequently the practice of the IGO will be the practice of the member State in forming customary international law, unless the State has objected on record to the practice.\textsuperscript{263} Furthermore, if the State regains at some stage the powers that it transferred to the IGO, it may not be bound by a customary international law arising from the practice of the IGO at a time when the State was still bound by the decisions of the IGO, if the State had persistently objected to that practice.\textsuperscript{264}

As will be seen in relation to the measures available to the EU in its transfer of powers to the WTO\textsuperscript{265}, even though most of the measures are available to the EU in the rules of the WTO, they are not easily achieved, in spite of the EU’s strength of voting power in the WTO.\textsuperscript{266} This suggests the possibility that the conferrer State may therefore be motivated to exercise a higher degree of contestation in the decision-making or exercise of conferred powers by the conferee IGO, the ‘increased use of voice’ described in Hirschman’s \textit{Exit, Voice, and Loyalty} above.\textsuperscript{267}

\textsuperscript{263} Saroooshi, Dan, \textit{International Organizations and their Exercise of Sovereign Powers} (Oxford University Press, 2005), 118.
\textsuperscript{264} Saroooshi, Dan, \textit{International Organizations and their Exercise of Sovereign Powers} (Oxford University Press, 2005), 118.
\textsuperscript{265} Chapter 6, Section 4.2.3.
\textsuperscript{266} Chapter 6, Section 4.2.3.
\textsuperscript{267} Above Section 5.3.
6.0 REVIEWS AND CRITIQUES OF THE SAROOSHI TYPOLOGY

In general, reviews and critiques of the Sarooshi Typology have been positive about its usefulness and clarity as a tool for analysing the conferral of sovereign powers from States to IGOs. The usefulness of the typology can be summed up in the critique by Brolmann:

[t]he taxonomy of conferrals of power in this book makes a real contribution to grappling with the complex international institutional landscape…the proposed framework offers a valuable analytical tool…It is true, as the book points out, that in discussions about “powers” given to international organizations, such powers are usually referred to without precision or differentiation. A more precise and refined scheme for assessing the position of organizations in a particular context will bring further clarity to discussions about “loss of sovereignty”.


Brandl’s critique of the typology concludes positively that “Sarooshi’s book in general focuses brilliantly on the essential relations in the exercise of sovereign powers by various actors in international law”. In addition, although critical of the typology’s focus on the contestation of sovereignty in the conferral of powers on IGOs, McGuinness acknowledges that “Sarooshi’s typology of conferrals is an important contribution to the project of unpacking the complex web of legal relationships created through state transfers of power to IOs”.

However, McGuinness nevertheless criticizes the typology for failing “to advance the internationalist case as effectively as it implicitly claims to do”. First, by conceptualizing the problem of global governance as a contestation of the concept of sovereignty rather than as a problem relating to democracy, Professor Sarooshi “avoids the question of the democratic accountability of IOs”. Second, his typology which describes how the different categories of participation by States in IGOs affect the legal rights and obligations of those States, presumes that the role of the State is limited.

Professor Sarooshi acknowledges that the idea that sovereignty incorporates sovereign values may be problematic for internationalists, because it raises questions about the possibility of a unified sense of sovereignty amongst States with different sovereign values.

273 Ibid.
274 Ibid.
and consequently the legitimacy of the IGOs’ exercise of sovereign powers.\textsuperscript{276} However, he argues that the debate arising over the contested concept of sovereignty is a vital and unique role of sovereignty, requiring “a set of ontological and legitimating decisions”.\textsuperscript{277}

Professor Sarooshi does refer to the democratic deficit in his discussion of the contestation of sovereignty, defining it as “the legitimacy of the exercise by international organizations of governmental powers”, and explaining that it is because the nation-State is the reference point for the contestation of sovereignty in IGOs that the debate on the democratic deficit is largely framed around the exercise of sovereign powers within the nation-State.\textsuperscript{278} Furthermore, according to Professor Sarooshi, sovereign norms provide objectives for, and normative constraints on, IGOs’ exercise of sovereign powers.\textsuperscript{279} Where democratic States are members of IGOs therefore, the norms of democracy which include the norm of accountability\textsuperscript{280}, will therefore also be applicable to IGOs.

According to Stein, the “internationalization of decision making in IGOs” often results in a “loss of democracy”, as the national governments have less control over the ‘executive’ and the participation of national citizens becomes more remote.\textsuperscript{281} For example, there is a widespread perception of a “severe ‘democratic deficit’” in the EU for many reasons, one of which is the distance between the “continental scope” of the EU and the individual citizen, and another being the fact that only one institution in the EU, the European

\textsuperscript{276} Sarooshi, above n 1, 10.
\textsuperscript{277} Ibid 11.
\textsuperscript{278} Ibid 6.
\textsuperscript{279} Ibid 2.
\textsuperscript{280} Zifcak, Spencer (ed), \textit{Globalisation and the Rule of Law} (Routledge, 2005), 2.
Parliament, is directly elected. Moravcsik argues however, that this view of a democratic deficit in the EU is unsupported by evidence, as “[c]onstitutional checks and balances, indirect democratic control via national governments, and the increasing powers of the European Parliament are sufficient to ensure that EU policy-making is, in nearly all cases, clean, transparent, effective and politically responsive to the demands of European citizens”.283

Consequently, if IGOs obtain their powers from democratically accountable member States, constraints such as those described by Moravcsik and Professor Sarooshi above, could arguably ensure at least a fair degree of democratic accountability in those IGOs. In a similar manner, IGOs which have a culture of democratic accountability will arguably convey those values to their sub-conferee IGOs, which then exercise those sub-conferred powers in accordance with the values of their sub-conferror IGOs.

A further critique of Professor Sarooshi’s Typology relates to his claim that domestic public and administrative law principles can be applied prima facie to IGOs. According to Brandl, the analogy between domestic and international law is “not a generally appropriate concept”, although he doesn’t explain why.284

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283 Ibid 605.
In response however, there are instances where the applicability of domestic law to international law may already be an existing practice.\textsuperscript{285} First, for example, there is the application of the “effects doctrine in the extraterritorial application of U.S. antitrust laws”.\textsuperscript{286} According to Bederman, some States may be able to influence international law by giving domestic laws extraterritorial effect, leading to domestic law being incorporated into international practice.\textsuperscript{287} Second, in international tribunals domestic laws can constitute evidence of a State’s legal position, in determining whether the State has fulfilled its international law obligations.\textsuperscript{288} Third, Professor Sarooshi addressed this issue further in a subsequent article, stating that “as the law of international organizations interacts increasingly with the domestic legal systems and is applied increasingly by domestic courts, there will naturally occur a degree of cross-fertilisation between legal rules that govern the exercise of the same type of public powers of governance”.\textsuperscript{289} Ultimately, the application of domestic laws relating to the processes of government to the exercise of sovereign powers by IGOs, rests on the fundamental premise that sovereign powers can only be exercised in accordance with their underlying sovereign values.\textsuperscript{290}

Alvarez’s review of the Sarooshi Typology however, is critical of several aspects of the typology. A significant part of his critique relates to Professor Sarooshi’s discussion on the potential attribution of responsibility to conferring States for the internationally wrongful

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\begin{enumerate}
\item Statute of the International Court of Justice art 38(1)(d) provides for the possibility that the “teachings of the most highly qualified publicists” may also be considered in determining the “rules of law”.
\item Bederman, David J., Globalization and International Law (Palgrave Macmillan, 2008), 162-163.
\item Ibid 164.
\item Mitchell, Andrew and Beard, Jennifer, International Law in Principle (Thomas Reuters, 2009), 54.
\item Sarooshi, above n 1, 14.
\end{enumerate}
\end{footnotesize}
acts of IGOs.\textsuperscript{291} For example, Alvarez appears to question the premise that IGOs are subject to international law, when he states that DARIO is “built on allegedly well-established first-order principles, especially the proposition that IOs are generally, like states, subject to both customary international law and general principles of law”.\textsuperscript{292} As discussed above, the ICJ confirmed in the \textit{Reparation} case that IGOs can have international legal personality and as a consequence, they have both rights and obligations as subjects of international law.\textsuperscript{293} Alvarez also questions for example, whether the type of conferral of powers on the IGO is “crucial to determining” whether the IGO is responsible for an international wrongful act.\textsuperscript{294} The Sarooshi Typology to the contrary, suggests that the type of conferral of powers by member States relates in part to the degree of control that the member States have in the IGO’s exercise of the conferred powers\textsuperscript{295}, and this may have a consequence in the attribution of responsibility to the member State for a wrongful act committed by the IGO.

On balance, whilst there have been some substantial criticisms of the Sarooshi Typology, there are also acknowledgments of the value of the typology, particularly with regard to its potential usefulness in clarifying and distinguishing the various types of conferrals of powers on IGOs, and their legal consequences.

\textsuperscript{292} Ibid 676.
\textsuperscript{293} Chapter 3, Section 2.1.
\textsuperscript{294} Alvarez, above n 291, 678.
\textsuperscript{295} Sarooshi, above n 1, 29-32.
The Sarooshi Typology describes three major categories of conferrals of sovereign powers from States to IGOs. The categories relate to varying degrees of conferred powers, defined by the elements of revocability, control and the right to exercise those powers concurrently or exclusively. Each category of conferred power establishes legal relationships between the conferror State and the conferee IGO. In addition, conferror States and conferee IGOs may, depending on the type of conferral, attract fiduciary duty or incur responsibility for internationally wrongful acts. Consequently, the typology is useful in providing a clear and consistent description of conferred powers, and a useful tool for analysing legal relationships and consequences arising from the conferral of powers from States to IGOs.

Where the conferror State disagrees with the IGO’s exercise of conferred powers, there are a number of measures which may be available to those States.

The typology is based on the premise that conferring States contest the values underlying their sovereignty in IGOs. The greater the degree of conferral of powers, the greater the contestation of sovereign values within the IGO. The IGO can only be said to be exercising conferred sovereign powers if those powers are exercised in accordance with the sovereign values of the conferror States. Consequently, sovereign values provide both the objectives and the constraints in an IGO’s exercise of conferred powers.

States have absolute sovereign authority within their own territories. Under international law, those States are accorded sovereign equality in their relationships with each other. As a consequence, in the international arena, a State has jurisdiction over its territory, a duty
not to intervene in the internal jurisdictions of other States, and the right to be bound by international law only with its consent.

When States confer their sovereign powers on IGOs, they are giving their consent to be bound by the decisions of the IGOs. The degree of power conferred on an IGO therefore reflects the degree to which the conferring State has agreed to be bound by the decisions of that IGO. In a conferral of agency powers, the conferror can revoke those powers, control the IGO’s exercise of those powers, and exercise those powers concurrently with the IGO. In a delegation of powers, the conferror can revoke those powers, but has no control over the IGO’s exercise of those powers, although it does retain the right to exercise those powers concurrently with the IGO. In a transfer of powers, the powers are generally irrevocable, the conferror has no control over the exercise of those powers, and the IGO has the exclusive right to exercise those powers.

Powers may be conferred on an IGO by express provisions in its constituent treaty, or by implication from the constituent treaty, where there are no express provisions for powers that are necessary for the IGO to carry out its duties. Constituent treaties contain provisions for States to protect their sovereign rights, as well as provisions for objectives, functions and powers conferred on IGOs.

Powers may also be conferred on an IGO on an ad hoc basis by treaty. Under customary law, ad hoc conferrals do not create rights or obligations in IGOs without their consent, which is given for example through a resolution or a declaration by the organ of the IGO.
which is accepting the conferral. In addition, powers conferred from an ad hoc conferral must not be powers which the IGO already possesses.

It may be possible for IGOs to create customary law, for example in procedural practices within the IGOs, or where ‘soft norms’ created by IGOs in carrying out their functions are widely adopted as practice by States. This can have consequences for States, for example where a customary law is a source of obligation which may create an international responsibility for a State which breaches that obligation.

In a conferral of agency powers, the IGO acts on behalf of the conferring State, and therefore owes the State a fiduciary duty to exercise its conferred powers in the interests of the State. In the case of a transfer of powers, the IGO has the exclusive right to exercise the conferred powers, and as a consequence, the conferring State has a fiduciary duty not to impinge on the IGO’s exercise of those powers. Delegations of powers do not attract a fiduciary duty, as the conferee IGO is acting on its own behalf rather than on behalf of the conferring State.

Under international law, the breach of an international obligation results in an international responsibility and a duty to make reparation. Pursuant to Art 5 ARSIWA, a conferring State may be responsible for an internationally wrongful act committed by the IGO in exercising its conferred powers. In a conferral of agency powers, the conferring State is responsible for the internationally wrongful acts of the IGO, whilst States conferring delegated or transferred powers may incur both a primary responsibility where it participates or
implements the wrongful act within its domestic jurisdiction, or a secondary responsibility from its ‘own acts and omissions’ in the IGO’s wrongful act.

A conferring State which disagrees with the IGO’s exercise of conferred powers has measures available to it, including amending the treaty, withdrawing from the treaty, utilising unilateral financial measures, terminating the conferral and persistently objecting. As seen in the discussion above, these measures are difficult to carry out in practice.

Whilst there have been some substantial criticisms of the Sarooshi Typology, there has also been a recognition of its value in providing a clear description of conferred powers, and a useful framework for analysing the legal relationships and consequences of conferrals of powers from States to IGOs.

Chapter 3 examines the applicability of the Sarooshi Typology to sub-conferrals of powers between IGOs. Whilst Chapter Two has discussed the Sarooshi Typology in relation to the ‘sovereign powers’ conferred on IGOs by States, it should be recognized that IGOs are not sovereign. They exercise powers conferred on them by sovereign States in accordance with the sovereign values of those States. Consequently, the following Chapters of this Thesis discuss the powers of IGOs, rather than the ‘sovereign powers’ of IGOs.
CHAPTER THREE
THE SUB-CONFERRAL AND EXERCISE OF POWERS BETWEEN INTERGOVERNMENTAL ORGANIZATIONS

1.0 INTRODUCTION

This chapter examines the applicability of the Sarooshi Typology to a sub-conferral of powers between IGOs. Although the typology is essentially a classification of categories of conferrals of powers, integral to its structure are the dynamics of a contestation of sovereign values between the conferror and the conferee of those powers, as well as the potential legal consequences of international responsibility which may arise from those conferrals.

In acknowledgement of the nature of IGOs as subjects of international law with rights and obligations but without the inherent sovereign powers of States, this chapter first discusses the nature of the international legal personality of IGOs. Second, it examines the nature of the powers of IGOs and whether they have the competence to sub-confer the powers that have been conferred on them by States. It also looks at the dynamics of a contestation of powers that could arise in the exercise of sub-conferred powers by IGOs. Finally, it examines the legal consequences of international responsibility which may be attributed to a conferror IGO for the wrongful acts of a sub-conferree IGO.

2.0 THE INTERNATIONAL LEGAL PERSONALITY OF IGOs

According to Schermers and Blokker, there are three theories on the international legal personality of IGOs. First, is the theory that legal personality exists only if it is

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1 The term ‘legal personality’ is used interchangeably with ‘international legal personality’ in this Thesis.
expressly attributed to the IGO in its constituent treaty. According to Schermers and Blokker, this theory has little support these days. There are instances, for example, of IGOs without express legal personality which nevertheless carry out activities which would seem to require the existence of a legal personality. Prior to the Lisbon Treaty of 2009 for example, the EU which did not have express legal personality at that time, was nevertheless taking action internationally, including the conclusion of agreements, making legally binding commitments, and administrating the town of Mostar following the Balkans crisis. Similarly, the UN, which does not have express legal personality, nevertheless has express powers to conclude treaties and to deploy troops.

The second theory relates to the objective legal personality of IGOs, whereby the IGO establishes its legal personality by meeting objective criteria which establish that it has at least one organ with a will that is separate from that of its members, rather than through the subjective will or intention of its member States. The major criterion in this theory is that the IGO has its own distinct will. Once an IGO is established, it becomes a subject of international law like a State is, and it has inherent legal personality under international law, provided that the relevant objective criteria are met, and subject to any limitations there may be, in the constituent treaty. Hence, according to Seyersted:

3 Schermers and Blokker, above n2, 989.
4 Ibid.
5 Klabbers, Jan, An Introduction to International Institutional Law (Cambridge University Press, 2nd ed, 2009), 51-52.
7 Schermers and Blokker, above n 2, 989.
8 Seyersted, Finn, ‘Objective International Personality of Intergovernmental Organizations: Do their Capacities Really Depend Upon the Conventions Establishing them?’ (1964) 34 Nordisk Tidsskrift Int’l Ret 3, 47-48; Klabbers, above n 5, 49; White, above n 6, 38.
9 Seyersted, above n 8, 46-47.
intergovernmental organizations, like States, have an inherent legal capacity to
perform any ‘sovereign’ or international acts which they are in a practical
position to perform. They are in principle, from a legal point of view, general
subjects of international law, in basically the same manner as States.12

However, in Reparation, the ICJ had clarified that although the UN was “an
international person”, it was not a State, nor was its legal personality, rights and duties
the same as a State’s.13 It also said that whilst a State possessed the full complement of
international rights and duties under international law, the rights and duties of the UN
depended on its purposes and functions.14

Seyersted had argued that the existence of an objective legal personality in IGOs, in this
case the UN, was confirmed by the ICJ in the Reparation case, when the Court said that
the UN had the capacity to bring a claim even against a State which was not a member
of the UN.15 The Court had said that:

the Court’s opinion is that fifty States, representing the vast majority of the
members of the international community, had the power, in conformity with
international law, to bring into being an entity possessing objective international
personality, and not merely personality recognized by them alone, together with
capacity to bring international claims.16

According to Schermers and Blokker, the Court’s meaning in this regard was that a vast
majority of States had the power under international law to create an entity with legal

12 Seyersted, above n 8, 28-29.
Rep 174, 179.
Rep 174, 180.
15 Seyersted, above n 8, 9.
Rep 174, 185.
personality not only recognized by its member States, but also by non-member States. Contrary to Seyersted’s view however, the Court meant that the UN had objective legal personality, not “irrespective of the will of the member states, but precisely because by implication this must have been the intention of the members”.

Furthermore, rather than establishing the IGO’s legal personality by identifying the necessary objective criteria, Amerasinghe suggests that the Court instead examined the characteristics of the UN in its constituent treaty and in its practice and concluded that the UN had legal personality based on the intention in its constitution. Thus the Court found that:

[the UN] could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.

Thus, the role of intent by member States in the ICJ’s judgment differs from Seyersted’s theory of objective personality, and it is discussed further in the following section, in relation to the third theory of legal personalities of IGOs. The third theory, which is also the prevailing theory, holds that the legal personality of IGOs is derived from member States, either expressly in the constituent treaty or by implication.

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17 Schermers and Blokker, above n 2, 990.
18 Ibid.
20 Ibid 80.
22 Schermers and Blokker, above n 2, 989; Klabbers, above n 5, 47.
23 Schermers and Blokker, above n 22, 989.
2.1 The Legal Personality of IGOs: The Reparation Case

The Advisory Opinion in the *Reparation Case*\(^{24}\), which has also been discussed earlier in relation to Seyersted’s theory of objective legal personality\(^{24}\), is commonly cited as the case which confirms that IGOs can have international legal personality.\(^{26}\) In coming to that conclusion the ICJ identified various characteristics which described the nature of the UN. First, the purposes and functions of the UN were specified in or implied from its constituent documents\(^{27}\), or developed by practice\(^{28}\). Second, the UN was equipped with organs and given special tasks to carry out.\(^{29}\) Third, the UN was a political body intended to carry out political tasks.\(^{30}\) Fourth, the UN was independent of its members in some respects and that included a duty to remind their members of their obligations.\(^{31}\) Fifth, the members of the UN had entrusted it with certain functions which carried duties and responsibilities, and which would therefore require the UN to have international legal personality in order to perform those functions.\(^{32}\) The Court, in what Jenks referred to as an ‘imaginative’ decision\(^{33}\), concluded therefore, that the UN was an international person, but clarified that the UN was not a State, nor did it have the


\(^{25}\) Above Section 2.0. The discussion of the Reparation case in that instance was to disagree with Seyersted’s argument that IGOs are subjects of international law in a manner similar to States, which he said had been confirmed by the Reparation case.


same legal personality, rights and duties as a State.\textsuperscript{34} However, it did mean that the UN was a subject of international law with international rights and duties, and the capacity to bring international claims to protect those rights.\textsuperscript{35}

Whilst the \textit{Reparation} case pertained to the UN, the criteria described in it can also be applied generally to other IGOs to determine if they have international legal personality\textsuperscript{36}, although not all IGOs will necessarily have equal “juridical status and capacities” internationally\textsuperscript{37}. According to Currie therefore, it is generally agreed that IGOs may be held to have international legal personality if (1) they represent their member States and are equipped with organs entrusted with international legal purposes or functions, (2) the legal powers and capacities of the IGO or its organs are distinctly separate from those of its member States, and (3) the IGO has legal rights and obligations that can be exercised in the international legal system.\textsuperscript{38}

For example, Art 5(2) of the Treaty on European Union (TEU) clearly establishes that the EU exercises competences conferred on it by its Member States for the purpose of achieving specified objectives, as well as affirming the limitations between the competences of the EU and those of its Member States. As such, Art 5(2) TEU states that:

\begin{quote}
Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the
\end{quote}

\textsuperscript{36} Currie, above n 27, 71-72; Sands and Klein, above n 26, 476; Amerasinghe, above n 19, 82-83.
\textsuperscript{37} Sands and Klein, Ibid.
\textsuperscript{38} Currie, above n 27, 71; Amerasinghe, above n 19, 82-83.
objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.39

The TEU also provides for the institutions of the EU40, as well as its external competences41. Consequently, although Art 47 TEU expressly provides that the EU has legal personality42, the other indications of legal personality are nevertheless evident in the TEU.

Objective and Qualified Personality

As discussed above in the previous section, the ICJ ruled in the Reparation case that the UN had an objective legal personality, and according to Shaw, that personality was “objective in the sense that it could be maintained as against non-members as well…as against members”.43 IGOs with objective legal personality can attract a wide range of rights and duties, and the IGO is entitled to acceptance of its legal personality by other subjects of international law.44 Objective legal personality is harder to acquire, and requires the action of at least a substantial number of the international community.45

The UN consisted of fifty States at the time, and according to the ICJ, those fifty States “representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them

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40 For example, Treaty on European Union, 7 February 1992, 1757 UNTS 3 (1 November 1993) art 13(1).
41 For example, Treaty on European Union, 7 February 1992, 1757 UNTS 3 (1 November 1993) Title V.
42 Treaty on European Union, 7 February 1992, 1757 UNTS 3 (1 November 1993) art 47: “The Union shall have legal personality.”.
43 Shaw, above n 26, 1298.
44 Ibid 260.
45 Ibid.
alone”.46 According to Shaw however, whilst it may be the case that the number of member States in the IGO is “relevant to the issue of objective personality”, it is not determinative.47 Otherwise, that would exclude many IGOs which are not ‘universal’, from having objective legal personality.48

Qualified legal personality on the other hand, which is binding only on those legal entities which consent to being bound, is attained more easily, as any legal entity can accept the legal personality of another entity.49 The rights and duties of entities with qualified legal personalities are more limited and their implied powers more difficult to establish.50 Those rights and duties are maintainable only against those entities which accept their legal personality.51 Art 3 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 for example, provides in part that “[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict”.52 The International Committee of the Red Cross is a “private non-governmental organization” which “has been accepted as being able to enter into international agreements under international law with international persons”.53

Objective personality, according to Shaw, does not depend on recognition by non-member States, but flows instead from the ‘nature and functions’ of the IGO.54 Although Sands and Klein argue that it is not clear that the concept of objective legal

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47 Shaw, above n 26, 1298. See also Amerasinghe, above n 19, 87.
48 Amerasinghe, above n 19, 87.
49 Shaw, above n 26, 261.
50 Ibid 263.
51 Ibid.
53 Shaw, above n 26, 262.
54 Ibid 1298.
personality, opposable to non-member States, is applicable to all IGOs\textsuperscript{55}, the refusal by non-member States to recognize the legal personality of an IGO has been mostly theoretical\textsuperscript{56}.

For the purposes of international responsibility at least, the ILC has said that the ICJ’s view appeared to be that where an IGO had legal personality it was an objective personality.\textsuperscript{57} Consequently the ILC stated that “it would not be necessary to enquire whether the legal personality of an organization has been recognized by an injured State before considering whether the organization may be held internationally responsible according to the present articles”.\textsuperscript{58}

**International Legal Personality and being a Subject of International Law**

Although the concepts of international legal personality and being a subject of international law are often used interchangeably, they are not the same thing.\textsuperscript{59} According to Shaw, once the international legal personality of an IGO is established, it then becomes a subject of international law, and thereby capable of enforcing rights and obligations internationally.\textsuperscript{60} This means that a subject of international law possesses rights and obligations, and both the capacity to make claims for its rights as well as being subject to claims for breaches of international obligations for which it is responsible.\textsuperscript{61} According to Crawford, if the entity is incapable of making and being subject to international claims, it may have a limited legal personality, which depends

\textsuperscript{55} Sands and Klein, above n 26, 479.
\textsuperscript{56} Ibid 480; Amerasinghe, above n 19, 87.
\textsuperscript{57} Commentary to the Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 67, 9 [9].
\textsuperscript{58} Ibid.
\textsuperscript{59} Klabbers, above n 5, 39.
\textsuperscript{60} Shaw, above n 26, 1296-1297.
\textsuperscript{61} Crawford, James, *Brownlie’s Principles of Public International Law* (Oxford University Press, 8\textsuperscript{th} ed, 2012), 115.
on the agreement of other legal persons and which is opposable only to those who agree.62

Rama-Montaldo similarly distinguishes between international legal personality and subjection. According to him, the ICJ in *Reparation* first established that the UN had legal personality based on objective criteria, and then relied on the concept of legal personality to derive the right to bring a claim internationally.63 In other words, rather than basing the right to bring a claim internationally on implied powers, the Court instead established legal personality and then attached to it certain rights such as the right to bring international claims.64 The capacity to bring a claim internationally is therefore a consequence of legal personality.65 The Court then considered the right of the UN to assert certain rights by claiming reparation, based on its functions and implied powers.66 Therefore, according to Rama-Montaldo, IGOs have two types of rights, those derived from their legal personality and “those which arise from their specific characteristics as subjects of international law, and especially from their functional nature”.67 Thus Rama-Montaldo appears to be saying that as an entity with legal personality an IGO has rights common to all IGOs, but as a unique subject of international law, it has rights which are derived from its specific powers and functions.68

In summary, whilst international legal personality and subjection in international law are not the same thing, they are arguably closely connected, resulting in the attainment of rights and duties by IGOs under international law. It should be clarified however,
that subjection in international law does not necessarily imply sovereignty. As discussed below in this chapter, although IGOs are subjects of international law they are not sovereign like States, because they only exercise conferred powers. In addition, IGOs do not have the full extent of “power, authority, or resources” that States have. Furthermore, the ICJ stated in the Reparation case that the legal personality of an IGO was not the same as that of a State’s. Consequently, it appears that legal personality or subjection are not necessarily the same concept as sovereignty. Whilst States are uniquely sovereign and have the full extent of international legal personality and subjection under international law, IGOs arguably have a lesser degree or quality of international legal personality and subjection.

Finally, the question also arises whether there are any implications for sovereignty and international law, if IGOs are recognized as subjects of international law. First, as subjects of international law, IGOs can bring claims against States, as was decided in the Reparation case. Second, IGOs may also have powers which have been conferred on them by member States, to make decisions that may be binding on those States. Hence for example, the member States of the WTO agreed to be bound by the decisions of the WTO, when they transferred their powers in international trade to the WTO. Third, there may be consequences such as fiduciary duty and responsibility for internationally wrongful acts, for the IGOs and their member States, depending on the type of conferrals of powers. Thus, for example, in a conferral of agency powers, the

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69 Below Section 4.0.
73 Sarooshi, Dan, International Organizations and Their Exercise of Sovereign Powers (Oxford University Press, 2005), 59. See also below Section 4.0.
conferee IGO owes a fiduciary duty to the conferror State\textsuperscript{74}, whereas in a transfer of powers, the conferror State owes a fiduciary duty to the conferee IGO, to not affect the IGO’s exercise of the transferred powers\textsuperscript{75}. Fourth, as discussed in chapter 2, IGOs may have the ability to create customary laws which are binding on member States.\textsuperscript{76} Therefore, the recognition of IGOs as subjects of international law with rights and duties, can have implications on the sovereignty of States and on international law.

3.0 THE POWERS AND CAPACITIES OF IGOs

According to Schermers and Blokker, the doctrine of attributed powers reflects fundamental differences between States and IGOs, that is, whereas States are sovereign in the sense that they have independent powers, IGOs are only competent to act within the powers attributed to them by their member States, in order to fulfil specified objectives and functions.\textsuperscript{77} Therefore, IGOs are not sovereign entities nor do they have sovereign powers, although it may be said that they exercise the ‘sovereign’ powers conferred upon them by States. Furthermore, as discussed above in chapter 2, IGOs can only be said to be exercising conferred powers if their actions reflect the sovereign values of their member States.\textsuperscript{78} Unlike States therefore, IGOs cannot “generate their own powers” nor can they “determine their own competence”, and consequently they are only authorized to act according to the powers attributed or conferred to them by their member States in their constituent treaties.\textsuperscript{79}

In the \textit{European Commission on the Danube} case for example, the PCIJ held that the only way to differentiate between the jurisdictions of two independent authorities in the

\textsuperscript{74} Chapter 2, Section 4.1.
\textsuperscript{75} Ibid.
\textsuperscript{76} Chapter 2, Section 3.4.2.
\textsuperscript{77} Schermers and Blokker, above n 2, 155-156.
\textsuperscript{78} Chapter 2, Section 2.1.1.
\textsuperscript{79} Schermers and Blokker, above n 2, 155-156.
same area was “by defining the functions allotted to them”, and in this regard it noted that:

As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it.\textsuperscript{80}

Similarly, citing the ‘basic principle’ referred to by the PCIJ in the \textit{European Commission on the Danube} case, the ICJ held in the \textit{WHO Advisory Opinion} of 1996, that:

international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the “principle of speciality”, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.\textsuperscript{81}

Consequently, the powers of IGOs are attributed powers, conferred to them by their member States in order for the IGOs to fulfil the objectives and functions defined by those member States in their constituent treaties.

\textsuperscript{80} Jurisdiction of the European Commission of the Danube between Galatz and Braila (Advisory Opinion) [1927] PCIJ (ser B) No 14, 64.

\textsuperscript{81} Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion) [1996] ICJ Rep 66, 78-79.
3.1  **Express Powers**

Express powers are powers specifically conferred on the IGO in its constituent treaty.\(^{82}\) Thus for example, the Court in the *Certain Expenses* case held that the UN Security Council had the power pursuant to Chapter VII of the UN Charter, to enforce international peace and security.\(^{83}\)

Express powers come under the doctrine of attributed or conferred powers, which states that IGOs are limited in their actions to specific powers conferred on them in their constituent treaties by their Member States.\(^{84}\) In practice however, many of the acts undertaken by IGOs have not been expressly provided for in their constitutions\(^{85}\), and some of them may perhaps fall under the category of implied powers.

3.2  **Implied Powers**

According to Klabbers, there are two approaches to the doctrine of implied powers.\(^{86}\) In the first approach, the implied powers flow from express powers contained in the constituent treaty.\(^{87}\)

In the *Greco-Turkish Agreement* case for example, the PCIJ found that Art IV of the Final Protocol ‘expressly contemplated’ questions arising in the Mixed Commission, and in accordance with, amongst other things, the principle that a body with jurisdictional powers has the right to establish the extent of its own jurisdiction, held that:

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\(^{82}\) Shaw, above n 26, 1306-1307.

\(^{83}\) *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter) (Advisory Opinion)* [1962] ICJ Rep 151, 163. See also below Section 3.5.

\(^{84}\) Seyersted, above n 10, 691.

\(^{85}\) Ibid.

\(^{86}\) Klabbers, above n 5, 59.

\(^{87}\) Shaw, above n 26, 1307; Klabbers, Ibid 59-60.
from the very silence of the article on this point, it is possible and natural to
deduce that the power to refer a matter to the arbitrator rests with the Mixed
Commission when that body finds itself confronted with questions of the nature
indicated.88

Similarly, in *Fedechar*, the European Court of Justice (ECJ) found that it was “possible
to apply a rule of interpretation generally accepted in both international and national
law, according to which the rules laid down by an international treaty or a law
presuppose the rules without which that treaty or law would have no meaning or could
not be reasonably and usefully applied”.89

In the second approach, implied powers flow from the functions and objectives of the
IGO.90 The ICJ, in taking this approach, has identified a number of tests or grounds for
the existence of implied powers in IGOs, namely that they: (1) are essential to the
performance of their duties, (2) arise out of necessary intendment from the treaty, or (3)
are appropriate for fulfilling the purposes of the IGO.91 The following three cases are
elements of cases where the ICJ identified those tests.

In the *Reparation* case, the ICJ found that the UN Charter did not expressly confer on
the UN the capacity to claim reparation for damage suffered by its agent, but held
nevertheless that:

Under international law, the Organization must be deemed to have those powers
which, though not expressly provided in the Charter, are conferred upon it by

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88 *Interpretation of the Greco-Turkish Agreement of December 1st, 1926 (Final Protocol, Article IV)
89 *Federation Charbonniere de Belgique v High Authority of the European Coal and Steel Community
90 Klabbers, above n 5, 60.
91 Shaw, above n 26, 1307-1308; White, above n 6, 83-87; Schermers and Blokker, above n 2, 177-179;
Amerasinghe, above n 19, 94-98; Klabbers, Ibid 59-63.
necessary implication as being essential to the performance of its duties (emphasis added).\(^92\)

In *Effect of Awards*, the Court found that there was neither an express provision nor a prohibition in the UN Charter, for establishing judicial organs\(^93\), but held that the General Assembly’s “power to establish a tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat”, and its capacity to do so arose “by necessary intendment out of the Charter” (emphasis added).\(^94\)

In *Certain Expenses* the ICJ was asked to advise on whether expenses authorized by the General Assembly in relation to UN operations in the Congo and the Middle East constituted ‘expenses of the Organization’ pursuant to Art 17(2) UN Charter.\(^95\) It found that purposes relating to international peace and security and the “powers conferred to effectuate them” were not unlimited, but held that:

> when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organization (emphasis added).\(^96\)

The ECJ has similarly affirmed the view in *Opinion 2/94*, that “whenever Community law has created for the institutions of the Community powers within its internal system


for the purpose of attaining a specific objective, the Community is empowered to enter into the international commitments necessary for attainment of that objective even in the absence of an express provision to that effect”, although eventually concluding that under Community law at the time, the European Community (EC) had “no competence to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms”.  

In conclusion, implied powers may flow from express powers contained in the constituent treaty of the IGO. In addition, according to the ICJ they may also be implied from the functions and objectives of the IGO, for example where they are essential to the IGO’s performance of its duties, where they arise out of necessary intendment from the constituent treaty, or where they may be appropriate for the fulfilment of the IGO’s purposes. This was affirmed by the ECJ, which said that powers may be implied in order to fulfil an objective of the EC, even in the absence of a relevant express provision.

3.3 Inherent Powers

As discussed in Section 2.0 above, Seyersted’s theory on objective legal personality, that is, the inherent capacity of IGOs “to act externally as subjects of national and international law”, was not a view commonly shared by all commentators. Nevertheless, according to Seyersted, in addition to inherent external capacity, IGOs also possess inherent powers over their organs and their member States. These

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99 Seyersted, above n 10, 693.
100 Above Section 2.0.
101 Seyersted, above n 10, 693.
inherent powers include “legislative, administrative and judicial power[s]”\textsuperscript{102}, and powers to establish new, subsidiary and judicial organs\textsuperscript{103}. Inherent internal powers are determined by general customary law\textsuperscript{104}, and exist subject to any limitations provided for in the IGO’s constituent treaty\textsuperscript{105}.

Whilst the Courts have determined that IGOs exercise express\textsuperscript{106} or implied\textsuperscript{107} powers, the ICJ nevertheless stated in the \textit{Nuclear Tests} case, that it had inherent jurisdiction which derived “from the mere existence of the Court as a judicial organ established by the consent of States, and [which] is conferred upon it in order that its basic judicial functions may be safeguarded.”\textsuperscript{108}

Similarly, in the 1995 \textit{Tadic} decision on the International Tribunal’s jurisdiction, heard in the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), the Court held that “[i]n international law, every tribunal is a self-contained system (unless otherwise provided)”, and that although the constitution of a tribunal can limit some of its powers of jurisdiction, it can only do so to the extent that the ‘judicial character’ of the tribunal is not jeopardized.\textsuperscript{109}

According to White, IGOs may have legal personality and powers which occur under international law, rather than as a result of the intent of member States.\textsuperscript{110} Under international law, IGOs have objective legal personality\textsuperscript{111}, that is, legal personality

\textsuperscript{102} Ibid.
\textsuperscript{103} Ibid.
\textsuperscript{104} Ibid 692.
\textsuperscript{105} Ibid 694.
\textsuperscript{106} Above Section 3.1.
\textsuperscript{107} Above Section 3.2.
\textsuperscript{110} White, above n 6, 87.
\textsuperscript{111} Above Section 2.1.
which occurs when the IGOs meet relevant objective criteria, and as result of that personality, an IGO has powers to carry out its functions where those powers are not expressly prohibited in its constituent treaty.\textsuperscript{112}

In his view, the doctrine of inherent powers has some advantages. First, it complies with the functional approach in that the IGO can fulfill its purposes but without the constraints of treaty provisions.\textsuperscript{113} Second, there are only two ‘legal controls’ in reviewing the actions of the IGO, one being that the action must achieve a purpose of the IGO and the other being that the action is not expressly prohibited by the constituent treaty.\textsuperscript{114} In this approach, the distinction between States and IGOs is maintained, as IGOs can only exercise powers in fulfilment of their purposes and without contravening the express provisions of their constituent treaty.\textsuperscript{115} Once the IGO has been created however, it acquires inherent powers, and States no longer control it.\textsuperscript{116}

According to Amerasinghe, however, the doctrine of inherent powers is not supported by the ICJ’s jurisprudence, although it “may be possible…that there are inherent capacities and powers which are skeletal in their incidence, their content and extent being subject to implication or express grant”.\textsuperscript{117} The Court’s findings on ‘implied capacities’ for example, suggest that “the existence of inherent skeletal capacities would not eliminate the need to imply the content of capacities and powers in regard to the exercise of powers, functions and duties”.\textsuperscript{118}

\begin{footnotesize}
\begin{itemize}
\item[112] White, above n 6, 87.
\item[113] Ibid 88.
\item[114] Ibid.
\item[115] Ibid.
\item[116] Ibid 89.
\item[117] Amerasinghe, above n 19, 98-99.
\item[118] Ibid 99.
\end{itemize}
\end{footnotesize}
In conclusion, whilst there may be what Amersinghe refers to as “inherent skeletal capacities”, the more widely accepted view is that IGO powers are either expressly stated in their constituent treaties, or that they are implied from the provisions of those constituent treaties. It is interesting to note however, that the ICJ, itself an organ under the UN Charter, and the international court which has handed down much of the jurisprudence on the express and implied powers of IGOs, has nevertheless stated that it possesses inherent judicial jurisdiction.

3.4 Ultra vires – Acting beyond powers

The acts of an IGO which are outside of the competence attributed to them by their constituent treaties are ultra vires.\footnote{Bernhardt, Rudolf, ‘Ultra Vires Activities of International Organizations’ in Makarczyk, Jerzy (ed), 
 Theory of International Law at the Threshold of the 21st Century: Essays in honour of Krzysztof Skubiszewski (Kluwer Law International, 1996), 602.} There are two general categories of ultra vires acts, one which relates to the internal actions of the IGO such that it exceeds the powers conferred on it, and the second relating to acts which are those that could similarly be committed by States.\footnote{Lauterpacht, E., ‘The Legal Effect of Illegal Acts of International Organisations’ in Cambridge Essays in International Law: Essays in honour of Lord McNair (Stevens & Sons, 1965), 89.}

Internal acts which are ultra vires include for example, an organ of the IGO asserting competence which it doesn’t have, the unjustified suspension or expulsion of a member State from the IGO, the implementation of decisions which were adopted without the required voting majority, and dismissal of staff members contrary to rules and regulations\footnote{Ibid.}

For example, Art 5 UN Charter provides for the suspension of the rights and privileges of a member State “by the General Assembly upon the recommendation of the Security
Council”. Similarly, Art 6 of the Charter provides for the expulsion of a member State, also by the joint action of the General Assembly and the Security Council. Therefore, the competence to suspend or expel a member State is conferred jointly on both these organs, and as a consequence, the exercise of this competence by only one of these organs would be an ultra vires act of that organ.

As discussed above, the ICJ found in *Certain Expenses* that where an act of the UN was to fulfil one of its purposes, the presumption was that it was not ultra vires. The Court went on to say that:

> If it is agreed that the action in question is within the scope of the functions of the Organization but it is alleged that it has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. 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.

According to Lauterpacht, the Court was not merely distinguishing between two classes of illegal acts, one which was illegal because it went beyond the powers of the IGO and therefore had no legal effect, and the second which was within the competence of the

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122 *Charter of the United Nations* art 5.
124 Schermers and Blokker, above n 2, 204.
125 Above Section 3.2.
IGO, and was illegal because it did not conform with the division of functions between
the organs of the IGO, but nevertheless could have external legal effect.\footnote{127} Rather,
Lauterpacht suggests that the Court “seems to have been prepared to acknowledge that
if an action (whether “external” or “internal”) could be truly established as \textit{ultra vires}, it
would be without legal force as a basis for further action by the organization, its organs
or its staff”.\footnote{128}

In \textit{Competence of ILO to Regulate Conditions of Persons Employed in Agriculture}, the
General Conference of the ILO had adopted draft conventions and several
recommendations relating to the protection of agricultural employees.\footnote{129} The French
Government requested the Council of the League of Nations to seek an advisory opinion
from the PCIJ as to whether the ILO had competence to deal with matters relating to
agricultural employees, and if it did, what the extent of those powers were.\footnote{130} The
Council decided to ask the Court for an opinion only on the question of ILO’s
competence in relation to agricultural employees.\footnote{131} Agriculture had not been
mentioned expressly in the Part XIII of the Treaty of Peace, which contained provisions
relating to Labour.\footnote{132} In its construction of the text of the Treaty, the Court found, for
example, that the express intent of the Parties to establish a ‘permanent labour
organisation’ militated against the exclusion of agriculture, which employed more than
half of the world’s workforce.\footnote{133} It also found, as another example, that ‘general
principles’ or standards in relation to employees in Art 427 of the Treaty were similarly

\footnote{127} Lauterpacht, above n 120, 111.
\footnote{128} Ibid.
\footnote{129} \textit{Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture (Advisory Opinion)} [1922] PCIJ (ser B) No 2, 19.
\footnote{130} \textit{Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture (Advisory Opinion)} [1922] PCIJ (ser B) No 2, 19.
\footnote{131} \textit{Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture (Advisory Opinion)} [1922] PCIJ (ser B) No 2, 21.
\footnote{132} \textit{Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture (Advisory Opinion)} [1922] PCIJ (ser B) No 2, 21, 23 and 25.
\footnote{133} \textit{Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture (Advisory Opinion)} [1922] PCIJ (ser B) No 2, 23 and 25.
applicable to agricultural workers. The Court concluded that “agricultural labour …[was]… within the competence of the International Labour Organisation”. Consequently, even though agriculture had not been expressly mentioned in the Treaty, the actions of the General Conference was found not to be ultra vires.

In a related matter, the PCIJ advised that the ILO did not have competence in the “organisation and development of methods of agricultural production”. The Court distinguished this competence from the ILO’s competence in regulating the working conditions of agricultural employees, finding that the ILO did not have functions in promoting improvements in production, either in the field of agriculture or in any other industry. The ILO had made it clear in the proceedings of this Advisory Opinion that it considered that the “organisation and development of agricultural production” was not within its competence. Based on the conclusion of the PCIJ, any acts of the ILO in the field of organization and development of agricultural production would be ultra vires.

In the IMCO case, the ICJ was asked for an advisory opinion as to whether the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization (IMCO) was elected in accordance with the Convention establishing the

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134 Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture (Advisory Opinion) [1922] PCIJ (ser B) No 2, 29.
135 Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture (Advisory Opinion) [1922] PCIJ (ser B) No 2, 41.
136 Competence of the ILO in regard to Examination of Proposals for the Organization and Development of the Methods of Agricultural Production and other Questions of a like Character (Advisory Opinion) [1922] PCIJ (ser B) No 3, [1] and [22].
138 Competence of the ILO in regard to Examination of Proposals for the Organization and Development of the Methods of Agricultural Production and other Questions of a like Character (Advisory Opinion) [1922] PCIJ (ser B) No 3, [14] and [15].
139 Competence of the ILO in regard to Examination of Proposals for the Organization and Development of the Methods of Agricultural Production and other Questions of a like Character (Advisory Opinion) [1922] PCIJ (ser B) No 3, [7].
Organization. Pursuant to Art 28 (a) of the Convention, the Committee was to consist of fourteen Members, of which at least eight would be “the largest ship-owning nations”. Although Liberia and Panama were among the eight largest ship-owning nations, they were not elected onto the Committee, whereas the ninth and tenth ranked nations were elected. The ICJ held that:

What Article 28 (a) requires the Assembly to do is to determine which of its Members are the eight “largest ship-owning nations” within the meaning which these words bear. That is the sole content of its function in relation to them. The words of the Article “of which not less than eight shall be the largest ship-owning nations” have a mandatory and imperative sense and precisely carry out the intention of the framers of the Convention.

The Court found that as a consequence, the Assembly had “failed to comply with Article 28 (a) of the Convention”, and concluded therefore that the Maritime Safety Committee was “not constituted in accordance with the Convention for the Establishment of the Organization”. The IMCO’s exercise of its power to elect a Maritime Safety Committee was therefore ultra vires, and as a consequence the election was nullified and void.

145 Amerasinghe, above n 19, 206-207.
3.5 Powers and Functions

According to Magliveras, it is necessary to distinguish between the notions of ‘power’ and ‘function’, for an IGO’s powers determine its functions, which in turn are the basis for the IGO’s rights and duties.\(^\text{146}\) In *Reparation*, the Court held that the member States of the UN had “entrust[ed] certain functions to it, with the attendant duties and responsibilities”\(^\text{147}\), and that “the rights and duties of an entity such as the [UN] must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice”\(^\text{148}\).

In a similar theme, as discussed above in relation to the powers and capacities of IGOs, the PCIJ in the *European Commission on the Danube* case, held that where there were two independent authorities in the same area, the only way to distinguish between their respective jurisdictions was through their functions.\(^\text{149}\)

According to Schermers and Blokker, the notion of function is the reference point for all IGOs, and “represents the core around which states have agreed to cooperate and forms the anchor for establishing the institutional structure of an international organization and for formulating and applying its institutional rules”.\(^\text{150}\) Furthermore, on a fundamental level, functions determine to some extent which powers to attribute to IGOs, by their member States.\(^\text{151}\)

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\(^{149}\) *Jurisdiction of the European Commission of the Danube between Galatz and Braila (Advisory Opinion)* [1927] PCIJ (ser B) No 14, 64. Also cited in Section 3.0 above.

\(^{150}\) Schermers and Blokker, above n 2, 1208.

\(^{151}\) Ibid.
The relevance and implications of distinguishing between the powers and functions of an IGO is illustrated for example in *Certain Expenses*, when the ICJ held that both the Security Council and the General Assembly of the UN had the function of maintaining international peace and security, but that only the Security Council had been “given a power to impose an explicit obligation of compliance if for example it issues an order or command to an aggressor under Chapter VII”.  

Similarly, according to Magliveras:

the UN has the duty to maintain international peace and security (Article 1 of the Charter) and the right to take enforcement action under Chapter VII. The latter is legally justified not on the ground that the UN has been entrusted with a function in these areas but because it has been conferred the relevant power.  

In conclusion, according to Magliveras, powers determine functions, which in turn determine the rights and duties of an IGO. In the *European Commission on the Danube* case for example, the PCIJ distinguished between the jurisdictions of two independent authorities, through their functions. According to Schermers and Blokker, the ‘notion of function’ is the core around which States have agreed to cooperate, and on which the structure and rules of the IGO are formulated. It is important to distinguish between the powers and functions of an IGO, as illustrated by the ICJ in the *Certain Expenses* case, where it held that whilst both the UN General Assembly and the Security Council had functions in maintaining international peace and security, only the Security Council had the power to enforce it pursuant to Chapter VII of the UN Charter.

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153 Magliveras, above n 146, 256-257.
4.0 APPLICATION OF THE SAROOSHI TYPOLOGY TO THE SUB-CONFERRAL AND EXERCISE OF POWERS BETWEEN IGOS

According to the ICJ in the Reparation case, although IGOs are subjects of international law with rights and obligations, they are not States.\textsuperscript{154} States for example, are said to have ‘natural’ sovereign powers, whereas IGOs exercise conferred sovereign powers.\textsuperscript{155} Nevertheless, according to Muldoon, IGOs “created by and for states have encompassed more or less the same competencies and functional characteristics of the state”.\textsuperscript{156} As a result, an analogy is sometimes drawn between States and IGOs:

The array of international organizations in the international system mirrored the institutions of modern national societies, which encouraged the “domestic analogy” approach to analyzing international organizations. There were international organizations that looked similar in structure and function to public institutions of central governments (for example, the League of Nations, the International Labor Organization, and the public international unions).\textsuperscript{157}

However, IGOs do not have the degree of “power, authority, or resources” that States have\textsuperscript{158}, and consequently, the analogy of IGOs to States in relation to governance could be ‘at best an approximation’.\textsuperscript{159}

The question therefore, is whether there are nevertheless sufficient similarities in legal principles and functions between States and IGOs, for the Sarooshi Typology to be usefully applied to the sub-conferral and exercise of powers between IGOs.

\textsuperscript{155} Sarooshi, above n 73, 1.
\textsuperscript{156} Muldoon, above n 70, 155.
\textsuperscript{157} Ibid 120-121.
\textsuperscript{158} Ibid 121.
\textsuperscript{159} Ibid 122.
4.1 The Ability to Sub-Confer Powers

In establishing that IGOs have international legal personality in *Reparations Case*, the ICJ specified that the substance of the international legal personality of IGOs is not the same as that of States. As such, according to Sands and Klein, it confirms that there is “no necessary link between international personality and sovereignty”. Instead, it means that IGOs are subjects of international law which derive their powers or capacities from their member States in order to fulfill the purposes and functions for which they have been created. States have the competence to confer “the full range of executive, legislative and judicial powers” on IGOs under international law.

It is also well established that IGOs can confer powers on their organs or other IGOs. The UN Charter for example, contains provisions for conferring powers on subsidiary organs. Art 7(2) UN Charter provides that “subsidiary organs as may be found necessary may be established in accordance with the present Charter”. Similarly, the UN General Assembly for example, may establish subsidiary organs necessary to perform its functions. Some IGOs may also create and delegate powers to common organs, for example the creation of the World Food Programme by the UN and the Food and Agriculture Organization (FAO).

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161 Sands and Klein, above n 26, 473.
162 Ibid 477.
163 Sarooshi, above n 73, 10.
164 Schermers and Blokker, above n 2, 1094.
165 Charter of the United Nations.
166 Charter of the United Nations art 7(2).
167 Charter of the United Nations art 22.
168 Schermers and Blokker, above n 2, 1094.
In addition, IGOs may also create, as well as become members of, other IGOs. In the *Laying-up Fund* opinion, the ECJ ruled that the EC had the power to cooperate with a third country “in setting up an appropriate organism such as the public international institution which it is proposed to establish...”. The ECJ also ruled that the EC could cooperate with the third country to give the organs of the IGO “appropriate powers of decision”.

As the powers of IGOs originate predominantly from conferrals of powers by their member States, where IGOs sub-confer powers to other IGOs, they are in effect sub-conferring powers conferred on them by their member States to those IGOs. This is affirmed by Bradley and Kelley, who define an international delegation of powers as “a grant of authority by two or more states to an international body to make decisions or take actions”. They identify a category of international delegation which they call a ‘redelegation’, and which is an authority that “permits the international body to further delegate authority to another entity”. According to them, redelegations therefore emanate indirectly from States, and are themselves international delegations.

**Conditions for Delegation**

Sub-conferrals of powers are, however, subject to strict conditions. In the *Meroni* case, the ECJ held that the powers conferred on the High Authority of the European Coal and Steel Community (High Authority) were to be exercised according to the rules of the

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173 Ibid 17.
174 Ibid 5.
175 Ibid.
Treaty\textsuperscript{176}, and that there had to be an express decision by the sub-conferror to sub-confer those powers.\textsuperscript{177} The High Authority had the relevant powers pursuant to the Treaty, and therefore had the right to sub-confer those powers subject to conditions and subject to its supervision.\textsuperscript{178} However, the Court also held that the High Authority could not sub-confer powers different from the powers which had been conferred on it by the Treaty\textsuperscript{179}, and as the High Authority had not placed conditions on the powers it had sub-conferred\textsuperscript{180}, it had in effect given the sub-conferees greater powers than what it had itself.\textsuperscript{181} The Court also held that where sub-conferred executive powers are clearly defined and subject to review, it “cannot appreciably alter the consequences involved in the exercise of the powers concerned”\textsuperscript{182}, but where a discretionary power is sub-conferred, the sub-conferror’s choices are replaced by the sub-conferee’s choices, resulting in “an actual transfer of responsibility”.\textsuperscript{183}

According to Professor Sarooshi, IGOs therefore have “a general competence…to sub-delegate their powers”\textsuperscript{184}, but that competence is subject to significant limitations.\textsuperscript{185} First, some conferred powers cannot be sub-conferred where it is ‘expressly or impliedly’ provided as such in the treaty.\textsuperscript{186} Second, broad discretionary powers should generally not be sub-conferred.\textsuperscript{187} Third, sub-conferrals must contain the original

\begin{itemize}
  \item \textsuperscript{176} Meroni v High Authority (C-9/56) [1958] ECR 135, 149.
  \item \textsuperscript{177} Meroni v High Authority (C-9/56) [1958] ECR 135, 151.
  \item \textsuperscript{178} Meroni v High Authority (C-9/56) [1958] ECR 135, 151.
  \item \textsuperscript{179} Meroni v High Authority (C-9/56) [1958] ECR 135, 150.
  \item \textsuperscript{180} Meroni v High Authority (C-9/56) [1958] ECR 135, 149-150.
  \item \textsuperscript{181} Meroni v High Authority (C-9/56) [1958] ECR 135, 150.
  \item \textsuperscript{182} Meroni v High Authority (C-9/56) [1958] ECR 135, 152.
  \item \textsuperscript{183} Meroni v High Authority (C-9/56) [1958] ECR 135, 152.
  \item \textsuperscript{185} Ibid.
  \item \textsuperscript{186} Ibid 1135.
  \item \textsuperscript{187} Ibid 1136.
\end{itemize}
conditions of the conferring States and they must not exceed the original powers conferred by the States.\textsuperscript{188}

**Processes for the Sub-Conferrals of Powers**

Powers are conferred from States to IGOs mainly through treaties as constituent treaties or on an ad hoc basis.\textsuperscript{189} It is generally accepted that IGOs have the capacity to conclude treaties or other international agreements.\textsuperscript{190} The *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* 1986, for example, applies also to “treaties between international organizations”\textsuperscript{191}. A determination of an IGO’s capacity to enter into treaties depends firstly on whether there is an express provision for it in the constituent treaty of the IGO\textsuperscript{192}, and secondly, if there is no express provision, whether it can be implied from the intentions of the IGO’s members in its constituent treaty\textsuperscript{193} or from the practice of the IGO\textsuperscript{194}. Competence to conclude a particular treaty however, relates to whether it is required for the performance of the functions for which the IGO has been created\textsuperscript{195}, and “derive[s] mainly from the rules of the organization”\textsuperscript{196}.

In addition, powers can also be sub-conferred by legal instruments other than treaties. The World Food Programme, for example, was formed by the UN and the FAO through “parallel resolutions of the general congresses of those organizations” rather than a formal agreement.\textsuperscript{197} The United Nations Relief and Works Agency for Palestine

\textsuperscript{188} Ibid 1137-1138.
\textsuperscript{189} Sarooshi, above n 73, 18.
\textsuperscript{190} Sands and Klein, above n 26, 483; Klabbers, above n 5, 251; Schermers and Blokker, above n 2, 1114.
\textsuperscript{192} Sands and Klein, above n 26, 483; Klabbers, above n 5, 255-256; Amerasinghe, above n 19, 101.
\textsuperscript{193} Klabbers, above n 5, 257.
\textsuperscript{194} Schermers and Blokker, above n 2, 1115.
\textsuperscript{195} Sands and Klein, above n 26, 483.
\textsuperscript{196} Klabbers, above n5, 252.
\textsuperscript{197} Schermers and Blokker, above n 2, 1136.
Refugees in the Near East was created by a resolution. The constitution of the International Refugee Organization was approved by a resolution in the UN General Assembly and signed by States at a later date.

In conclusion therefore, IGOs have the competence to sub-confer powers on organs and other IGOs within the boundaries of strict conditions, and they are able to do so through the process of concluding treaties or other international legal instruments.

4.2 Contestation in the Exercise of Sub-Conferred Powers

Having been created by States for the purpose of fulfilling specific functions and duties for which they have been given international legal personalities and having been vested with specific powers, IGOs are, according to Tietje, “entitled to claim a protected area of jurisdiction” corresponding to their assigned competences. According to Schermers & Blokker however, given the existence of hundreds of IGOs, there will be an inevitable overlap of their powers and operations. This may partly be a result of the process by which the international network of IGOs has developed:

International organizations are heaped on top of each other as the architects of the international order see the need or the environment presents something new that existing international organizations do not address. This has led to considerable overlaps and redundancies within and among the burgeoning

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198 Assistance to Palestine Refugees, GA Res 302 (IV), UN GAOR, UN Doc A/RES/302 (IV) (8 December 1949), [7].
199 Constitution of the International Refugee Organization, 15 December 1946; Refugees and Displaced Persons, GA Res 62 (I), UN GAOR, 67th plen mtg, UN Doc A/RES/62 (I) (15 December 1946); Schermers and Blokker, above n 2, 32.
201 Above n 200, 511.
202 Ibid 512.
203 Schermers and Blokker, above n 2, 1085.
population of international organizations. It is common to see clashes and conflicts among two or more international organizations that are competing for attention, resources, position, and/or power…

The conflict and protection of jurisdictions by IGOs is reflected, for example, in Art 103 of the Charter of the United Nations, which provides that where there is a “conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”. Since most IGOs are created by treaties, the UN can as a consequence claim priority where there are overlaps or conflicts. Similarly, Art 8 of the North Atlantic Treaty is a declaration by the parties to the Treaty that none of their international engagements conflict with the Treaty and that they undertake not to enter into any international engagements which conflict with it.

Given that IGOs exercise conferred powers, the conflict between them in protecting their conferred jurisdictions could therefore in that sense, be said to be a contestation in their exercise of their powers.

This is discussed further in the case studies below, in the contestation of power between the UN and NATO in Kosovo where long-standing contestation exists in the relationship between them, in the contestation of power between the UN and the IAEA in Iraq where they exercised the same powers concurrently, and in the

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204 Muldoon, above n 70, 149.
205 Charter of the United Nations art 103.
206 Schermers and Blokker, above n 2, 1088.
208 Chapter 4, Section 4.1.
209 Chapter 5, Section 4.1.
4.3 Consequences of a Sub-Conferral of Powers – International Responsibility of an IGO for a Wrongful Act

The rules of international responsibility have developed mainly in relation to States, as the original and primary subjects of international law. As a result, there is little judicial precedent internationally relating to the international responsibility of IGOs. However, it is generally accepted that the rules of international responsibility of States are largely applicable to IGOs. This is because the rules of international responsibility are customary in nature, thus making them a ‘natural transposition’ from the circumstances of States to IGOs. Consequently, according to Schermers & Blokker “the main principles underlying the rules on state responsibility are applicable *mutatis mutandis* to international organizations”.

The ILC’s *Draft Articles on the Responsibility of International Organizations* (2011) (DARIO), adopted by the International Law Commission in 2011, reflects similarities in the rules of international responsibility attributed to IGOs for breaches of international obligations, to those for the international responsibility of States in ARSIWA.
According to Boon, DARIO “appl[ies] and adapt[s] the principles of state responsibility to IOs, sometimes word for word”.\(^{218}\) In the ILC’s First Report on Responsibility of International Organizations in 2003, Special Rapporteur Gaja had stated that:

It would be unreasonable for the Commission to take a different approach on issues relating to international organizations that are parallel to those concerning States, unless there are specific reasons for doing so.\(^{219}\)

Nevertheless, there are significant differences in the basis of the responsibility between States and IGOs. The international responsibility of States for example, “flow[s] from the control they have over territory, airspace, persons, etc. or from their relations with other international persons arising from treaties or otherwise.”\(^{220}\) IGOs on the other hand, “have a certain amount of control over persons and enter into treaties, agreements and other relations with other international persons which could give rise to international obligations generating responsibility in the appropriate circumstances”.\(^{221}\)

The differences between States and IGOs and the difficulties in drafting DARIO have been acknowledged by the ILC.\(^{222}\) One significant difference is that unlike States, there is a big variation between IGOs in terms of their sizes, functions and mandates.\(^{223}\) Another difference is that IGOs do not have general competence but instead have been


\(^{220}\) Amerasinghe, above n 19, 399.

\(^{221}\) Ibid 399.


\(^{223}\) Above n 218, 8; Commentary to the Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 67, 3 [7].
formed to carry out specific functions.\textsuperscript{224} In addition, the difficulty of codifying the international responsibility of IGOs also arises because practice relating to the international responsibility of IGOs has developed only relatively recently, and because disputes involving IGOs do not often utilize third-party settlement procedures.\textsuperscript{225} As a result, the lack of established rules, custom or general practice relating to IGOs on which to base DARIO, has led the ILC to adapt the provisions of DARIO from the \textit{Articles on Responsibility of States for Internationally Wrongful Acts} (ARSIWA).\textsuperscript{226}

Consequently, according to the ILC, whilst the provisions of ARSIWA may be regarded as codification and therefore have a greater degree of authority, the provisions of DARIO are “more in the nature of progressive development”.\textsuperscript{227} Furthermore, given the vast diversity amongst IGOs themselves, the ILC has weighted some appropriate provisions in DARIO to reflect the unique character of an IGO, particularly in relation to its functions.\textsuperscript{228} As a result, Art 64 DARIO for example, provides for the application of \textit{lex specialis}, and states that some provisions of DARIO do not apply where the internationally wrongful act or the international responsibility of the IGO (or a State which is connected with the conduct of the IGO) are governed by special rules of international law, such as the rules of the IGO on relations between the IGO and its members.\textsuperscript{229}

\textsuperscript{224} Commentary to the Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 67, 3 [7].
\textsuperscript{225} Commentary to the Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 67, 2 [5].
\textsuperscript{227} Commentary to the Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 67, 3 [5].
\textsuperscript{228} Commentary to the Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 67, 3 [7].
\textsuperscript{229} Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 52 art 64; Commentary to the Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 67, 3 [7].
4.3.1 Responsibility of IGOs for Wrongful Acts in International Law

There are a number of contexts in which IGOs are answerable for their actions, in particular being responsible, liable or accountable for the consequences of those actions. Responsibility occurs when an IGO breaches its obligations, whilst liability is a wider concept that includes an IGO’s acts which cause damage even though those acts may not be unlawful, and accountability includes both responsibility and liability of IGOs as well as “the extent to which they are and should be subject to or exercising forms of internal and external scrutiny and monitoring”. The liability of IGOs relates mainly to private or civil law, such as breaches of contractual or tortious (non-contractual) obligations. Accountability “involves the justification of an actor’s performance vis-à-vis others, the assessment or judgment of that performance against certain standards, and the possible imposition of consequences if the actor fails to live up to applicable standards”.

The International Law Association (ILA), in the report of its Berlin Conference on the accountability of international organizations in 2004, stated that accountability was “linked to the authority and power of an IO” and that “[p]ower entails accountability, that is the duty to account for its exercise”. According to the ILA, the accountability of IOs was multifaceted, and forms of accountability could include “legal, political,
administrative or financial” accountability.236 Howse, for example, identified four issues that were relevant to the democratic accountability of the WTO: (1) sufficient ‘democratic consent’ underpinning WTO rules, (2) whether the rules of the WTO enhanced or undermined democracy, (3) justification for a pre-commitment to WTO rules which could be binding on future majorities in a member State, and (4) whether ‘behaviors and attitudes’ within the WTO were reflective of democratic values.237

According to Crawford, whilst ‘accountability’ and ‘responsibility’ are terms which tend to be used interchangeably, responsibility is more narrowly limited to the ‘legal relations’ arising from internationally wrongful acts, whilst accountability relates to “wider forms of answerability” which include “financial, political and administrative” accountability.238 Consequently, this thesis discusses the consequences of sub-conferrals of powers between IGOs in relation to their international responsibility for wrongful acts.

International responsibility relates to the IGO’s breaches of its obligations under international law.239 Hence, the ILC in its First Report on the Responsibility of International Organizations for example, excludes from DARIO matters relating to civil liability before municipal courts240, as they arise from “acts not prohibited in international law”241, whereas international responsibility relates to acts which are wrongful in international law242.

236 Ibid.
239 Schermers and Blokker, above n 2, 1005.
International Legal Personality and the International Responsibility of IGOs

The ILC has noted that international responsibility can only arise for subjects of international law, and consequently, primary obligations and secondary obligations arising from the breach of primary obligations can only be imposed on entities with international legal personality. Conversely, entities with even one obligation under international law must be considered subjects of international law. Therefore, where an IGO has an obligation under international law, there also exists the question of its international responsibility.

When an IGO has legal personality it becomes a separate legal person from its member States and not just the sum of its member States, with its own rights and obligations. Therefore responsibility for international wrongful acts committed by the IGO are attributable directly to the IGO rather than to its member States.

As discussed above, the ICJ in the Reparation case recognized that an IGO has international legal personality separate from that of its member States. The objective legal personality of the IGO, separate from its member States, was also confirmed by Krylov J in his dissenting opinion when he stated that “[i]t is true that the non-member States cannot fail to recognize the existence of the United Nations as an objective fact”. In addition, in the WHO Agreement case, the Court stated that:

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246 Amerasinghe, above n 19, 390.
247 Schermers and Blokker, above n 2, 1006; Giorgio Gaja, Special Rapporteur, *First Report on Responsibility of International Organizations*, UN Doc A/CN.4/532 (26 March 2003), 15 [27].
248 Above Section 2.1.
International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.250

Consequently, according to Sands and Klein, it is now well established that IGOs which have international legal personality are responsible for their own breaches of international obligations.251

4.3.2 The International Responsibility of IGOs and DARIO

Pursuant to Art 3 DARIO, “[e]very internationally wrongful act of an international organization entails the international responsibility of the international organization”.252 According to Art 4 DARIO there are two elements constituting an internationally wrongful act relating to the IGO’s action or omission in its conduct.253 First, the wrongful act is attributable to the IGO in international law254, and second, the wrongful act consists of a breach of the IGO’s international obligation255. Pursuant to Art 10(1) DARIO, a breach of an international obligation occurs when “an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned”.256

251 Sands and Klein, above n 26, 523.
4.3.2.1 The Attribution of Responsibility to IGOs

IGOs may attract the attribution of responsibility for internationally wrongful acts either in their own right or as a consequence of the actions of other IGOs. First, as discussed above, an IGO is responsible for its own internationally wrongful act.\textsuperscript{257} Second, pursuant to Arts 6 to 8 DARIO, an IGO can be responsible for the internationally wrongful acts of its organs or agents, or for the internationally wrongful acts of organs and agents placed at its disposal, in carrying out their functions.\textsuperscript{258} Pursuant to Art 9 DARIO, conduct which doesn’t fall under Arts 6 to 8 DARIO can still be considered an act of the IGO “if and to the extent” that the IGO “acknowledges and adopts” it as its own.\textsuperscript{259} Third, an IGO may be attributed with responsibility for an internationally wrongful act of another IGO jointly or in parallel.\textsuperscript{260} In this situation however, the attribution of responsibility to an IGO for the wrongful act of another IGO arises as a result of the IGO’s own conduct, as will be seen below. Under this category, an IGO which hides behind its members in order to avoid its own obligations also incurs international responsibility.\textsuperscript{261} Fourth, an IGO may incur responsibility for the actions of another IGO of which it is a member.\textsuperscript{262}

\begin{itemize}
\item \textsuperscript{257} Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 52 art 3.
\item \textsuperscript{258} Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 52 arts 6, 7 and 8.
\item \textsuperscript{259} Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 52 art 9.
\item \textsuperscript{260} Klein, above n 213, 306-313; Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 52 arts 14 to 17.
\item \textsuperscript{261} Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 52 art 17.
\item \textsuperscript{262} Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 52 arts 18, 61 and 62.
\end{itemize}
An IGO can be attributed with the responsibility for the conduct of its organs or agents, or organs and agents placed at its disposal if it exercises effective control over their conduct. In the Cumaraswamy advisory opinion, the ICJ held that:

…compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity…The United Nations may be required to bear responsibility for the damage arising from such acts.

This is reflected in Art 6(1) DARIO, which states that:

The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.

According to the ILC, in practice and also in some legal instruments, the focus is often on the attribution of responsibility instead of on the attribution of conduct. As stated above, pursuant to Art 3 DARIO, an internationally wrongful act of an IGO entails its

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international responsibility\textsuperscript{268}, of which the attribution of conduct is one of the elements
determining whether the IGO has committed the internationally wrongful act\textsuperscript{269}. Accordingly, Arts 6 to 9 DARIO provide for the attribution of conduct to an IGO for the acts of its organs and agents, rather than for the attribution of responsibility to the IGO.\textsuperscript{270}

DARIO has defined an organ of an IGO as any person or entity which is accorded that status by the rules of the IGO.\textsuperscript{271} An agent is defined in Art 2(d) DARIO to mean “an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts”.\textsuperscript{272}

According to Klein, in order for the wrongful conduct to be attributed to the IGO, two elements have to be present: (1) ‘formal organic links’ between the IGO and its organ or agent and/or (2) effective control by the IGO over the organ or agent.\textsuperscript{273} Evidence of formal organic links between an IGO and its organs include for example, constituent documents or resolutions creating the organs.\textsuperscript{274} Formal organic links between an IGO and its agents are evidenced by, for example, personnel regulations or legal instruments relating specifically to certain activities of the IGO, such as mandates for peacekeeping missions.\textsuperscript{275}

\textsuperscript{268} Above Section 4.3.2.
\textsuperscript{270} Commentary to the Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 67, 16 [3].
\textsuperscript{271} Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 52 art 2(c).
\textsuperscript{272} Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 52 art 2(d).
\textsuperscript{273} Klein, above n 213, 298-301.
\textsuperscript{274} Ibid 298.
\textsuperscript{275} Ibid.
Effective control on the other hand is based on fact and assessed on a case-by-case basis.\(^{276}\) It is limited in DARIO to the attribution of the conduct of organs and agents placed at the disposal of the IGO.\(^ {277}\) According to the ILC, unlike the issue of control in the international responsibility of States, where control is a criterion for determining whether conduct is attributable to a State, in DARIO control is a criterion for determining whether conduct is attributed to the contributing State or IGO or to the receiving IGO.\(^ {278}\)

Pursuant to Art 7 DARIO, the conduct of organs of States or the organs or agents of other IGOs placed at the disposal of an IGO, are attributable to the receiving IGO if it “exercises effective control over that conduct”.\(^ {279}\) However, control does not exist where powers are merely delegated without operational control over the use of those powers.\(^ {280}\) In the 2007 cases of \textit{Behrami v France} and \textit{Saramati v France}\(^ {281}\), the European Court of Human Rights (ECtHR) considered whether “ultimate authority and control” had been retained by the UN Security Council such that only “operational command” over the Kosovo Force (KFOR) had been delegated to NATO.\(^ {282}\) On

\(^{276}\) Ibid 300.

\(^{277}\) Ibid 301.


\(^{281}\) \textit{Agim Behrami and Bekir Behrami v France; Ruzhdi Saramati v France, Germany and Norway}, ECt HR (Grand Chamber), Decision as to Admissibility (Application Nos 71412/01; 78166/01) (2 May 2007). This case is discussed further in Chapter Four. In \textit{Behrami}, a boy was killed and his brother seriously injured by an undetonated cluster bomb which had been dropped during the NATO air strikes in 1999, and in \textit{Saramati} the applicant had been arrested by UNMIK police and detained by KFOR. One of the issues that the ECtHR had to decide was whether the conduct of KFOR was attributable to the UN or to NATO.

\(^{282}\) \textit{Agim Behrami and Bekir Behrami v France; Ruzhdi Saramati v France, Germany and Norway}, ECt HR (Grand Chamber), Decision as to Admissibility (Application Nos 71412/01; 78166/01) (2 May 2007), [133] and [135].
concluding that this was the case\textsuperscript{283}, the Court attributed the ‘impugned action’ to the UN\textsuperscript{284}. According to Sands and Klein, this decision by the ECtHR has been criticized, because attribution has traditionally been based on effectiveness.\textsuperscript{285} Sari, for example, states that whilst the UN Security Council might have retained ultimate authority and control in order to “render the delegation of its powers lawful under the Charter”, the ECtHR should have considered whether the Security Council exercised a level of control over KFOR such that KFOR’s conduct was attributable to it, the level of necessary control being that of effective control.\textsuperscript{286}

Finally, pursuant to Art 9 DARIO, where conduct may not have been attributable to an IGO pursuant to Arts 6 to 8 DARIO (the conduct of organs and agents), it may nevertheless be attributed to the IGO if the IGO “acknowledges and adopts” that conduct as its own.\textsuperscript{287}

The EC for example, declared to a WTO Panel in \textit{European Communities – Customs Classification of Certain Computer Equipment}, that it was:

ready to assume the entire international responsibility for all measures in the area of tariff concessions, whether the measure complained about has been taken at the EC level or at the level of Member States.\textsuperscript{288}

\textsuperscript{283} Agim Behrami and Bekir Behrami v France; Ruzhdi Saramati v France, Germany and Norway, ECtHR (Grand Chamber), Decision as to Admissibility (Application Nos 71412/01; 78166/01) (2 May 2007), [134].
\textsuperscript{284} Agim Behrami and Bekir Behrami v France; Ruzhdi Saramati v France, Germany and Norway, ECtHR (Grand Chamber), Decision as to Admissibility (Application Nos 71412/01; 78166/01) (2 May 2007), [141].
\textsuperscript{285} Sands and Klein, above n 26, 525-526.
\textsuperscript{288} Unpublished document, Oral pleading of the European Community before a WTO Panel in \textit{European Communities – Customs Classification of Certain Computer Equipment}, quoted in Commentary to the
However, according the ILC, it was unclear whether the EC was acknowledging the attribution to itself of conduct or of responsibility.\textsuperscript{289} As discussed above, the attribution of conduct and not responsibility, is one of the elements in determining an internationally wrongful act of an IGO.\textsuperscript{290}

In \textit{Prosecutor v Nikolic}, heard by the International Criminal Tribunal for the former Yugoslavia\textsuperscript{291}, it was alleged that Nikolic had been kidnapped from Serbia and subsequently delivered to the Stabilization Force (SFOR) in Bosnia and Herzegovina, which arrested and detained him.\textsuperscript{292} According to the ILC, an issue in question was whether the arrest of Nikolic was attributable to SFOR.\textsuperscript{293} Although the Trial Chamber concluded in this case that SFOR had not acknowledged or adopted the illegal conduct as its own\textsuperscript{294}, the Chamber identified the relevant question as being “whether on the basis of the assumed facts SFOR …[could]… be considered to have “acknowledged and adopted” the conduct undertaken by the individuals “as its own”.”\textsuperscript{295}


\textsuperscript{291} International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the former Yugoslavia since 1991.

\textsuperscript{292} \textit{Prosecutor v Nikolic (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal)} ICTY (Trial Chamber II) Case No IT-94-2-PT (9 October 2002), [15].

\textsuperscript{293} Commentary to the Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 67, 30 [4].

\textsuperscript{294} \textit{Prosecutor v Nikolic (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal)} ICTY (Trial Chamber II) Case No IT-94-2-PT (9 October 2002), [66]-[67].

\textsuperscript{295} \textit{Prosecutor v Nikolic (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal)} ICTY (Trial Chamber II) Case No IT-94-2-PT (9 October 2002), [64].
Joint or Parallel Responsibility of an IGO with States or other IGOs

(Art 14 to 17 DARIO)

Arts 14 to 17 DARIO provide for the responsibility of an IGO for internationally wrongful acts committed in connection with a State or another IGO. In its Third Report on Responsibility of International Organizations in 2005, the ILC considered that whilst there was not much practice relating to such types of situations, it was not completely unlikely that international responsibility arising for IGOs under such circumstances could arise. Consequently, Arts 14 to 17 DARIO provide for situations where an IGO “assists or aids, directs and controls, or coerces another organization or a State in the commission of an internationally wrongful act”. In other words, the responsibility arises from the IGO’s own act which is connected to the wrongful act of a State or another IGO.

Although joint or parallel responsibility is not limited to situations where there has been a sub-conferral of powers, it can nevertheless arise in those circumstances. For example, in Legality of Use of Force (Yugoslavia v. France), France argued that acts of the French contingent in KFOR had been carried out under the direction and control of NATO, and under the control of the UN, which had authorized and monitored the deployment of KFOR, and therefore responsibility lay with NATO and the UN. Similarly, Art 18 DARIO discussed below, provides for the eventuality where an IGO which is a member of another IGO may be attributed with responsibility for a wrongful act.

296 Commentary to the Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 67, Ch IV.
299 See also Klein, above n 213, 306.
301 Below Section 4.3.2.1 (iii).
Aiding or assisting in an internationally wrongful act

Pursuant to Art 14 DARIO, an IGO is responsible for aiding and assisting a State or another IGO in commissioning an internationally wrongful act if it knew the circumstances of the wrongful act\(^\text{302}\) and the act would be wrongful if it was committed by the aiding IGO itself\(^\text{303}\). For example, an IGO may be considered to have assisted or aided a wrongful act by offering financial assistance to another IGO in circumstances which infringed human rights.\(^\text{304}\)

Direction and control in an internationally wrongful act

Pursuant to Art 15 DARIO, an IGO is internationally responsible for a wrongful act if it directed and controlled a State or another IGO in commissioning that act, where it knew the circumstances of the wrongful act\(^\text{305}\) and the act would be internationally wrongful if committed by the controlling IGO itself\(^\text{306}\).

Thus as discussed above, France had argued in *Legality of Use of Force (Yugoslavia v France)*, that responsibility lay with NATO and the UN, which had exercised direction and control over the French contingent in Kosovo.\(^\text{307}\) According to the ILC, if KFOR was an IGO, then an example of alleged direction and control over it in the commission of an internationally wrongful act, may be found in France’s argument.\(^\text{308}\) According to

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\(^\text{307}\) Above Section 4.3.2.1 (ii).
France, NATO had created KFOR and participated substantially in it, as well as exerting a “unified command and control” over it, and that KFOR had been deployed in Kosovo through the auspices of the UN.309 It argued that the responsibility for wrongful acts committed by KFOR in Kosovo should therefore be attributed to NATO and the UN, since “NATO…[was]…responsible for the “direction” of KFOR and the United Nations for “control” of it”.310 It should be noted that this was only France’s opinion, and that the ICJ did not reach a decision on this issue.

Coercing another IGO in an internationally wrongful act

Under Art 16 DARIO, a coercing IGO is responsible for an internationally wrongful act if the act would be an internationally wrongful act of the State and IGO being coerced but for the coercion311 and if the coercing IGO knows the circumstances of the wrongful act.312

According to the ILC, a hypothetical example of coercion by an IGO in the commission of an internationally wrongful act “would be that of an international financial organization imposing strict conditions for an essential loan and thereby coercing the recipient State to infringe obligations towards another State or certain individuals”.313

Circumvention of International Obligations

Under Art 17 DARIO, an IGO is internationally responsible if it circumvents an international obligation by adopting a decision that binds its members to commit an act

309 Legality of Use of Force (Yugoslavia v France) (Preliminary Objections) [2000] ICJ Rep, 32 [43].
310 Legality of Use of Force (Yugoslavia v France) (Preliminary Objections) [2000] ICJ Rep, 33 [46].
311 Art 16(a), DARIO.
312 Art 16(b), DARIO.
that would be internationally wrongful if it committed that act itself\textsuperscript{314}, or if it authorizes its members to commit an act that would be internationally wrongful if it committed that act itself, and if the members commit that act because of the IGO’s authorization\textsuperscript{315}. According to the ILC, there is an implication in the term ‘circumvention’ of “an intention on the part of the international organization to take advantage of the separate legal personality of its members in order to avoid compliance with an international obligation”.\textsuperscript{316}

‘Co-authoring’ an internationally wrongful act

In addition to the types of joint or parallel responsibility discussed above, Klein identifies another circumstance whereby a State (or an IGO by analogy) which is a member of an IGO is the ‘co-author’ of the wrongful act with the IGO:

Activities carried out jointly by an international organization and one or several of its member State(s) may give rise to violations of international obligations binding both the organization and its members. In such a situation, the organization and the State(s) would be co-authors of the wrongful act, and that act could be attributed to one or the other.\textsuperscript{317}

Consequently, responsibility for failing to prevent or end the 1994 Rwandan genocide could perhaps be attributed to the UN as well as its member States “where neither the

\textsuperscript{314} Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 52 art 17(1).

\textsuperscript{315} Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 52 art 17(2).


\textsuperscript{317} Klein, above n 213, 307.
organization nor its members had adopted measures sufficient to prevent the genocide”.[318]

In Bankovic v Belgium, several of NATO’s member States appeared before the ECtHR for complaints against NATO’s airstrikes over the Federal Republic of Yugoslavia (FRY).[319] The Court concluded that there wasn’t a jurisdictional link between the victims of the bombings and the respondent States.[320] In the proceedings France had argued that “the bombardment was not imputable to the respondent States but to NATO, an organisation with an international legal personality separate from that of the respondent States”.[321] However, NATO was not party to the European Convention on Human Rights (ECHR).[322] According to Schermers and Blokker therefore, “this is a legal vacuum…[and]…implies the need for member states to closely stay involved in all relevant decision-making in the organization, as they may later be held (co)responsible for its actions”.[323]

(iii) Responsibility incurred as a Member of another IGO

Art 18 DARIO provides that an IGO may also incur responsibility for the actions of another IGO of which it is a member, pursuant to conditions described in Arts 61 and 62 DARIO.[324]

Art 61 DARIO provides against the circumvention of international obligations of State members of IGOs.[325] Sands & Klein have described this responsibility as “an

[318] Ibid.
[319] Bankovic v Belgium (Admissibility) [2001] ECtHR 890 Application No 52207/99, [28].
[320] Bankovic v Belgium (Admissibility) [2001] ECtHR 890 Application No 52207/99, [82].
[321] Bankovic v Belgium (Admissibility) [2001] ECtHR 890 Application No 52207/99, [32].
[322] Schermers and Blokker, above n 2, 1010.
[323] Ibid 1010-1011.
obligation of due diligence, which compels…[members of IGOs]…to make sure that the transfer of competences to the organisation does not allow them to avoid their responsibilities under international law”  

According to Klein, due diligence obligations may also require member States to ensure that the IGO complies with its international obligations.  

In Bosphorus Hava Yollary v Ireland, the ECtHR said in establishing the degree to which a State’s action could be justified by its obligations as a member of an IGO to which it had transferred a part of its sovereignty, that:

> absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention; the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards... 

Art 62 DARIO provides that a State member is responsible for an internationally wrongful act of the IGO if the State member has accepted responsibility for that act or if the injured party has been led by the State member to rely on the State member’s responsibility. Under this provision, international responsibility only occurs for member States which accept that responsibility or where their actions led to a reliance on their responsibility.

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326 Sands and Klein, above n 26, 530.  
327 Klein, above n 213, 313.  
328 Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland [2005] VI ECtHR 109, 157 [154].  
329 Art 62(1)(a), DARIO.  
330 Art 62(1)(b), DARIO.  
When an IGO becomes a member of another IGO, it sub-confers some of its powers to the IGO of which it becomes a member, in the same way that a member State confers some of its powers to an IGO. Consequently, Art 18 DARIO provides that it is “without prejudice to articles 14 to 17” DARIO, because an IGO that is a member of another IGO can take actions for which it can be attributed joint or parallel responsibility. The responsibility of member IGOs may also arise in other additional circumstances specifically relating to its membership, although according to the ILC, there is as yet “no known practice relating to the responsibility of international organizations as members of another international organization”.

5.0 CONCLUSION

This chapter examined the applicability of the Sarooshi Typology to the sub-conferral of powers between IGOs by first considering the nature of the legal personalities of IGOs and the nature of the powers they may exercise. It then considered whether IGOs had the competence to sub-confer powers, whether the dynamics of the contestation of powers would also arise in the exercise of sub-conferred powers, and finally what legal consequences of international responsibility an IGO may incur from sub-conferring powers.

It concluded firstly that IGOs had the competence to sub-confer powers within the boundaries of strict limitations. IGOs also had the capacity to conclude treaties, and it
was through this process predominantly but also through other international legal instruments, that they sub-conferred their powers.

Second, having been vested with international legal personality and powers to carry out specific duties and functions, IGOs sometimes experience conflicts resulting from overlaps of their jurisdictions. Since they contest and protect the jurisdictions which have been conferred on them by States, it could be said that IGOs contest the exercise of their powers. Art 103 of the UN Charter for example, which provides for members’ obligations under the Charter to prevail if there are conflicts with their obligations under other international agreements, results in the UN having priority over other IGOs where there are conflicts or overlaps in their jurisdictions.

Third, whilst the law relating to the international responsibility of IGOs is not fully developed, there is a growing recognition that IGOs may be responsible, first for their own internationally wrongful acts, and second for internationally wrongful acts of other IGOs. IGOs may for example, be attributed with responsibility for the wrongful acts of their organs or agents, jointly or in parallel with other States or IGOs, and also through their membership of other IGOs.

Having established that IGOs can sub-confer powers and contest the exercise of those powers, as well as incur international responsibility for wrongful acts, the next three chapters will examine the application of the types of conferrals of powers in the Sarooshi Typology. Agency powers are discussed in Chapter Four in the case study of the peacekeeping activities of the UN and NATO in Kosovo. Delegations of powers are considered in Chapter Five, in relation to inspections for weapons of mass destruction in
Iraq by the UN and the IAEA. Transfers of powers are examined in Chapter Six in relation to the EU’s long running Banana case in the WTO.
CHAPTER FOUR
AGENCY RELATIONSHIPS

1.0 INTRODUCTION

This chapter examines the applicability of agency powers from the Sarooshi Typology to a sub-conferral of powers between IGOs. Agency powers consist of the smallest degree of conferral of powers in the Sarooshi Typology. Like all conferrals of powers in the Typology, they reflect an underlying contestation of powers between the entities involved in the conferral. In the Sarooshi Typology, the contestation is between States which have conferred powers on IGOs, whilst in this thesis, the contestation is between sub-conferror and sub-conferee IGOs.

In examining the sub-conferral of agency powers, this chapter examines the case study of a sub-conferral of peacekeeping powers from the UN to the NATO in Kosovo in the late 1990s, in relation to post-conflict peacekeeping in Kosovo. The case study examines whether the elements of a conferral of agency powers on the Sarooshi Typology can be applied to the sub-conferral of powers between the UN and NATO. It explores the possibility of a contestation of these powers between the two IGOs in the exercise of these powers, and discusses the potential for the responsibility for wrongful acts committed by conferree IGOs to be attributed to conferror IGOs.

As discussed in chapter 3, whilst States are sovereign entities, IGOs are not. The powers conferred on IGOs by States are powers that enable the IGOs to carry out their duties and functions in order to fulfil the purposes for which those powers have been conferred. Consequently, IGOs may be said to exercise ‘sovereign powers’ in the sense

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\[1\] Chapter 3, Section 2.0.
that their exercise of conferred powers must be in accordance with the sovereign values of the conferring States.² It is in this sense that sub-conferred powers are considered in the following case study and in the case studies in chapters 5 and 6.

Section 2 below is a summary of the characteristics of agency powers in the Sarooshi Typology. Section 3 discusses the basis and background of the agency relationship between the UN and NATO in Kosovo. Section 4 discusses the applicability of the Sarooshi Typology to the agency relationship between the UN and NATO in relation to the elements of a sub-conferral of agency powers, the contestation between the UN and NATO in the exercise of those powers, the consequences that could arise from the sub-conferral of those powers, and the measures that are available to the UN if it disagrees with NATO’s exercise of the sub-conferred powers.

2.0 THE SAROOSHI TYPOLOGY: SUMMARY OF AN AGENCY RELATIONSHIP BETWEEN A STATE AND AN INTERGOVERNMENTAL ORGANIZATION

According to Professor Sarooshi,³ agency relationships exist in international law, where (1) the principal and agent are both distinct legal entities, and (2) the principal agrees to confer powers on the agent to act on its behalf and the agent consents to act on the principal’s behalf.³ As the agent acts on behalf of the principal, there is a requirement that they are separate legal entities.⁴ The requirement of consent also arises because under international law, the State must consent freely to the agency.⁵

² Chapter 2, Section 2.1.1.
⁴ Ibid 34.
⁵ Ibid 36.
In an agency relationship, “a principal has empowered an agent to act on its behalf to change certain of its rights and duties”. As a consequence, an agent owes a fiduciary duty to its principal to act in the principal’s best interests.

According to Sereni, an agent does not have the power to sub-confer its conferred powers, unless it has been expressly granted by the principal. As argued in sub-section 3.1.3 below, the UN Security Council has been ‘expressly empowered’ to sub-confer its powers to use force in order to enforce international peace and security.

Agency relationships between States and IGOs are not common because IGOs are often set up to act independently of their member States, and consequently there is a general presumption against such agency relationships.

### 2.1 Elements of an Agency Relationship between a State and an IGO

In the Sarooshi Typology, conferral of agency powers have three characteristics: (1) States may revoke those powers at any time, (2) they maintain a direct control over the exercise of those powers by IGOs, and (3) they have the right to exercise those powers concurrently with and independently of the agent IGO.
First, States may revoke the conferred powers at any time because as a separate legal identity from the IGO\(^{16}\) and because of the consensual nature of the agency relationship\(^{17}\), a State cannot be forced to retain another entity as its agent\(^{18}\). The right to revoke a conferred power exists independently of the treaty or agreement establishing the agency relationship\(^{19}\), and is a separate legal issue from a potential breach of treaty arising from a unilateral termination of the treaty\(^{20}\).

Second, whilst a State’s direct control over the exercise of conferred powers by the IGO is not a necessary condition for establishing an agency relationship, control is nevertheless sufficient to establish the State’s implied consent to an agency.\(^{21}\)

Third, States have the right to exercise the conferred powers concurrently with and independently of the agent IGO because a conferral of powers does not necessarily result in the limitation of the State’s competence to exercise those powers\(^{22}\), except where the State has agreed to be bound by the decisions of the IGO, as they have in the category of transfers of powers on the Sarooshi Typology\(^{23}\).

### 2.2 Consequences of an Agency Relationship between a State and an IGO

Professor Sarooshi describes three consequences flowing from an agency relationship between member States and an IGO.\(^{24}\) First, an agent exercising conferred powers can change the legal relationship between the States and third parties, although it will not

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\(^{16}\) Ibid 29.
\(^{17}\) Ibid 41.
\(^{19}\) Ibid 41-42.
\(^{20}\) Ibid 42.
\(^{21}\) Ibid 37.
\(^{22}\) Ibid 59.
\(^{23}\) Ibid.
\(^{24}\) Ibid 50-52.
change the legal relationship between the agent and the third parties. Second, an agent has an obligation or fiduciary duty to act in the interests of the principal, in exercising its conferred powers. Third, where an unlawful act has been committed, the principal is responsible for that act, and in general the agent may also have a ‘joint responsibility’ for that unlawful act. Fiduciary duty is discussed further in chapter 2, and international responsibility in chapter 3.

2.3 MEASURES AVAILABLE TO A STATE IN AN AGENCY RELATIONSHIP BETWEEN A STATE AND AN IGO

According to Professor Sarooshi, conferrors of power in agency relationships have the widest range of measures available to change the way that conferred powers are being exercised, from direct control over the exercise of the conferred powers to the right to amend or revoke the powers at any time. These measures have been discussed in greater detail in chapter 2.

3.0 CASE STUDY: THE AGENCY RELATIONSHIP BETWEEN THE UNITED NATIONS (UN) AND THE NORTH ATLANTIC TREATY ORGANIZATION (NATO) IN KOSOVO - KFOR

Although they embody different strategic purposes and objectives, there have been increasing levels of cooperation and coordination between the UN and NATO globally. This has resulted in part from a convergence between the evolving practices.

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25 Ibid 50.
26 Ibid 51-52.
27 Ibid 50-51.
28 Chapter 2, Section 4.1.
29 Chapter 3, Section 4.3.
30 Sarooshi, above n 3, 109.
31 Ibid 108.
33 Chapter 2, Section 5.0.
of both IGOs, such as the UN’s efforts to connect with regional organizations and NATO’s broadening activities following the end of the Cold War, and has been fostered by initiatives of the UN and NATO leaderships such as the Joint Declaration on UN/NATO Secretariat Cooperation signed by the Secretary-Generals of the UN and NATO on 23 September 2008.

3.1 The United Nations

The idea for the United Nations was developed during the Second World War and as a consequence, one of its main purposes is the maintenance of international peace and security, supported by parallel goals of universal economic and social security for all.

The aims of the United Nations, as stated in the Preamble of the UN Charter, are to protect future generations from the ‘scourge of war’, to affirm human rights and equality for all, to observe justice and respect for obligations under treaties and international law, and to promote “social progress and better standards of life in larger freedom”. In order to do this, the Preamble envisaged the practice of tolerance and peace, unity in maintaining international peace and security, refraining from the use of armed force except in the common interest, and the promotion of economic and social advancement for all.

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38 Charter of the United Nations art 1(1).
40 Charter of the United Nations Preamble.
41 Charter of the United Nations Preamble.
### 3.1.1 The Roles of the Security Council and the General Assembly in the Maintenance of International Peace and Security

Under the Charter of the United Nations, both the Security Council and the General Assembly are vested with responsibility to regulate the use of force.\(^{42}\) The Security Council however, is vested with the primary responsibility for the UN’s peace and security functions pursuant to Art 24(1), which states that:

> In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.\(^{43}\)

Pursuant to Art 25 of the Charter, members of the UN agree to accept and carry out the Security Council’s decisions.\(^{44}\)

The General Assembly, which is made up of “all the Members of the United Nations”\(^{45}\) has a more indirect involvement in the peace and security functions of the organization, defined by Arts 11 and 12 of the Charter. Under Art 11(1) for example, the Assembly may make recommendations to UN Members or to the Security Council regarding principles of co-operation in peace and security internationally, including issues for disarmament and regulation of armaments.\(^{46}\) Under Art 11(3), the Assembly may bring situations which could potentially disrupt international peace and security to the attention of the Security Council.\(^{47}\) Under Art 12(1) of the UN Charter however, the

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\(^{42}\) For example, Charter of the United Nations art 24, art 11 and art 12.

\(^{43}\) Charter of the United Nations art 24(1).

\(^{44}\) Charter of the United Nations art 25.

\(^{45}\) Charter of the United Nations art 9(1).

\(^{46}\) Charter of the United Nations art 11(1).

\(^{47}\) Charter of the United Nations art 11(3).
Assembly may not make recommendations to the Security Council regarding any matter in which the Council is exercising its assigned functions, unless requested by the Council.48

Whilst the General Assembly consists of every Member of the United Nations, the Security Council is made up of fifteen Members, of which five are permanent Members, namely The Republic of China, France, the Soviet Union (now Russia), the United Kingdom, and the United States.49 These five Permanent Members were the “five great-power victors of World War II”.50 Pursuant to Art 27(3) of the Charter51, the five Permanent Members have what has been described as a power of veto over non-procedural matters.52 According to Schlesinger, this is because the Permanent Members were the ‘Big Powers’ which would carry most of the burden for enforcement, and therefore should have the final influence on interventions by the UN.53

Conforti and Focarelli argue that the requirement that all five Permanent Members must concur in non-procedural decision-making means that abstentions by permanent Members are also considered as vetos, and that this could paralyse the Council’s ability to act.54 However, in the Namibia Advisory Opinion the ICJ held that it was accepted practice in the UN that voluntary abstentions by permanent Members did not prevent

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48 Charter of the United Nations art 12(1).
49 Charter of the United Nations art 23(1).
51 Charter of the United Nations art 27(3): “Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concuring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.”.
52 Conforti, Benedetto and Focarelli, Carlo, The Law and Practice of the United Nations (Martinus Nijhoff, 4th revised ed, 2010), 76.
54 Conforti and Focarelli, above n 52, 77.
the adoption of resolutions, and it was by casting a negative vote that the permanent member vetoed a resolution.55

In *Certain Expenses*, the ICJ confirmed that the Security Council’s responsibility pursuant to Art 24 UN Charter is primary but not exclusive, and the reason for the conferral of primary authority on the Security Council was “to ensure prompt and effective action”.56 Yet, vetoes through negative votes by Permanent Members have on occasion effectively paralysed decision-making in the Security Council. In 1950 for example, the Soviet Union’s veto of military assistance to South Korea to repel an invasion by North Korea was widely considered in the General Assembly as effectively paralysing the Security Council’s management of the situation.57

In response the General Assembly passed the Uniting for Peace Resolution58, which permits it to take a more assertive role in the maintenance of international peace and security.59 In Paragraph 1 of the Resolution, the General Assembly recognised the primary responsibility of the Security Council in the maintenance of international peace and security, but where the Council failed to act because of a lack of concurrence by its permanent Members, the General Assembly would make recommendations to Members for collective measures including the use of armed force if necessary.60

59 Uniting for Peace Resolution, UN General Assembly – Fifth Session, GA Res 377 (V) (1950); Chesterman above n 57, 274.
60 Uniting for Peace Resolution, UN General Assembly – Fifth Session, GA Res 377 (V) (1950), [1].
3.1.2 The Peace and Security Functions of the United Nations

The peace and security functions of the United Nations are well enshrined in the Charter of the United Nations, for example in Arts 1 and 2 of the Charter, relating to the purposes and principles of the organization.\(^\text{61}\) As an agreement between member States of the United Nations, the Charter can be said to reflect and legitimise the norms of the United Nations as agreed to by its members, in achieving international peace and security.

According to Pease, the UN is founded on five principles, namely (1) the sovereign equality of member States, (2) the acceptance by member States of international obligations and the bindingness of UN Security Council decisions, (3) the peaceful settlement of disputes, (4) agreement not to threaten to use force against other States, and (5) non-intervention in internal matters of other member States.\(^\text{62}\)

The principles which are binding on the United Nations as well as its member States are articulated in Art 2 of the Charter\(^\text{63}\), and given authority by Art 2(2) of the Charter, whereby Members undertake to “fulfill in good faith” their obligations under the Charter.\(^\text{64}\)

The norm of sovereign equality of all its members on which the UN is founded, is expressly stated in Art 2(1)\(^\text{65}\) and reinforced by Art 2(7), a non-intervention provision which prohibits the United Nations from intervening in domestic matters, with the

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\(^\text{61}\) Charter of the United Nations arts 1 and 2 constitute “Chapter 1: Purposes and Principles”.

\(^\text{62}\) Pease, above n 50, 22.

\(^\text{63}\) Brownlie, Ian, Principles of Public International Law (Oxford University Press, 7th ed, 2008), 731.

\(^\text{64}\) Charter of the United Nations art 2(2): “All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.”.

exception of enforcement measures authorized by Chapter VII of the Charter. Art 2(3) provides that all international disputes between its Members shall be settled peacefully, and Art 2(6) requires that the United Nations ensures that non-member States also maintain international peace and security.

The prohibition of the threat or use of force by UN Members has been described as the cornerstone of the Charter, and is provided for in Art 2(4) which states that:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Nevertheless, there are a number of exceptions to the prohibition of the threat or use of force, in particular the exceptions whereby the UN Security Council may use force to “maintain or restore international peace and security”, in collective self-defence, in individual self-defence, and where the Security Council authorizes “regional agencies or arrangements” to use force in the maintenance of international peace and security.

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67 Charter of the United Nations art 2(3): “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”.
68 Charter of the United Nations art 2(6): “The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.”.
69 Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment) [2005] ICJ Rep 168, [148]: “The prohibition against the use of force is a cornerstone of the United Nations Charter. Article 2, paragraph 4, of the Charter requires that: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”. Also Brierly, The Law of Nations (6th ed, by Waldoc, 1963), 414, quoted in Brownlie, above n 63, 732.
70 Charter of the United Nations art 2(4).
71 O’Connell, Mary Ellen, ‘The UN, NATO, and International Law After Kosovo’ (2000) 22(1) Human Rights Quarterly 57, 58-73. For example, Charter of the United Nations art 51 authorizes the use of force in ‘individual or collective self-defence’ and arts 39 and 42 permit the use of force with the authorization of the Security Council.
72 Charter of the United Nations art 42.
73 Charter of the United Nations art 51. This exception is not relevant to the discussion in this case study.
74 Charter of the United Nations art 51.
75 Charter of the United Nations art 53(1).
(i) Security Council Authorization to Use Force

Chapter VII of the UN Charter (Arts 39 to 51 UN Charter) provides the UN Security Council with the powers to authorize measures which include the use of force, in order to maintain international peace and security. Pursuant to Art 39, the Security Council has the authority to decide whether there has been a threat to or breach of peace and what measures to take in accordance with Arts 41 and 42 of the Charter, to maintain and restore international peace and security:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Art 41 authorizes the Security Council to decide upon measures not involving the use of armed force such as economic, transport, communication and diplomatic measures, and to call upon members of the UN to apply such measures. Under Art 42, the Security Council may take more forceful action including operations by armed forces provided by UN Members. Art 43 UN Charter requires UN member States to make available to

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78 Charter of the United Nations art 41: “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”.
79 Charter of the United Nations art 42: “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”.
the Security Council, various resources necessary for the maintenance of international peace and security. Art 43(1) UN Charter for example, provides that:

All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

According to Franck, there has never been a “stand-by police force” available to the Security Council, envisaged by Art 43 of the Charter. Instead, the Security Council has adapted the text of Art 43 to authorize what has come to be called a “coalition of the willing”, to use force collectively. Hence, for example, when Iraq invaded Kuwait in 1990, the Security Council found that there was a “breach of international peace and security”, and adopted Security Council Resolution 678 which invoked Chapter VII of the Charter and authorized UN member States “to use all necessary means…to restore international peace and security in the area”. Authorizations by the Security Council such as these, for coalitions of the willing to use collective force, have become established practice in the UN.

According to Blokker therefore, the power of the Security Council to authorize the use of force is not pursuant to an express power that the Security Council possesses.

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80 Charter of the United Nations art 43.
81 Charter of the United Nations art 43(1).
83 Ibid 54 and 57.
84 SC Res 660, UN SCOR, 2932nd mtg, UN Doc S/RES/660 (2 August 1990).
85 SC Res 678, UN SCOR, 2963rd mtg, UN Doc S/RES/678 (29 November 1990), [2].
87 Blokker, above n 86, 547.
Whilst the Security Council has the express power of military enforcement pursuant to Arts 42 and 43 of the UN Charter, it has through necessity implied the power to authorize member States for example, to use those powers of military enforcement, in order that it can fulfil its functions of maintaining international peace and security. Consequently, sub-conferrals of powers to use force may flow from implied powers rather than express powers of the Security Council to engage in military enforcement.

According to Sloan, if the Security Council was able to exercise an implied power, the Council would still be subject to the same restrictions or limitations on its powers contained in the UN Charter. In addition, if the Security Council’s implied power is based on or is similar to one of its express powers, the limitations and prerequisites of the express power must also apply to the implied power.

It has similarly been the view of the ECJ in the Kadi case for example, that the powers of the UN Security Council to maintain international peace and security are not unlimited. The Kadi case related to the European Community (EC) regulations adopted following UN Security Council resolutions imposing sanctions on assets of terrorists, which resulted in financial restrictions on Kadi and Al Barakaat International Foundation. The ECJ (Grand Chamber) said that “it…[was]…not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms…[was]…excluded by virtue of the fact that that measure…[was]…intended to give effect to a resolution of the Security Council

88 Ibid.
90 Ibid 113.
91 Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities (Court of Justice of the European Communities, Joined Cases C-402/05 P and C-415/05 P, 3 September 2008), [13]-[45].
adopted under Chapter VII of the Charter of the United Nations”.

As such, even the EC’s obligations under UN Security Council resolutions do not preclude the ECJ from reviewing the EC’s actions resulting from those Security Council resolutions, in the light of human rights obligations.

(ii) Individual or Collective Self-Defence

The second exception to the prohibition of the use of force is in self-defence. Art 51 UN Charter authorizes the use of force, with conditions, in individual or collective self-defence if a member of the United Nations is under an armed attack. The use of force in self-defence must be reported immediately to the Security Council, and is authorized only until the Security Council has intervened in the aggression. The authority and responsibility of the Security Council for matters relating to international peace and security is specifically maintained in Art 51.

(iii) Use and Authorization of Regional Arrangements to Enforce Peace and Security

The third exception to the prohibition of the use of force exists when the Security Council authorizes regional arrangements to use force to maintain and enforce international peace and security. Chapter VIII of the UN Charter (Arts 52 to 52 UN Charter) provides for the Security Council to authorize regional arrangements to assist in the maintenance of peace and security. Pursuant to Art 53(1) for example, the Security Council may utilize regional arrangements or agencies for enforcement purposes under

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92 Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities (Court of Justice of the European Communities, Joined Cases C-402/05 P and C-415/05 P, 3 September 2008), [299].
93 Charter of the United Nations art 51.
94 Charter of the United Nations art 51.
95 Charter of the United Nations art 51 states that the use of force in self-defence “shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”.
its authority. The use of regional arrangements was a recognition by the drafters of the Charter of the effectiveness of dealing with regional problems with regional solutions, whilst maintaining the UN’s universal approach to global problems.

3.1.3 The Ability of the Security Council to Sub-conferr its Powers to Use Force

According to Mitchell and Beard, the character of a Security Council authorization for a member State to use force is permissive rather than a conferral of powers. The following discussion however, argues instead that the authorization to use force pursuant to a Security Council resolution is actually a sub-conferral of powers, rather than permission to use force.

Mitchell and Beard state two reasons for their view that the authorizations are permissive. First, a Permanent member, through its powers of veto, can block the subsequent modification, suspension or termination of the authorization, and as such, “a fundamental element of the delegation of powers is missing” from the authorization. According to Schermers and Blokker however, decisions by IGOs can be terminated, replaced, revised or revoked:

Some decisions are taken for a specific period of time or with the objective of realizing a particular aim. They come to an end at the end of this period of time or when their aim has been realized. Other decisions are intended to remain in

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97 Charter of the United Nations art 53(1).
98 Pease, above n 50, 22.
99 Ibid 22; O’Connell, above n 71, 62.
100 Mitchell, Andrew & Beard, Jennifer, International Law in Principle (Thomas Reuters, 2009), 216.
101 Ibid.
force until replaced, revised or revoked. As a rule, organizations that can make rules can also amend or revoke them…

Consequently, whilst a Permanent Member may have the right to veto changes to a sub-conferral of powers to use force, in principle the Security Council has the ability to alter its decision relating to that conferral of powers.

Mitchell and Beard’s second reason for arguing that a Security Council authorization to use force is permissive rather than a conferral of powers, is based on the doctrine of non-delegation. According to them, “the Security Council cannot delegate ‘back’ powers that have been conferred on it by member states through Chapter VII of the UN Charter”. In other words, Mitchell and Beard are arguing that since the Security Council’s Chapter VII powers were conferred on it by UN member States, the Security Council may be prohibited from sub-conferring those powers to use force back to the member States, for example to act in a situation where international peace and security may be threatened. According to Professor Sarooshi however, the non-delegation doctrine “deals with the extent to which the exercise of a power entrusted to an authority may be delegated to another entity”. The principle of non-delegation as described by De Smith, Woolf & Jowell, and quoted by Professor Sarooshi is as follows:

A discretionary authority must, in general, be exercised only by the authority to which it has been committed. It is a well-known principle of law that when a power has been confided to a person in circumstances indicating that trust is

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103 Mitchell and Beard, above n 100, 216.

104 Ibid.

being placed in his individual judgment and discretion, he must exercise that
power personally unless he has been expressly empowered to delegate it to
another….It applies to the delegation of all classes of powers…106

As such, under the doctrine of non-delegation the Security Council, which has been
conferred with powers to use force, can sub-confer those powers to either a member
State or another IGO, provided that the Security Council has been ‘expressly
empowered’ to do so. Some of the provisions in Chapter VII of the Charter suggest that
the Security Council has been given such express empowerment. Pursuant to Art 41 for
example, the Security Council is empowered to call upon members of the UN to apply
measures not involving armed force, which it has decided upon.107 Pursuant to Art 42,
the Security Council may take forceful action through forces provided by UN member
States.108 In addition, Art 48(2) clearly provides for the involvement of UN member
States and through them, international agencies, in carrying out the decisions of the
Security Council:

Such decisions shall be carried out by the Members of the United Nations
directly and through their action in the appropriate international agencies of
which they are members.109

As such, it would appear that the intention of the signatories to the UN Charter is for the
Security Council to be able to sub-confer its powers to use force to enforce international
peace and security, on member States or international agencies.

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107 Charter of the United Nations art 41.
108 Charter of the United Nations art 42.
109 Charter of the United Nations art 48(2).
According to Professor Sarooshi, the distinction between permission or authorization and a conferral of powers, lies in whether the entity has been given the “power of discretionary decision making”:

An authorization…may represent the conferring on an entity of a very limited right to exercise a power, or part thereof; or the conferring on an entity of the right to exercise a power it already possesses, but the exercise of which is conditional on an authorization that triggers the competence of the entity to use the power. While the case of a delegation will usually represent an unencumbered right to exercise the same power as the delegator: in many cases a power of broad discretion. It is this single characteristic of a delegation of power – the transfer of a power of discretionary decision making – that allows it to be distinguished in general terms from an authorization…In the case of an authorization by the Council of States to use force, the Council is not, in legal terms, simply making an authorization, but…is in fact delegating to Member States its Chapter VII powers.\footnote{Sarooshi, above n 105, 13. Professor Sarooshi’s use of the terms ‘delegation of power’ and ‘transfer of power’ in this quote is not necessarily similar to the categories of delegation and transfer of powers in his Typology.}

Chapter VII provisions such as Arts 42 and 48(2) discussed above for example, suggest that the powers given to member States and international agencies by the Security Council in those provisions, contain a large degree of autonomy, and as such, they are arguably sub-conferrals of powers by the Security Council. In the Iraq crisis of 2003 for instance, para 13 of Security Council Resolution 1511 (2003) “authorize[d] a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq”, whilst para 14 urged “Member States to contribute assistance under this United Nations mandate, including military
forces, to the multinational force”\(^{111}\). In a similar manner, para 4 of Security Council Resolution 816 (1993) contained an authorization for UN member States “acting nationally or through regional organizations or arrangements to take...all necessary measures in the airspace of the Republic of Bosnia and Herzegovina, in the event of further violations, to ensure compliance with the ban on flights”, whilst para 7 requested that the member States inform the UN Secretary-General “immediately of any actions they take in exercise of the authority conferred by paragraph 4”\(^{112}\), that is, after the decisions and actions had already been taken. The wording and the actions authorized in both these resolutions suggest a high degree of autonomy and discretion vested in the member States and regional organizations, suggesting that they were sub-conferrals of powers from the Security Council to use force to enforce international peace and security.

3.2 The North Atlantic Treaty Organization (NATO)

NATO is an alliance of European and North American countries, with the fundamental role of “safeguard[ing] the freedom and security of its member countries by political and military means”\(^{113}\). Formed after World War II, it was initially intended as a military alliance to defend Western Europe and North America against the Soviet Union\(^{114}\).

Created by the North Atlantic Treaty 1949 (NAT), which is also known as the Washington Treaty\(^{115}\), the Alliance’s central purpose pursuant to Art 5 NAT, is the “exercise of the right of individual or collective self-defence recognised by Article 51 of

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\(^{111}\) SC Res 1511, UN SCOR, 4844\(^{th}\) mtg, UN Doc S/RES/1511 (16 October 2003), [13] and [14].

\(^{112}\) SC Res 816, UN SCOR, 3191\(^{st}\) mtg, UN Doc S/RES/816 (31 March 1993), [4] and [7].


\(^{115}\) NATO, above n 113, 17.
the Charter of the United Nations” where one or more of its members are attacked. The Alliance’s commitment to defending its members against armed attacks or threats of armed attacks, is based on the principle that an attack against one of them is an attack on all of them. However, any defensive action by NATO is permitted only until the UN Security Council has implemented action to restore peace and security.

The main organ within NATO is the North Atlantic Council, established pursuant to Art 9 NAT. Under Art 9 NAT, all Member States of NATO are represented on the Council, and the Council may create subsidiary bodies or committees as required, to carry out the purpose and activities of the Alliance. Generally, therefore, NATO consists of the Council, the Military Committee, and various Civil Committees, such as the Political Committee, the Economic Committee and the Senior Civil Emergency Planning Committee. According to NATO, this organizational structure has given it the flexibility to evolve and adapt itself to new challenges that arise.

The Alliance was created with the sovereignty of its Member States as an important premise. Within the organizational structure of NATO, the decision-making process is based on joint decision-making and the consensus of all NATO members. Art 4 NAT for example, provides that the Parties will consult together on security matters,

\[\text{\footnotesize{\cite{116}} \text{\footnotesize{North Atlantic Treaty}, signed 4 April 1949, 34 UNTS 243 (entered into force 24 August 1949) art 5.}}\]
\[\text{\footnotesize{\cite{117}} \text{\footnotesize{North Atlantic Treaty}, signed 4 April 1949, 34 UNTS 243 (entered into force 24 August 1949) art 5; NATO, above n 113, 15.}}\]
\[\text{\footnotesize{\cite{118}} \text{\footnotesize{North Atlantic Treaty}, signed 4 April 1949, 34 UNTS 243 (entered into force 24 August 1949) art 5.}}\]
\[\text{\footnotesize{\cite{119}} \text{\footnotesize{North Atlantic Treaty}, signed 4 April 1949, 34 UNTS 243 (entered into force 24 August 1949) art 5.}}\]
\[\text{\footnotesize{\cite{120}} \text{\footnotesize{North Atlantic Treaty}, signed 4 April 1949, 34 UNTS 243 (entered into force 24 August 1949) art 9: “The Parties hereby establish a Council, on which each of them shall be represented, to consider matters concerning the implementation of this Treaty. The Council shall be so organized as to be able to meet promptly at any time. The Council shall set up such subsidiary bodies as may be necessary; in particular it shall establish immediately a defence committee which shall recommend measures for the implementation of Articles 3 and 5.”.}}\]
\[\text{\footnotesize{\cite{121}} \text{\footnotesize{Sands and Klein, above n 114, 198 – 200.}}\]
\[\text{\footnotesize{\cite{122}} \text{\footnotesize{Above n 113, 9.}}\]
\[\text{\footnotesize{\cite{123}} \text{\footnotesize{NATO Handbook 2001 (NATO, 2001), 149 \url{http://www.nato.int/docu/handbook/2001/pdf/handbook.pdf}.}}\]
\[\text{\footnotesize{\cite{124}} \text{\footnotesize{North Atlantic Treaty}, signed 4 April 1949, 34 UNTS 243 (entered into force 24 August 1949) art 4.}}\]
and under Art 10 NAT the Parties may invite another European State to accede to the Treaty by unanimous agreement\textsuperscript{125}. Art 12 NAT provides for the Parties to consult together to review the Treaty.\textsuperscript{126} According to the NATO Handbook 2001:

> When decisions have to be made, action is agreed upon on the basis of unanimity and common accord. There is no voting or decision by majority. Each nation represented at the Council table or on any of its subordinate committees retains complete sovereignty and responsibility for its own decisions.\textsuperscript{127}

Consensus decisions are accepted by all Member States, making them “the expression of the collective will of all the sovereign states that are members of the Alliance”.\textsuperscript{128}

Although initially formed as a defensive military alliance primarily to protect European States against the Soviet Union, NATO has undergone significant transformation following the end of the Cold War.\textsuperscript{129} NATO only invoked Art 5 of the North Atlantic Treaty for the first time in support of the United States after September 11, 2001.\textsuperscript{130} Significant strategic changes within NATO include cooperation with non-NATO countries which has extended NATO’s focus and activities beyond its original geographical territory, the development of partnerships with other countries including Russia, and cooperation with other IGOs.\textsuperscript{131} In addition, NATO has also embarked on an enlargement process to recruit new member States.\textsuperscript{132}

\textsuperscript{125} \textit{North Atlantic Treaty}, signed 4 April 1949, 34 UNTS 243 (entered into force 24 August 1949) art 10.
\textsuperscript{126} \textit{North Atlantic Treaty}, signed 4 April 1949, 34 UNTS 243 (entered into force 24 August 1949) art 12.
\textsuperscript{127} \textsuperscript{128} ‘Consensus decision-making at NATO : A fundamental principle’  
\textsuperscript{131} \textsuperscript{132} NATO, above n 113, 16.
\textsuperscript{132} NATO, above n 113, 16.  
\textsuperscript{133} Ibid 183-187.
In relation to security, NATO’s activities have expanded to include crisis management, which includes military and non-military responses to ‘crisis situations which threaten national or international security’. Crisis management includes collective defence operations pursuant to Art 5 of the North Atlantic Treaty, the original category of activities for which NATO was created, as well as situations unrelated to collective defence, thereby reflecting the widening of NATO’s focus and activities, for example in “peace support operations…conflict prevention, peacekeeping and peace enforcement measures, peace-making, peace-building, preventive deployment and humanitarian operations”.

The first peacekeeping mission carried out by NATO was in Bosnia, where it provided both air and naval forces initially to the mission to protect UN peacekeeping forces, monitor safe havens that had been declared by the Security Council to enforce a UN arms embargo on warring factions, and following a cease-fire, NATO assumed command and control of a multinational force as part of a UN peacekeeping mission.

3.2.1 NATO’s Adherence to the Principles of the UN Charter

The North Atlantic Treaty affirms its adherence to the principles of the UN Charter in its Preamble, which states in part that:

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133 Ibid 44.
134 Ibid.
135 Ibid.
136 Ibid 45.
138 Ibid 1-3.
The Parties to this Treaty reaffirm their faith in the purposes and principles of the Charter of the United Nations and their desire to live in peace with all peoples and all governments…

They are resolved to unite their efforts for collective defence and for the preservation of peace and security.\textsuperscript{139}

In addition, Art 1 NAT for example, links the fundamental principles of NATO to those of the United Nations Charter and NATO members undertake to refrain from the use of threat or force in international relations and to settle international disputes peacefully, in keeping with the UN Charter.\textsuperscript{140} Art 7 NAT affirms that the North Atlantic Treaty does not detract from the rights and obligations under the United Nations Charter of NATO members who are also members of the UN, and it also affirms the “primary responsibility of the UN Security Council in international peace and security”.\textsuperscript{141}

3.3 The United Nations and NATO in Kosovo

NATO participated in a peacekeeping mission under the auspices of the UN Security Council, aimed at bringing about a peaceful resolution to the conflict in Kosovo. Part of NATO’s duties was air verification that the Government of FRY was complying with Security Council requirements to bring about an end to the conflict.\textsuperscript{142} In March 1999 however, NATO launched a series of unauthorized air strikes in Kosovo to hasten or bring about compliance of Security Council demands of the warring factions in FRY.\textsuperscript{143}

The air strikes led to a ceasefire, following which NATO then led an international

\textsuperscript{139} North Atlantic Treaty, signed 4 April 1949, 34 UNTS 243 (entered into force 24 August 1949) Preamble.

\textsuperscript{140} North Atlantic Treaty, signed 4 April 1949, 34 UNTS 243 (entered into force 24 August 1949) art 1.

\textsuperscript{141} North Atlantic Treaty, signed 4 April 1949, 34 UNTS 243 (entered into force 24 August 1949) art 7.

\textsuperscript{142} SC Res 1203, UN SCOR, 3937th mtg, UN Doc S/RES/1203 (24 October 1998), [1] and [3].

\textsuperscript{143} Smith, M. A., Kosovo: Background & Chronology (April 1999), Conflict Studies Research Centre, 26 www.da.mod.uk/colleges/arag/document-listings/cee/g72-mas.pdf.
military force in the enforcement and facilitation of the terms of the ceasefire agreement.  

3.3.1 Brief Background to the Conflict in Kosovo

Kosovo was a province of Serbia. Although there had been conflict between Serbs and Albanians for centuries over the province, according to the Independent International Commission on Kosovo the conflict in Kosovo was a result of a “new wave of nationalism in the 1970s and 1980s” which built on those ethnic conflicts. 

Yugoslavian President Tito had granted autonomous status to Kosovo in 1974. However, in 1989 Serb leader Slobodan Milosevic became the President of Serbia, and began the process of rescinding Kosovo’s autonomy to replace it with governance from Belgrade. The Kosovar Albanians set up a parallel government in Kosovo, with their own President, Dr Ibrahim Rugova, who was committed to peaceful resistance against Serbian authorities.

Around that time in 1991, the Socialist Federal Republic of Yugoslavia had begun to disintegrate, with conflict breaking out in Slovenia, Croatia and Bosnia-Herzegovina (‘Bosnia’). Although the international community was aware of the tensions in

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144 SC Res 1244, UN SCOR, 4011th mtg, UN Doc S/RES/1244 (10 June 1999), Annex 2 [4].
145 Smith, above n 143, 1.
149 Ibid; Smith, above n 143, 3.
150 Global, above n 148; Smith, above n 143, 3.
Kosovo, it was focused on the problems in Croatia and Bosnia, where the Serbs had taken control and were practising ethnic cleansing.152

When the Dayton Accords on Bosnia were concluded in 1995 without a resolution for the problems in Kosovo, the Kosovar Albanians increasingly turned to armed conflict.153 Over the next few years, the Kosovo liberation Army engaged in armed clashes with Serbian forces, with the fighting escalating into open conflict in 1998.154 The violent conflict was condemned by the UN, the EU, the Contact Group and NATO.155 In March 1998, the UN Security Council adopted Resolution 1160, which imposed an arms embargo on both the Serbian Government and the KLA.156

Diplomatic attempts to bring about a peaceful resolution to the conflict in Kosovo during 1998 were led by the Contact Group157, but President Milosevic refused to accept these efforts.158 In June 1998, NATO Defence Ministers asked NATO to report on options for air and ground military support for the diplomatic process, which were considered by the North Atlantic Council by early August 1998.159

By September 1998, there were estimates that 250,000 Albanians had left their homes and 50,000 people were still out in the open because of the offensives by the Serbian forces.160

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152 Department of State, above n 151; Ministry of Defence, above n 151, [2.3].
153 Smith, above n 143, 3.
154 Ministry of Defence, above n 151, [2.7].
155 Smith, above n 143, [2.8].
156 SC Res 1160, UN SCOR, 3868th mtg, UN Doc S/RES/1160 (31 March 1998).
157 Ministry of Defence, above n 151, [2.10].
158 Ibid.
159 Ibid.
160 Ibid, [2.12].
Pursuant to UN Security Council Resolution 1199 on 23 September 1998, the Security Council called for a ceasefire and the withdrawal of Serbian forces. On 24 September 1998, NATO Defence Ministers reaffirmed their readiness to take action if required and began to prepare for readiness to launch air campaigns. On 8 October 1998, the Contact Group mandated US Envoy Richard Holbrooke to secure Belgrade’s agreement to the demands of UN Security Council Resolution 1199. On 13 October 1998, NATO issued Activation Orders for air strikes to commence within approximately 96 hours on the decision of the NATO Secretary-General. On the same day, Ambassador Holbrooke reported that president Milosevic had agreed to an OSCE verification mission and a NATO aerial verification mission to monitor Serbian compliance with UNSC Resolution 1199.

Agreements between NATO and Belgrade for the reduction of Yugoslav/Serbian forces were ‘underpinned by UNSC Resolution 1203’, and NATO agreed to monitor compliance and “remain prepared to carry out air strikes should they be required given the continuing threat of a humanitarian crisis”.

On 15 January 1999, a massacre of Albanians in Racak resulted in the deaths of 45 Albanians, illustrating the ‘disproportionate and indiscriminate use of force’ by Serbian forces against the KLA. On 28 January 1999, “NATO issued a “solemn warning” to Milosevic and the Kosovo Albanian leadership” and on 29 January 1999, the Contact Group called for talks in Rambouillet with Yugoslav/Serbian leaders and Albanian leaders.

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162 Ministry of Defence, above n 151, [2.13].
163 Ibid.
164 Ibid; Department of State, above n 151.
165 Ministry of Defence, above n 151, [2.13].
166 Ibid [2.14].
167 Ibid [2.17].
leaders. On 30 January 1999, NATO delegated authority to Javier Solana, the NATO Secretary General, to commence air strikes in ‘Yugoslav territory’ if necessary. Following the failure of the Rambouillet talks and last ditch diplomatic efforts, NATO commenced air strikes on targets in Yugoslavia on 24 March 1999.

On 9 June 1999 a Military Technical Agreement was signed between NATO and FRY, and on 10 June 1999 following evidence of a withdrawal of Serb forces from northern Kosovo, NATO Secretary General Solana suspended NATO airstrikes over Kosovo.

On 10 June 1999 the UN Security Council adopted UN Security Council Resolution 1244, which included a mandate for a NATO-led military presence in Kosovo (the Kosovo Force or KFOR) and an interim administration under the UN Interim Administration Mission in Kosovo (UNMIK).

3.3.2 UN Mandates to NATO to Participate in Peacekeeping in Kosovo

Peacekeeping operations are intended to prevent a resumption or escalation of conflict or to assist a State to restore its institutions and political systems after a conflict. According to Conforti and Focarelli, although called peacekeeping, in reality force may be used against the peacekeepers as well as by the peacekeepers. An “essential distinctive element of peacekeeping” is the requirement of the consent of the States in

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168 Ibid [2.19].
169 Ibid.
171 Smith, above n 143, 26; Sands and Klein, above n 114, 191-192.
172 Department of State, above n 151, 9.
175 Ibid.
which the peacekeeping is carried out\textsuperscript{176}, as can be seen in the Security Council resolutions authorizing the peacekeeping missions in Kosovo.

As discussed in section 3.1.3 above, the Security Council’s powers to use force in Chapter VII of the UN Charter can be sub-conferred on UN member States and regional agencies or arrangements.\textsuperscript{177} According to Professor Sarooshi, whilst powers can be conferred in different forms, it is important that the conferrer’s intention to confer its powers is expressly stated, and consequently, the only appropriate form for the sub-conferral of a Chapter VII power is through a resolution of the Security Council.\textsuperscript{178}

On 24 October 1998, the UN Security Council adopted Resolution 1203, mandating NATO with air verification of Yugoslavia’s compliance with the conditions of Security Council Resolution 1199.\textsuperscript{179} On 15 October 1998, FRY had signed an agreement with NATO agreeing to NATO’s verification of compliance with the conditions of the Security Council’s Resolution 1199.\textsuperscript{180} As such, the Security Council in paragraph 1 of Resolution 1203, endorsed and supported the agreement, and demanded “full and prompt implementation of...[the agreement]...by the Federal Republic of Yugoslavia”.\textsuperscript{181} The Resolution affirmed that the Security Council was acting under its powers from Chapter VII of the UN Charter.\textsuperscript{182}

Following the cessation of conflict in Kosovo, the UN Security Council adopted Resolution 1244 in June 1999, which mandated NATO’s involvement in a security

\textsuperscript{176} Ibid.
\textsuperscript{177} Above Section 3.1.3.
\textsuperscript{178} Sarooshi, above n 105, 9.
\textsuperscript{179} ‘SC Res 1203, UN SCOR, 3937\textsuperscript{th} mtg, UN Doc S/RES/1203 (24 October 1998), [1] and [3].
\textsuperscript{180} SC Res 1203, UN SCOR, 3937\textsuperscript{th} mtg, UN Doc S/RES/1203 (24 October 1998), [1].
\textsuperscript{181} SC Res 1203, UN SCOR, 3937\textsuperscript{th} mtg, UN Doc S/RES/1203 (24 October 1998), [1].
\textsuperscript{182} SC Res 1203, UN SCOR, 3937\textsuperscript{th} mtg, UN Doc S/RES/1203 (24 October 1998).
presence in Kosovo. Paragraph 7 of the Resolution authorized UN “Member States and relevant international organizations to establish the international security presence in Kosovo as set out in point 4 of annex 2”. Point 4 of Annex 2 provided that the international security presence had a “substantial North Atlantic Treaty Organization participation” and “be deployed under unified command and control”. The Resolution affirmed that the Security Council was acting under its powers from Chapter VII of the UN Charter.

3.3.3 Post-Conflict Peacekeeping in Kosovo - KFOR

Following the agreement of terms with President Milosevic, and the cessation of air strikes by NATO in Kosovo, UN Security Council in Resolution 1244 (10 June 1999) Annex 2 Clause 4 mandated NATO’s participation in the peacekeeping mission as follows:

1. The international security presence with substantial North Atlantic Treaty Organization participation must be deployed under unified command and control and authorized to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees.

KFOR was a NATO-led military force in Kosovo to “help maintain a safe and secure environment and freedom of movement for all citizens, irrespective of their ethnic origin”. KFOR’s mandate was founded on both Resolution 1244 and the Military-
Technical Agreement (MTA) between NATO and FRY and the Republic of Serbia. The MTA specifically supported and authorized NATO’s security functions in Kosovo:

b. To provide for the support and authorization of the international security force (“KFOR”) and in particular to authorize the international security force (“KFOR”) to take such actions as are required, including the use of necessary force, to ensure compliance with this Agreement and protection of the international security force (“KFOR”), and to contribute to a secure environment for the international civil implementation presence, and other international organizations, agencies, and non-governmental organizations…

UN Security Council Resolution 1244 also provided for the “[e]stablishment of an interim administration for Kosovo as part of the international civil presence” in Kosovo. The function of the UN Interim Administration Mission in Kosovo (UNMIK) was to “organize and oversee the development of provisional institutions for democratic and autonomous self-government pending a political settlement, and, at a final stage, to oversee the transfer of authority from provisional institutions to institutions established under the said political settlement”. The UNMIK police force was tasked with policing duties in cooperation with KFOR.

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http://www.nato.int/issues/kosovo/index.html
189 Ibid.
191 SC Res 1244, UN SCOR, 4011th mtg, UN Doc S/RES/1244 (10 June 1999), Annex 2 [5].
192 Conforti and Focarelli, above n 174, 291.
The different mandates of UNMIK and KFOR however, have meant that UNMIK and the Special Representative of the Secretary-General had no jurisdiction over KFOR\(^{194}\), with KFOR only obliged to observe the laws in Kosovo which did not conflict with its mandate.\(^{195}\) This has led to concerns that aspects of KFOR’s conduct, such as those which violate international standards of human rights for example, may go unchallenged.\(^{196}\)

According to Nasu, whilst there is less scope for the UN Security Council as an “umpire” in a conflict, to violate the purposes and principles of the UN Charter or the norms of international human rights, there have nevertheless been misconduct and violations of human rights by peacekeepers and UN personnel involved in peacekeeping or provisional territorial administration, resulting in a greater call for accountability for the UN’s peacekeeping operations.\(^ {197}\)

The observance of human rights has become an integral part of UN missions, particularly in UN peacekeeping missions\(^{198}\), and this is discussed further below in relation to the responsibility of the UN for the internationally wrongful acts of KFOR.\(^ {199}\)


\(^{195}\) Pacquee and Dewulf, above n 194, 2-3.

\(^{196}\) Ibid 3.

\(^{197}\) Nasu, Hitoshi, International Law on Peacekeeping: A Study of Article 40 of the UN Charter (Martinus Nijhoff, 2009), 263.


\(^{199}\) Below Section 4.2.2.
4.0 THE AGENCY RELATIONSHIP BETWEEN THE UN AND NATO

According to the Sarooshi Typology, conferrals of agency powers contain the following elements: (1) States may revoke those powers at any time\textsuperscript{200}, (2) they have a direct control over the exercise of those powers\textsuperscript{201}, and (3) they have the right to exercise those powers concurrently and independently of the agent IGO\textsuperscript{202}. Given that NATO’s use of force must be expressly authorized by the UN through the resolutions of the Security Council, the UN therefore also has the capability to revoke that authority at any stage. In addition, the UN retains overall direct control of the peacekeeping mission in Kosovo and determines the terms of engagement, with the UN Secretary-General being the Commander in Chief of UN Forces in the peacekeeping mission. Furthermore, by maintaining active overall direct control of the peacekeeping mission, the UN is exercising its powers to use force concurrently with NATO. Consequently, the powers conferred by the UN on NATO in the peacekeeping mission in Kosovo are agency powers in the context of the Sarooshi Typology.

4.1 The Contestation of Powers between the UN and NATO

According to Yannis, the dualistic nature of the international administration of Kosovo with powers divided between UNMIK and KFOR, reflected “the reluctance of key NATO states to place their military forces under UN command” and this created an “accountability gap in the chain of command”.\textsuperscript{203}

\begin{itemize}
  \item \textsuperscript{200} Sarooshi, above n 3, 29 and 41.
  \item \textsuperscript{201} Ibid 31.
  \item \textsuperscript{202} Ibid 32.
  \item \textsuperscript{203} Yannis, Alexandros, ‘Kosovo Under International Administration’ (2001) 43(2) Survival 31, 32.
\end{itemize}
The contestation of powers and values between the UN and NATO could arguably be subtle and deep-seated. During the Cold War for example, “tensions between the U.S. and the…[Soviet Union]…carried over, often undermining the UN Security Council’s effectiveness and precluding the use of NATO to coordinate with UN peace efforts”, resulting in NATO and the UN being protective of their respective independence.204

Since the Cold War era and the cooperative efforts of the early 1990s however, the UN and NATO have established closer institutional links205, but according to Kille et al:

…increased coordination is still relatively limited in practice, and each step taken has been a cautious one – as demonstrated by the politically sensitive quiet signing of the Joint Declaration…It is clear the debate over what form of institutional coordination should be employed remains highly relevant…questions remain about the degree to which the organizational structures and cultures can truly mesh, especially in the face of ongoing debates over legitimacy, the best approach to peace and security, and a subcontracting versus equal partner role for NATO.206

NATO’s view of its independence was evident for example, in the comments of one of its’ members, the United States. In March 1999, NATO had carried out air strikes over Kosovo which were not authorized by the UN. According to US Deputy Secretary of State Strobe Talbot, in agreeing with the Secretary of Defense Cohen that NATO would not require UN Security Council authority to intervene in Kosovo:

205 Ibid 44.
206 Ibid 45.
[W]e must be careful not to subordinate NATO to any other international body or compromise the integrity of its command structure. We will try to act in concert with other organizations, and with respect for their principles and purposes. But the Alliance must reserve the right and the freedom to act when its members, by consensus, deem it necessary.207

The fundamental contestation of powers between the UN and NATO lies perhaps in NATO’s uneasy relationship with its role under the UN Charter. Despite the enshrinement in the North Atlantic Treaty of the principles of peace and security pursuant to the principles of the Charter of the United Nations, and despite its close cooperation in peacekeeping operations with the United Nations, NATO has nevertheless maintained its autonomy from the United Nations, not just politically but also legally, by basing its authority on Art 51 of the UN Charter instead of Chapter VIII:

For almost five decades, NATO members insisted that the Alliance was not a Chapter VIII regional organization. Instead, the members carefully tied NATO’s mission to collective self-defense. The North Atlantic Council’s motive for limiting its agreement was partially driven by the fear that operating under Chapter VIII would give the UN Security Council an opportunity to meddle in the alliance’s affairs. The North Atlantic Council particularly wanted to avoid the possibility of a Soviet veto over NATO initiatives.208

According to Professor Sarooshi, NATO wanted to avoid the obligation of seeking prior authorization for the use of force from the Security Council under Art 53(1) UN

208 Godwin, above n 137, 8-9.
Similarly, it has been suggested that NATO may also have intended to free itself of the requirement in Art 54 of the UN Charter to keep the Security Council fully informed at all times of activities undertaken or contemplated in maintaining peace and security. Nevertheless, despite the underlying tension or contestation between NATO and the UN, NATO was willing within the context of KFOR, to act as an agent of the UN.

In conclusion, these issues relate to a contestation of power and values in the exercise of the respective powers of NATO and the UN, and the continuing debate over them reflects the ongoing contestation of those powers.

4.2 Consequences of the Agency Relationship between the UN and NATO – Responsibility and Fiduciary Duty

According to the Sarooshi Typology, there are two possible consequences arising from the conferral of Agency powers – the conferee agent’s fiduciary duty to its conferror, and the responsibility of the conferror for the internationally wrongful acts of its conferee. This section discusses the consequences of fiduciary duty and international responsibility in the sub-conferral of agency powers from the UN to NATO.

4.2.1 The Fiduciary Duty of NATO to the UN

According to Professor Sarooshi, a conferee agent has the ability to alter the legal relationships between its conferror and third parties, and as such, the conferee has a fiduciary duty to use its conferred powers in the interests of its conferror.

209 Sarooshi, above n 105, 251.
210 O’Connell, above n 71, 60; Sarooshi, above n 105, 251 fn 13. Charter of the United Nations art 54 states that: “The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.”.
211 Chapter 2, Sections 4.1 and 4.2.
212 Chapter 2, Section 4.1.
Consequently, if for example the UN is obliged to observe international human rights, then NATO in exercising its sub-conferred powers to use force in peacekeeping in Kosovo, arguably has a fiduciary duty to observe human rights norms in its conduct. If for example, the terms of NATO’s mandate pursuant to UN Security Council Resolution 1244 (1999) reflect the parameters of the UN’s agreement with FRY for the peacekeeping mission, then NATO may have a fiduciary duty to operate within those terms.

According to the typology, if NATO as an agent fails to observe the interests of the UN in its exercise of sub-conferred powers to use force in Kosovo, then the UN has a range of measures available to it.\textsuperscript{213} The UN Security Council, for example, has the right to modify or revoke the powers it sub-conferred on NATO at any time, or it can exercise its right of direct control over NATO’s exercise of those powers.\textsuperscript{214}

4.2.2 The Responsibility of the UN for a Wrongful Act by NATO

Pursuant to Art 4 DARIO, conduct whether it is an action or an omission, is said to be the internationally wrongful act of an IGO when (1) it is attributable to the IGO in international law, and (2) it is a breach of the IGO’s international obligation.\textsuperscript{215}

Using the example of international human rights obligations in the UN’s peacekeeping missions in Kosovo, the following sections will first consider whether the UN is subject to international human rights obligations. It will then consider whether any breaches of international human rights obligations by NATO will be attributable to the UN.

\textsuperscript{213} Sarooshi, above n 3, 109.
\textsuperscript{214} Ibid.
(i) Are the UN and NATO Subject to International Human Rights Obligations

According to Wouters et al, IGOs (with the exception of the EU) are not signatories to any human right treaties, and as such are not bound by those treaties.\(^{216}\) However, it has been argued by some that IGOs may nevertheless be bound by the norms of international human rights which have become customary international law, general principles of international law, or peremptory or jus cogens norms.\(^{217}\) All these forms of obligations are considered to be binding on IGOs, and consequently although they are not parties to international human rights treaties, IGOs may still have binding obligations to observe human rights norms.\(^{218}\) According to Jochnick, it is important for the human rights regime, if it is to remain relevant to its constituency, that the regime “must be free to challenge the full range of actors that currently threaten human dignity”.\(^{219}\)

Bongiorno argues that customary norms of international law are even more binding on IGOs such as the UN than they are on States, for IGOs are created under international law, and they are governed by the treaties from which they have been created.\(^{220}\) Furthermore, when IGOs carry out the functions for which they have been empowered, the duties or obligations relating to those functions have to apply.\(^{221}\) Hence for

\(^{217}\) Ibid 6-7.
\(^{218}\) Ibid 7.
\(^{221}\) Ibid 643.
example, since the UN has an obligation under the UN Charter to promote human rights, international standards of human rights law also apply to it.\textsuperscript{222}

Reinisch similarly argues that the UN, since it has personality under the international legal system, is subject to public international law.\textsuperscript{223} In addition, IGOs are only endowed with the powers which their member States have conferred on them, and thus they cannot acquire more powers than their member States by opting out of international human rights obligations.\textsuperscript{224}

In the \textit{Reparation} case, the ICJ held in relation to a competence to make an international claim, that an IGO which has international legal personality has the “capacity to resort to the customary methods recognized by international law for the establishment, the presentation and the settlement of claims”.\textsuperscript{225}

In the \textit{WHO Agreement} case, the ICJ held that IGOs are “subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties”.\textsuperscript{226}

In the \textit{Application of the Convention on the Prevention and Punishment of the Crime of Genocide} case, Judge Lauterpacht in a separate opinion agreed that Bosnia-Herzegovina’s inability to defend itself effectively was at least in part due to the

\textsuperscript{222} Ibid 644.
\textsuperscript{224} Ibid.
embargo on weapons and equipment adopted in Security Council Resolution 713 (1991). Affirming that the prohibition of genocide was jus cogens, the Judge held that the effect of the Resolution was inadvertent or unforeseen, stating that it was “not to be contemplated that the Security Council would ever deliberately adopt a resolution clearly and deliberately flouting a rule of jus cogens or requiring a violation of human rights.” This suggests that the UN Security Council is subject to jus cogens obligations to observe human rights.

Consequently, although the UN and NATO are not signatories to any treaties on international human rights, they may still have human rights obligations under customary law, general international law including their constituent treaties and international agreements they may have entered into, as well as the obligation to observe peremptory or jus cogens norms of human rights. It follows then, that the breach of any of these human rights obligations by the UN or NATO would be an internationally wrongful act, constituting a breach of the UN’s or NATO’s international obligations.

(ii) Attribution of Conduct – Effective Control Test

In relation to UN peacekeeping missions as discussed above, the established practice has been for the UN to sub-confer its powers to use force in peacekeeping missions to a collective of member States or regional agencies and arrangements, to carry out those missions under the command of the UN Secretary-General.

230 Above Sub-section 3.1.2(i).
Pursuant to Art 7 DARIO:

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.\(^{231}\)

Consequently, if the conduct of armed forces placed under the command of the UN is in breach of international human rights, then that conduct can be attributed to the UN if it can be shown that the UN had “effective control over that conduct”.\(^{232}\)

The *Al-Jedda* case for example, related to the detention of Al-Jedda by British troops in Iraq, without his being charged with any offence.\(^{233}\) On the issue of attribution of conduct, Lord Bingham in the lead judgment for the majority\(^{234}\), referred to the effective control test in Art 5 DARIO adopted in 2004\(^{235}\), which is now Art 7 in DARIO 2011, quoted above.

In finding that the conduct of the British troops was attributable to the UK and not to the UN\(^{236}\), Lord Bingham held that (1) the multinational force in Iraq had not been established at the request of the UN, (2) that it had not been mandated to act under the auspices of the UN, (3) that it was not a subsidiary organ of the UN, (4) that the UN had

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\(^{233}\) *R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)* [2007] UKHL 58, 12 December 2007, [1] and [2].


\(^{235}\) *R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)* [2007] UKHL 58, 12 December 2007, [5].

\(^{236}\) *R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)* [2007] UKHL 58, 12 December 2007, [25].
not delegated power to it in Iraq, and (5) that the duty to report to the UN was a result of
the UN’s concern for the protection of human rights and adherence to humanitarian law,
and that receiving reports was not the same as exercising “effective command and
control”. Lord Bingham also held that the fact that the UN had reserved the right to
revoke the authority to the multinational force was insignificant, as “it could clearly do
so whether or not it reserved power to do so”.238

In a subsequent case brought before the ECtHR by Al-Jedda, the Grand Chamber
similarly concluded that the conduct of the British troops in detaining Al-Jedda, was
attributable to the UK.239 First, the Court found that the coalition partners had entered
Iraq without a “United Nations Security Council resolution providing for the allocation
of roles in Iraq in the event that the existing regime was displaced”.240 Second, that the
UN’s role in Iraq was that of humanitarian assistance and reconstruction rather than
security.241 Third, the subsequent authorization by the Security Council for the
multinational force to take all necessary measures towards security and stability in Iraq,
contained in UN Security Council Resolution 1511, did not cause the conduct of the
multinational force to become attributable to the UN or to cease being “attributable to
the troop-contributing nations”, because the multinational force had already been in Iraq
since the invasion.242 Fourth, the Security Council’s reaffirmation of its authorization
of the multinational force in Security Council Resolution 1546 did not indicate that the
Security Council intended to take greater control or command of the multinational

237 R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)
[2007] UKHL 58, 12 December 2007, [24].
238 R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)
[2007] UKHL 58, 12 December 2007, [24].
239 Al-Jedda v The United Kingdom, Eur Court HR (Grand Chamber), Judgment (Application no.
27021/08) (7 July 2011), [86].
240 Al-Jedda v The United Kingdom, Eur Court HR (Grand Chamber), Judgment (Application no.
27021/08) (7 July 2011), [77].
241 Al-Jedda v The United Kingdom, Eur Court HR (Grand Chamber), Judgment (Application no.
27021/08) (7 July 2011), [78].
242 Al-Jedda v The United Kingdom, Eur Court HR (Grand Chamber), Judgment (Application no.
27021/08) (7 July 2011), [79]-[80].
force. Distinguishing the UN’s role in Iraq from its role in Kosovo, and acknowledging that the House of Lords in the earlier case had agreed that the test to be applied was that of effective control, the Court found from the reasons above, that the UN Security Council did not have either “effective control…[or]…ultimate authority and control over the acts and omissions” of the multinational force, and as a consequence, the detention Al-Jedda was not attributable to the UN. As the detention took place in an area under the exclusive control of British troops, Al-Jedda was therefore under the authority and control of the UK, and thus his detention was attributable to the UK.

Consequently, using the effective control test, both the House of Lords and the ECtHR in Al-Jedda attributed the wrongful conduct of British troops to the contributing State, that is, to the United Kingdom rather than to the UN.

(iii) The UN’s Responsibility for Wrongful Acts of NATO

The following two cases relate to the question of UN responsibility for wrongful acts committed by NATO forces in the Balkans. In the first case, the Behrami and Saramati case, the ECtHR attributed responsibility for the wrongful acts to the UN, whilst in the second case, the Nuhanovic case, the Supreme Court of the Netherlands attributed

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243 Al-Jedda v The United Kingdom, Eur Court HR (Grand Chamber), Judgment (Application no. 27021/08) (7 July 2011), [81].
244 Al-Jedda v The United Kingdom, Eur Court HR (Grand Chamber), Judgment (Application no. 27021/08) (7 July 2011), [82].
245 Al-Jedda v The United Kingdom, Eur Court HR (Grand Chamber), Judgment (Application no. 27021/08) (7 July 2011), [83].
246 Al-Jedda v The United Kingdom, Eur Court HR (Grand Chamber), Judgment (Application no. 27021/08) (7 July 2011), [84].
247 Al-Jedda v The United Kingdom, Eur Court HR (Grand Chamber), Judgment (Application no. 27021/08) (7 July 2011), [85].
responsibility to the State of Netherlands, at the same time leaving open the possibility of joint UN responsibility for the wrongful acts committed.

The joined Behrami v France; Saramati v France, Germany & Norway case relates to post-conflict Kosovo. 248 In the Behrami case a boy was killed and his brother seriously injured in March 2000 by an undetonated cluster bomb which had been dropped during NATO air strikes in 1999. 249 In the Saramati case the applicant was arrested by UNMIK police and kept in “extra-judicial detention” by KFOR. 250

The Court first ascertained that pursuant to UN Security Council Resolution 1244, the supervision of de-mining the undetonated cluster bombs fell within the mandate of UNMIK, whilst the orders to detain fell within KFOR’s security mandate. 251

In this case, the Court applied the test of whether the UN Security Council had retained “ultimate authority and control” of the mission in Kosovo, with only matters of operational command being delegated. 252 The Court found that the Security Council had retained ultimate authority and control of the mission for the following reasons. 253

First, the Security Council was permitted by Chapter VII of the Charter to delegate its

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248 Agim Behrami and Bekir Behrami v France; Ruzhdi Saramati v France, Germany and Norway, Eur Court HR (Grand Chamber), Decision as to Admissibility (Application Nos 71412/01; 78166/01) (2 May 2007)
249 Agim Behrami and Bekir Behrami v France; Ruzhdi Saramati v France, Germany and Norway, Eur Court HR (Grand Chamber), Decision as to Admissibility (Application Nos 71412/01; 78166/01) (2 May 2007), [5].
250 Agim Behrami and Bekir Behrami v France; Ruzhdi Saramati v France, Germany and Norway, Eur Court HR (Grand Chamber), Decision as to Admissibility (Application Nos 71412/01; 78166/01) (2 May 2007), [8]-[17] and [62].
251 Agim Behrami and Bekir Behrami v France; Ruzhdi Saramati v France, Germany and Norway, Eur Court HR (Grand Chamber), Decision as to Admissibility (Application Nos 71412/01; 78166/01) (2 May 2007), [126].
252 Agim Behrami and Bekir Behrami v France; Ruzhdi Saramati v France, Germany and Norway, Eur Court HR (Grand Chamber), Decision as to Admissibility (Application Nos 71412/01; 78166/01) (2 May 2007), [133].
253 Agim Behrami and Bekir Behrami v France; Ruzhdi Saramati v France, Germany and Norway, Eur Court HR (Grand Chamber), Decision as to Admissibility (Application Nos 71412/01; 78166/01) (2 May 2007), [134].
security powers to member States and relevant organizations. Second, the power was a delegable power. Third, the delegation of powers was “prior and explicit in the Resolution itself”. Fourth, the Resolution had defined the limits of the delegation of power sufficiently, for example by defining the objectives of the mission, and the roles and responsibilities of those involved. Fifth, the Resolution required the leadership of the military presence to report to the Security Council, so that the Security Council could “exercise its overall authority and control”. As such, the Court held that the Security Council had delegated to NATO “the power to establish, as well as the operational command of” KFOR, whilst retaining for itself the “ultimate authority and control over the security mission”.

Consequently, although the Court declared the Applicants’ complaints incompatible ratione personae with the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, it concluded nevertheless, that the conduct of KFOR and UNMIK was in principle attributable to the UN. This was because KFOR was exercising Ch VII powers of the Security Council which had been

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254 Agim Behrami and Bekir Behrami v France; Ruzhdi Saramati v France, Germany and Norway, Eur Court HR (Grand Chamber), Decision as to Admissibility (Application Nos 71412/01; 78166/01) (2 May 2007), [134].
255 Agim Behrami and Bekir Behrami v France; Ruzhdi Saramati v France, Germany and Norway, Eur Court HR (Grand Chamber), Decision as to Admissibility (Application Nos 71412/01; 78166/01) (2 May 2007), [134].
256 Agim Behrami and Bekir Behrami v France; Ruzhdi Saramati v France, Germany and Norway, Eur Court HR (Grand Chamber), Decision as to Admissibility (Application Nos 71412/01; 78166/01) (2 May 2007), [134].
257 Agim Behrami and Bekir Behrami v France; Ruzhdi Saramati v France, Germany and Norway, Eur Court HR (Grand Chamber), Decision as to Admissibility (Application Nos 71412/01; 78166/01) (2 May 2007), [134].
258 Agim Behrami and Bekir Behrami v France; Ruzhdi Saramati v France, Germany and Norway, Eur Court HR (Grand Chamber), Decision as to Admissibility (Application Nos 71412/01; 78166/01) (2 May 2007), [134].
259 Agim Behrami and Bekir Behrami v France; Ruzhdi Saramati v France, Germany and Norway, Eur Court HR (Grand Chamber), Decision as to Admissibility (Application Nos 71412/01; 78166/01) (2 May 2007), [134].
260 Agim Behrami and Bekir Behrami v France; Ruzhdi Saramati v France, Germany and Norway, Eur Court HR (Grand Chamber), Decision as to Admissibility (Application Nos 71412/01; 78166/01) (2 May 2007), [135].
261 Agim Behrami and Bekir Behrami v France; Ruzhdi Saramati v France, Germany and Norway, Eur Court HR (Grand Chamber), Decision as to Admissibility (Application Nos 71412/01; 78166/01) (2 May 2007), [152].
delegated to it\(^\text{262}\), and because UNMIK was a “subsidiary organ of the UN created under Chapter VII of the Charter”\(^\text{263}\).

In the case of *Netherlands v Nuhanovic*, the Supreme Court of Netherlands upheld the findings of the Dutch Court of Appeal in 2011, that the wrongful conduct which was the subject of the case, was attributable to the State of Netherlands\(^\text{264}\). Nuhanovic was employed by the UN, and worked in the Dutchbat compound Potocari, Srebrenica\(^\text{265}\). Following the capture of Srebrenica by the Bosnian-Serb army in 1995, it was decided that Dutchbat and the refugees would be evacuated\(^\text{266}\). However, Nuhanovic’s parents and brother who had sought refuge in the compound were told they had to leave the compound, and were subsequently taken away by Bosnian Serbs and murdered\(^\text{267}\).

The Supreme Court held that the attribution rule in Art 7 DARIO applies to the situation where troops are placed at the disposal of the UN in a peacekeeping mission, wherein “command and control is transferred to the United Nations, but the disciplinary powers and criminal jurisdiction…remain vested in the seconding State”\(^\text{268}\). According to the Court, Art 7 DARIO in conjunction with Art 48(1) DARIO, which provides for the

\(^{262}\) *Agim Behrami and Bekir Behrami v France; Ruzhdi Saramati v France, Germany and Norway*, Eur Court HR (Grand Chamber), Decision as to Admissibility (Application Nos 71412/01; 78166/01) (2 May 2007), [141].

\(^{263}\) *Agim Behrami and Bekir Behrami v France; Ruzhdi Saramati v France, Germany and Norway*, Eur Court HR (Grand Chamber), Decision as to Admissibility (Application Nos 71412/01; 78166/01) (2 May 2007), [143].

\(^{264}\) *The State of the Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v Hasan Nuhanovic*, Judgment, Supreme Court of the Netherlands, First Chamber, 12/03324, (6 September 2013), 11 and 36.

\(^{265}\) *The State of the Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v Hasan Nuhanovic*, Judgment, Supreme Court of the Netherlands, First Chamber, 12/03324, (6 September 2013), 3.

\(^{266}\) *The State of the Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v Hasan Nuhanovic*, Judgment, Supreme Court of the Netherlands, First Chamber, 12/03324, (6 September 2013), 5-6.

\(^{267}\) *The State of the Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v Hasan Nuhanovic*, Judgment, Supreme Court of the Netherlands, First Chamber, 12/03324, (6 September 2013), 9.

\(^{268}\) *The State of the Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v Hasan Nuhanovic*, Judgment, Supreme Court of the Netherlands, First Chamber, 12/03324, (6 September 2013), 21.
responsibility of each responsible State or organization to be invoked in an internationally wrongful act, allowed for the possibility of a ‘dual attribution’ to both the Netherlands and the UN.  

The determination of effective control, according to the Court, is “based on the factual control over the specific conduct, in which all factual circumstances and the special context of the case must be taken into account”.  

The Court found for example, that the decision to evacuate was a mutual decision by the UN and the Netherlands, and that both the UN and the Netherlands had control over Dutchbat during the transitional period during which one of the tasks was the evacuation of refugees, that the Netherlands had close involvement in the evacuation of Dutchbat and the refugees, and that it had effective control over Dutchbat’s conduct within the compound.  

With regard to the question of whether Dutchbat’s conduct was wrongful, the Court held that Dutchbat’s presence in Srebrenica and the Potocari compound resulted from the Netherland’s participation in UNPROFOR, which had the right to take action in Srebrenica under the UN’s agreement with Bosnia and Herzegovina. Consequently, the Netherlands was “competent, through Dutchbat, to exercise jurisdiction within the meaning of article 1 ECHR in the compound”.  

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269 The State of the Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v Hasan Nuhanovic, Judgment, Supreme Court of the Netherlands, First Chamber, 12/03324, (6 September 2013), 18 and 23.  
271 The State of the Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v Hasan Nuhanovic, Judgment, Supreme Court of the Netherlands, First Chamber, 12/03324, (6 September 2013), 25-26  
272 The State of the Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v Hasan Nuhanovic, Judgment, Supreme Court of the Netherlands, First Chamber, 12/03324, (6 September 2013), 33.  
273 The State of the Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v Hasan Nuhanovic, Judgment, Supreme Court of the Netherlands, First Chamber, 12/03324, (6 September 2013), 33.
indicated that Dutchbat did have the authority within the compound, to comply with the ECHR and the ICCPR in relation the Muhamed and Ibro Nuhanovic.\footnote{The State of the Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v Hasan Nuhanovic, Judgment, Supreme Court of the Netherlands, First Chamber, 12/03324, (6 September 2013), 34.}

Consequently, whilst the Behrami and Saramti cases concluded that the attribution of conduct rested with the UN, which had the ultimate authority and control over the actions of KFOR, the Court in Nuhanovic applied the effective control test and attributed the conduct of Dutchbat to the contributing State of the Netherlands, whilst allowing for the possibility of attribution also to the UN, pursuant to Art 48(1) of DARIO which provided for multiple attribution of a wrongful act.

According to Milanovic, the ECtHR’s decision in Behrami and Saramati was incorrect, as the Court should have used the test of effective control rather than the test of ultimate authority and control, in deciding on the attribution of KFOR’s wrongful conduct.\footnote{Milanovic, Marko, ‘Norm Conflict in International Law: Whither Human Rights?’ (2009) 20 Duke Journal of Comparative & International Law 69, 85.}

The decision could allow contributing States rather than the UN to retain control over their troops in peacekeeping missions, whilst at the same time allowing the responsibility for the actions of those troops to be attributed to the UN.\footnote{Ibid 85-86.}


However, this only applies to peacekeeping missions which are under the ‘command and control’ of the UN and which therefore have the legal status of a subsidiary organ of the UN.\footnote{Ibid.} According to Ryngaert, in UN peacekeeping missions, “contributing states typically retain full and exclusive strategic level command and control over their
personnel and equipment, whereas the UN exercises operational authority over the troops”. In this situation, both the UN and the contributing States have effective control over the forces and therefore share joint responsibility for wrongful acts. However, effective control could shift, for example during emergencies, in which case either the UN or the contributing State will assume sole responsibility. According to Dannenbaum, effective control must mean the control which is most effective in preventing the wrongful act. In other words, the effective control test “locates responsibility with the actor who is in a position to prevent the violation”.

Whilst the ECtHR in the Behrami and Saramati case discussed above, attributed KFOR’s wrongful conduct to the UN on the basis of an ultimate authority and control test, the Court nevertheless found that “effective command of the relevant operational matters was retained by NATO”. Ryngaert similarly affirms that “[i]t was NATO and its member states which exercised effective control, and not the UN”.

Art 48(1) DARIO provides for multiple attribution of responsibility for a wrongful act:

Where an international organization and one or more States or other international organizations are responsible for the same internationally

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280 Ibid.
281 Ibid.
283 Ryngaert, above n 279, 178.
284 Agim Behrami and Bekir Behrami v France; Ruzhdi Saramati v France, Germany and Norway, Eur Court HR (Grand Chamber), Decision as to Admissibility (Application Nos 71412/01; 78166/01) (2 May 2007), [140].
285 Ryngaert, above n 279, 170.
wrongful act, the responsibility of each State or organization may be invoked in relation to that act.286

Consequently, if the ECtHR had applied the effective control test to its analysis of the case, it may have concluded that KFOR’s wrongful conduct should have been attributed to NATO (and perhaps also to its member States).

4.3 Measures Available to the United Nations

According to Professor Sarooshi, conferrors of agency powers have the widest range of measures available to them, including direct control over the exercise of the powers and the right to amend or revoke the conferred powers unilaterally.287

According to Blokker there are a number of ways in which the Security Council can increase its control over the authorizations contained in its Resolutions. First, it can define its authorization more precisely and less broadly.288 In UN Security Council Resolution 1101 (1997) regarding Albania for example, the objectives of the multinational protection force was “to facilitate the safe and prompt delivery of humanitarian assistance, and to help create a secure environment for the missions of international organizations in Albania, including those providing humanitarian assistance”.289 Second, the Council can limit the duration of the authorization.290 The authorization in UN Security Council Resolution 1101 (1997) above was limited to three months.291 Third, the Security Council can require more extensive and more

287 Sarooshi, above n 3, 109.
288 Blokker, above n 86, 561-562.
289 SC Res 1101, UN SCOR, 3758th mtg, UN Doc S/RES/1101 (28 March 1997), [2].
290 Blokker, above n 86, 562.
291 SC Res 1101, UN SCOR, 3758th mtg, UN Doc S/RES/1101 (28 March 1997), [6].
frequent reporting. In UN Security Council Resolution 1101 (1997), participating member States were asked to provide reports at least every two weeks.

In relation to the UN’s authorization to NATO to use force in Kosovo in this case study, paragraph 9 of UN Security Council Resolution 1244 defines very specific responsibilities for the security presence to be deployed to Kosovo. Under paragraph 19 of the Resolution, the security presence is established for 12 months initially, to be continued after that unless decided otherwise by the Security Council. Paragraph 20 requests the Secretary-General to report at regular intervals to the Security Council on the implementation of the resolution. As such, the Security Council is able to maintain a high degree of control over the exercise of the powers it has sub-conferrred to KFOR.

According to Schermers and Blokker, an IGO has the ability to terminate, replace, revise or revoke a decision it has made. Other measures available to the Security Council in relation to the powers it has sub-conferrred on NATO therefore include the right to amend or revoke that sub-conferral.

According to Professor Sarooshi, the Security Council cannot delegate away its power under Art 39 UN Charter to decide if there has been a threat to or a breach of international peace and security and also to decide if that threat or breach has ceased. As such, the Security Council arguably has both the right to sub-conferr its powers on the use of force, as well as the right to terminate that sub-conferral of powers.

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292 Blokker, above n 86, 563.
293 SC Res 1101, UN SCOR, 3758th mtg, UN Doc S/RES/1101 (28 March 1997), [9].
294 SC Res 1244, UN SCOR, 4011th mtg, UN Doc S/RES/1244 (10 June 1999), [9].
295 SC Res 1244, UN SCOR, 4011th mtg, UN Doc S/RES/1244 (10 June 1999), [19].
296 SC Res 1244, UN SCOR, 4011th mtg, UN Doc S/RES/1244 (10 June 1999), [20].
297 Above Section 3.1.3.
298 Sarooshi, above n 3, 109.
299 Sarooshi, above n 105, 33.
In Security Council Resolution 940 (1994) regarding Haiti for example, the Security Council decided that:

the multinational force will terminate its mission and UNMIH will assume the full range of its functions described in paragraph 9 below when a secure and stable environment has been established and UNMIH has adequate force capability and structure to assume the full range of its functions; the determination will be made by the Security Council…

In a similar way, Security Council 1244 regarding Kosovo which is discussed above, provides for example, that the term of the sub-conferral to NATO would continue after the initial period of twelve months, unless otherwise decided by the Security Council. The Security Council therefore, has the power to amend or to revoke its sub-conferral of powers to NATO on the use of force.

5.0 CONCLUSION

This chapter examined the application of the Sarooshi Typology to the sub-conferral of powers to enforce international peace and security from the United Nations to NATO. The Security Council’s mandate to retain control over the use of the powers it had sub-confferred, its power to revoke that authority, and its right to exercise the powers concurrently are elements which Professor Sarooshi has identified as indicators of an agency relationship.

300 SC Res 940, UN SCOR, 3413th mtg, UN Doc S/RES/940 (31 July 1994), [8].
301 SC Res 1244, UN SCOR, 4011th mtg, UN Doc S/RES/1244 (10 June 1999), [19].
NATO’s characterisation of its purpose as a self-defence alliance rather than a regional arrangement under the UN Charter, suggests its intent to exercise its own powers as independently as possible of the United Nations, and as such could be taken as a contestation of power. This assertion of independence or contestation of authority was evident by way of example, in its decision to commence air strikes without the express authority of the UN Security Council, in part because the NATO Member States believed that the authorization to use force in what NATO considered to be a humanitarian crisis in Kosovo, would be vetoed by certain Permanent Members of the Security Council. By commencing air strikes in Kosovo, NATO was contesting the exclusive powers of the UN Security council to authorize the use of force internationally.

KFOR’s conduct in relation to human rights standards in its peacekeeping activities, highlighted the potential legal consequences for a sub-conferror of powers for the wrongful acts of its sub-conferree, with the suggestion that there may be instances where the UN could potentially be attributed with responsibility for some of the wrongful acts that occurred as a result of KFOR’s actions in Kosovo.

Finally, according to the Sarooshi Typology, the UN had available to it a wide range of measures that it could take, including the exercise of direct control over NATO in Kosovo and amending or revoking its mandate to NATO/KFOR through the adoption of UN Security Council resolutions.

In conclusion, the Sarooshi Typology is applicable to the sub-conferral and exercise of agency powers between intergovernmental organizations. In its applicability it provides a useful framework for distinguishing the conferral of agency powers from other
categories of conferrals, as well as the possible consequences and measures available to
this type of conferral. The Typology’s applicability in the IGOs in relation to agency
powers also reflects and provides insights into the exercise and contestation of powers
between those international organizations.

The next chapter will examine the delegations of powers between IGOs. Delegations of
powers are similar to agency relationships, in that the sub-conferred powers are
revocable and the sub-conferrer has the right to exercise the same powers concurrently
with the sub-conferee.\textsuperscript{302} However, unlike agency powers, in delegations of powers
sub-conferrors of delegated powers cannot exercise control over the manner in which
the sub-conferred powers are exercised by the sub-conferee.\textsuperscript{303}

\textsuperscript{302} Sarooshi, above n 3, 54.
\textsuperscript{303} Ibid.
CHAPTER FIVE
DELEGATION OF POWERS

1.0 INTRODUCTION

This chapter examines the applicability of the category of delegated powers from the Sarooshi Typology to the conferral of powers between IGOs. Delegated powers fall between agency powers and transfers of powers on the continuum of conferred powers, and like the other categories of conferrals they reflect the contestation of values between the conferrer and conferee of those powers. In examining this category of conferred powers, this chapter will discuss the conferral of disarmament powers from the UN to the International Atomic Energy Agency (IAEA) to inspect for nuclear weapons of mass destruction in Iraq.

The case study examines whether the elements of a delegation of powers on the Sarooshi Typology can be applied to the sub-conferral of powers between the UN and the IAEA. It also examines the possibility of a contestation of values in the exercise of those sub-conferred powers and discusses the potential for the responsibility for wrongful acts committed by the sub-conferee IGO to be attributed to the sub-conferrer IGO.

2.0 THE SAROOSHI TYPOLOGY: SUMMARY OF THE DELEGATION OF POWERS FROM A STATE TO AN INTERGOVERNMENTAL ORGANIZATION

According to Professor Sarooshi, delegations of powers fall between agency relationships and transfers of powers on the continuum of conferrals of powers.¹

¹ Sarooshi, Dan, International Organizations and Their Exercise of Sovereign Powers (Oxford University Press, 2005), 54.
Delegated powers are a higher degree of conferral of powers than that of agency powers, but a lesser degree of conferral or powers than transfers of powers.  

2.1 Elements of a Delegation of Powers from a State to an IGO

There are three elements which characterise a conferral of powers as a delegation of powers in the Sarooshi Typology: (1) the State may revoke the delegated powers at its discretion\(^3\), (2) the State cannot apply direct control over the IGO’s exercise of delegated powers\(^4\), and (3) the State may exercise the delegated powers concurrently with the IGO\(^5\).

First, whilst the competence of a State to revoke the conferred powers in an agency relationship is inherent in the relationship, the State’s competence to revoke delegated powers at its discretion is an express or implicit provision in the instrument of conferral.\(^6\)

Second, the lack of competence by a State to control the exercise of delegated powers by the IGO is similar to that of a transfer of powers, but different from that of an agency relationship where the State can control the agent’s exercise of conferred powers.\(^7\)

Third, the right of the State to exercise the delegated powers concurrently with the IGO is due to the fact that the conferral “does not \textit{ipso facto} mean that [the] State has limited its own competence to exercise the conferred powers”.\(^8\) In the \textit{Lotus} case for example, the PCIJ was asked to rule on whether Turkey had contravened international law by

\(^2\) Ibid.
\(^3\) Ibid 55.
\(^4\) Ibid 31 & 54.
\(^5\) Ibid 58-59.
\(^6\) Ibid 55.
\(^7\) Ibid 54.
\(^8\) Ibid 59.
instituting joint criminal proceedings against an officer on the French steamer *Lotus*, which had been in a collision with a Turkish steamer.9 The Court held that rules of international law bind independent States of their own free will, and thus “[r]estrictions upon the independence of States cannot therefore be presumed”.10 Consequently, according to Professor Sarooshi, except where the State has limited its right to exercise the conferred powers, for example by agreeing to be bound by the IGO’s exercise of those powers, the State retains the right to exercise those powers unilaterally, even if they have been conferred on the IGO.11

2.2 Consequences of a Delegation of Powers from a State to an IGO

The two main consequences that result from a State’s delegation of powers to an IGO are fiduciary duty and responsibility.12

With regard to fiduciary duty, since the State is free to exercise the delegated powers concurrently with the IGO and is therefore not bound by the IGO’s exercise of the delegated powers, both the State and the IGO are thereby exercising those powers in their own interests.13 Therefore neither the State nor the IGO owe fiduciary duties to each other.14

With regard to responsibility, where the IGO commits an internationally wrongful act, it is the IGO’s own responsibility.15 Furthermore, since the State has no control over the IGO’s exercise of delegated powers, the State cannot be attributed with responsibility

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9 *S.S. “Lotus” (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10, 5.
10 *S.S. “Lotus” (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10, 18.
11 Sarooshi, above n 1, 59.
13 Ibid 62.
15 Ibid 63.
for the IGO’s wrongful acts.\textsuperscript{16} However, a State may nevertheless be responsible for an IGO’s internationally wrongful acts in the IGO’s exercise of delegated powers, due to the State’s “own acts or omissions”.\textsuperscript{17}

2.3 Measures available to a State in a Delegation of Powers from a State to an IGO

Measures available to a State in a delegation of powers include: (1) amending the constituent treaty although it will depend on the consent of all the States in the treaty\textsuperscript{18}, (2) taking ‘unilateral financial measures’ against the IGO, such as withholding contributions\textsuperscript{19}, (3) termination of the conferral of the delegated powers, which may require the State to withdraw from the IGO\textsuperscript{20}, and (4) objecting persistently to the IGO’s act or decision\textsuperscript{21}.

3.0 CASE STUDY: THE DELEGATION OF POWERS FROM THE UN TO THE IAEA IN RELATION TO DISARMING IRAQ OF NUCLEAR WEAPONS

Following the war with Iraq over its invasion of Kuwait, the UN Security Council adopted Resolution 687 on 3 April 1991, which mandated the IAEA, with the assistance and cooperation of the United Nations Special Commission (UNSCOM), to carry out inspections for nuclear capabilities in Iraq, and to develop a plan for continued monitoring and verification of Iraq’s compliance with the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).\textsuperscript{22} The IAEA was to inspect sites based on Iraq’s declarations, as well as any other sites designated by UNSCOM.\textsuperscript{23} UN Security Resolution 687 also authorized the formation of a Special Commission (UNSCOM) to

\begin{footnotesize}
\begin{itemize}
\item[16] Ibid.
\item[17] Ibid.
\item[18] Ibid 110.
\item[19] Ibid 111.
\item[20] Ibid 114-115.
\item[21] Ibid 115-116.
\item[22] SC Res 687, 2981\textsuperscript{a} mtg, UN Doc S/RES/687 (8 April 1991), [13] and [9(b)(iii)].
\item[23] SC Res 687, 2981\textsuperscript{a} mtg, UN Doc S/RES/687 (8 April 1991), [13].
\end{itemize}
\end{footnotesize}
carry out inspections in Iraq for biological, chemical and missile capabilities, and to provide assistance to the IAEA in carrying out its activities in Iraq.24

3.1 The United Nations - Powers for Arms Control and Disarmament

The functions of the UN in the maintenance of peace and security discussed in Section 3.1.2 of Chapter 4 in this thesis similarly apply in this case study. According to Schachter and Joyner, “[a]rms control, disarmament, non-proliferation and its safeguards are closely related to regulation of the use of force”.25 Unlike the UN’s peacekeeping functions however, the Charter of the United Nations “places little emphasis on arms control and disarmament”.26

According to Goodrich, the architects of the UN Charter regarded disarmament as a subsidiary means of maintaining international peace and security.27 There was a belief that armed forces and facilities might be needed to counter aggression, and consequently “the emphasis in the Charter was as much upon the desirability of a floor as upon the need of a ceiling for national armaments…[and it]…is in this sense that regulation is to be understood”.28

The legal basis for arms control and disarmament in the United Nations is founded on Arts 11(1), 26 and 47 of the UN Charter29, which empower the General Assembly, the Security Council, and the Military Staff Committee to act in relation to the regulation of armaments and disarmament.30 Art 11(1) empowers the General Assembly to consider and make recommendations to UN member States and the Security Council on

24 SC Res 687, 2981st mtg, UN Doc S/RES/687 (8 April 1991), [9(b)].
26 Ibid.
27 Leland Goodrich, quoted in Schachter and Joyner, ibid.
28 Ibid.
29 Schachter and Joyner, above n 25, 301.
30 Ibid.
maintaining international peace and security, including matters of disarmament and regulation of armaments.\textsuperscript{31} Art 26 provides for the Security Council to formulate plans to establish a system for regulating armaments, with the assistance of the Military Staff Committee, to submit to the members of the UN.\textsuperscript{32} Art 47(1) provides for the establishment of the Military Staff Committee to advise and assist the Security Council in relation to its military requirements in maintaining international peace and security, including the “regulation of armaments…and possible disarmament”.\textsuperscript{33} From these provisions, it is clear that the ultimate power for arms control and disarmament belongs to the UN Security Council. As discussed in relation to the \textit{Kadi} case in Chapter Four however, the UN Security Council’s powers to maintain international peace and security are not unlimited.\textsuperscript{34} The ECJ ruled in \textit{Kadi} that it could review the actions of the EC in relation to human rights obligations, despite the EC’s obligations pursuant to UN Security Council resolutions.\textsuperscript{35}

### 3.2 The International Atomic Energy Agency

In December 1953, General Eisenhower proposed to the UN General Assembly that there be established “a world body devoted entirely to the peaceful uses of atomic energy…[which]…would distribute nuclear material on a strictly controlled basis”\textsuperscript{36}. The Statute of the IAEA was adopted in October 1956, and the IAEA came into existence on 29 July 1957.\textsuperscript{37} Art II of the Statute states that the IAEA’s objectives are to “accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world” and to “ensure, so far as it is able, that assistance

\textsuperscript{31} \textit{Charter of the United Nations} art 11(1).
\textsuperscript{32} \textit{Charter of the United Nations} art 26.
\textsuperscript{33} \textit{Charter of the United Nations} art 47(1).
\textsuperscript{34} Chapter 4, Sub-section 3.1.2(i).
\textsuperscript{35} Chapter 4, Sub-section 3.1.2(i).
provided by it or at its request or under its supervision or control is not used in such a way as to further any military purpose”.38

The IAEA’s functions pursuant to Art III(A) of the Statute, are broadly operational, jurisdictional, and regulatory39, and include the facilitation of research, technical support and training in the ‘use of atomic energy for peaceful purposes”40, the establishment and administration of safeguards against the use of ‘fissionable and other materials’, resources and information for military purposes41, and to establish and apply “standards of safety for protection of health and minimization of danger to life and property (including such standards for labour conditions)”42. These functions are independent activities, without any indication of priorities among them in the Statute.43

There is only one specific reference to arms control and disarmament in the Statute, with Art III(B)(1) providing that the IAEA shall:

Conduct its activities in accordance with the purposes and principles of the United Nations to promote peace and international co-operation, and in

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38 Statute of the International Atomic Energy Agency, signed 23 October 1956, 276 UNTS 3 (entered into force 29 July 1957) art II.  
conformity with policies of the United Nations furthering the establishment of safeguarded worldwide disarmament… 44.

The IAEA’s activities in establishing and administering safeguards are provided for in Art XII of the Statute 45. Art XII(A)(1) authorizes the IAEA to examine equipment and facilities including nuclear reactors, but “only from the view-point of assuring that it will not further any military purpose, that it complies with applicable health and safety standards, and that it will permit effective application of the safeguards provided for in this article”. 46 Art XII(A)(3) authorizes the IAEA to access records to ensure accountability of fissionable materials. 47 The authority of the IAEA to send inspectors into a State is contained in Art XII(A)(6), which provides that the IAEA may:

…send into the territory of the recipient State or States inspectors, designated by the Agency after consultation with the State or States concerned, who shall have access at all times to all places and data and to any person who by reason of his occupation deals with materials, equipment, or facilities which are required by this Statute to be safeguarded, as necessary to account for source and special fissionable materials supplied and fissionable products and to determine whether there is compliance with the undertaking against use in furtherance of any military purpose… 48

3.2.1 The Treaty on the Non-Proliferation of Nuclear Weapons (NPT)\textsuperscript{49}

The NPT has three functions.\textsuperscript{50} First, the NPT seeks to prevent the acquisition of nuclear weapons by Non-Nuclear-Weapon States.\textsuperscript{51} Second, the NPT recognizes and facilitates the right of Non-Nuclear-Weapon States to acquire or develop nuclear technology for peaceful purposes along with IAEA safeguards.\textsuperscript{52} Third, the NPT is responsible for the gradual nuclear disarmament of the Nuclear-Weapon States through its safeguards system.\textsuperscript{53}

Pursuant to Art VI NPT, parties to the Treaty are obliged to negotiate in good faith to end the nuclear arms race and to achieve nuclear disarmament.\textsuperscript{54} The ICJ in the \textit{Threat or Use of Nuclear Weapons} case, recognised this obligation as “an obligation to achieve a precise result – nuclear disarmament in all its aspects – by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith”.\textsuperscript{55} Consequently, under this provision, States are considered to have bound themselves to a special duty of cooperation, greater than a general duty to cooperate, to negotiate to bring about nuclear disarmament.\textsuperscript{56}

\textsuperscript{49} \textit{Treaty on the Non-Proliferation of Nuclear Weapons}, signed 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970).
\textsuperscript{50} Ronen, Yael, \textit{The Iran Nuclear Issue} (Hart Publishing, 2010), 8.
\textsuperscript{51} \textit{Treaty on the Non-Proliferation of Nuclear Weapons}, signed 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970) art II; Ronen, Yael, \textit{The Iran Nuclear Issue} (Hart Publishing, 2010), 10-11.
\textsuperscript{52} According to Yael at p 8, as there were a number of States which had nuclear weapons when the NPT was being negotiated, the treaty distinguishes between ‘Nuclear-Weapon States’ which had ‘manufactured and exploded a nuclear weapon’ before 1 January 1967, and Non-Nuclear-Weapon States.
\textsuperscript{53} \textit{Treaty on the Non-Proliferation of Nuclear Weapons}, signed 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970) arts IV and III.1; Ronen, Yael, \textit{The Iran Nuclear Issue} (Hart Publishing, 2010), 8-10 and 11-14.
\textsuperscript{54} Ronen, Yael, \textit{The Iran Nuclear Issue} (Hart Publishing, 2010), 8.
\textsuperscript{55} \textit{Treaty on the Non-Proliferation of Nuclear Weapons}, signed 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970) art VI.
\textsuperscript{56} \textit{Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)} [1996] ICJ Rep 226, 264 [99].
\textsuperscript{56} Kolb, Robert, \textit{An Introduction to the Law of the United Nations} (Hart Publishing, 2010), 100.
States which are Parties to the NPT are required to “place all peaceful nuclear activities under safeguards”. According to Pilat, the limitation of safeguards is that they are “only designed to detect one step on one of the paths to nuclear weapons – the diversion of nuclear material from declared peaceful nuclear activities to nuclear weapons”. Safeguards depend on the State’s accuracy in its declarations to the IAEA on nuclear materials in its possession.

The right of inspection, according to Alexandrowicz, “is the most remarkable feature of the IAEA safeguards system”, and yet perhaps it is also at the same time its inherent weakness. Establishing with absolute certainty that Iraq no longer possesses weapons of mass destruction (WMD) for example, is a “logically impossible task of proving a negative”. Consequently, whilst inspections can confirm that WMD existed or were disarmed, they cannot ‘prove the absence’ of WMD. Cooperation with Inspectors by Iraq does not provide absolute assurance that there are no WMD, whilst obstruction of weapons inspections by Iraq can be construed by some as concealing WMD. Furthermore, the IAEA has no powers of enforcement or powers to impose sanctions, thereby limiting the Agency’s verification role to “confidence-building and demonstrating compliance”.

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58 Ibid.
59 Ibid.
60 Alexandrowicz, above n 39, 148.
63 Squassoni, above n 61, 2.
64 Pilat, above n 57, 1227.
3.2.2. The Relationship between the UN and the IAEA

In 1956, the Secretary-General of the UN presented a report on his conclusions into the form that the relationship between the IAEA and the UN should take, which included: (1) that the relationship agreement should be between the IAEA and the General Assembly instead of with the Economic and Social Council (ECOSOC), the UN body which usually concludes the UN’s agreements with UN Specialized Agencies, thus implying a special status for the IAEA, (2) that the IAEA will be an autonomous organization under the aegis of the UN, and (3) that the IAEA acknowledges the UN’s responsibility in maintaining international peace and security as well as economic and social development, and accepts the obligation to inform and report on its activities to the UN and its organs. Consequently, Art III(B)(1) of the IAEA Statute provides that the IAEA shall “[c]onduct its activities in accordance with the purposes and principles of the United Nations to promote peace and international co-operation…” and Art XVI(B)(1) requires the IAEA to report to the General Assembly, the Security Council, ECOSOC and other organs of the UN as required.

The unique status of the IAEA within the UN framework was a result of the importance and strategic significance of nuclear energy, and consequently, because the Security Council has responsibility for the maintenance of international peace and security, aspects of the IAEA’s work also come under its supervision, in addition to the General Assembly and ECOSOC. From the discussion above, it is clear that the IAEA is an autonomous organization, albeit under the aegis of the UN, and that its obligation to report to the General Assembly, the Security Council and ECOSOC pursuant to Art

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68 Luard, Evan, above n 36, 124.
XVI(B)(1) of the IAEA Statute, results from its agreement to do so. Whilst this section has described the overall relationship between the UN and the IAEA, the sub-conferral of powers discussed later in this chapter relates specifically to the UN Security Council’s sub-conferral of its powers in international peace and security to the IAEA to search and disarm Iraq of any nuclear weapons it may have had.

3.3 The UN and the IAEA in Iraq

Iraq’s programmes for the development of ‘missile, nuclear, chemical and biological’ weapons, were “among the most sophisticated in the Third World” when it invaded Kuwait in 1990. The international community had long been concerned about Iraq’s development of WMD and its use of those weapons in its war with Iran as well as on its own citizens.

The use of chemical or biological weapons is clearly prohibited under international conventions and customary laws. The signatories of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare 1925 for example, agree to be bound by this prohibition. Under the Chemical Weapons Convention, each party to the Convention “undertakes never under any circumstances…to use chemical weapons.” Parties to the Biological Weapons Convention undertake “never in any circumstance to develop, produce,
stockpile or otherwise acquire or retain” biological weapons for “hostile purposes or in armed conflict”. 74

The prohibition on the use of nuclear weapons at the international level is less clear-cut or cohesive. 75 First, there are divergent views on the effectiveness of a nuclear non-proliferation regime. 76 Second, the NPT is seen by some as consisting of double standards. 77 Third, the policies of individual States have tended to reflect their own interests or perspectives on nuclear weapons. 78

The lack of coherence in global policy on nuclear weapons was reflected in the ICJ’s Advisory Opinion in the Nuclear Weapons case 79, in which the Court held that (1) there was no international law or customary law which authorizes the threat or use of nuclear weapons 80, (2) there was no comprehensive and universal prohibition in international law or customary law on the threat or use of nuclear weapons 81, (3) the “threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful” 82, (4) threats or use of nuclear weapons must observe the international law of armed conflict, including the provisions of international humanitarian law and

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74 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, opened for signature 10 April 1972, 1015 UNTS 163 (entered into force 26 March 1975) art I.
75 Mitchell and Beard, above n 71, 224 [10.190].
80 Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 266 [105(2)(A)].
81 Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 266 [105(2)(B)].
82 Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 266 [105(2)(C)].
obligations under treaties\textsuperscript{83}, and (5) there is an obligation to negotiate in good faith to achieve nuclear disarmament\textsuperscript{84}.

The Court stated that in order for a threat to use force to be legal, it “must be a use of force that is in conformity with the Charter”.\textsuperscript{85} According to Kolb, threats are not lawful merely because they support recognised rules or even because they support the aims of the UN Charter.\textsuperscript{86} The possession of nuclear weapons could constitute a threat that is contrary to Art 2(4) UN Charter, if for example it was a threat against the territory or political independence of a State, or it contravened the purposes of the UN, or in the case of self-defence, it violated the principles of necessity and proportionality.\textsuperscript{87} The criteria for the legality of a threat to use force is therefore whether the force threatened if carried through would be unlawful pursuant to Art 2(4) of the UN Charter.\textsuperscript{88}

Finally, the Court concluded that whilst the threat or use of nuclear weapons is generally contrary to the international law of armed conflict, especially with regard to humanitarian law, it could not “conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake”.\textsuperscript{89} Consequently it leaves open the possibility that the threat or use of nuclear weapons may in certain circumstances be legal.

\textsuperscript{83} Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 266 [105(2)(D)].
\textsuperscript{84} Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 267 [105(2)(F)].
\textsuperscript{85} Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 246 [47].
\textsuperscript{86} Kolb, above n 56, 69.
\textsuperscript{87} Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 246-247 [48].
\textsuperscript{88} Kolb, above n 56, 69.
\textsuperscript{89} Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 266 [105(2)(E)].
According to Mitchell and Beard however, it is clear nevertheless that under Art 39 of the UN Charter the Security Council, if it determines that there is a threat to international peace and security, has the power to “order a state to suspend, terminate or dismantle a programme of development of weapons of mass destruction”, and a member State of the UN is bound to comply with those demands pursuant to Art 25 UN Charter, under which the member State has agreed to “accept and carry out the decisions of the Security Council”.

Consequently, following the war that ended Iraq’s invasion of Kuwait, the UN Security Council adopted Resolution 687, which contained provisions for the disarmament of WMD in Iraq. Resolution 687 however, was not primarily or originally a result of non-proliferation concerns, but rather a cease-fire resolution. That, according to Pilat, was one of the reasons why the Security Council failed to achieve a consensus on the use of military action against Iraq when it failed to meet its obligations on disarmament of its WMD.

3.3.1 The Mandate from the UN to the IAEA to Inspect for Nuclear Weapons of Mass Destruction in Iraq – UN Security Council Resolution 687

The safeguards system within the NPT, which is administered by the IAEA, is regarded as the cornerstone of the global non-proliferation regime. Pursuant to paragraph 13 of

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90 Charter of the United Nations art 39: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”.
91 Mitchell and Beard, above n 71, 224 [10.190].
93 Pilat, above n 57, 1226.
94 Ibid.
96 Pilat, above n 57, 1226.
UN Security Council Resolution 687, the IAEA was authorized to carry out on-site inspections for nuclear weapons and capabilities in Iraq, and to design and implement a plan for “future ongoing monitoring and verification of Iraq’s compliance with paragraph 12”\(^99\). The IAEA was to base its inspections on declarations by Iraq pursuant to its obligations under the NPT\(^100\), with additional locations to be designated by a Special Commission subsequently called UNSCOM\(^101\).

Paragraph 9(b) of Resolution 687 provided for the forming of the Special Commission to carry out “on-site inspection[s] of Iraq’s biological, chemical and missile capabilities”\(^102\) and the destruction by the Special Commission of those capabilities or the supervision by the Special Commission of the destruction of missile capabilities by Iraq\(^103\). Pursuant to paragraph 9(b)(iii) of Resolution 687, the Special Commission was mandated to assist the IAEA in its activities to disarm Iraq of nuclear weapons\(^104\).

UN Security Council Resolution 687 required Iraq generally to agree unconditionally (1) not to acquire or develop nuclear weapons or related materials and not to engage in any nuclear weapon research or activities, (2) to disclose to the UN Secretary-General and the Director-General of the IAEA the locations, quantities and types of all nuclear weapons and materials, and (3) to release them into the custody of the IAEA, and to permit on-site inspections and the “destruction, removal or rendering harmless” of such materials, as well as ongoing monitoring and verification of Iraq’s compliance with its undertakings\(^105\).

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\(^98\) Lavoy, above n 76, 29; Ronen, above n 50, 8.
\(^99\) SC Res 687, UN SCOR, 2981\(^a\) mtg, UN Doc S/RES/687 (8 April 1991), [13].
\(^100\) SC Res 687, UN SCOR, 2981\(^b\) mtg, UN Doc S/RES/687 (8 April 1991), [11].
\(^101\) SC Res 687, UN SCOR, 2981\(^c\) mtg, UN Doc S/RES/687 (8 April 1991), [13].
\(^102\) SC Res 687, UN SCOR, 2981\(^d\) mtg, UN Doc S/RES/687 (8 April 1991), [9(b)(i)].
\(^103\) SC Res 687, UN SCOR, 2981\(^e\) mtg, UN Doc S/RES/687 (8 April 1991), [9(b)(ii)].
\(^104\) SC Res 687, UN SCOR, 2981\(^f\) mtg, UN Doc S/RES/687 (8 April 1991), [9(b)(iii)]; Malone, above n 70, 153.
\(^105\) SC Res 687, UN SCOR, 2981\(^g\) mtg, UN Doc S/RES/687 (8 April 1991), [12].
3.3.2 Brief Background to the Inspections for WMD in Iraq

The IAEA carried out its first inspection pursuant to SC Resolution 687 in May 1991.106 In June 1991, UNSCOM commenced its first inspections for chemical weapons and for missiles in Iraq.107

Between 22 June 1991 to 3 July 1991, the IAEA carried out inspections at sites designated by UNSCOM.108 The IAEA reported that they were denied access during short-notice inspections at two of the sites designated by UNSCOM, and that materials were removed by the Iraqi authorities against the orders of the Chief Inspector.109 The IAEA stated that there was strong evidence that the removed material related to uranium enrichment activities which had not been declared by Iraq.110 The inspection team concluded at the end of the second inspection that from evidence found, Iraq “had been pursuing an undeclared uranium enrichment programme using the electromagnetic isotope separation technique”.111

On 4 July 1991, the Director-General of the IAEA (Dr Hans Blix), the Chairman of UNSCOM (Mr Rolf Ekeus), and the UN Under-Secretary-General for Disarmament

Affairs (Mr Yasushi Akashi) arrived in Baghdad to discuss with Iraqi authorities the denial of access and the removal of materials during the IAEA’s inspection at the two sites.\textsuperscript{112} The Iraqi authorities were requested to provide access to any location to the IAEA inspection team, and to produce for inspection the equipment and materials that had been removed from the two sites.\textsuperscript{113}

On 6 August 1991, Iraq provided additional information regarding experimental activities involving plutonium to the fourth inspection team from the IAEA.\textsuperscript{114} Iraq’s failure in declaring that information in a timely manner pursuant to its safeguards agreement with the IAEA was held to be a non-compliance with that agreement.\textsuperscript{115} On 15 August 1991, the UN Security Council condemned Iraq for violating a number of its obligations under SC Resolution 687\textsuperscript{116}, and for its non-compliance with its safeguards agreement with the IAEA\textsuperscript{117}. The Resolution set out a number of demands on Iraq, including “full, final and complete disclosure” relating to weapons of mass destruction pursuant to SC Resolution 687\textsuperscript{118}, full access to inspection teams from UNSCOM and the IAEA, and the ceasing of concealment, movement or destruction of relevant materials and equipment without notifying UNSCOM and receiving prior consent from UNSCOM to do so.\textsuperscript{119}

Between 23 September 1991 and 30 September 1991, the IAEA carried out its sixth inspection at a site in Baghdad which held extensive documentation on Iraq’s nuclear programme.\textsuperscript{120} The Iraqi authorities refused to allow the inspection team to leave the

\textsuperscript{112} IAEA, above n 106.
\textsuperscript{113} Ibid.
\textsuperscript{114} Ibid.
\textsuperscript{115} Ibid.
\textsuperscript{116} SC Res 707, UN SCOR, 3004\textsuperscript{th} mtg, UN Doc S/RES/707 (15 August 1991), [1].
\textsuperscript{117} SC Res 707, UN SCOR, 3004\textsuperscript{th} mtg, UN Doc S/RES/707 (15 August 1991), [2].
\textsuperscript{118} SC Res 687, UN SCOR, 2981\textsuperscript{st} mtg, UN Doc S/RES/687 (8 April 1991).
\textsuperscript{119} SC Res 707, UN SCOR, 3004\textsuperscript{th} mtg, UN Doc S/RES/707 (15 August 1991), [3].
\textsuperscript{120} IAEA, above n 106; UNSCOM, above n 107.
site with any documentation, detaining them for four days until 27 September 1991\textsuperscript{121}, when they were released with the documents following a threat of action by the Security Council.\textsuperscript{122} On 4 October 1991, Dr Hans Blix reported that the sixth inspection by the IAEA had obtained documents which showed conclusively that Iraq had a nuclear weapons programme.\textsuperscript{123}

The ongoing process of inspections for weapons of mass destruction by UNSCOM and the IAEA in Iraq from 1991 to 1997 continued to be marked by a similar pattern of delay and incomplete compliance by Iraq.\textsuperscript{124}

On 17 December 1997, the Executive Chairman of UNSCOM reported to the Security Council that Iraq had determined that inspections of “presidential and sovereign sites” would not be permitted under any circumstances.\textsuperscript{125} The President of the Security Council issued a statement on 22 December 1997, reiterating the Council’s demand that Iraq cooperate fully with UNSCOM pursuant to relevant Council resolutions and that Iraq permit immediate and unconditional access to UNSCOM inspectors.\textsuperscript{126} The Security Council also stressed that Iraq’s failure to permit UNSCOM immediate and unconditional access to sites was unacceptable and a violation of relevant resolutions.\textsuperscript{127}

\textsuperscript{121} Ibid.
\textsuperscript{122} UNSCOM, above n 107.
\textsuperscript{123} IAEA, above n 106.
\textsuperscript{124} UNSCOM, above n 107.
\textsuperscript{125} Letter dated 17 December 1997 from the Executive Chairman of the Special Commission established by the Secretary-General pursuant to paragraph 9 (b) (i) of Security Council Resolution 687 (1991) addressed to the President of the Security Council (17 December 1997), S/1997/987, Annex [13].
\textsuperscript{126} Statement by the President of the Security Council (22 December 1997), S/PRST/1997/56.
\textsuperscript{127} Statement by the President of the Security Council (22 December 1997), S/PRST/1997/56.
On 22 January 1998 the Executive Chairman of UNSCOM reported to the Security Council that Iraq was still delaying access to the Presidential and Sovereign sites. In February 1998 the UN Secretary-General sent a United Nations Technical Mission to Iraq to survey the size and perimeters of the eight Presidential Sites. Between 20 February 1998 to 23 February 1998 the UN Secretary-General visited Iraq, and a Memorandum of Understanding (MOU) was signed between the UN and Iraq on 23 February 1998. The terms of the MOU included Iraq’s reconfirmation of its acceptance of all relevant Security Council resolutions, its undertaking to cooperate fully with UNSCOM and the IAEA, and also its undertaking to permit “immediate, unconditional and unrestricted access” to UNSCOM and the IAEA in accordance to the relevant Security Council resolutions. The UN reiterated “the commitment of all Member States to respect the sovereignty and territorial integrity of Iraq”, and UNSCOM undertook to respect Iraq’s concerns “relating to national security, sovereignty and dignity”. Special procedures were to apply to inspections of the Presidential Sites, and the Secretary-General undertook to bring the matter of the

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128 Letter dated 22 January 1998 from the Executive Chairman of the Special Commission established by the Secretary-General pursuant to paragraph 9 (b) (i) of Security Council Resolution 687 (1991) addressed to the President of the Security Council (22 January 1998), S/1998/58, Annex, Section E.
129 UNSCOM, above n 107;
lifting of sanctions on Iraq to the Security Council\textsuperscript{137}. The MOU was endorsed by the UN Security Council on 2 March 1998.\textsuperscript{138}

In June 1998 the Executive Chairman of UNSCOM met with the Deputy Prime Minister of Iraq to discuss outstanding issues relating to disarmament\textsuperscript{139}, and agreement was reached on a schedule of work to address certain disarmament issues over the following two months\textsuperscript{140}.

On 14 July 1998, UNSCOM biological experts did a third review of Iraq’s declaration on its biological weapons programme, and concluded that it was not verifiable.\textsuperscript{141}

On 3 August 1998, the Executive Chairman of UNSCOM met with the Deputy Prime Minister of Iraq to assess results achieved by the schedule of work agreed to in June 1998.\textsuperscript{142} The Executive Chairman proposed to address disarmament issues which were not in the June schedule of work as well as a further programme of work to be undertaken.\textsuperscript{143} The Deputy Prime Minister rejected the proposals and requested that the Executive Chairman report to the UN Security Council that “there were no more

\textsuperscript{137} Letter dated 25 February 1998 from the Secretary-General addressed to the President of the Security Council (27 February 1998), Memorandum of Understanding between the United Nations and the Republic of Iraq, S/1998/166, [7].

\textsuperscript{138} SC Res 1154, UN SCOR, 3858\textsuperscript{th} mtg, UN Doc S/RES/1154 (2 March 1998), [1].

\textsuperscript{139} Letter dated 16 June 1998 from the Executive Chairman of the Special Commission established by the Secretary-General pursuant to Paragraph 9 (b) (i) of Security Council Resolution 687 (1991) addressed to the President of the Security Council, UN Doc S/1998/529 (17 June 1998).

\textsuperscript{140} Letter dated 16 June 1998 from the Executive Chairman of the Special Commission established by the Secretary-General pursuant to Paragraph 9 (b) (i) of Security Council Resolution 687 (1991) addressed to the President of the Security Council, UN Doc S/1998/529 (17 June 1998), [23].

\textsuperscript{141} UNSCOM, above n 107.

\textsuperscript{142} Letter dated 5 August 1998 from the Executive Chairman of the Special Commission established by the Secretary-General pursuant to Paragraph 9 (b) (i) of Security Council Resolution 687 (1991) addressed to the President of the Security Council, UN Doc S/1998/719 (5 August 1998).

\textsuperscript{143} Letter dated 5 August 1998 from the Executive Chairman of the Special Commission established by the Secretary-General pursuant to Paragraph 9 (b) (i) of Security Council Resolution 687 (1991) addressed to the President of the Security Council, UN Doc S/1998/719 (5 August 1998).
proscribed weapons and related materials in Iraq”. The Executive Chairman indicated that he was unable to do so, as “the Commission did not yet have the evidence to verify that Iraq had carried out all the actions contemplated in the relevant disarmament paragraphs of resolution 687 (1991)”. The meeting was subsequently suspended.

On 5 August 1998, Iraq decided to cease cooperation with UNSCOM and the IAEA pending agreement by the UN Security Council to lift the oil embargo on Iraq and to reorganize the Commission. In the meantime, Iraq would permit monitoring on its own terms.

On 9 September 1998, the UN Security Council adopted SC Resolution 1194, which condemned Iraq’s decision of 5 August 1998 to suspend cooperation with UNSCOM and the IAEA, in contravention of its obligations, demanded that Iraq rescind its decision of 5 August 1998 and cooperate fully with UNSCOM and the IAEA pursuant to their obligations, and decided to postpone reviews pursuant to SC Resolution 687 (1991) paragraphs 21 and 28 until Iraq had rescinded its decision of 5 August 1998 and UNSCOM and the IAEA had reported to the Security Council that they had been able to exercise all the activities provided for in their mandates.

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144 Letter dated 5 August 1998 from the Executive Chairman of the Special Commission established by the Secretary-General pursuant to Paragraph 9 (b) (i) of Security Council Resolution 687 (1991) addressed to the President of the Security Council, UN Doc S/1998/719 (5 August 1998).
146 UNSCOM, above n 107.
147 Ibid.
149 SC Res 1194, UN SCOR, 3924th mtg, UN Doc S/RES/1194 (9 September 1998), [1].
150 SC Res 1194, UN SCOR, 3924th mtg, UN Doc S/RES/1194 (9 September 1998), [2].
151 SC Res 1194, UN SCOR, 3924th mtg, UN Doc S/RES/1194 (9 September 1998), [3].
On 31 October 1998 Iraq announced that it would cease all interactions with UNSCOM and stop all UNSCOM activities in Iraq. On 5 November 1998 the UN Security Council adopted SC Resolution 1205, which condemned Iraq’s decision on 31 October 1998 to cease cooperation with UNSCOM “as a flagrant violation of resolution 687 (1991) and other relevant resolutions”, and which demanded that Iraq rescind immediately the decisions of 5 August 1998 and 31 October 1998 which suspended cooperation with UNSCOM and restricted the work of the IAEA.

On 10 November 1998, the Executive Chairman of UNSCOM decided to withdraw all UNSCOM personnel from Iraq, with his prime consideration being their safety in Iraq. They left Iraq for Bahrain on 11 November 1998. IAEA personnel were similarly withdrawn from Iraq to Bahrain on 11 November 1998, due to safety concerns.

On 13 November 1998, the UN Secretary-General wrote to the President of Iraq, informing him of the Security Council’s unanimous preference for a diplomatic resolution of the crisis, and its endorsement of the Secretary-General’s appeal of 11 November 1998 to the President of Iraq to resume cooperation with UNSCOM and the IAEA.

152 UNSCOM, above n 107.
153 SC Res 1205, UN SCOR, 3939th mtg, UN Doc S/RES/1205 (5 November 1998), [1].
154 SC Res 1205, UN SCOR, 3939th mtg, UN Doc S/RES/1205 (5 November 1998), [2].
157 Iraq Nuclear Verification Office, above n 148.
On 14 November 1998, the Deputy Prime Minister of Iraq replied to the Secretary-General’s letter of 13 November 1998, informing him that Iraq had decided to resume working with UNSCOM and the IAEA, and would permit them to carry out their duties in accordance with the relevant UN Security Council resolutions and the principles agreed to in the MOU of 23 February 1998.159

On 15 December 1998 the UN Secretary-General submitted reports from the Director General of the IAEA (dated 14 December 1998) and the Executive Director of UNSCOM (dated 15 December 1998) covering the period from 17 November 1998, to the President of the UN Security Council.160 The IAEA’s report listed the activities carried out by the IAEA Nuclear Monitoring Group in Iraq since 17 November 1998, and stated that Iraq had “provided the necessary level of cooperation to enable the…activities to be completed efficiently and effectively” and that Iraq had expressed its intention to continue cooperating with the IAEA to resolve “the few remaining questions and concerns related to Iraq’s clandestine nuclear programme”.161 The UNSCOM report concluded that “Iraq did not provide the full cooperation it promised on 14 November 1998”, that Iraq had furthermore imposed new restrictions on UNSCOM’s work, and that as a consequence of the lack of full cooperation from Iraq, UNSCOM was unable to carry out the “substantive disarmament work” mandated by the Security Council.162

On 16 December 1998, UNSCOM withdrew its personnel from Iraq.\(^{163}\) IAEA personnel were similarly relocated to Bahrain, due to safety concerns.\(^{164}\)

On 30 January 1999, the UN Security Council decided to establish three separate Panels to make recommendations on disarmament and monitoring and verification issues\(^{165}\), humanitarian issues\(^{166}\), and issues relating to Kuwait\(^{167}\).

On 17 December 1999 the UN Security Council adopted SC Resolution 1284, deciding to replace UNSCOM with the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC).\(^{168}\) The Security Council reaffirmed the IAEA’s mandate in Iraq “with the assistance and cooperation of UNMOVIC”.\(^{169}\)

On 16 September 2002, Iraq informed the UN Secretary-General of its decision to permit the return of United Nations weapons inspectors unconditionally.\(^{170}\) In the interim the IAEA had continued to conduct limited inspections in Iraq\(^{171}\), but had been unable to carry out its disarmament mandate from the UN Security Council since mid-December 1998\(^{172}\).

\(^{163}\) UNSCOM, above n 107.

\(^{164}\) Iraq Nuclear Verification Office, above n 148.

\(^{165}\) Note by the President of the Security Council, UN Doc S/1999/100 (30 January 1999), [4].

\(^{166}\) Note by the President of the Security Council, UN Doc S/1999/100 (30 January 1999), [5].

\(^{167}\) Note by the President of the Security Council, UN Doc S/1999/100 (30 January 1999), [6].

\(^{168}\) SC Res 1284, UN SCOR, 4084\(^{th}\) mtg, UN Doc S/RES/1284 (17 December 1999), [1]. For UNMOVIC’s responsibilities, see SC Res 1284, UN SCOR, 4084\(^{th}\) mtg, UN Doc S/RES/1284 (17 December 1999), [2].

\(^{169}\) SC Res 1284, UN SCOR, 4084\(^{th}\) mtg, UN Doc S/RES/1284 (17 December 1999), [3].


On 8 November 2002 the UN Security Council adopted SC Resolution 1441, which set out the terms for Iraq’s compliance with its disarmament obligations pursuant to relevant UN Security Council resolutions\(^{173}\), including the provision of “immediate, unimpeded, unconditional, and unrestricted access” to UNMOVIC and the IAEA\(^{174}\).

On 27 November 2002, UNMOVIC and the IAEA resumed weapons inspections in Iraq\(^{175}\).

On 18 March 2003, UNMOVIC and IAEA inspectors withdrew from Iraq\(^{176}\).

On 20 March 2003, President George W. Bush announced that American and coalition forces had commenced military operations in Iraq\(^{177}\).

On 29 June 2007 the UN Security Council adopted SC Resolution 1762, which “terminate[d] immediately the mandates of UNMOVIC and the IAEA under the relevant resolutions”\(^{178}\), and reaffirmed “Iraq’s disarmament obligations under relevant resolutions”\(^{179}\).

### 4.0 THE DELEGATION OF POWERS FROM THE UN TO THE IAEA

According to the Sarooshi Typology, conferrals of delegated powers are characterised by the following elements: (1) the State has the right to revoke the delegated powers at

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\(^{173}\) SC Res 1441, UN SCOR, 4644\(^{th}\) mtg, UN Doc S/RES/1441 (8 November 2002).

\(^{174}\) SC Res 1441, UN SCOR, 4644\(^{th}\) mtg, UN Doc S/RES/1441 (8 November 2002), [5].

\(^{175}\) UNMOVIC, Chronology of Main Events


\(^{176}\) UNMOVIC, above n 175; Iraq Nuclear Verification Office, above n 148.

\(^{177}\) ‘Bush declares war’, CNN (online), 20 March 2003


\(^{178}\) SC Res 1762, UN SCOR, 5710\(^{th}\) mtg, UN Doc S/RES/1762 (29 June 2007), [1].

\(^{179}\) SC Res 1762, UN SCOR, 5710\(^{th}\) mtg, UN Doc S/RES/1762 (29 June 2007), [2].
its discretion, (2) the State lacks the competence to directly control the IGO’s exercise of the delegated powers, and (3) the State has the right to exercise the delegated powers concurrently with the IGO. As discussed below, the sub-conferral of powers to disarm Iraq of WMD conferred on the IAEA by the UN, contains the elements of a delegation of powers described in the Sarooshi Typology.

First, the IAEA was given its mandate or power to disarm Iraq of nuclear weapons pursuant to UN Security Council Resolution 687 on 3 April 1991. This mandate was terminated on 29 June 2007 by UN Security Council Resolution 1762. According to the Council, the operations of UNMOVIC and the IAEA in Iraq were no longer necessary, and it therefore decided “to terminate immediately the mandates of UNMOVIC and the IAEA under the relevant resolutions”. This confirmed that the Security Council had the power to unilaterally and immediately revoke the powers it had sub-conferred on the IAEA regarding Iraq.

Second, the IAEA was formed as a special autonomous IGO under the aegis of the United Nations. Pursuant to Art I(2) of the Agreement Governing the Relationship between the United Nations and the International Atomic Energy Agency, the UN undertakes to recognize the IAEA’s right to function as an autonomous organization:

The United Nations recognizes that the Agency, by virtue of its intergovernmental character and international responsibilities, will function under its

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180 See above Section 2.1.
181 SC Res 687, UN SCOR, 2981st mtg, UN Doc S/RES/687 (8 April 1991), [12] and [13]. See also above Section 3.3.1.
182 SC Res 1762, UN SCOR, 5710th mtg, UN Doc S/RES/1762 (29 June 2007), [1].
183 SC Res 1762, UN SCOR, 5710th mtg, UN Doc S/RES/1762 (29 June 2007), preamble [6].
184 SC Res 1762, UN SCOR, 5710th mtg, UN Doc S/RES/1762 (29 June 2007), [1].
185 Above Section 3.2.2.
Statute as an autonomous international organization in the working relationship with the United Nations established by this Agreement.  

Similarly, pursuant to Art I(1) of the Agreement, the UN affirms its recognition of the IAEA’s responsibility “for international activities concerned with the peaceful uses of atomic energy in accordance with its Statute”. Furthermore, according to Szasz, because the IAEA is not strictly a UN specialized agency, UN recommendations “do not automatically apply to it”. Art V of the Agreement between the UN and the IAEA provides for the referral of resolutions by the UN to the IAEA, which the IAEA shall consider, suggesting a high degree of independence on the part of the IAEA. As such, the requirement for the IAEA to report to the UN pursuant to Art XVI(B)(1) of the IAEA Statute for example is, as suggested above in section 3.2.2, a result of the IAEA’s agreement to do so, rather than a fundamental premise of its relationship with the UN. 

Third, the UN retained the right to exercise the power of disarming Iraq of WMD concurrently with the IAEA. The IAEA’s responsibility for the peaceful use of atomic energy pursuant to Art I(1) of the Agreement between the UN and the IAEA, is “without prejudice to the rights and responsibilities of the United Nations in this field under the Charter”. UNSCOM, a subsidiary organ of the UN, and its successor the

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189 Szasz, above n 65, 276.
191 Above Section 3.2.2.
UNMOVIC which was established pursuant to UN Security Council Resolution 1284\textsuperscript{194}, worked closely with the IAEA in the disarmament of WMD in Iraq\textsuperscript{195}, in accordance with the UN’s right to exercise concurrently the powers it had delegated to the IAEA. The separate but coordinated activities of UNSCOM/UNMOVIC and the IAEA in Iraq which are described in the chronology in section 3.3.2 above, reflect the concurrent nature of the powers that were sub-conferred on the IAEA by the UN\textsuperscript{196}.

For example, pursuant to paragraphs 12 and 13 of UN Security Council Resolution 687 (1991), the IAEA was mandated to perform certain tasks in Iraq with the “assistance and cooperation” of UNSCOM, including the inspection of any additional sites designated by UNSCOM\textsuperscript{197}, and taking custody of and removing Iraq’s “nuclear-weapon-usable materials” with UNSCOM’s assistance and cooperation\textsuperscript{198}. Paragraph 9(b)(iii) in turn, mandated UNSCOM to provide the Director General of the IAEA with the assistance and cooperation referred to in paragraphs 12 and 13\textsuperscript{199}.

Subsequently, pursuant to UN Security Council Resolution 1284 (1999) paragraph 3, the Security Council reaffirmed the role of the IAEA in Iraq with the “assistance and cooperation of UNMOVIC”, the UN organ which had succeeded UNSCOM\textsuperscript{200}. Paragraph 3 stated that the Security Council:

- **Reaffirms** the provisions of the relevant resolutions with regard to the role of the IAEA in addressing compliance by Iraq with paragraphs 12 and 13 of resolution 687 (1991) and other related resolutions, and **requests** the Director

\textsuperscript{193} Malone, above n 70, 153.
\textsuperscript{194} SC Res 1284, UN SCOR, 4084\textsuperscript{th} mtg, UN Doc S/RES/1284 (17 December 1999).
\textsuperscript{195} Above Section 3.3.2.
\textsuperscript{196} Above Section 3.3.2.
\textsuperscript{197} SC Res 687, UN SCOR, 2981\textsuperscript{st} mtg, UN Doc S/RES/687 (8 April 1991), [13].
\textsuperscript{198} SC Res 687, UN SCOR, 2981\textsuperscript{st} mtg, UN Doc S/RES/687 (8 April 1991), [12].
\textsuperscript{199} SC Res 687, UN SCOR, 2981\textsuperscript{st} mtg, UN Doc S/RES/687 (8 April 1991), [9(b)(iii)].
\textsuperscript{200} SC Res 1284, UN SCOR, 4084\textsuperscript{th} mtg, UN Doc S/RES/1284 (17 December 1999), [3].
General of the IAEA to maintain this role with the assistance and cooperation of UNMOVIC...\(^{201}\)

As the Security Council only ‘reaffirmed’ the IAEA’s mandate and requested the Director General of the IAEA to maintain that role, rather than conferring a new mandate on the IAEA, it suggests that changes to the UN’s exercise of its own concurrent powers of disarmament may not necessarily have changed the central mandate of the IAEA pursuant to UN Security Council Resolution 687. As such, the separate and concurrent nature of their exercise of powers is therefore evidenced by the Security Council’s right to replace UNSCOM with UNMOVIC in Iraq, without negating its sub-conferral of those powers on the IAEA.

Therefore, the powers conferred upon the IAEA by the UN in relation to the disarmament of Iraq, demonstrated that the UN had the right to revoke those powers at its discretion, that the UN had no direct control over the IAEA’s exercise of those powers, and that the UN had the right to exercise those powers concurrently with the IAEA. Consequently, the powers to disarm Iraq of WMD that were sub-confferred from the UN to the IAEA, were delegated powers.

4.1 The Contestation of Powers between the UN and the IAEA

This section discusses the contestation of powers between two IGOs, the UN and the IAEA. According to Professor Sarooshi, States contest their individual concepts of sovereignty and the values which underlie their sovereignty, in IGOs.\(^{202}\) Although they are subjects of international law, IGOs however are not sovereign.\(^{203}\) They exercise

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\(^{201}\) SC Res 1284, UN SCOR, 4084th mtg, UN Doc S/RES/1284 (17 December 1999), [3].

\(^{202}\) Chapter 2, Section 2.1.

\(^{203}\) Chapter 3, Section 3.0.
powers conferred on them by member States in order to fulfil their given objectives and functions. In this sense they have jurisdictions within which they are competent to act, and which sometimes overlap with the jurisdictions of other IGOs. As stated in chapter 3, “[g]iven that IGOs exercise conferred powers, the conflict between them in protecting their conferred jurisdictions could therefore in that sense, be said to be a contestation in their exercise of their powers”.

Furthermore, contestations between member States and IGOs may not necessarily reach the level of formal disputes going to adjudication. Member States can contest their sovereign values in IGOs in a number of ways, for example through voting, debate, diplomacy and perhaps even sometimes by not meeting their obligations. For example, according to Alvarez, the US has been the “UN’s biggest debtor, the member which has since the 1980s most threatened the organization with bankruptcy by failing to pay on time its annual assessed contributions to the UN regular budget”. According to him, payment of the US’ UN contributions “remains essentially a realist foreign policy tool rather than a debt legally due”. Another example of non-adjudicated contestation between member States and IGOs relates to the withdrawal from the United Nations Educational, Scientific and Cultural Organization (UNESCO) by the US in 1984 and by the UK and Singapore in 1985 over “management and other issues”, as a result of which UNESCO’s “budget drop[ped] considerably”. The UK returned to UNESCO in 1997, the US returned in 2003, and Singapore ‘joined’ in 2007. In a similar manner

204 Chapter 3, Section 3.0.
205 Chapter 3, Section 4.2.
206 Chapter 3, Section 4.2.
208 Ibid 230.
210 Ibid.
therefore, disagreement or disharmony between IGOs could in a sense, perhaps be an indication of a contestation of their powers and of their organizational values.

In relation to a contestation of powers between the UN and the IAEA, Duelfer identified a number of reasons for the perceived failure of inspections in Iraq, one of which was the undermining of inspectors by the intervention of the UN Secretary-General.211 There were also differences in values between the organizational cultures of the IAEA and UNSCOM, which led to additional tensions between them in their working relationship in Iraq. These issues reflect the challenges that exist in a delegation of powers, wherein the sub-conferror and the sub-conferee have the right to exercise the same powers concurrently.

First, according to Duelfer, the UN Security Council resolutions relating to the IAEA’s mandate, were intentional in their placement of the weapons inspectors in a position of authority over Iraq, such that Iraq had to report to the inspectors, who would then report to the Council.212 Iraq however, appealed on occasion directly to sympathetic members of the Security Council as well as to the UN Secretary-General, thus undermining the authority of the Inspectors.213

The UN intervened in a number of disputes between Iraq and the inspectors, which it had the right to do, as it had reserved the right to exercise concurrently the powers it had sub-conferred on the IAEA. In late June 1991 for example, when Iraqi personnel fired warning shots at IAEA and UNSCOM inspectors who were attempting to “intercept Iraqi vehicles carrying nuclear related equipment”214, the Security Council instructed

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211 Duelfer, above 95, 9.
212 Ibid.
213 Ibid.
214 UNSCOM, above n107, 1.
the Secretary-General to “send a high-level mission to Baghdad immediately to meet with the highest levels of the Iraqi Government”.\footnote{Note by the President of the Security Council (28 June 1991), S/22746, 1-2; UNSCOM, above n 107, 1.} In late February 1998, the UN Secretary-General intervened again following the refusal of Iraq to permit inspection of several Presidential sites by UNSCOM and the IAEA, by visiting Iraq and agreeing the terms of a Memorandum of Understanding, in which Iraq reiterated “its undertaking to cooperate fully with the Commission and the IAEA”.\footnote{UNSCOM, above n 107, 8.}

According to Duelfer, since “the inspectors’ power over Iraq was derived from its relationship with the Security Council,…to the extent that Iraq could put distance between the council and its inspectors, the inspectors’ authority and ability to enforce Iraqi compliance was degraded”.\footnote{Duelfer, above n 95, 9.} In that sense, the UN took action which could be perceived to be a contestation between its power and the power of the IAEA to act, in relation to managing the disarmament process with Iraq.

Second, differences in values and culture between the IAEA and UNSCOM created tensions in their working relationship right from the start of their relationship.\footnote{Yale-UN Oral History interview with Rolf Ekeus, February 3, 1998, Washington, D.C., quoted in Krasno, Jean E. and Sutterlin, James S., \textit{The United Nations and Iraq: Defanging the Viper} (Praeger Publishers, 2003), 13; Blix, Hans, \textit{Disarming Iraq} (Bloomsbury, 2005), 23.} UNSCOM for example, was created by UN Security Council Resolution 687 under a cease-fire agreement between the UN and Iraq.\footnote{Krasno and Sutterlin, above n 218, 25.} The IAEA’s essential purpose on the other hand, was to manage the peaceful use and development of nuclear energy by its member States\footnote{Ibid.}, as a result of which, inspections “were based on trust and respect for sovereignty”\footnote{Ibid.} and inspections were “carefully announced ahead of time and approved
by the government involved”. 222 In this sense, the values being contested between the IAEA and UNSCOM were on the one hand, UNSCOM’s predominant objective to maintain international peace and security pursuant to its mandate from the UN Security Council, and on the other hand, the IAEA’s practice of consensual procedures and respect for State sovereignty.

According to Dr Hans Blix, a former Director-General of the IAEA, the “difference in inspection style between the organizations” was a serious matter. 223 In addition, there was also friction arising from the IAEA’s perception that UNSCOM was trying to control it, for example when Dr Blix found out that UNSCOM was actively recruiting personnel for the IAEA’s inspection team. 224

According to Dr Blix however, the friction between the IAEA and UNSCOM did not reduce the effectiveness of their operations. 225 To the extent that the IAEA could exercise its sub-conferred powers autonomously, without the direct control of the UN, it is perhaps unlikely that the differences in values or cultures between it and UNSCOM impacted on the actual delegation of power. Just as member States attempt to protect their sovereign values and influence outcomes within IGOs, the contestations between the IAEA and UNSCOM similarly reflected their attempts to protect their jurisdictions and values, and to influence outcomes. Their mandates however, would not necessarily have been affected by this contestation.

222 Ibid.
223 Blix, above n 218, 23.
224 Ibid 22-23.
225 Ibid 23.
This stance is reflected in the comments of a chief arms inspector with the IAEA, although it was in relation to pressures over the threat of a military invasion of Iraq\textsuperscript{226}, and not to the tensions between the IAEA and UNSCOM:

As leader of the team, I have to understand the pressure, but I have not to bend so much that we would lose in technical credibility. We’re going to implement everything we feel we need to implement as fast as we can. But one thing we won’t compromise on is the credibility of our conclusions. If we draw conclusions, it’s because we’ve done everything we need to.”\textsuperscript{227}

In conclusion, the discussion above on the contestation of powers between the UN and the IAEA, reflects some of the challenges resulting from the exercise of the same powers concurrently by the sub-conferrer and the sub-conferee.

\textbf{4.2 Consequences of the Delegation of Powers from the UN to the IAEA – Fiduciary Duty and Responsibility}

According to Professor Sarooshi, in a delegation of powers from States to an IGO, the IGO does not owe its member States any fiduciary duties.\textsuperscript{228} This is because the IGO is acting on its own behalf in exercising the delegated powers, and therefore it does not alter the legal relationships of its member States with third parties.\textsuperscript{229} Consequently, in relation to the delegation of powers between IGOs, the IAEA in this case study does not owe a fiduciary duty to the UN. This is affirmed by the UN exercising in its own right the same powers of disarming Iraq of WMD, through its organs UNSCOM and UNMOVIC, concurrently with the IAEA in Iraq. According to the Sarooshi Typology,

\ \textsuperscript{226} ‘The nuclear physicist who could give peace another chance in Iraq: UN inspector insists he will not compromise’, \textit{The Guardian}, 12 November 2002, 1 \texttt{http://www.guardian.co.uk/world/2002/nov/12/iraq.janraynor/print}.
\ \textsuperscript{227} Ibid.
\ \textsuperscript{228} Sarooshi, above n 1, 62.
\ \textsuperscript{229} Ibid.
the UN in this case would be accepting its own obligations as a result of its exercise of those powers.  

The UN and the IAEA could however, attract responsibility for any internationally wrongful act that was committed as a result of the sub-conferral of powers from the UN to the IAEA. In relation to the IAEA for example, the Safeguards Committee, according to Rainer and Szasz, had discussed the international responsibility of the IAEA, and had envisaged two situations which could result in claims against the IAEA:

(a) Activities by the Agency within the territory of a State, involving the possibility of an accident resulting in damage to persons or property. This could arise, in particular, from actions of Agency inspectors but also owing to Agency equipment being installed at a nuclear facility.

(b) Damage suffered as a result of divulgence of commercial and industrial secrets and other confidential information obtained by the Agency in applying safeguards.  

Unlike the case study on the UN and NATO in Kosovo in Chapter Four however, there did not appear to be any apparent incidents of wrongful acts committed by the IAEA during the period of its mandate in Iraq. If there had been, then the IAEA and perhaps the UN, could have been responsible for those wrongful acts, either in their own right or jointly.

Pursuant to Art 3 DARIO for example, an IGO is responsible for its own internationally wrongful act. Consequently, the IAEA would have been responsible for any internationally wrongful act that it committed.

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230 Ibid.
231 Rainer and Szasz, above n 43, 654.
However, as discussed in chapter 3, an IGO could potentially be responsible for the wrongful acts of another IGO.\footnote{Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 52 art 3.} First, Arts 6 to 8 DARIO provide that an IGO could be responsible for the conduct of its organs and agents.\footnote{Chapter 3, Sub-section 4.3.2.1(i).} One of the elements required for the IGO to be held responsible in these circumstances, is the ability of the IGO to exercise effective operational control over the organ or agent.\footnote{Chapter 3, Sub-section 4.3.2.1(i).} As discussed above, in a delegation of powers the sub-conferrer has no direct control over the sub-conference’s exercise of the delegated powers.\footnote{Above Section 2.1.} Therefore, given that the UN lacks the competence to exercise direct control over the IAEA’s exercise of its delegated powers, it is unlikely that the UN would be responsible for the IAEA’s wrongful acts under Arts 6 to 8 DARIO.

Second, pursuant to Art 9 DARIO, the UN may be attributed with a wrongful conduct if it “acknowledges and adopts the conduct in question as its own”.\footnote{Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 52 art 9.} According to Leck, in relation to peacekeeping forces, the UN has generally assumed responsibility for the actions of those forces which are under its own ‘command and control’, and which as such are considered subsidiary organs of the UN.\footnote{Leck, Christopher, ‘International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct’ (2009) 10 Melbourne Journal of International Law 346, 350. See also Chapter 4, Sub-section 4.2.2(iii).} Whilst the IAEA is not a peacekeeping force, Art 9 DARIO nevertheless suggests another instance in which the UN may be attributed with responsibility for a wrongful act, that is, if it decides to acknowledge and adopt that act as its own. In this instance however, it would be
unlikely that the UN would adopt any wrongful conduct of the IAEA as its own, as the IAEA operates autonomously and the UN has no direct control over the IAEA’s actions.

Third, the UN may be responsible jointly or in parallel with the IAEA, for the IAEA’s wrongful acts pursuant to Arts 14 to 16 DARIO, if for example it aided or assisted, directed or controlled, or coerced, the IAEA into committing those wrongful acts. In those circumstances, the UN’s responsibility will be a result of a wrongful act which is directly attributable to it in its own right.

In conclusion, although the discussion above is hypothetical, it is nevertheless useful in illustrating circumstances in which potential responsibility for wrongful acts may or may not be apportioned between the sub-conferror and the sub-conferree in a delegation of powers.

4.3 Measures available to the United Nations

In the Sarooshi Typology, measures available to a conferror IGO in a delegation of powers include amendment of the constituent treaty, “unilateral financial measures”, terminating the conferral of powers, and objecting persistently to the conferee IGO’s actions.

The Security Council reiterated its support for the IAEA in carrying out its duties in Iraq on a couple of occasions, for example in UN Security Council Resolution 1194 (1998).
in which it reaffirmed “its full support for the Special Commission and the IAEA in their efforts to ensure the implementation of their mandates under the relevant resolutions of the Council”.245 In addition, when the Security Council terminated its sub-conferral of powers to the IAEA in 2007, it expressed its gratitude to UNMOVIC and the IAEA “for their important and comprehensive contributions under the relevant resolutions”.246 However, in the event that the UN had disagreed with the IAEA’s actions in exercising the sub-conferred powers to disarm Iraq of nuclear weapons, the UN had a number of measures available to it.

First, the UN could have amended the terms of its sub-conferral of powers to the IAEA, as shown by the Security Council’s amendment relating to the source of the IAEA’s assistance in Iraq. Pursuant to UN Security Council Resolution 1284 (1999), the Security Council requested that the IAEA continue its role in Iraq, with the “assistance and cooperation of UNMOVIC”, instead of UNSCOM. This indicates that just as the sub-conferral of powers from the Security Council to the IAEA can be achieved by the adoption of Security Council a resolution, the amendment of the sub-conferral can similarly be achieved by the adoption of another Security Council resolution.

Second, the Security Council could have terminated its sub-conferral of powers to the IAEA. On 29 June 2007, the Security Council adopted UN Security Council Resolution 1762, deciding “to terminate immediately the mandates of UNMOVIC and the IAEA under the relevant resolutions”.247 The termination of the IAEA’s mandate in this case however, related to a recognition by the Security Council that “the continued operations of UNMOVIC and the IAEA…[were]…no longer necessary to verify Iraqi compliance

245 SC Res 1194, UN SCOR, 3924th mtg, UN Doc S/RES/1194 (9 September 1998), [4]. Also SC Res 1205, UN SCOR, 3939th mtg, UN Doc S/RES/1205 (5 November 1998), [3].
246 SC Res 1762, UN SCOR, 5710th mtg, UN Doc S/RES/1762 (29 June 2007), preamble [2].
247 SC Res 1762, UN SCOR, 5710th mtg, UN Doc S/RES/1762 (29 June 2007), [1].
with its obligations under the relevant resolutions \(^{248}\), rather than as a measure relating to concerns about the way in which the IAEA had been exercising its sub-conferring powers in Iraq. Nevertheless, it confirms that the Security Council had the option of adopting the measure of terminating a sub-conferral of delegated powers.

Third, with regard to the measure of persistent objection, it is suggested that the Security Council could similarly have made its objections known to the IAEA through its resolutions, as it has done in relation to other parties. For example, on 9 September 1998 the UN Security Council adopted Security Council Resolution 1194, condemning Iraq’s decision to suspend its cooperation with UNSCOM and the IAEA as contravening its obligations, and demanding that Iraq cooperate fully with UNSCOM and the IAEA.\(^{249}\) Similarly, on 5 November 1998 the Security Council adopted Security Council Resolution 1205, condemning Iraq’s decision to cease cooperation with UNSCOM and demanding that it rescind immediately its decisions to cease cooperation with UNSCOM and restrict the IAEA’s work in Iraq.\(^{250}\) Consequently, the Security Council could arguably have objected to the IAEA’s exercise of its sub-conferred powers through a Security Council resolution, just as it did in relation to Iraq’s actions discussed above.

In conclusion therefore, the UN had a number of measures available to it, if it had disagreed with the IAEA’s exercise of its delegated powers in Iraq.

5.0 CONCLUSION

This chapter examined the application of the Sarooshi Typology to the sub-conferral of powers from the UN to the IAEA to inspect for nuclear weapons of mass destruction in

\(^{248}\) SC Res 1762, UN SCOR, 5710th mtg, UN Doc S/RES/1762 (29 June 2007), preamble [6].
\(^{249}\) Above, Section 3.3.2.
\(^{250}\) Above, Section 3.3.2.
Iraq. The UN’s right to revoke the powers unilaterally, its lack of competence to exercise direct control over the IAEA’s use of those powers, and its right to exercise the powers concurrently with the IAEA, are elements which Professor Sarooshi has identified as indicators of a delegation of powers on his Typology.

The undermining of IAEA inspectors in Iraq by the intervention of the UN Secretary-General, the divisions within the UN Security Council, and the differences in values between the cultures of the IAEA and UNSCOM highlighted the challenges that exist when conferrors and conferees of powers exercise the same powers concurrently, and the tensions that occurred reflected the contestation of those powers between the UN and the IAEA.

The IAEA, which has international legal personality, is subject to international responsibility if it commits an internationally wrongful act. As its Safeguards regime is one of the areas in which it could incur a liability, there was the potential for the UN to be attributed with joint or parallel responsibility for a wrongful act of the IAEA in Iraq.

Finally, the UN had available to it a range of measures that it could take if it was dissatisfied with the IAEA’s exercise of the conferred powers, including the amendment or termination of the sub-conferral, and persistent objection.

In conclusion, the Sarooshi Typology is applicable to the sub-conferral and exercise of delegated powers between IGOs.

The next chapter will examine the transfer of powers between IGOs. Transfers of powers are similar to delegations of powers in that the conferror cannot exercise direct
control over the conferee’s exercise of the powers. However, unlike delegations of powers, transfers of powers are generally irrevocable and the conferee has the exclusive right to use the conferred powers.

251 Sarooshi, above n 1, 54.
252 Ibid.
CHAPTER SIX
TRANSFERS OF POWERS

1.0  INTRODUCTION

This chapter examines the applicability of the category of transferred powers in the Sarooshi Typology to a conferral of powers between IGOs. Transfers of powers reflect the greatest degree of conferred powers on the continuum, and according to Professor Sarooshi, they result in the greatest degree of contestation of powers between the conferrors and conferees of those powers. In examining this category of conferred powers, the chapter will discuss the conferral of powers in international trade from the EU to the WTO, in relation to the bananas dispute at the WTO.

The case study examines whether the elements of a transfer of powers on the Sarooshi Typology can be applied to the sub-conferral of powers from the EU to the WTO, the possibility of a contestation of values between them in the WTO’s exercise of those sub-conferrred powers, and the potential for responsibility for wrongful acts committed by the WTO to be attributed to the EU. The case study also discusses the lack of direct effect of WTO rules and decisions in the EU, as it determines whether a transfer of powers is a partial transfer or a full transfer of powers. In addition, it also reflects the degree of contestation between the EU and the WTO of their values. Finally, the description of the long running bananas dispute supports not just the presence of a contestation of powers in the sub-conferral of transferred powers between IGOs, but also Professor Sarooshi’s proposal that the greater the degree of powers conferred, the greater will be the contestation of powers.
2.0 THE SAROOSHI TYPOLOGY: SUMMARY OF THE TRANSFER OF POWERS FROM A STATE TO AN INTERGOVERNMENTAL ORGANIZATION

According to Professor Sarooshi, transfers of powers are the greatest degree of conferrals of powers on the continuum of conferred powers.¹ Like delegations of powers but unlike agency powers, States conferring transfers of powers have no direct control over the conferee’s exercise of the conferred powers.² Furthermore, whilst agency powers and delegated powers are revocable, transfers of powers are generally irrevocable.³ Finally, whilst agency powers and delegated powers can be exercised concurrently by the conferror of those powers, transfers of powers can only be exercised exclusively by the conferee of those powers.⁴

The greater the degree of powers conferred, the greater will be the degree of contestation of those powers between the conferror and the conferee, according to Professor Sarooshi.⁵ Consequently, as transfers of powers from States to IGOs are the highest degree of conferred powers in the Sarooshi Typology, they therefore reflect the greatest degree of contestation of powers.⁶

2.1 Elements of a Transfer of Powers from a State to an IGO

In the Sarooshi Typology, transfers of powers have three characteristics: (1) the powers are irrevocable, (2) States have no direct control over the IGO’s exercise of those powers, and (3) the IGO has the exclusive right to exercise the conferred powers, and States are bound by the decisions of the IGO.⁷

² Ibid 54.
³ Ibid.
⁴ Ibid.
⁵ Ibid 65.
⁶ Ibid.
⁷ Ibid.
First, according to Professor Sarooshi, if the notice period for withdrawing the conferred powers is for example five years, then it is considered that the powers have been given away to a sufficient degree for it to be a transfer of powers rather than a delegation of powers. There may be situations where conferred powers are revocable, but the conferrals are nevertheless characterized as transfers of powers because of the presence of the second and third elements of transfers of powers, namely that the States have no direct control over the IGO, and the IGO has the exclusive right to exercise the conferred powers.

Second, where a State has agreed by treaty to be bound by the IGO’s exercise of conferred powers, the IGO has the right to interpret “the scope and use of the transferred power and any obligations that flow therefrom”. Consequently the State has no direct control over the exercise of those powers by the IGO.

Third, where the IGO has the exclusive right to exercise the conferred powers, the powers are still retained by the States, but they have agreed to limit their own right to exercise those powers in favour of the IGO. The degree to which States have transferred such powers to the IGO will depend on the degree to which they have agreed to be bound by the obligations arising from the IGO’s exercise of those powers. In the case of partial transfers of powers, the States have agreed to be bound by those obligations internationally. In the case of full transfers of powers, the States have agreed to be bound by those obligations internationally as well as agreeing to permit

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8 Ibid 56.
9 Ibid 68-69.
10 Ibid 70.
11 Ibid 69.
12 Ibid.
13 Ibid 70.
those obligations direct effect in their national legal systems without the need for ‘separate domestic legislation’.\textsuperscript{14}

\subsection*{2.2 Consequences of a Transfer of Power from a State to an IGO}

The two consequences arising from a transfer of powers are fiduciary duty and responsibility.

First, a conferring State has a fiduciary duty not to encroach on the IGO’s exclusive right to exercise the transferred powers, as well as a duty to comply with the binding decisions arising from the IGO’s exercise of those powers.\textsuperscript{15}

Second, even though the State may have no direct control over the actions of the IGO, the State could still be attributed with responsibility for the internationally wrongful act of the IGO, pursuant to Art 5 ARSIWA, which provides that a wrongful act committed by an entity which is lawfully empowered to exercise that power, is attributable to the State.\textsuperscript{16}

\subsection*{2.3 Measures available to a State in a Transfer of Powers from a State to an IGO}

According to Professor Sarooshi, the measures available to States in a transfer of powers are (1) to amend the constituent treaty\textsuperscript{17}, (2) withhold financial contributions, although that might be limited legally\textsuperscript{18}, (3) terminate the conferred powers, although there might be legal problems in doing so as transferred powers are generally

\textsuperscript{14} Ibid.
\textsuperscript{15} Ibid 100-101.
\textsuperscript{16} Ibid 102.
\textsuperscript{17} Ibid 117.
\textsuperscript{18} Ibid.
irrevocable\textsuperscript{19}, and (4) object persistently to the way in which the IGO is exercising the transferred powers\textsuperscript{20}.

3.0 CASE STUDY: THE TRANSFER OF POWERS FROM THE EUROPEAN UNION (EU) TO THE WORLD TRADE ORGANIZATION (WTO) IN INTERNATIONAL TRADE

This section discusses the powers or competencies conferred on the EU by its members, which in turn affects for example, its authority to conclude agreements which incur rights and obligations on the EU. It also discusses the relationship between the EU and the WTO by examining the rules and decisions of the WTO in the EU. Finally, it discusses the international legal personality of the EU and the EU’s capacity to become a member of the WTO.

3.1 The European Union

The Treaty on European Union (the TEU or Treaty of Maastricht) was signed in 1992 and came into force on 1 November 1993.\textsuperscript{21} On 1 December 2009, the Treaty of Lisbon came into force.\textsuperscript{22} It consists of two existing treaties, the Treaty on European Union (TEU) and the Treaty Establishing the European Community (EC Treaty), both of which have been amended.\textsuperscript{23} The EC Treaty is now called the Treaty on the Functioning of the European Union (TFEU).\textsuperscript{24} Some of the key provisions of the

\textsuperscript{19} Ibid.
\textsuperscript{20} Ibid 118.
\textsuperscript{23} Szyszczak, Erika and Cygan, Adam, Understanding EU Law (Sweet & Maxwell, 2\textsuperscript{nd} ed, 2008), 13.
Lisbon Treaty include the vesting of legal personality on the EU and a clearer division of powers between the EU and its member States.

3.1.1 Allocation of Competences between the EU and its member States

Since competences are allocated between the EU and its member States, the international agreements they have entered into fall into different categories: (1) those that fall exclusively within the competence of the EC, (ii) those that involve shared competences between the EU/EC and EU member States, and (iii) those where the member States have sole competence.

These categories of international agreements are significant, because many agreements are concluded by member States in IGOs where the EU is not a member of those IGOs. This could result in a conflict where the EU may have laws in similar areas. Consequently, the ECJ ruled in a number of cases that the EU was not bound by international conventions to which EU member States but not the EU, were parties, for example in Intertanko, Bogiatzi and TNT.

The competences of the EU and its member States in the WTO consist of those that fall exclusively within the competences of the EU under the Common Commercial Policy.

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27 Szyszczak and Cygan, above n 23, 311.
28 Ibid 312.
29 Ibid.
30 Editorial Comments, ‘The Union, the Member States and international agreements’ (2011) 48 Common Market Law Review 1, 1.
31 Ibid.
32 The Queen ex parte Intertanko et al. v Secretary of State for Transport (Case C-308/06) [2008] ECR I-4057, [49]-[50].
33 Irene Bogiatzi v Deutscher Luftpool et al (Case C-301/08) [2009] ECR I-10185, [32]-[33].
34 TNT Express Nederland BV v AXA Versicherung AG (Case C-533/08) [2010] ECR I-04107, [62].
(CCP), and those that are shared competences with EU member States, such as trade in services and intellectual property. According to Bermejo Garcia and Garciandia Garmendia, the EU’s agreements with the WTO are ‘mixed in two senses’, first in the sense that the EU and its member States are both parties to the agreement, and second in that “it may contain norms on subject-matters characterized as different types of competences for the EU”. Consequently, the clear allocation of competences between the EU and its member States is important, as it determines which party has the rights and obligations associated with those competences.

EU’s External Competences – The Common Commercial Policy

According to Harvey and Longo, it was the CCP, a coherent or common approach by the EU and its member States to international trade, which enabled the EC (which until the Treaty of Lisbon, was the institution for the EU’s membership in the WTO), to play a significant role in the WTO. The CCP contains the jurisdiction for most of the EC’s trade activities, and it therefore provides the basis for the EU’s membership of the WTO.

The ECJ has provided a body of case law on the competencies of the EU and its member States under the CCP. In Opinion 1/75 (OECD Local Cost Standard) for example, the ECJ ruled that the EC’s competences under the CCP empowered it to adopt internal rules and conclude agreements with third countries, and that such

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37 Ibid, 57.
40 Ibid 9.
41 Opinion 1/75 [1975] ECR 01355 [OECD Local Cost Standard], [1362]-[1363].
competences were exclusive to the EC. In this case, the Court had been asked to decide whether the EC had the power to conclude the OECD Understanding on a Local Cost Standard, and whether those powers were exclusive to the EC. The Court held that the subject matter of the OECD Understanding concerned aid for exports and export policy which were within the ambit of the CCP, and were therefore part of the powers of the EC. The Court also held that in the context of the Common Market and the common interests of the EC, member States could not exercise concurrent powers with the EC both within the EC and internationally, in areas that were covered by the CCP.

In Opinion 1/76 (Laying-up Fund), one of the issues considered by the ECJ was whether the EC could conclude an agreement for an inland waterway through the territories of certain member States, which included a third State which was not a member of the EC. In relation to this issue, the Court held that the EC did not have an express power to conclude such an agreement, but that even if a corresponding internal power had not yet been used to adopt measures, “the power to bind the Community vis-à-vis third countries nevertheless flow[ed] by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the Community in the international agreement…[was]...necessary for the attainment of one of the objectives of the Community”.

In Opinion 1/94, one of the issues to be decided by the ECJ was whether the EC had the exclusive competence to conclude the Agreement on Trade-Related Aspects of

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42 Opinion 1/75 [1975] ECR 01355 [OECD Local Cost Standard], [1363]-[1364].
43 Opinion 1/75 [1975] ECR 01355 [OECD Local Cost Standard], [1361].
44 Opinion 1/75 [1975] ECR 01355 [OECD Local Cost Standard], [1363].
45 Opinion 1/75 [1975] ECR 01355 [OECD Local Cost Standard], [1362].
46 Opinion 1/75 [1975] ECR 01355 [OECD Local Cost Standard], [1363]-[1364].
Intellectual Property Rights (TRIPS). The Court found that apart from provisions relating to the circulation of counterfeit goods, TRIPS was not within the scope of the CCP. The Court also found that the EC had only achieved partial harmonization in certain areas of TRIPS, and no harmonization in other areas. Consequently, the Court concluded that both the EC and its member States had joint competence to conclude TRIPS.

In Parfums Christian Dior which was a joined case, one of the questions asked of the ECJ was “whether, and to what extent, the procedural requirements of Article 50(6) of TRIPS…[had]…entered the sphere of Community law so that, whether on application by the parties or of their own motion, the national courts…[were]….required to apply them”. The EC and its member States had concluded TRIPS under joint competence. The Court held that the EC had exclusive competence in a field within TRIPS where the EC had already legislated. The EC member States had competence in a field of TRIPS where the EC had not yet legislated.

The Treaty of Lisbon and EU Competences

The Lisbon Treaty has made some significant changes to the CCP. First, trade now encompasses “goods and services”, “commercial aspects of intellectual property”, and “foreign direct investment”. Second, the EU has now been given exclusive competence to administer the CCP pursuant to Art 3(1)(e) TFEU, whereas previously trade in services and intellectual property were not exclusive to the EU. As a consequence for example, the General Agreement on Trade in Services (GATS) was entered into by both the EC and member States, because of the mixed allocation of competences between them in this field. Third, the EU rather than its member States now has sole authority to negotiate and conclude new WTO agreements and amendments. This greatly enhances the EU’s unity and coherence as an influential participant in the WTO and the international trade framework.

3.1.2 Direct Effect – WTO Laws in the EU

When the EU concludes an international agreement, it has a responsibility to the parties in the agreement to ensure that EU institutions and its member States observe the obligations under the agreement. According to Klabbers “it is clear that under EC law, treaties concluded by the EC and third states bind the member states and the

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61 Dimopoulos, above n 35, 159.
62 Harvey and Longo, above n 38, 116.
63 Puig and Al-Haddab, above n 59, 289.
64 Ibid 300.
institutions”. 66 Art 300(7) TEC for example, states that “[a]greements concluded under
the conditions set out in this Article shall be binding on the institutions of the
Community and on Member States”. 67 This is affirmed in the Lisbon Treaty, in which
Art 216(2) TFEU states that “[a]greements concluded by the Union are binding upon
the institutions of the Union and on its Member States”. 68 According to Hartley, this
would be achieved much more easily “if the agreement [was] directly effective in the
Member States and prevail[ed] over their legislation”. 69

For reasons of harmonisation and the uniform application of EU laws, the ECJ
developed the concept of direct effect 70, which relates to the enforceability of EU law in
national courts 71.

In Van Gend en Loos, the ECJ held that EC law had a direct effect enforceable by
national courts, on member States and individuals in member States, without requiring
implementing legislation. 72 The case related to customs duties and charges, which were
prohibited by Art 9 of the EEC Treaty, and applied by Art 12 of the Treaty. 73 The Court
held that provided certain criteria were met, the principle of direct effect could apply:

The wording of Article 12 [of the EEC Treaty] contains a clear and
unconditional prohibition which is not a positive but a negative obligation. This
obligation, moreover, is not qualified by any reservation on the part of states

66 Klabbers, Jan, An Introduction to International Institutional Law (Cambridge University Press, 2nd ed,
2009), 262.
224/6 (entered into force 1 November 1993) art 300(7); Klabbers, above n 66, 262.
115/199 (entered into force 1 November 1993) art 216(2); Bermejo Garcia and Gariandia Garmendia,
above n 36, 60.
69 Hartley, above n 65, 252.
71 Ibid 133.
73 Van Gend en Loos v Nederlandse Administratie der Belastingen (Case 26/62) [1963] ECR 1, 12.
which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.

The implementation of Article 12 does not require any legislative intervention on the part of the states.\textsuperscript{74}

Consequently, the Court established that in order to have a direct effect, a provision must be clear, unconditional and its implementation not subject to any further legislative measures by the States.\textsuperscript{75}

In the \textit{Kupferberg} case\textsuperscript{76}, the ECJ held that international agreements established by the EC pursuant to its powers under its Treaty were “binding on the institutions of the community and on member states…[and]…[c]onsequently, it [was] incumbent upon the community institutions, as well as upon member states, to ensure compliance with the obligations arising from such agreements.”\textsuperscript{77} In this way the member States fulfilled their obligations both to non-member countries which were parties to the agreement, and also to the EC which had assumed responsibility for the performance of the agreement.\textsuperscript{78}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{74} \textit{Van Gend en Loos v Nederlandse Administratie der Belastingen} (Case 26/62) [1963] ECR 1, 13.
\item \textsuperscript{75} \textit{Van Gend en Loos v Nederlandse Administratie der Belastingen} (Case 26/62) [1963] ECR 1, 13; Davies, above n 72, 63-64; Hartley, above n 65, 150-151.
\item \textsuperscript{76} \textit{Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.} (Case 104/81) [1982] ECR 3641.
\item \textsuperscript{77} \textit{Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.} (Case 104/81) [1982] ECR 3641, 3662 11.
\item \textsuperscript{78} \textit{Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.} (Case 104/81) [1982] ECR 3641, 3662 [13].
\end{itemize}
\end{footnotesize}
However, the ECJ rejected the direct effect or applicability of the provisions of the General Agreement on Tariffs and Trade (GATT) within the European Economic Community (EEC) in the *International Fruit* and *Germany v Council* cases.79

In *International Fruit*80, the ECJ considered whether the EC’s regulations restricting apple imports were contrary to Art XI of GATT.81 The Court in concluding that the provisions of GATT had no direct application within the EEC, found that under the EEC Treaty the member states had conferred their powers on the EEC in relation to GATT, and as the EEC was therefore the contracting party in the GATT Agreement, community citizens did not have any individual rights pursuant to GATT.82

In *Germany v Council*83 the ECJ found that GATT rules were not unconditional84, and could not be invoked within a national court to assess a Community regulation85, except where the Community intended to assume a GATT obligation:

In the absence of such an obligation following from GATT itself, it is only if the Community intended to implement a particular obligation entered into within the framework of GATT, or if the Community act expressly refers to specific

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80 *International Fruit Company NV & Ors v Produktschap voor Groenten en Fruit* (No 3) (Joined cases 21 to 24-72) [1972] ECR 1219.

81 *International Fruit Company NV & Ors v Produktschap voor Groenten en Fruit* (No 3) (Joined cases 21 to 24-72) [1972] ECR 1219, [ 3].

82 *International Fruit Company NV & Ors v Produktschap voor Groenten en Fruit* (No 3) (Joined cases 21 to 24-72) [1972] ECR 1219, [12], [15], [16], [18], [19] and [27].


provisions of GATT, that the Court can review the lawfulness of the Community act in question from the point of view of the GATT rules…

3.1.3 Legal Personality and Capacity of the EU to Become a Member of the WTO

Whilst both the EC (Art 281 TEC\(^{87}\)) and Euratom (Art 54 TEAEC\(^{88}\)) had express legal personality under their treaties, the EU did not\(^9^9\). The EU’s initial lack of express legal personality was due to the view that giving the EU legal personality could compromise the sovereignty of member States internationally and possibly impinge on the legal personality of the EC.\(^{90}\) Consequently, the EU was represented at the WTO by the EC, as was confirmed by the ECJ in *Opinion 1/94*\(^{91}\) when it acknowledged that the Council and member States of the EU had decided that “the Commission would act as the sole negotiator on behalf of the Community and the Member States”.\(^{92}\)

Following the entry into force of the Treaty of Lisbon in 2009, the EU succeeded the EC and was endowed with legal personality\(^{93}\) pursuant to Art 47 TEU\(^{94}\). Consequently, the EU now represents itself in the WTO.\(^{95}\)

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\(^{92}\) *Opinion 1/94* [1994] ECR I-5267 [Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property], [3].

\(^{93}\) *The Treaty of Lisbon and the Court of Justice of the European Union*, Court of Justice of the European Communities, Press Release No 104/09, Luxembourg, 30 November 2009, Section A.

**Legal Personality**

In order to participate in the international arena, an entity must possess international legal personality. In the Treaty on European Union 1992, one of the stated objectives of the EU was “to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy”. Yet, the TEU of 1992 did not explicitly confer legal personality on the EU.

Nevertheless, the EU was perceived to have had legal personality. First, according to the ICJ in the *Reparations Case*, an IGO can be presumed to have a legal personality if it is to perform the functions and duties intended by its Members. The objectives of the EU, for example its stated objective of ‘asserting its identity internationally through the common foreign and security policy’ suggest that the EU had implied legal personality at the time of its creation.

Second, in practice the EU’s capacity to enter into treaties such as the Agreement between the European Union and the Federal Republic of Yugoslavia (FRY) on the activities of the European Union Monitoring Mission (EUMM) in the FRY 2001 and the Agreements between the European Union and the United States of America on

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OJ C 306/1 (entered into force 1 December 2009) art 1(4) art 47: “The Union shall have legal personality.”.

95 Above Section 3.1.
96 de Schoutheete and Andoura, above n 90, 1.
98 Above Section 3.1.3.
101 Raluca, above n 99, 3; de Schoutheete and Andoura, above n 90, 2.
103 Raluca, above n 99, 9 fn 23.
extradition and mutual legal assistance in criminal matters 2003, suggested that the EU was not only recognized internationally as an IGO with legal personality, but that it also performed its duties and functions as an entity with international legal personality.

Nevertheless, the ambiguity of the EU’s legal status was viewed by some as an impediment. At the European Convention in 2002, the Final Report of Working Group III on Legal Personality recommended the conferral of explicit legal personality on the European Union. According to the working group, conferring explicit legal personality on the EU would enhance its international activities:

The explicit conferral of legal personality on the Union heightens its profile on the world stage. The Union thus becomes a subject of international law – alongside the Member States but without jeopardizing their own status as subjects of international law – and would as a result be able to avail itself of all means of international action (right to conclude treaties, right of legation, right to submit claims or to act before an international court or judge, right to become a member of an international organization or become party to international conventions, e.g. the ECHR, right to enjoy immunities), as well as to bind the Union internationally.

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104 Ibid 9 fn 24.
105 Ibid 11; de Schoutheete and Andoura, above n 90, 6.
107 Ibid 6[19].
**Capacity of EU to be a Member of the WTO**

It is sometimes important for an IGO to have the capacity to become a member of another IGO, for example, where policies are being developed in areas of common competence.\(^{108}\) In the case of the EU, this is especially important where it has been granted exclusive competence over its member States.\(^{109}\) The EU for example, is a member of the Food and Agriculture Organization (FAO), the European Bank for Reconstruction and Development (EBRD), and the World Trade Organization.\(^{110}\) Through its membership of these organizations, the EU relinquishes or confers some of its powers in specific competencies to the organizations.\(^{111}\)

Prior to the EU obtaining its own international legal personality, membership in other IGOs and the sub-conferral of powers was achieved through the EC, which had legal personality.\(^{112}\) The authority of the EC to enter into membership of other IGOs and to sub-confer some of its own powers in the process was acknowledged by the ECJ in the *Laying-up Fund Case*\(^ {113}\), where it held that the EC had the competence to conclude international agreements, to establish international organizations and to be a member of the organization\(^ {114}\), even if not expressly authorized to do so in its constituent treaty.\(^ {115}\) The Court ruled that the Community’s actions in carrying out its objectives could include the setting up of a public international institution\(^ {116}\), and to delegate powers to such IGOs, including the conferral of powers by means of membership of another IGO\(^ {117}\).


\(^{109}\) Ibid.

\(^{110}\) Ibid 1238.

\(^{111}\) Schermers and Blokker, above n 89, 173.

\(^{112}\) Ibid.

\(^{113}\) *Opinion 1/76 [1977] ECR 741 [Laying-up Fund]*.


\(^{115}\) *Opinion 1/76 [1977] ECR 741 [Laying-up Fund]*, 755-756; Schermers and Blokker, above n 89, 173.


\(^{117}\) Schermers and Blokker, above n 89, 173; Sack, above n 108, 1229.
3.1.4 Is the EU Representative of IGOs in General

There are some qualities of the EU which may distinguish it from other IGOs, thus raising the question of whether the example of the EU in this case study on the Sarooshi Typology, can be generalizable to other IGOs. These qualities include its supranational features, and its size and power relative to many other IGOs. It is argued in this section that there are qualities of the EU which suggest that it may still be regarded as an IGO, but in any event this would equally be a problem for the Sarooshi Typology.

EU as a Supranational Organization

The EU is sometimes described as a supranational organization\(^\text{118}\) and the question, as stated above, therefore arises whether it is representative of IGOs in general. According to Klabbers, binding decisions in IGOs, especially in relation to substantive issues, usually require unanimity or consensus amongst their members, and the rules of the IGOs do not usually have direct effect in the legal systems of their member States, nor are their member States pre-empted from enacting legislation.\(^\text{119}\) In this sense, the IGO is said to be intergovernmental or “between its members”.\(^\text{120}\) In the EU\(^\text{121}\), decisions taken by majority vote can be binding on member States, EU law arising from those decisions has supremacy over domestic law which conflicts with it, and much of the law of the EU may have direct effect in its member States’ legal systems.\(^\text{122}\) In this sense,

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\(^{119}\) Klabbers, above n 66, 25.

\(^{120}\) Ibid.


\(^{122}\) Ibid.
parts of its member States’ sovereignty may be said to have been transferred to the EU, making it supranational or ‘standing above’ its member States.\textsuperscript{123}

Whilst the EU may be distinguished from other IGOs by its supranational quality, there are reasons why it may nevertheless still be regarded as an IGO. First, it appears from Klabber’s discussion on the difference between the EU and IGOs in general, that the major difference perhaps lies in the legal force of the EU’s rules within its member States. In this sense, it could perhaps be argued that the supranational quality of the EU is an internal quality governing the relationship between it and its member States, similar for example to the dispute settlement system in the WTO or the veto power of the permanent members of the UN Security Council in the UN.\textsuperscript{124} In relation to the EU’s external relations however, it would be expected that it has obligations as an entity with legal personality\textsuperscript{125}, to observe for example the rules of the WTO just like other member States of the WTO, regardless of its supranational nature.

Second, the EU has operational procedures which are similar to other IGOs. Art 49 TEU for example provides for membership in the EU, stating in part that “[a]ny European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.”\textsuperscript{126} Art 50 TEU provides for the withdrawal of a member from the EU.\textsuperscript{127} Art 50(1) for example, states that “[a]ny Member State may decide to withdraw from the Union in accordance with its

\textsuperscript{123} Ibid.
\textsuperscript{124} Below Section 3.2.2 and Chapter 4, Section 3.1.1.
\textsuperscript{125} Above, Section 3.1.
own constitutional requirements". Art 48 TEU provides for the amendment of the TEU and the TFEU. Art 7 TEU provides for action relating to breaches by Member States of the EU’s values articulated in Art 2 TEU. Title III TEU contains provisions on the functions and procedures of the Institutions of the EU. Thus, according to Amersinghe, “there are certain general principles which apply to it which also apply to other organizations”.

Third, the EU was formed, like other IGOs, from a conferral of powers by its member States. Art 5(1) TEU states in part that “[t]he limits of Union competences are governed by the principle of conferral”. Art 5(2) TEU states in part that “[u]nder the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein”. In addition, Art 288 TFEU states in part that “[t]o exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions,

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132 Amerasinghe, above n 118, 12.
recommendations and opinions”. The EU’s powers to make rules which affect their member States are therefore tied in to their conferred competences, and are not general powers to ‘legislate’.

The competences of the EU are thus conferred upon it in order for it to fulfil the objectives of its member States, and they are limited to achieving those objectives. According to Schermers and Blokker therefore, it is the EU’s attributed competences, which help to clarify why it should still be categorized as an IGO.

Size and Power of the EU

As seen in section 3.3 below, the EU is a significant trading bloc which plays an important part in the WTO and in international trade. However, the rules of the WTO may provide a level playing field for all its members to a significant extent.

First, decisions in the WTO are made by consensus, failing which a vote may be taken. Although the EU has a powerful voice in the WTO, it only has the number of votes equivalent to the number of its member States in the WTO. Consequently, whilst it may have the influence of voting as a bloc, it has no extra vote over the number of its members in the WTO, and is therefore not advantaged in that sense. In addition, other WTO members with common interests could similarly form blocs for voting purposes, hence enhancing their influence like the EU.

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136 Schermers and Blokker, above n 89, 157.
137 Ibid.
138 Below Section 3.3.
139 Below Section 4.2.3.
140 Below Section 4.2.3.
Second, the WTO has a dispute settlement system, which requires members seeking redress to abide by the rules and procedures of the Dispute Settlement Understanding (DSU)\textsuperscript{141}, and refrain from taking unilateral action to settle the dispute\textsuperscript{142}. As such, all members of the WTO can have access to a system for settling their disputes, with rules which establish some order and discipline in the dispute settlement process.

Third, as will be seen below regarding the measures available to the EU in relation to the actions of the WTO\textsuperscript{143}, the EU is not necessarily more effective in applying these measures because of its size and power. The measure of persistent objection is available to all members of the WTO for example through Art IX:1 WTO Agreement, which provides for decision-making by consensus, and which according to Van den Bossche, effectively gives all WTO members a power of veto over decisions.\textsuperscript{144} The right of any member to propose an amendment of the WTO Agreement or the Multilateral Trade Agreements, is provided for in Art X WTO Agreement.\textsuperscript{145} Any member of the WTO may choose to take unilateral financial measures against the WTO, such as withholding its financial contributions. The withholding of contributions by the EU member States in total would probably have a bigger impact than the withholding of contributions by other member States.\textsuperscript{146} However, the withholding members could themselves be subject to measures for being in arrears, pursuant to Art VII(2)(b) of the WTO Agreement.\textsuperscript{147} Finally, pursuant to Art XV of the WTO Agreement, any member may withdraw its membership of the WTO.\textsuperscript{148}

\textsuperscript{141} ‘Understanding on Rules and Procedures Governing the Settlement of Disputes’.
\textsuperscript{142} Below Section 3.2.2.
\textsuperscript{143} Below Section 4.2.3.
\textsuperscript{144} Below Section 4.2.3.
\textsuperscript{145} Below Section 4.2.3.
\textsuperscript{146} Below Section 4.2.3.
\textsuperscript{147} Below Section 4.2.3.
\textsuperscript{148} Below Section 4.2.3.
In conclusion, whilst the EU may have greater voting power as a bloc and a greater impact on the WTO because of the size of its collective financial contributions and trading activities, there are nevertheless provisions within the WTO Agreement which provide a significant level playing field for all members of the WTO, especially in the decision-making process of the WTO.

3.2 The World Trade Organization (WTO)

The World Trade Organization is the “principal institution of the multilateral trading system”\(^\text{149}\) internationally. The predecessor of the WTO was the General Agreement on Tariffs and Trade (GATT).\(^\text{150}\) Negotiations to create the WTO were concluded in the Uruguay Round in 1994 and the WTO came into existence in 1995.

Clause 6 of the Marrakesh Declaration of 15 April 1994 affirmed the “transition from the GATT to the WTO”:

> Ministers declare that their signature of the “Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations” and their adoption of associated Ministerial Decisions initiates the transition from the GATT to the WTO…and commit themselves to seek to complete all steps necessary to ratify the WTO Agreement so that it can enter into force by 1 January 1995 or as early as possible thereafter…\(^\text{151}\)


\(^\text{150}\) *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations (World Trade Organization)* (Cambridge University Press, 1999), iv.

\(^\text{151}\) Ibid.
The functions\(^{152}\) of the WTO are defined in Art III of the WTO Agreement\(^{153}\), which include the ‘implementation, administration, operation and furtherance’ of multilateral trade\(^{154}\), the provision of a forum for negotiations amongst its Members\(^{155}\), the settlement of disputes pursuant to the Understanding on Rules and Procedures Governing the Settlement of Disputes\(^{156}\), the administration of the Trade Policy Review Mechanism (TPRM)\(^{157}\), and cooperation with the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD) to ‘achieve greater coherence in global economic policy-making’\(^{158}\).

Pursuant to Art XVI (4), WTO Members agree to ensure that their “laws, regulations and administrative procedures” conform to their obligations under the agreements annexed to the WTO Agreement\(^{159}\).

3.2.1 The Principles of the WTO Agreement

The main purpose of the WTO is to formalise, facilitate, manage and adjudicate the liberalization of trade at the international level.\(^{160}\) The WTO Agreement is based on four essential principles in the conduct of international trade: (1) the principle of non-

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152 See also Chapter 3, Section 3.5.
160 Farrell, Mary, EU and WTO Regulatory Frameworks: Complementarity or Competition? (Kogan Page, 1999), 1.
discrimination, (2) the principle of reciprocity, (3) the principle of open market access, and (4) the principle of fair competition.\footnote{Ibid.}

The principle of non-discrimination has two dimensions. The first dimension is the most-favoured-nation (MFN) rule, whereby all imports, regardless of their country of origin are accorded equal treatment.\footnote{Ibid.} The second dimension is the national treatment rule, whereby foreign goods after tariffs have been paid, are treated no less favourably than domestically produced goods.\footnote{Ibid.}163

The principle of reciprocity relates to “reciprocal exchange of market-access commitments” such as a “quid pro quo exchange of concessions”, for example, in tariff rates.\footnote{Ibid 2-3.}

The principle of market access is facilitated by the principles of non-discrimination and reciprocity, as well as the process of tariff binding, whereby States cannot unilaterally raise tariff rates above the rates stipulated on their schedules, unless they offer compensation to States affected by their actions.\footnote{Ibid 3.} States cannot nullify or impair their tariff commitments through other non-tariff means.\footnote{Ibid.}

The principle of fair competition permits States to use “anti-dumping measures, countervailing duties, and measures to protect the balance of payments, national security, or public health and morals” if “trade competition gets too intense”.\footnote{Ibid 34.}
3.2.2 The Dispute Settlement System of the WTO

The dispute settlement procedure of GATT, the predecessor of the WTO, was provided for in Article XXIII of the GATT Agreement relating to “nullification or impairment”\textsuperscript{168}. Under this provision, if the contracting parties believed that their benefits under the Agreement were being nullified or impaired as a result of a number of stated reasons, they could follow a procedure commencing with consultation and leading to suspension of concessions or obligations to the offending party if justified.\textsuperscript{169}

There was controversy over the nature of the GATT dispute settlement system, with some believing that it should be negotiation or diplomacy based, while others believed in a disciplined rule-based system.\textsuperscript{170} Jackson has argued that “a rule-orientation [had]…largely prevailed in the GATT context”\textsuperscript{171}, founded on Art XXV of the GATT Agreement\textsuperscript{172}. He suggests that the adoption of a panel report by the GATT Council is equivalent to a resolution or decision by the Contracting Parties of the GATT making a definitive interpretation of the GATT Agreement.\textsuperscript{173} Art XXV GATT Agreement provides for joint action by contracting parties to the Agreement, to give effect to Agreement provisions which require joint action in order to facilitate the operation and further the objectives of the Agreement.\textsuperscript{174} According to Jackson, “[a] definitive interpretation is intended to mean a binding secondary treaty action which obligates all

\textsuperscript{168} General Agreement on Tariffs and Trade, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 29 July 1948) art XXIII.

\textsuperscript{169} General Agreement on Tariffs and Trade, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 29 July 1948) art XXIII.


\textsuperscript{171} Ibid 132.

\textsuperscript{172} Ibid 127-128.

\textsuperscript{173} Ibid.

\textsuperscript{174} General Agreement on Tariffs and Trade, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 29 July 1948) art XXV(1); Jackson, above n 170, 127-128.
Contracting Parties to the GATT pursuant to their advance delegation of this authority under Article XXV”.

A significant difficulty with the GATT dispute settlement system, as will be seen below in Sections 3.3.1 (i) & (ii) relating to the Bananas Dispute, was the practice of blocking which was based on the GATT’s “consensus decision-making” process, explained by Jackson as follows:

Although the GATT provides for a majority vote in decisions of the Contracting Parties, with “one nation, one vote,” the GATT Contracting Parties for some years have endeavoured to avoid strict voting and to adopt decisions by “consensus,” which generally means extensive negotiation for a text to which all parties can agree. It is this idea of consensus that has been carried over into the dispute settlement procedure, such that it is deemed necessary to have a consensus decision of the Council to adopt a panel report. Although not entirely clear, the Contracting Parties have generally deferred to the idea that consensus means no dissent, or at least no significant dissent. Thus it has been the case that when the losing part of a dispute objects to the adoption by the Council (or other dispute committee), adoption is blocked. Thus the losing party to a panel procedure has had the ability to prevent the panel report from coming into force, and this blocking action has been used in a number of significant cases (particularly cases relating to subsidies).

175 Jackson, above n 170, 127-128.
176 Ibid 123.
177 Ibid.
The Uruguay Round culminated in the establishment of the WTO in 1995, which had a substantial institutional structure including a dispute settlement system, provided for in an ‘Understanding on Rules and Procedures Governing the Settlement of Disputes’, contained in Annex 2 of the WTO Agreements.

Pursuant to Art 3(1) DSU, the members of the WTO “affirm their adherence” to the rules of the dispute settlement system. Art 4 provides for consultations between members of the WTO on matters affecting the Agreements. Art 5 provides for ‘voluntary good offices, conciliation and mediation’ in a dispute. Art 25 provides for “arbitration within the WTO as an alternative means of dispute settlement”.

Art 6 DSU provides for the establishment of Panels to examine a dispute between members of the WTO, and pursuant to Art 7(1) make its findings on the dispute.

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178 Ibid 15.
179 For example, Marrakesh Agreement establishing the World Trade Organization, signed 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) arts IV and VI.
180 Jackson, above n 170, 401.
182 Marrakesh Agreement establishing the World Trade Organization, signed 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 2 (Understanding on Rules and Procedures Governing the Settlement of Disputes) 1869 UNTS 401 art 3(1): “1. Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.”.
16 provides for the adoption of Panel Reports\(^{188}\), and Art 16(4) provides that within sixty days of a panel report being circulated to WTO Members, the report will be adopted by the Dispute Settlement Body (DSB), unless there is an appeal or the DSB “decides by consensus not to adopt the report”\(^{189}\).

Art 17 DSU provides for Appellate Review and a Standing Appellate Body\(^{190}\), and Art 17(14) provides for the “Adoption of Appellate Body Reports”\(^{191}\). Art 19 relates to the rules for “Panel and Appellate Body Recommendations”\(^{192}\), and Art 21 provides for the “Surveillance of Implementation of Recommendations and Rulings”\(^{193}\), the enforcement aspects of the WTO’s dispute settlement system. Under Art 21(3) DSU, “[a]t a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB…”\(^{194}\).

The general rule relating to the DSU is that dispute settlement reports are intended only to settle a dispute between the parties to that dispute, and consequently the reports are only binding on the parties involved, and only in relation to the specific case

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disputed. According to McNelis, this rule is emphasised by Art 3(2) DSU and Art 19(2) DSU, which provide that recommendations and rulings of the DSB and findings and recommendations of the Panel and Appellate Body “cannot add to or diminish the rights and obligations provided in the covered agreements”. Furthermore, dispute settlement reports at the WTO do not set precedents for future cases.

WTO Members who seek redress pursuant to the DSU are required to abide by the rules and procedures of the DSU, ruling out unilateral action to resolve the dispute. If a WTO Member which has had an adverse ruling against it from the DSB fails to comply with that ruling within a reasonable time, the Member that sought the ruling from the DSB can seek authorization from the DSB to temporarily ‘suspend concessions or other obligations’ pursuant to the provisions of Art 22 DSU.

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198 Marrakesh Agreement establishing the World Trade Organization, signed 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 2 (Understanding on Rules and Procedures Governing the Settlement of Disputes) 1869 UNTS 401 art 3(2) and art 19(2).
199 McNelis, above n 195, 652.
200 Marrakesh Agreement establishing the World Trade Organization, signed 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 2 (Understanding on Rules and Procedures Governing the Settlement of Disputes) 1869 UNTS 401 art 23(1) and art 23(2).
3.2.3 The Sub-Conferral of Dispute Settlement Powers from the EU to the WTO

As the case study in this Chapter focuses mainly on the dispute settlement system in the WTO, the question arises as to whether the case study relates to an agreement by the EU to submit to the jurisdiction of the WTO’s dispute settlement system, or whether it is truly representative of a transfer of powers under the Sarooshi Typology. It is contended that the findings of this Chapter relate to the transfers of powers between IGOs generally, rather than to a submission to the jurisdiction of the WTO’s dispute settlement system specifically.

First, as discussed in chapter 3, powers are expressly conferred on IGOs, or they may be implied from the express powers, functions and objectives of the IGO. The powers of the WTO as reflected in the WTO Agreement include for example, the “implementation, administration and operation” and furtherance of the objectives of, the WTO Agreement and the Multilateral Trade Agreements, the administration of the Trade Policy Review Mechanism, and the administration of the Understanding on Rules and Procedures Governing the Settlement of Disputes. Consequently, the WTO has been sub-conferred with the powers to perform a number of functions by the EU, one of which is the administration of the dispute settlement system in the WTO.

Second, according to Klabbers, most IGOs have a mechanism of dispute settlement, ranging from flexible methods to complex mechanisms involving the strict application of rules, for example in the EU and the WTO, where organs of dispute settlement may

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203 Chapter 3, Section 3.1.
204 Chapter 3, Section 3.2.
also play the role of assisting integration within the organizations.\textsuperscript{208} Thus, the WTO dispute settlement system may be considered an integral part of the functioning of the WTO as a whole, for the purpose of settling disputes arising from matters within the jurisdiction of the WTO.

Third, Amerasinghe distinguishes between judicial bodies which have an independent status in their own right and those that don’t.\textsuperscript{209} Thus for example, the International Tribunal for the Law of the Sea (ITLOS) was established by the UN Convention on the Law of the Sea and has independent status, whilst the ICJ is an organ of the UN, and is therefore not a separate organization existing in its own right.\textsuperscript{210} Art IV(3) of the WTO Agreement provides that the “General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding”, and that “[t]he Dispute Settlement Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities”.\textsuperscript{211} Therefore, the Dispute Settlement Body of the WTO may be considered an organ of the WTO, and an integral part of its operations.

Fourth, if the EU disagrees with the way in which the WTO’s powers in dispute settlement are exercised, then the EU could avail itself of the measures suggested by Professor Sarooshi, such as seeking an amendment of the WTO Agreement, taking unilateral financial measures such as withholding its financial contributions, objecting

\textsuperscript{208}Klabbers, above n 66, 229-230.
\textsuperscript{209}Amerasinghe, above n 118, 12.
\textsuperscript{210}Ibid. The ITLOS was established pursuant to Annex VI (Statute of the International Tribunal for the Law of the Sea) of the United Nations Convention on the Law of the Sea. Art 1(1) of Annex VI states that “The International Tribunal for the Law of the Sea is constituted and shall function in accordance with the provisions of this Convention and this Statute”. \textit{Charter of the United Nations} art 92 provides that “The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter”.
\textsuperscript{211}Marrakesh Agreement establishing the World Trade Organization, signed 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) art IV(3).
persistently, or withdrawing its membership of the WTO.\(^{212}\) These measures apply to the WTO as an organization, rather than specifically to the Dispute Settlement Body, thus providing further support to the view that the dispute settlement functions of the WTO are authorized pursuant to powers which have been sub-conferred on it by the EU.

Consequently, this section has argued that the EU has sub-conferred the power to settle disputes to the WTO as an integral part of all of its functions in international trade. As such, the discussion in this case study which focuses on the dispute settlement system of the WTO relates to a sub-conferral of powers from the EU to the WTO, and not a distinct conferral of jurisdiction on an independent international court or tribunal. This case study also shows that the Sarooshi Typology can be usefully applied to the sub-conferral of different types of powers which in turn organize different types of functions in IGOs.

### 3.3 The EU and the WTO in International Trade – The Banana Dispute

Statistics indicate the importance of the EU in the WTO\(^{213}\) and in international trade generally. The EU was responsible for 15.06% total global exports in 2011, and 16.54% of total global imports in the same year.\(^{214}\) Thus the EU is a significant trading bloc in the international trading system.

Contrasted to the WTO’s fundamental principles, the EU’s trade policy as part of its single regional market objective is based on (1) a “common external tariff on imports from non-members”, (2) a “hierarchy of preferential trading agreements with trading partners outside the union”, and (3) “the use of various measures to protect the interests

\(^{212}\) Below Section 4.2.3.

\(^{213}\) Bermejo Garcia and Garciandia Garmendia, above n 36, 50.

\(^{214}\) Ibid 51, quoting from “WTO, Trade Profiles, 2011”.

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of domestic producer and sectoral groups within the EU from the intensified competition that is so much a feature of the international trading system.”

Hence, the EU’s trade policy is more regional and protective, as opposed to the open market trade liberalization policies of the WTO.

The stage is set, therefore, for potential conflict or tension between the policies of the EU and the WTO. Members of the WTO, including the EU, have made use of the WTO principles in both the pursuit and the defence of their individual trade interests and thereby, their sovereign rights or interests. Using the fair competition principle as justification, “[i]n 1996 alone, the EU initiated 23 anti-dumping measures”. And in 1997 for example, 18 out of 49 disputes at the WTO relating to “regional trade agreements…involv[ed] the European Community.”

3.3.1 The European Community’s Banana Dispute at the WTO - Background

The Banana dispute related to the banana regime in the EU, based on certain European countries’ obligations to countries they had colonised. The Banana dispute involved the dispute settlement systems of ‘both the General Agreement on Tariffs and Trade (GATT) and the WTO’.

(i) Banana I (GATT)

Following a request by a group of Latin American countries, the GATT Council established a Panel on 10 February 1993 to review an alleged breach of GATT

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215 Farrell, above n 161, 14.
216 Ibid 4.
217 Ibid 32.
218 Ibid 5.
219 Ibid 22.
regulations by various national schemes for banana importation into Europe. The alleged breaches related to import quotas and licensing schemes in the national schemes of European countries. On 3 June 1993, the Panel issued a report finding that the European national schemes violated GATT Articles I and XI.1.

Pursuant to GATT Art I, GATT members were required to extend most-favoured-nation treatment to each other. The Panel found that the Lome Convention, which gave tariff preferences to African, Carribean and Pacific (ACP) countries for bananas, was inconsistent with the MFN principle in GATT Article I, as other non-ACP countries which were also members of GATT were subject to less favourable tariffs.

GATT Article XI.1 prohibited the imposition of quantitative restrictions on imports and exports of products from or to the territory of GATT members. The Panel “found that quantitative restrictions maintained by France, Italy, Portugal, Spain and the United Kingdom were inconsistent with GATT Article XI.1, which provides disciplines on quantitative restrictions, unless justified by other GATT provisions”.

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223 Salas and Jackson, above n 221, 148.
224 General Agreement on Tariffs and Trade, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 29 July 1948) art 1: “…any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”; Clark, above n 222, 295.
226 General Agreement on Tariffs and Trade, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 29 July 1948) art XI.1: “No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.”; Clark, above n 222, 295.
227 Komuro, above n 225, 6.
The EEC (predecessor to the European Communities and the European Union) and the ACP countries blocked the adoption of the Panel’s Report by the GATT Council.\textsuperscript{228} GATT decisions were made on the basis of consensus of all the members of the GATT Council, and consequently the GATT Dispute Settlement practice permitted the blocking of Panel Reports by any member of the GATT Council, including unsuccessful parties in a dispute.\textsuperscript{229}

At any rate, the violating European national schemes were replaced by the EU’s Regulation 404/93 the following month, on 1 July 1993, and in effect replaced the disputed national schemes for banana importations with a ‘common banana regime’ in the EC.\textsuperscript{230}

(ii) Banana II (GATT)

EU Regulation 404/93 replaced national import schemes with a common or uniform set of rules in the EC, in accordance with the Single European Act of 1996.\textsuperscript{231} It still distinguished between ACP and non-ACP countries, favouring the ACP countries, and also “imposed new restrictions on the import of bananas into EU Member States”.\textsuperscript{232}

The Latin American countries had “requested consultations with the EEC concerning the draft text of 404/93 on 28 January 1993”\textsuperscript{233}, but the EEC refused on the basis that it was “premature, since the still-unadopted text was not a ‘measure’ subject to GATT

\textsuperscript{228} Salas and Jackson, above n 221, 148; Clark, above n 222, 295.
\textsuperscript{229} ‘Blocking’ was a practice in GATT dispute settlement under the GATT 1947 system. See Salas and Jackson, above n 221, 148 including fn 18; Komuro, above n 225, 6. See generally Footer, Mary E., ‘The Role of Consensus in GATT/WTO Decision-making’ (1997) 17(1) Northwestern Journal of International Law & Business 653.
\textsuperscript{230} Salas and Jackson, above n 221, 148; Komuro, above n 225, 6.
\textsuperscript{232} Clark, above n 222, 296.
\textsuperscript{233} Salas and Jackson, above n 221, 148.
discipline."234 This was while Banana I was still in progress. Subsequently, Regulation 404/93 was adopted by the EC Council on 13 February 1993, “three days after the establishment of the Bananas I panel”235, and in April 1993 consultations were held between the Latin American countries and the EEC236.

When the Regulation came into force in July 1993, Latin American countries requested new consultations and “challenged the validity of Regulation 404/93 under GATT rules”237. Less than two weeks after the Panel Report in Banana I, another GATT Panel “was established on 16 June 1993”238 and reported on 18 January 1994.239 The Panel found that the tariff preferences in favour of the ACP countries, and the import licensing scheme in the Regulation breached GATT Articles I, II and III.240 The Panel had rejected the EEC’s “arguments based on GATT Article XXIV (relating to customs unions and free-trade areas)”241. Once again the Panel’s Report was blocked from being adopted by the GATT Council by the EEC.242

(iii) Banana III (WTO)

In an effort to settle the continuing dispute, the EC entered into negotiations with the Latin American countries.243 Under the Framework Agreement on Bananas, “the EU pledged to increase the tariff quota for non-ACP bananas on a country-by-country basis, and to revise the management of export licenses”244, and in return, “the Latin American

234 Ibid.
235 Komuro, above n 225, 6 fn 23.
236 Salas and Jackson, above n 221, 148.
237 Ibid.
238 Ibid.
239 Ibid.
240 GATT Panel Report, EEC – Import Regime for Bananas, GATT Doc DS38/R (11 February 1994) [136], [146]-[147];Salas and Jackson, above 221, 148-149.
241 Salas and Jackson, above n 221, 149.
242 Ibid 148.
243 Clark, above n 222, 297.
244 Ibid.
countries agreed to forego further action against the Europeans under GATT.”

On 29 March 1994, Colombia, Costa Rica, Venezuela and Nicaragua accepted the negotiated Framework Agreement on Bananas, whilst Guatemala rejected it and “Germany and the United States protested.”

Meanwhile the Uruguay Round negotiations to form the WTO were concluded and the WTO was due to come into force on 1 January 1995. The WTO regulations took a more stringent approach to waivers than GATT 1947, and in late 1994 just before the WTO came into force, the EEC and ACP countries “negotiated a five-year waiver concerning the Lome Convention at the GATT General Council, ending on 29 February 2000”. The waiver, referred to as the Lome Waiver in reference to the Fourth Lome Convention which extended preferential access to the European market to the ACP countries, recognized the importance of the trade provisions of the Convention to ACP economies. However, the waiver only exempted the EEC from its MFN obligations under Article I.1 of GATT, and all its other obligations under GATT still applied.

On 4 October 1995, the United States, Guatemala, Honduras & Mexico, but not the Latin American countries that had agreed to the FAB, requested consultations within the newly established WTO Dispute Settlement Body regarding the EU’s banana regime. Ecuador later also submitted a request for consultations on 13 February 1996. The WTO regulations did not permit blocking by members, “so panel rulings always are

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245 Ibid.
246 Ibid.
247 Salas and Jackson, above n 221, 149.
250 Salas and Jackson, above n 221, 149.
251 Ibid 150 fn 37.
252 Ibid 151 and fn 44.
adopted unless there is a consensus among the members not to do so”, a process known as automaticity.\cite{253}

The consultations, held on 14 March 1996 and 15 March 1996 failed, and on 11 April 1996, a new Panel was requested.\cite{254} The Panel’s Report was circulated on 22 May 1997, and “for the third time, the outcome went against the EU.”\cite{255} The Panel recommended that the Dispute Settlement Board of the WTO (DSB) “request the EU to bring its import regime for bananas into conformity with the mentioned obligations.”\cite{256}

The EU appealed the Panel’s findings on 11 June 1997, and in its report on 9 September 1997, the WTO Appellate Body upheld the Panel’s findings “with certain modifications.”\cite{257} The modified Panel decision was adopted on 25 September 1997.\cite{258}

Amongst the findings of the Panel that were upheld by the Appellate Body were the findings that:

the European Communities…[was]…“required” under the relevant provisions of the Lome Convention to provide preferential tariff treatment for non-traditional ACP bananas,…[was]…not “required” to allocate tariff quota shares to traditional ACP States in excess of their pre-1991 best-ever export volumes, and…[was]…not “required” to maintain the EC import licensing procedures that…[were]…applied to third-country and non-traditional ACP bananas…\cite{259}

\cite{253} Ibid 151.
\cite{254} Ibid.
\cite{255} Ibid.
\cite{256} Ibid 151-152.
\cite{257} Ibid 152.
\cite{258} Ibid.
(iv) Implementation of the Banana III Panel Recommendations

The implementation of the recommendations of the modified Panel decision of 25 September 1997 has subsequently been contested for a very lengthy period, with the latest WTO Appellate Body report being handed down on 26 November 2008. 260

On 24 October 1997, the EU sought “consultations with the complaining parties, seeking an agreement on the reasonable period of time for the implementation of the Bananas III report”. 261 The EU wanted a period of 15 months and one week for it to implement the recommendations. 262 The consultations were unsuccessful and on 17 November 1997, the complainants sought arbitration under Article 21.3 (c) of the DSU. 263 The usual time for implementation of recommendations by the DSB “cannot exceed 15 months” 264, but on 23 December 1997, the arbitrator ruled in favour of the EU’s request for 15 months and one week to implement the Bananas III report. 265

The EU then prepared and forwarded a document amending its banana regime to the EU Council of Agriculture Ministers on 14 January 1998. 266 All the Banana III complainants as well as Panama, voiced concerns that the draft amendments contained the same GATT inconsistencies of Regulation 404/93. 267 Those concerns were rejected by the EU at a meeting held at the WTO on 5 February 1998. 268 The US repeated its concerns with “[d]etailed legal concerns on the banana plan” 269 on 12 February 1998, which were once again rejected by the EU. 271

260 WTO Dispute DS27, ‘European Communities – Regime for the Importation, Sale and Distribution of Bananas’.
261 Salas and Jackson, above n 221, 152.
262 Ibid.
263 Ibid.
264 Ibid.
265 Ibid.
266 Ibid 152-153.
267 Ibid 153.
268 Ibid.
269 Ibid.
A DSB meeting was held on 25 March 1998 to revisit the issue, and the EU dismissed the concerns of the complaining parties as “premature, since the amended system had not been implemented.”

Diplomatic exchanges continued through May and June 1998. On 20 July 1998 the new banana regime regulations were approved by the European Agriculture Council and subsequently by the EU’s General Affairs Council, following which they were published “in the Official Journal on 28 July 1998.”

The EU’s new banana regime took effect on 1 January 1999, and was challenged by the Banana III complainants. The challenge focused on “the correct interpretation of Articles 21.5 and 22 of the DSU, and to the eventual relationship between these two provisions.”

Art 21.5 DSU provides that a dispute should be decided in accordance with dispute settlement procedures, and also provides that the panel shall report within 90 days from the date of referral of the matter. Article 22 pertains to “Compensation and the

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270 Ibid.
271 Ibid.
272 Ibid.
273 Ibid.
274 Ibid.
275 Ibid.
276 Ibid.
277 Ibid.
278 Marrakesh Agreement establishing the World Trade Organization, signed 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 2 (Understanding on Rules and Procedures Governing the Settlement of Disputes) 1869 UNTS 401 art 21(5): “Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.”

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Suspension of Concessions”279, but as it “does not provide any express reference to Article 21.5, when it allows a Member to request authorization for retaliatory action if the other party ‘fails to bring the measure found to be inconsistent with a covered agreement into compliance”280, it was unclear whether recourse pursuant to Article 21.5 had to be exhausted before “retaliatory action…[could]…be taken” 281 by the complainants.

The EU took the initial view that “Article 21.5 implied a revisiting of all stages of a dispute settlement procedure, starting with a standard request for consultations by the complaining parties…[and]…maintained that an Article 21.5 procedure was necessary before the provisions for unilateral action foreseen in Article 22 could be enforced”.282 The complainants however, took the view that “Article 21.5 provide[d] for an expedited procedure, not a new dispute”283, and the US “also insisted that retaliation under Article 22 could be sought even in the absence of an Article 21.5 procedure.”284

The dispute continued without resolution, and “in a letter to Congressional Leaders dated 10 October 1998, White House Chief of Staff Erskine Bowles indicated that the Administration would announce retaliatory action pursuant to Section 301 of the Trade Act of 1974 on 15 December if the EU regime was not in compliance with WTO rules by that time.”285

280 Salas and Jackson, above n 221, 154.
281 Ibid 153.
283 Ibid 154.
284 Ibid.
285 Ibid 155.
The European Union then reacted with its own challenges to the validity of the United States’ threats of retaliatory action under the Trade Act of 1974, with the EU filing a status report with the DSB on 12 November 1998 contending that it had adequately completed implementing the panel’s report through publishing Regulation 2362/98, and following up with a request for a “new dispute settlement proceeding, concerning the WTO consistency of Sections 301-310 of the Trade Act of 1974”.286

The tactics and challenges continued in a similar vein from both sides of the dispute, including separate requests by both the EU and Ecuador for an Article 21.5 Panel, both of which were granted by the DSB on 12 January 1999.287 At the meeting of the DSB on that day, the “United States announced that it would resort to the retaliation provision foreseen in Article 22 of the DSU.”288 This was followed predictably by further challenges from the various parties involved.289

On 6 April the reconstituted Bananas III panel handed down its ruling relating to “(a) the Article 21.5 request filed by Ecuador, (b) the Article 21.5 request filed by the EU, and (c) the arbitration award requested by the EU, pursuant to Article 22.6.”290

With regard to Ecuador’s Article 21.5 request, “the panel found key aspects of the 1998 EU banana regulation to be inconsistent with WTO rules.”291 With regard to the EU’s Article 22.6 request, the Panel “confirmed the US’ right to retaliate, even before the finalization of an Article 21.5 panel procedure.”292

286 Ibid.
290 Ibid 160.
291 Ibid.
292 Ibid.
At a DSB meeting on 19 November 1999, Ecuador requested authorization to suspend concessions or other obligations under the GATT 1994, the GATS, and the TRIPS Agreement, for an amount of US$450 million dollars…aimed to affect trade originating from 13 of the Member States.”293 The EU “objected to the level of proposed suspension” and the DSB then referred Ecuador’s request to arbitration.294

At that same meeting, the EC proposed to reform its banana regime which would involve “a two-stage process, comprising a tariff rate quota system for several years…[to]…be replaced by a tariff only system no later than 1 January 2006.”295 At a DSB meeting held on 24 February 2000, the EC reported that the main parties could not reach an agreement on the matter.296

On 24 March 2000, the report by the arbitrator in Ecuador’s Article 21.5 request was circulated, with the arbitrators finding that “the level of nullification and impairment suffered by Ecuador amounted to US$201.6 million per year…[and]…that Ecuador may request authorization by the DSB to suspend concessions or other obligations under GATT 1994 (not including investment goods or primary goods used as inputs in manufacturing and processing industries)”297

In 2000 and 2001, the EC continued with its efforts to reform its banana regime298, and on 1 March 2001, the EC reported to the DSB that on 29 January 2001 the Council of the European Union adopted Regulation (EC) No 216/2001, which amended Regulation

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293 Ibid 161.
294 Ibid 161-162.
(EEC) No 404/93 to implement a system of three tariff quotas\textsuperscript{299}, as a “transitional measure leading ultimately to a tariff-only regime”.\textsuperscript{300} On 22 June 2001 the EC notified the DSB that an ‘Understanding on Bananas between the EC and the US’ of 11 April 2001, and an ‘Understanding between the EC and Ecuador’ of 30 April 2001 constituted mutually satisfactory solutions pursuant to Art 3(6) DSU, a view that was disputed by both the US and Ecuador.\textsuperscript{301}

The dispute continued over the following years, without resolution, and in 2007 some of the complainants requested the establishment of Panels at the DSB, for example on 23 February 2007 Ecuador requested that an Article 21(5) panel be established\textsuperscript{302}, and on 29 June 2007 the US also requested that an Article 21(5) panel be established\textsuperscript{303}. On 7 April 2008 the DSB Panel circulated its report on Ecuador’s Article 21(5) request, finding that there were inconsistencies in the European Communities’ banana regime, and recommending that “the DSB request the European Communities to bring the inconsistent measures into conformity with its obligations under the GATT 1994.”\textsuperscript{304} On 19 May 2008 the DSB Panel circulated its report on the US’s Article 21(5) request, concluding that “the European Communities had failed to implement the


\textsuperscript{300} WTO DS27, ‘European Communities – Regime for the Importation, Sale and Distribution of Bananas’, 11.

\textsuperscript{301} WTO Dispute DS27, ‘European Communities – Regime for the Importation, Sale and Distribution of Bananas’, 12-13. Marrakesh Agreement establishing the World Trade Organization, signed 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 2 (Understanding on Rules and Procedures Governing the Settlement of Disputes) 1869 UNTS 401 art 3(6): “Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.”.

\textsuperscript{302} WTO Dispute DS27, ‘European Communities – Regime for the Importation, Sale and Distribution of Bananas’, 15 and 2-3. Marrakesh Agreement establishing the World Trade Organization, signed 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 2 (Understanding on Rules and Procedures Governing the Settlement of Disputes) 1869 UNTS 401 art 21(5): “Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures…”.

\textsuperscript{303} WTO Dispute DS27, ‘European Communities – Regime for the Importation, Sale and Distribution of Bananas’, 4-5.

\textsuperscript{304} WTO Dispute DS27, ‘European Communities – Regime for the Importation, Sale and Distribution of Bananas’, 3-4.
recommendations and rulings of the DSB…[and that]…to the extent that the current European Communities bananas import regime contains measures inconsistent with various provisions of the GATT 1994, it has nullified or impaired benefits accruing to the United States under that Agreement”.  

On 28 August 2008, the EC notified the DSB of its intention to appeal the panel reports. On 26 November 2008, the WTO Appellate Body handed down its rulings upholding most of the Panel’s findings and “recommend[ed] that the DSB request the European Communities to bring its measure, found in this Report and in the Ecuador Panel Report, as modified by this Report, to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement.” With regard to the US Panel Report, the WTO Appellate upheld all the findings of the WTO Panel Report.

Following the handing down of the WTO Appellate Body’s Reports, the EC was reported as “insisting that the underlying dispute in the banana sector should be resolved in the context of a wider Doha Agreement”. Consequently, it was unclear that the long running Banana dispute which commenced in 1993 was concluded, either at the WTO Dispute Settlement Body, or in further negotiations at the WTO.

In 2010, the EU and other parties in the Banana dispute ended the dispute at the WTO by signing the Geneva Agreement on Trade in Bananas, which came into force on 1 May 2012.

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306 WT/DS27/AB/RW/ECU and WT/DS27/AB/RW/USA, 11 [22].
308 WT/DS27/AB/RW/ECU and WT/DS27/AB/RW/USA, ECU-162 [479].
309 WT/DS27/AB/RW/ECU and WT/DS27/AB/RW/USA, USA161-162 [478].
In this case study, the EU had transferred its powers in international trade exclusively to the WTO and had to work within the rules of the WTO Dispute Settlement system, in order to assert its powers and interests in the Banana dispute. As the Background to the dispute shows, this dispute lasted over almost two decades, with challenges and strategies along the way, reflecting the fact that where an IGO sub-confers a higher degree of its powers to another IGO, which in this case was exclusively, the contestation of the exercise of those powers is greater. 313 This accords with Professor Sarooshi’s Typology in relation to contestation.

4.0 THE TRANSFER OF POWERS FROM THE EU TO THE WTO

According to the Sarooshi Typology, the conferral of transferred powers is characterised by: (1) the irrevocability of the transferred powers, (2) the lack of direct control by the State over the exercise of those powers by the IGO, and (3) the IGO’s exclusive right to exercise the conferred powers, which are binding on the state. 314

First, the criteria that the transfer of powers should be irrevocable is not met in this case study. Art XV:1 WTO Agreement provides for the withdrawal of any member of the WTO by a written notice to the Director-General of the WTO. 315 However, according to Professor Sarooshi, there is an exception to this requirement, where the conferral may be revocable but should still classified as a transfer of powers, if the conferror has no

313 Below Section 4.1.
314 Sarooshi, above n 1, 65.
direct control over the exercise of the powers and the conferee has the exclusive right to exercise those powers.316

Second, the EU’s lack of direct control over the WTO’s exercise of its conferred powers is evidenced by Art VI:4 WTO Agreement, which provides that:

The responsibilities of the Director-General and of the staff of the Secretariat shall be exclusively international in character. In the discharge of their duties, the Director-General and the staff of the Secretariat shall not seek or accept instructions from any government or any other authority external to the WTO…The Members of the WTO shall respect the international character of the responsibilities of the Director-General and of the staff of the Secretariat and shall not seek to influence them in the discharge of their duties.317

Third, the exclusive right of the WTO to exercise the powers transferred to it by the EU, is evidenced by provisions such as Art IX:2, which states that the “Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements…”318. In addition, according to Professor Sarooshi, by agreeing to be bound by obligations arising from the conferee’s exercise of the conferred powers, the conferrer has agreed to limit its own right to exercise those powers, and consequently, the conferee has the exclusive right to use them.319 Consequently, another example of the EU’s transfer of powers to the WTO is in the dispute settlement system of the WTO, where the EU has

316 Sarooshi, above n 1, 68-69.
319 Sarooshi, above n 1, 59.
agreed pursuant to Art 3:1 DSU to affirm its adherence to the rules of the dispute
settlement system.\textsuperscript{320}

Consequently, although the conferral of powers from the EU to the WTO is revocable,
the EU has no direct control over the exercise of those powers by the WTO, and the
WTO has the exclusive right to exercise those powers. Therefore, the conferral of
powers from the EU to the WTO, is a transfer of powers. Furthermore, because there is
no direct effect of the WTO’s rules and decisions within the EU\textsuperscript{321}, the transfer of
powers from the EU to the WTO is a partial transfer of powers according to the
Sarooshi Typology.\textsuperscript{322}

4.1 The Contestation of Powers between the EU and WTO

According to Professor Sarooshi, the transfer of powers is the highest degree of
conferral of powers in his typology, and consequently there is the greatest degree of
contestation between the conferor and the conferee, as the conferor attempts to
maintain the greatest degree of autonomy and power that it can.\textsuperscript{323}

The EU has been the subject of many disputes in the GATT and WTO.\textsuperscript{324} According to
Harvey and Longo, about forty percent of the cases at the WTO have been disputes

\textsuperscript{320} Marrakesh Agreement establishing the World Trade Organization, signed 15 April 1994, 1867 UNTS
3 (entered into force 1 January 1995), annex 2 (Understanding on Rules and Procedures Governing the
Settlement of Disputes) 1869 UNTS 401 art 3(1): “1. Members affirm their adherence to the principles
for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the
rules and procedures as further elaborated and modified herein.”.

\textsuperscript{321} Above Section 3.1.2.

\textsuperscript{322} Above Section 2.1.

\textsuperscript{323} Sarooshi, above n 1, 65.

\textsuperscript{324} Harvey and Longo, above n 38, 119. For example, GATT Panel Report, EEC Measures on Animal
Feed Proteins, GATT Doc L/4599 - 25S/49 (2 December 1977, adopted 14 March 1978); GATT Panel
Report, European Communities – Refunds on Exports of Sugar, GATT Doc L/4833 – 26S/290 (25
October 1979, adopted 6 November 1979); Appellate Body Report, European Communities – Anti-
Dumping Duties on Imports of Cotton-Type Bed Linen from India, WTO Doc WT/DS141/AB/R, AB-
between the EU and the United States.\textsuperscript{325} And in 2007 alone, the EU was involved in 134 cases, of which it was a complainant in 76 cases and a respondent in 58 cases.\textsuperscript{326} The Banana dispute illustrates the extent and manner in which the EU contested its powers and interests against not just other WTO members which were parties to the dispute, but also against the laws and dispute settlement processes of the WTO. Not only has the dispute and the implementation of the recommendations of the WTO Dispute Settlement Board been drawn out for almost two decades, but the EU (as well as its opponents in the dispute) have used a wide range of tactics and strategies ranging from negotiations, arbitration, requests for panel decisions, and appeals to the WTO appellate body, as well as retaliation, sanctions and compensation, in order to influence the course of the dispute.\textsuperscript{327}

Direct effect is another means by which the EU contests its power in relation to the authority of the WTO. As discussed above, the ECJ has rejected the direct effect or applicability of WTO laws and decisions within the EU except where there is clear or express intent to do so.\textsuperscript{328} According to Zonnekeyn, the ECJ’s position is not based on legal argument but rather on political reasons, because of concerns that “a legal assessment by the ECJ of the WTO Agreements would bind the EC’s legislative and executive bodies so that they would no longer be able to enjoy identical discretionary powers as similar bodies of the EC’s major trading partners”.\textsuperscript{329} The lack of direct effect means that WTO rules have no legal effect or enforceability within EU member States, unless the EU has made those rules into law within EU.\textsuperscript{330}

\textsuperscript{325} Harvey and Longo, above n 38, 119.
\textsuperscript{326} Ibid 120.
\textsuperscript{327} O’Connor, above n 220, 251, 253 and 256.
\textsuperscript{328} Above Section 3.1.2.
\textsuperscript{330} Above Section 3.1.2
This case study of a transfer of powers from the EU to the WTO can be contrasted to the sub-conferral of agency powers and delegated powers, in that the degree of sub-conferral is significantly higher in a transfer of powers. In a sub-conferral of agency powers, the sub-conferror has the right to revoke those powers at any time, to maintain direct control over the sub-conferee’s exercise of those powers, and the right to exercise those powers concurrently with the sub-conferee. In a sub-conferral of delegated powers, the sub-conferror has the right to revoke those powers at any time, it does not have the right of direct control over the sub-conferee’s exercise of those powers, but it can exercise those powers concurrently with the sub-conferee. These categories of sub-conferrals of powers therefore contrast with a transfer of powers, wherein the sub-conferral is irrevocable, the sub-conferror has no direct control over the sub-conferee’s exercise of those powers, and the sub-conferee has the exclusive right to exercise those powers, which are binding on the sub-conferror. Hence, the degree of contestation within a transfer of powers is understandably greater.

4.2 Consequences of the Transfer of Powers from the EU to the WTO – The Fiduciary Duty of the EU and its Responsibility for the WTO’s Wrongful Acts

According to the Sarooshi Typology, the two consequences that could arise from a transfer of powers are the conferror’s fiduciary duty to the conferee, and the conferror’s responsibility for the internationally wrongful acts of the conferee. This section discusses the issues of fiduciary duty and international responsibility in the transfer of powers from the EU to the WTO.

331 Chapter 4, Section 2.1.
332 Chapter 5, Section 2.1.
333 Above Section 2.1.
334 Sarooshi, above n 1, 100-101.
4.2.1 The Fiduciary Duty of the EU to the WTO

According to Professor Sarooshi, in a transfer of powers, the conferror has transferred the exclusive right to exercise those powers to the conferee. Consequently, the conferror should not engage in actions which will affect the conferee’s exercise of those powers.

In the *ERTA* case for example, one of the questions that the ECJ had to decide on was whether the EEC or its member States had the power to negotiate and conclude the European Agreement concerning the work of crews of vehicles engaged in international road transport (AETR). In finding that the EEC had the exclusive power to negotiate and conclude the Agreement, the Court held that:

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

Under Article 5, the Member States are required on the one hand to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions and, on the other hand, to abstain from any measure which might jeopardize the attainment of the objectives of the Treaty.

If these two provisions are read in conjunction, it follows that to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the

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335 Sarooshi, above n 1, 100.
336 Ibid.
Community institutions, assume obligations which might affect those rules or alter their scope.\textsuperscript{339} Consequently, in transferring its powers in international trade to the WTO exclusively, the EU has accepted the obligation to comply with its fiduciary duty not to affect the WTO’s exclusive exercise of those powers.

4.2.2 The Responsibility of the EU for the Wrongful Acts of the WTO

In considering the responsibility of the EU for internationally wrongful acts of the WTO, a fundamental premise that needs to be established is whether the WTO can engage in internationally wrongful acts. In one of its submissions to the ILC regarding the responsibility of IGOs, the WTO stated that up till then it had never received any formal claims relating to the violation of international law.\textsuperscript{340} That does not necessarily mean however, that the WTO cannot commit an internationally wrongful act.

First, pursuant to Art VIII:1 WTO Agreement, the WTO has been conferred with legal personality by its members.\textsuperscript{341} This means that the WTO has rights and obligations under international law.\textsuperscript{342} Therefore, the WTO has the potential at least, to commit an internationally wrongful act, for example by breaching one of its international obligations. In addition, pursuant to Art 2(a) DARIO, the term “international organization” for the purposes of DARIO, is taken to mean “an organization established

\textsuperscript{339} Commission of the European Communities v Council of the European Communities (C-22/70) [1971] ECR 264, 274-275.
\textsuperscript{342} Chapter 3, Section 2.1.
by a treaty or other instrument governed by international law and possessing its own international legal personality”.

Consequently, the WTO arguably falls within the scope of DARIO.

Second, as discussed in chapter 4, IGOs may have binding obligations to observe the norms of human rights. Hence, according to Gal-Or and Ryngaert, there is the potential that the WTO could perhaps attract responsibility for breaches of obligations in areas such as human rights and the environment, if DARIO becomes law.

Third, it is arguable that the WTO may breach international obligations that arise in the many areas of international trade which come under its jurisdiction, and as a consequence incur responsibility for those breaches.

Fourth, although the lex specialis provision in DARIO may exempt the WTO from the jurisdiction of DARIO, it may nevertheless still be subject to the provisions of DARIO. Pursuant to Art 64 DARIO, the provisions of DARIO “do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law”.

However,
according to Gal-Or and Ryngaert, there are other provisions in DARIO which might potentially limit the force of Art 64 and permit the WTO to incur responsibility, for example Art 10(1) DARIO, which provides that “[t]here is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned”.349 In addition, Art 10(2) DARIO provides that Art 10(1) “includes the breach of any international obligation that may arise for an international organization towards it members under the rules of the organization”.350

Fifth, the WTO could be committing a wrongful act if it failed to follow the procedures mandated by the WTO Agreement. For example, Art 22(4) of WTO Agreement, Annex 2, states in relation to temporary counter-measures in the dispute settlement process, that “[t]he level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment”.351 Art 22(5) WTO Agreement, Annex 2 states that “[t]he DSB shall not authorize suspension of concessions or other obligations if a covered agreement prohibits such suspension”.352 If the DSB authorized disproportionate suspensions of concessions or other obligations for example, or if it authorized prohibited suspensions of concessions or other obligations, the WTO could be committing a wrongful act by breaching its obligations under the WTO Agreement.

Consequently, it appears from the discussion above that the WTO has the potential to commit internationally wrongful acts, and to be attributed with those wrongful acts. That being the case, both the WTO and the EU may incur responsibility for internationally wrongful acts which result from the WTO’s exercise of powers sub-conferred on it by the EU, for the following reasons.

Pursuant to Art 3 DARIO, the WTO would itself be responsible for an internationally wrongful act that it has committed.\textsuperscript{353} As discussed in chapter 3, however, pursuant to Arts 6 to 8 DARIO, an IGO could potentially be responsible for the conduct of its organs and agents.\textsuperscript{354} However, for the IGO to be held responsible, it would have had to be exercising effective operational control over the organ or agent.\textsuperscript{355} As the EU does not have direct control over the WTO’s exercise of its transferred powers, it is unlikely that the EU could be responsible for the WTO’s wrongful acts under provisions Arts 6 to 8 of DARIO. However, the EU may still choose to be attributed with a wrongful act committed by the WTO pursuant to Art 9 DARIO, which states that “\textit{c]onduct which is not attributable to an international organization under articles 6 to 8 shall nevertheless be considered an act of that organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own}”.\textsuperscript{356}

In addition, pursuant to Arts 14 to 16 DARIO, the EU may be responsible jointly or in parallel with the WTO for the WTO’s wrongful acts, if for example the EU aided or assisted, directed or control, or coerced, the WTO into committing those wrongful

\textsuperscript{354} Chapter 3, Sub-section 4.3.2.1(i).
\textsuperscript{355} Chapter 3, Sub-section 4.3.2.1(i).
acts.\textsuperscript{357} Under those circumstances, the EU will be responsible for the wrongful acts in its own right.\textsuperscript{358}

In conclusion, the WTO has the potential to commit internationally wrongful acts, and the discussion above has illustrated that both the WTO in its own right, and the EU as a sub-conferror of transferred powers, may be responsible for the WTO’s wrongful acts arising from the WTO’s exercise of its sub-conferred powers.

4.2.3 Measures available to the EU

According to Professor Sarooshi, there are four measures available to the sub-conferring IGO in a situation where it disagrees with the way that the sub-conferee IGO is exercising the sub-conferred powers.\textsuperscript{359} The conferring IGO can object persistently, it can amend the conferring treaty, withhold financial contributions, or revoke the conferred powers.\textsuperscript{360}

Formal Objection

The EU, like other WTO members, has a strong voice in the decision-making process at the WTO, where it has representation at the Ministerial Conference\textsuperscript{361} and the General Council\textsuperscript{362}. In addition, pursuant to Art IX:1 WTO Agreement, decisions are made by consensus, and unless provided otherwise, if a consensus cannot be achieved, then the decision will be made by voting.\textsuperscript{363} The WTO Agreement defines a decision by

\textsuperscript{357} Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 52 arts 14 to 16.
\textsuperscript{358} Chapter 3, Sub-section 4.3.2.1(ii).
\textsuperscript{359} Above Section 2.3.
\textsuperscript{360} Above Section 2.3.
consensus as a decision where “no Member, present at the meeting when the decision is taken, formally objects to the proposed decision”. According to Van den Bossche, this in effect gives all WTO Members the power of veto over decision-making.

Furthermore, if a consensus is not achieved and a vote is taken, Art IX:1 WTO Agreement provides that the European Communities have the number of votes equivalent to the number of EC Member States which are in the WTO, which up till 2012 was 27 votes. Consequently, the EU and its member States constitute an influential voting bloc in the WTO. As such, the EU has a very powerful voice at the WTO, particularly in the decision-making process.

Amendment of Treaty

Although the rules are complex, the WTO Agreement provides for amendments to the Treaty, pursuant to Art X of the Agreement. Pursuant to Art X:1, “[a]ny Member of the WTO may initiate a proposal to amend the provisions of this Agreement or the Multilateral Trade Agreements in Annex 1 by submitting such proposal to the Ministerial Conference”.

Withholding Financial Contributions

Financial contributions are levied on WTO Members, and they are assessed on the Member’s share of international trade as a percentage of the total international trade carried out by all WTO Members. In 2012, the EU Member States together contributed approximately 40% of the WTO budget, compared to a contribution of approximately 12% by the United States and about 7% by the People’s Republic of China. As such, a withholding of financial contributions by the EU would have a big impact on the WTO budget. However, Art VII (4) WTO Agreement requires members to pay their contributions promptly, and Art VII (2) (b) provides for measures against Members who are in arrears.

Withdrawal of Membership

Art XV WTO provides for the withdrawal of membership by any member of the WTO. When a Member withdraws from the WTO, its withdrawal will also apply to the Multilateral Trade Agreements annexed to the WTO Agreement. The withdrawal notice must be in writing, and takes effect six months from its receipt by the Director-

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370 Report of the Joint WTO/GATT Committee on Budget, Finance and Administration, WTO Doc WT/BFA/13, L/7649 (3 November 1995), Annex I, Chapter IV (a) Contributions from Members, Regulation 12 (1) and (2). This Report was adopted by the General Council on 15 November 1995, see General Council, Minutes of Meeting, WTO Doc WT/GC/M/8 (13 December 1995), 15 [7 (c)].
371 World Trade Organization, Members’ contributions to the WTO budget and the budget of the Appellate Body for the year 2012 http://www.wto.org/english/thewto_e/secret_e/contrib12_e.htm
In spite of the apparent ease of withdrawal from the WTO, there have been no withdrawals by WTO Members to date.\footnote{Marrakesh Agreement establishing the World Trade Organization, signed 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) art XV(1).}

5.0 CONCLUSION

This chapter examined the application of the Sarooshi Typology to the sub-conferral of powers from the EU to the WTO in relation to international trade in bananas. According to the Typology, a transfer of powers is characterized by its irrevocability, the lack of direct control by the conferror over the exercise of the conferred powers, and the conferee’s exclusive right to exercise the powers. The chapter found that the EU has no direct control over the exercise of the conferred powers by the WTO, and that the WTO has the exclusive right to exercise those powers. The chapter also found however, that the powers conferred on the WTO by its members can be revoked by the member’s withdrawal from the WTO. According to the Sarooshi Typology it is an exception, which can be mitigated if the elements of no direct control and exclusive use of powers by the conferee, are present. Consequently, the powers conferred by the EU on the WTO are transfers of powers. However, although the WTO’s rules and decisions are binding on the EU, they have no direct effect in EU member States. Therefore, the transfers of powers from the EU to the WTO are partial transfers of powers.

According to the Sarooshi Typology, a conferral of powers is underpinned by a contestation of power between the conferror and the conferee, and the greater the degree of power conferred, the greater will be the contestation between the conferror and the conferee. This was shown to be the case in the relationship between the EU and the WTO. First, the rejection by the ECJ of the direct effect of WTO rules and decisions
within the EU is based on the principle of protecting the freedom of the political institutions of the EU in making their own decisions. Second, the acrimonious\textsuperscript{378} long running Banana dispute highlighted the extent and degree of contestation of sovereignty between the members of the WTO, as they sought to obtain the best outcomes for their own States. In doing so, the EU was at the same time contesting the rules and decisions of the WTO, and as a consequence, the norms of trade in bananas within the WTO.

The WTO as a subject of international law with international legal personality is also subject to obligations for which it will incur responsibility if it breaches those obligations. As the EU does not have control over the exercise of the conferred powers by the WTO, it is unlikely that it will be attributed with responsibility pursuant to the provisions of DARIO relating to acts of organs or agents. However, the EU may nevertheless incur responsibility jointly or in parallel with the WTO for its own actions in relation to the WTO’s wrongful act.

Finally, although the degree of powers conferred by the EU on the WTO are the highest on the Sarooshi continuum, and the conferral of powers was the most formalized of the three case studies in this thesis, it was nevertheless under the provisions of the WTO Agreement that the EU was given significant powers to use all four categories of measures identified by Professor Sarooshi, to remedy any dissatisfaction it may have had with the WTO’s exercise of the conferred powers.

This chapter therefore established that the Sarooshi Typology can be applied to the sub-conferral of transferred powers between IGOs. In conclusion, chapters 4, 5 and 6 of this

thesis have found that the Sarooshi Typology can be applied to the sub-conferral and exercise of powers between IGOs.
CHAPTER SEVEN

CONCLUSION

There is a need in a globalized world for cooperation and the coordination of global activities in order to manage all the many activities that constitute our daily lives. In what may perhaps be loosely called a form of global governance which includes both political and legal frameworks, many entities such as States, IGOs, non-governmental organizations (NGOs), transnational corporations (TNCs) and even individuals, interact and contest their values and norms to influence outcomes globally. States and IGOs are predominant in this system, wherein States retain their sovereignty but confer some of their sovereign powers on IGOs to manage these global activities.

Archer has described IGOs as a means for their member States to carry out their purposes, as forums for negotiations or contestation by States of their sovereign powers and norms, and also as independent legal entities in their own right.\(^1\) The ICJ ruled in the *Reparations* case that IGOs can have international legal personalities, and capacities and competences which are conferred expressly in their constituent treaties or implied from the intentions of their members in the purposes or functions expressed in the treaties.\(^2\) IGOs with international legal personality have rights as well as responsibilities internationally.

In conferring some of their sovereign powers on IGOs, States seek to retain as much power and to maintain their sovereign values or norms, as much as possible. Conferrals of powers occur on the international stage and therefore reflect international law,

\(^1\) Archer, Clive, *International Organizations* (Routledge, 2\(^{nd}\) ed, 1992), 135, 141, and 147.

including the rules of IGOs. Contestations of sovereign values are therefore conducted not only within the framework of international politics, but also within the framework of international law, and reflect what Scott refers to as ‘legal argument being political manoeuvring’.³

Conferrals also reflect the degree of authority and legitimacy in the exercise of powers by IGOs. The conferral reflects the intent of the conferror, and defines the capacities and powers conferred as well as the degree of powers conferred. Ad hoc conferrals require the consent of the conferee in order for legal effect to occur.

Finally, conferrals of powers from States to IGOs may result with the conferror State being attributed with the conduct of a conferee IGO which commits an internationally wrongful act in exercising its conferred powers.⁴ A conferror State may incur primary responsibility for the conferee IGO’s wrongful act where it participates in the wrongful act. It may also incur secondary responsibility for the wrongful act of the IGO, if for example, it ‘aids or assists’, ‘directs or controls’ or ‘coerces’ the IGO in committing the wrongful act. In addition, the conferror State may attract fiduciary duty in the category of transfers of powers, where it has a duty not to affect the conferee IGO’s exclusive exercise of the conferred powers.

These characteristics of conferrals of powers have been conceptualised into a typology on the conferrals of powers from States to IGOs by Professor Sarooshi.

³ Scott, Shirley V., *International Law in World Politics: An Introduction* (Lynne Rienner, 2nd ed, 2010), Chapter 7.
⁴ Chapter 2, Section 4.0.
The Sarooshi Typology\textsuperscript{5}

The Sarooshi Typology on the conferrals of powers from States to IGOs is founded on the concept of contestation of sovereign values between member States of an IGO. According to Professor Sarooshi, sovereignty possesses sovereign values or norms\textsuperscript{6}, and the reference points in a contestation of sovereign values are “what…powers [are] reserved to government…who exercises which of them, and how should they be exercised?”.\textsuperscript{7} In his typology, the greater the degree of conferral, the greater will be the degree of contestation.

Conferrals are made through the constituent treaty of the IGO or by treaties to confer powers on an ad hoc basis. There are three major categories of conferrals on a continuum, from agency powers on one end of the continuum, through delegations of powers, to transfers of powers on the other end of the continuum. These categories overlap on the continuum. They are defined by three elements: (1) whether the conferred powers are revocable, (2) whether the conferror has direct control over the exercise of conferred powers, and (3) whether the conferror can exercise the powers concurrently with the conferee.

Agency powers are the smallest degree of conferred powers. Agency powers are revocable, the conferror has direct control over the exercise of the conferred powers, and the conferror can exercise those powers concurrently with the conferee. The consequences that may arise from the conferree’s exercise of agency powers include the conferee agent’s ability to change the relationship between the conferror and a third party. In addition, the conferror is responsible for the conferree’s wrongful acts because

\textsuperscript{5} See Chapter 2 for a discussion on the Sarooshi Typology.
\textsuperscript{7} Ibid 7.
the conferror has direct control over the conferee’s exercise of those powers. In this case the conferee may be held jointly responsible for the wrongful act. Finally, the conferee has a fiduciary duty to use the conferred powers in the interests of the conferror.

Delegations of powers lie between agency powers and transfers of powers in terms of the degree of powers conferred. Delegated powers are revocable, the conferror has no direct control over the exercise of the delegated powers, and the conferror can exercise the delegated powers concurrently with the conferee. As the conferror can exercise the conferred powers concurrently with the conferee, both the conferror and conferee are exercising those powers in their own right, and therefore there are no fiduciary duties owed to either party. In addition, since the conferror has no direct control over the exercise of the conferred powers, the conferee is responsible for a wrongful act that results from its exercise of those powers. However, the conferror may nevertheless still be responsible for its ‘own acts or omissions’ in relation to the wrongful act committed by the conferee.

The transfer of powers is the highest degree of conferred powers in the Sarooshi Typology. Transferred powers are irrevocable, the conferror has no direct control over the exercise of those powers, and the conferee has the exclusive right to exercise the conferred powers, with the conferee’s decisions being binding on the conferror. The conferee’s exclusive right to exercise the conferred powers may place a fiduciary duty on the conferror to comply with its binding obligations. In addition, although the conferror may not have direct control over the exercise of conferred powers by the conferee, the conferror may still be responsible for the wrongful acts of the conferee. According to Professor Sarooshi, pursuant to Art 5 ARSIWA, acts of persons or entities...
exercising “conferred powers of government” may be considered acts of the State. In partial transfers of powers, where the State is bound by the decisions of the conferee but there is no direct effect of those decisions in the domestic legal system of the State, the State may nevertheless be attributed with responsibility pursuant to Art 5 where it has “agreed in internal law to be bound by the organization’s exercise of powers on the international plane”. In the case of full transfers of powers, whereby the State has agreed to both the State and its domestic legal system being bound by the conferee’s decisions, Art 5 ARSIWA could apply.

The measures or remedies available to the conferror who disagrees with the conferee’s exercise of the conferred powers appear to be generic across the categories of conferrals. These measures include amending the treaty conferring the powers on the conferee, applying ‘unilateral financial measures’, terminating the conferral, and ‘persistent objection’. In the case of a conferral of agency powers, the conferror can also exercise its right of direct control over the conferee’s exercise of the conferred powers.

IGOs are prominent, prolific and have a very pervasive presence in global and domestic activities. There is also significant interaction, cooperation and coordination amongst them, as well as inevitable overlaps in their fields of operation. It was hypothesised that the Sarooshi Typology could perhaps serve as a useful model or typology for identifying, classifying and analysing types of sub-conferred powers between IGOs, to better understand the legal and power relationships between them.

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8 Ibid 102.
9 Ibid.
This thesis therefore examined the applicability of the Sarooshi Typology to the sub-conferrals of powers between IGOs. It considered three case studies relating to each of the main categories of conferrals of powers on the Sarooshi Typology. In Chapter 4 it examined the sub-conferral of agency powers from the United Nations to NATO for peacekeeping in Kosovo, in Chapter 5 it examined the sub-conferral of delegated powers from the UN to the IAEA in disarming Iraq of nuclear weapons, and in Chapter 6 it examined the transfers of powers from the EU to the WTO in relation to international trade.

The Ability of IGOs to Sub-Confer Powers

According to Professor Sarooshi, there is nothing in international law that prevents States from conferring the ‘full range’ of sovereign powers (legislative, executive, and judicial) on IGOs. There are instances where IGOs coordinate their activities by conferring powers on a common organ, hence sub-conferrals of powers by IGOs are possible in the law and practice of IGOs. As IGOs originate predominantly from conferrals of powers by States, IGOs can be said to sub-confer those conferred powers to other IGOs. Bradley and Kelley, for example, identify a classification of ‘grants of power’ from States, that of ‘redelegation’.12

The Meroni case however, places limitations on the sub-conferral of powers.13 First, the constituent treaty may prohibit the sub-conferral of certain powers. Second, the IGO should generally not sub-confer ‘broad powers of discretion’. Third, limitations on the powers conferred on the sub-conferring IGO must similarly be imposed on the sub-
conferee IGO, and the sub-conferred powers cannot exceed the sub-conferror’s own powers.

According to Professor Sarooshi, sovereign contestations in States are often the same contestations occurring in IGOs, suggesting the possibility of a contestation between IGOs in their exercise of powers.

The Applicability of the Sarooshi Typology to the Sub-Conferral of Powers between IGOs – Case Studies

Chapter 4 examined the conferral of agency powers from the UN Security Council to NATO (KFOR) in Kosovo. The UN Security Council has absolute powers in international peace and security, and peacekeeping activities are authorized by the UN through the resolutions of the Security Council. The UN therefore also has the capability to revoke that authority at any stage. In this case, UNSC Resolution 1244 (1999) Annex 2 para 4 mandated NATO to command the security force (KFOR) in Kosovo. The UN also retains overall direct control over its peacekeeping missions. It determines the terms of engagement, and the UN Secretary-General is the Commander in Chief of the peacekeeping forces. With regard to Kosovo, the UN defined the responsibilities of the security presence in Kosovo through UNSC Resolution 1244 (1999) paragraph 9. Finally, by retaining absolute power and control over the peacekeeping force in Kosovo, the UN can be said to have exercised the powers concurrently with NATO. Therefore, the conferral of powers from the UN to NATO for a peacekeeping force in Kosovo fulfils the three elements of a conferral of agency powers in the Sarooshi Typology, and can be said to be a conferral of agency powers.

15 SC Res 1244, UN SCOR, 4011th mtg, UN Doc S/RES/1244 (10 June 1999), [9].
One of the possible consequences of the conferral of agency powers from the UN to NATO in Kosovo was the potential attribution of responsibility to the UN for breaches of human rights by KFOR in Kosovo. In the Behrami and Saramati cases, the ECtHR attributed responsibility for the wrongful conduct of KFOR and UNMIK to the UN on the basis of the ‘ultimate authority and control’ test. In the Nuhanovic case however, the Supreme Court of Netherlands found that the wrongful conduct of Dutchbat was attributable to the State of Netherlands, on the basis of the ‘effective control test’. It is generally agreed that the correct test should be the effective control test.

Finally, NATO’s relationship with the UN contains tensions in the contestation of their respective powers and authority. On a fundamental level, NATO has sought to maintain its autonomy from the UN politically and also legally by basing its authority on Art 51 UN Charter, a provision authorizing collective self-defence, rather than on Chapter VIII UN Charter, which provides for the UN’s power to call on regional organizations in the maintenance of international peace and security. It has been suggested that NATO wanted to avoid the obligation of seeking the UN Security Council’s prior authorization to use force, or to avoid the obligation of keeping the Security Council informed of its activities in maintaining peace and security.

Chapter 5 examined the sub-conferral of delegated powers in international peace and security from the UN to the IAEA, to disarm and inspect for nuclear weapons in Iraq. As discussed above, delegated powers are characterised by their revocability, the lack of direct control on the part of the sub-conferror, and the sub-conferror’s right to exercise those powers concurrently with the sub-conferee. Pursuant to UN Security Council
Resolution 687 (1991) paragraph 13, the Security Council mandated or empowered the IAEA to inspect for nuclear weapons in Iraq. This power was revoked by the Security Council at its discretion in 2007 pursuant to UN Security Council Resolution 1762 (2007) paragraph 1. The UN Security Council had no direct control over the IAEA’s exercise of the conferred powers. Art I(2) of the Agreement Governing the Relationship between the United Nations and the International Atomic Energy Agency (Agreement) recognises that the IAEA “function[s] under its Statute as an autonomous international organization in the working relationship with the United Nations established by this Agreement”. Art V of the Agreement for example, provides for the referral of UN Resolutions to the IAEA which the IAEA shall consider, but UN recommendations “do not automatically apply to it”. In addition, the right of the UN to exercise concurrently the powers it sub-confers on the IAEA is recognised by Art I(1) of the Agreement, which states that the UN recognises the responsibilities of the IAEA pursuant to its Statute, but “without prejudice to the rights and responsibilities of the United Nations in this field under the Charter”.

In this case study UNSCOM and UNMOVIC, organs of the UN, worked closely with the IAEA in inspecting for weapons of mass destruction in Iraq. The IAEA was responsible for searching for nuclear weapons, whilst UNSCOM and UNMOVIC were responsible for finding chemical and biological weapons. Consequently, the sub-
conferral of powers from the UN to the IAEA relating to Iraq fulfils the three elements of a delegation of powers in the Sarooshi Typology.

The concurrent exercise of powers for disarming Iraq of weapons of mass destruction by the UN created some tensions and contestations of values between the UN and the IAEA. For example, the UN Secretary-General’s intervention in Iraq was said to have undermined the IAEA inspectors’ authority in Iraq. Similarly, differences in culture between the IAEA and UNSCOM created operational tensions between them. These tensions or contestations reflect the consequences of a sub-conferral of powers whereby both the sub-conferror and the sub-conferee exercise those powers concurrently.

Chapter 6 examined the category of transfers of powers in relation to the sub-conferral of powers in international trade from the EU to the WTO, in the context of the Banana cases. In this case study, the EU had no direct control over the WTO’s exercise of the sub-conferred powers. Art IV(1) of the WTO Agreement for example, provides for a Ministerial Conference with “authority to take decisions on all matters under any of the Multilateral Trade Agreements”. Art IX(1) WTO Agreement provides that decisions are to be made by consensus and if there is no consensus then the decisions are made by voting, with each member having one vote. The EC has the number of votes equivalent to the number of their member States in the WTO. Pursuant to Art X(3), some amendments to the WTO Agreement may require an acceptance by two thirds of the WTO members, and even then they only take effect for those members which have

accepted them, thereafter taking effect for each other member on their acceptance of the amendments.\textsuperscript{29}

In addition, the decisions of the WTO are binding on the EU. According to Professor Sarooshi, the extent of a conferee’s right in a transfer of powers to exercise those powers exclusively is reflected in the extent of the conferror’s agreement to be bound by the conferee’s decisions.\textsuperscript{30} In a partial transfer of powers, the decisions of the conferee bind the conferror only internationally.\textsuperscript{31} In a full transfer of powers, the decisions of the conferee bind the conferror internationally as well as having direct effect in the conferror’s domestic legal system.\textsuperscript{32}

In Art 3(1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), WTO members affirm their adherence to Arts XXII and XXIII of GATT 1947, as well as the rules and procedures of the DSU.\textsuperscript{33} In Art 17(14) DSU, the parties to a dispute agree to accept unconditionally an Appellate Body report which has been adopted by the Dispute Settlement Body of the WTO.\textsuperscript{34} Art 21 DSU provides for the monitoring of the implementation of the DSB’s recommendations and rulings.\textsuperscript{35}

Although transfers of powers, according to the Sarooshi Typology, are irrevocable, Art XV(1) of the WTO Agreement provides for the unilateral withdrawal by WTO members

\textsuperscript{29} Marrakesh Agreement establishing the World Trade Organization, signed 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) art X(3).
\textsuperscript{30} Sarooshi, above n 6, 69.
\textsuperscript{31} Ibid 70.
\textsuperscript{32} Ibid.
\textsuperscript{33} Marrakesh Agreement establishing the World Trade Organization, signed 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 2 (Understanding on Rules and Procedures Governing the Settlement of Disputes) 1869 UNTS 401 art 3(1).
\textsuperscript{34} Marrakesh Agreement establishing the World Trade Organization, signed 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 2 (Understanding on Rules and Procedures Governing the Settlement of Disputes) 1869 UNTS 401 art 17(14).
from the organization. As such, the transfer of powers from the EU to the WTO is revocable. According to Professor Sarooshi however, this is an exception in the category of transfers of powers, and although the sub-conferral of powers from the EU to the WTO is revocable, the fact that the decisions of the WTO Dispute Settlement Body are binding on WTO members and the members’ lack of direct control over those decisions, strongly suggest that the sub-conferral is a transfer of powers.

Finally, the long standing Banana cases, which took place over almost two decades, reflect the extent of contestation of powers between the EU and the decisions of the WTO’s Dispute Settlement Body. This supports Professor Sarooshi’s view that the greater the degree of power that is conferred, the greater will be the degree of contestation of the exercise of those powers.

In conclusion, the sub-conferral of powers from the EU to the WTO examined in Chapter 6 is therefore a transfer of powers, but as WTO rules and decisions have no direct effect within the domestic legal systems of the EU member States, it is a partial transfer of powers.

**Measures in the Sarooshi Typology**

According to Professor Sarooshi, when a conferror disagrees with the way in which the conferee exercises conferred powers, there are various measures available to the conferror, such as amending the constituent treaty, taking unilateral financial measures such as withholding contributions to the IGO, terminating the conferral, and persistent

37 Sarooshi, above n 6, 68-69.
objection. In the case of the conferral of agency powers, the conferrer can also exercise
direct control over the conferee’s use of the conferred powers.\(^\text{38}\)

In the sub-conferral of agency powers in peacekeeping from the UN to NATO in
Kosovo, the UN had direct control over NATO’s exercise of those powers, but there
were no obvious use of measures by the UN to censure NATO’s exercise of those sub-
conferred powers in Kosovo.

In the sub-conferral of delegated powers from the UN to the IAEA in relation to
inspections for nuclear weapons in Iraq, there were no apparent reasons for the UN to
apply measures to the IAEA. In 2007, the UN terminated its sub-conferral of those
powers to the IAEA, but not for reasons relating to the IAEA’s exercise of the sub-
conferred powers.

Finally, in relation to the sub-conferral of transferred powers from the EU to the WTO,
the EU did not appear to apply the measures identified by Professor Sarooshi to the
exercise of powers by the WTO. In a sense, it could perhaps be argued that the EU
engaged in persistent objection to the decisions of the WTO by its long drawn out
resistance and contestation of the DSB’s decisions in the Banana cases. However, the
EU did not terminate its sub-conferral of powers on the WTO by withdrawing its
membership of the WTO, even though there was a provision for unilateral withdrawal
of membership in the WTO Agreement. This could suggest that to the EU, the value of
belonging to the WTO may be greater than the value of leaving the organization.

\(^{38}\) Ibid 109.
In conclusion, it appears that unlike States in general, IGOs may be reluctant to use measures against each other where they may disagree with the exercise of the powers that they have sub-conferrred on another IGO.

As seen in the reviews of the Sarooshi Typology in chapter 2, the typology offers a useful framework to analyse with greater clarity, precision and differentiation, the legal relationships in conferrals of powers from States to IGOs. It has been argued in this thesis that the Sarooshi Typology can also be applied usefully to the sub-conferrals of powers between IGOs.

It should be noted however, that the typology only considered three case studies. There is a big diversity among IGOs, for instance with some IGOs being of a universal character and others of a regional or functional nature. In this Thesis for example, the UN is an IGO with universal membership, and the predominant function of maintaining international peace and security. The EU is considered by some to be a regional IGO and by others to be a supranational organization with some of the features of an IGO. NATO is a military alliance between European and North American member States, which has expanded its activities to include peacekeeping operations. The IAEA is an IGO created to facilitate the peaceful use of atomic energy and to ensure that atomic energy is not used for military purposes.

Despite the diversity of the IGOs examined in the case studies in this thesis, the case studies have highlighted some important aspects on how sub-conferrred powers between IGOs operate in practice, including the legal consequences that could result from a sub-conferral of powers, such as fiduciary duty and international responsibility. Some of the
insights into the sub-conferrals of powers between IGOs that have been identified by the application of the Sarooshi Typology to the case studies in this Thesis are as follows.

First, this thesis discussed the different types of powers that can be conferred on an IGO by States, which authorize the IGO to perform certain functions internationally. Whilst IGOs are not sovereign entities like States, it has been suggested that IGOs may be able to create or help crystallise customary international law which can be binding on States. It therefore creates an interesting situation whereby powers that originated from States, could be exercised in a manner that creates laws or practices which are binding on the States.

Second, as discussed in chapter 3, there is often conflict between IGOs when their jurisdictions overlap. With the proliferation of IGOs, it is possible that there could be an increase in the sub-conferrals of powers between them. Consequently, the type of sub-conferrals such as those examined in this Thesis may indicate how those contestations may evolve. Delegations of powers, for example, may have a lesser degree of contestation than transfers of powers, because the sub-conferrer and the sub-conferee can exercise the same powers concurrently. In a transfer of powers, where the greatest degree of powers has been sub-confferred on the sub-conferee, and where the decisions of the sub-conferee are binding on the sub-conferrer, the degree of contestation may be greater. As seen in this thesis, various forms of contestation or strategies may evolve to preserve the priority of certain IGOs over other IGOs, for example, the priority of the UN over other IGOs which is provided for in Art 103 of the UN Charter. It would perhaps be interesting to examine further the circumstances of overlaps of jurisdictions of IGOs, and the interactions and contestations that may arise. One question that could be asked is whether a sub-conferral of powers in these
situations of overlapping jurisdictions may be a more efficient and effective way to achieve common objectives.

Third, the consequences of sub-conferrals of powers are an important consideration. As seen in this thesis, fiduciary duty and responsibility for internationally wrongful acts can arise, not just for the sub-conferee of powers, but also for the sub-conferrer. For example, in a sub-conferral of agency powers, the sub-conferee owes a fiduciary duty to the sub-conferrer, but in a transfer of powers, the sub-conferrer owes a fiduciary duty to the sub-conferee. In all the categories of sub-conferrals of powers, whilst the sub-conferee may be responsible for an internationally wrongful act it commits, the sub-conferrer may also be responsible for the sub-conferee’s wrongful acts, either in its own right, or jointly or in parallel with the sub-conferee. These considerations are important for sub-conferrer of powers, particularly if there is an increasing degree of cooperation and sub-conferrals of powers between IGOs.

Fourth, the Sarooshi Typology identifies a number of measures available to a sub-conferrer of powers, which is dissatisfied or concerned about the sub-conferee’s exercise of the sub-conferred powers. In addition to the sub-conferrer wanting to have its objectives and the purposes for which it sub-conferred those powers achieved, there are possible consequences such as fiduciary duty and international responsibility which were discussed above. As such, the availability, effectiveness and legal effects of measures available to sub-conferrors in situations where they are concerned about the sub-conferee’s exercise of powers may also be a useful area for further research.

Finally, the three categories of sub-conferrals of powers exist on a continuum, and consequently, the features of the different categories may overlap. This is arguably
useful, in that it can potentially accommodate a greater variety or diversity amongst IGOs. IGOs may have certain characteristics or varying degrees of characteristics, which fit on the continuum, with elements approximating one or more of the three categories of sub-conferrals identified by the Sarooshi Typology. The greater the number and types of sub-conferrals of powers between IGOs that can be identified according to the typology, the easier it is to discern patterns, commonalities and differences, leading to greater insights into the interactions between IGOs.

**Conclusion**

In conclusion, the Sarooshi Typology for the conferral and exercise of sovereign powers from States to IGOs is applicable to the sub-conferral and exercise of powers between IGOs in the three case studies examined in this thesis. Given the extensive role played by IGOs in the management of global activities, the Sarooshi Typology provides a useful typology for identifying, classifying and analysing the types of powers sub-conferred between IGOs, and also for understanding the relationships, contestations of powers and legal consequences that may arise as a result of the types of powers sub-conferred.
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