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## The Essentially Contested Nature of the Concept of Sovereignty: Implications for the Exercise by International Organizations of Delegated Powers of Government

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**THE ESSENTIALLY CONTESTED NATURE OF  
THE CONCEPT OF SOVEREIGNTY:  
IMPLICATIONS FOR THE EXERCISE BY  
INTERNATIONAL ORGANIZATIONS OF  
DELEGATED POWERS OF GOVERNMENT**

*Dan Sarooshi\**

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**I. INTRODUCTION**

The relationship between the concept of sovereignty and international organizations is often posed as being problematic. The establishment and

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subsequent operations of international organizations are often characterized as involving the 'loss' of a State's sovereignty and as such have been viewed with suspicion, if not antagonism, by certain domestic commentators.<sup>1</sup> The response in legal journals by supporters of international organizations has been too narrow, technical, and often simply reaffirms the fears of the domestic commentators by focusing on how the organization's exercise of powers constrains the State in the exercise of its powers. The approach adopted herein is different. It involves a focus on the essentially contested nature of the concept of sovereignty and contends that this nature is the same whether sovereign powers are being exercised on the domestic or international planes. This unity of identity has two main consequences for our discussion of international organizations: first, it provides a cogent reason for the existence of international organizations; and second, it provides a rationale for the construction of the normative framework that governs international organizations in the exercise of their delegated powers of government by recourse, in part, to domestic public and administrative law norms.

## II. SOVEREIGNTY AS AN ESSENTIALLY CONTESTED CONCEPT AND INTERNATIONAL ORGANIZATIONS

### A. *Sovereignty as an Essentially Contested Concept*

The precise meaning and scope of the application of sovereignty in different contexts remains unclear. Stephen Krasner has provided a useful typology of the concept, and yet there are still different ways of approaching, giving content to, and using the concept. In addition to domestic sovereignty, interdependence sovereignty, international legal sovereignty, and Westphalian sovereignty,<sup>2</sup> the concept of sovereignty, as the ultimate and supreme power of decision, can be both analyzed and qualified from the perspective of what can be called its "contested elements:" such elements as legal versus political sovereignty, external versus internal sovereignty, indivisible versus divisible sovereignty, and

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1. This was, for example, the view of Republican Senate Leader Robert Dole who considered that the US joining of the World Trade Organization would involve a loss of US sovereignty. See John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 COLUM. J. TRANSNAT'L L. 157, 186 (1997). For an example of the exaggeration and rhetoric adopted in this debate, even in academic journals, see Scott McBride, *Dispute Settlement in the WTO: Backbone of the Global Trading System or Delegation of Awesome Power?*, 32 LAW & POL'Y INT'L BUS. 643, 644 (2001); and Mari Presley, *Sovereignty and Delegation Issues Regarding U.S. Commitment to the World Trade Organization's Dispute Settlement Process*, 8 J. TRANSNAT'L L. & POL'Y 173 (1998).

2. STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 9 (1999).

governmental versus popular sovereignty.<sup>3</sup> These elements of sovereignty have always been contested within polities and the outcome of these contests at a particular point in time has established where sovereignty can be said to rest on a number of different spectra where these contested elements represent points of extremity. However the specific locus of decision-making within polities resulting from these contestations through history is almost secondary to the importance of sovereignty as an essentially contested concept.<sup>4</sup> I am using here the notion of an essentially contested concept as it is used in the philosophy of language.<sup>5</sup> Samantha Besson provides a useful meaning of this notion when she states: “[an essentially contested concept] is a concept that not only expresses a normative standard and whose conceptions differ from one person to the other, but whose correct application is to create disagreement over its correct application or, in other words, over what the concept itself is. . . . It is [the concept’s] nature not only to be contested, but to be contestable in [its] essence, so that not only [its] applications, but also [its] core elements or criteria are contestable.”<sup>6</sup> This is central to sovereignty’s contribution; that the very existence of the concept of sovereignty generates continual arguments as to its core criteria. For example: What are the conditions for the existence and exercise of sovereignty? Who should exercise sovereignty and what form should these entities take? These are but a few of the questions that the essentially contested nature of the concept of sovereignty raises and will continue to raise.

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3. Samantha Besson, *Sovereignty in Conflict: Post-sovereignty or Mere Change of Paradigms?*, in *THE SOVEREIGNTY OF STATES AND THE SOVEREIGNTY OF INTERNATIONAL LAW* (forthcoming 2004)..

4. On sovereignty as an essentially contested concept, see Georg Sorensen, *Sovereignty: Change and Continuity in a Fundamental Institution*, 47 *POL. STUD.* 590, 604 (1999); and Besson, *supra* note 3, at § 3; and, importantly, for detailed consideration of how the concept of sovereignty fulfils the three preconditions for a concept to be considered as being essentially contested (the concept must be normative, intrinsically complex, and lacking any immutable minimal criteria of correct application), see Besson, *supra* note 3, at § 4.

5. For the original promulgation of the idea of essentially contested concepts, see W.B. Gallie, *Essentially Contested Concepts*, 56 *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* 167 (1956); and for its subsequent development and application in varying contexts, see, for example, WILLIAM E. CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* 10 (3d ed., 1993); John N. Gray, *On the Contestability of Social and Political Concepts*, 5 *POL. THEORY* 331 (1977); John Kekes, *Essentially Contested Concepts: A Reconsideration*, 10 *PHIL. & RHETORIC* 71 (1977); and Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 *LAW & PHIL.* 137 (2002).

6. Besson, *supra* note 3, at para. 3.1. For a similar view, see Gray, *supra* note 5, at 344.

### B. Sovereignty and International Organizations

The characterization of sovereignty as an essentially contested concept has an important real-world manifestation in relation to international organizations. The concept of sovereignty being inherently unstable and in a constant state of having its core criteria subject to contestation and change has the consequence that there is no single, or indeed authoritative, definition that can be given to the concept. This has two important implications. First, it necessarily admits that the concept of sovereignty can legitimately be contested in other fora and, for our purposes, this includes international organizations that exercise conferred powers of government. Second, it does not privilege conceptions of sovereignty determined within States as opposed to those decided upon within international organizations. As a matter of positive law within a State, the decision of a particular domestic arm of government in the exercise of its powers may of course be authoritative, but even these decisions will be subject to contestation domestically and in the case where States have conferred powers on international organizations these may well be subject to contestation within these organizations.

The contestation of sovereignty within an international organization has inherent within it causation that runs both ways between States and the organization: States and their representatives contest conceptions of sovereignty within an international organization, but this contestation on the international plane inevitably affects domestic conceptions of sovereignty.<sup>7</sup> A good example of this is provided by the debate within the UK on the constitutional basis of judicial review of Acts of Parliament for their conformity with EC Law and whether indeed such review can be justified by domestic interpretations of the constitutional relationship between democracy and sovereignty.<sup>8</sup>

The fact that sovereignty is now being increasingly contested within international organizations does not of course diminish the importance of contestations of sovereignty on the domestic plane, even where an organization has been given a binding power of decision in the exercise of conferred powers. To the contrary, the contestations of sovereignty that have been, and are still, occurring within Nation-States are often the very same contestations that are now taking place within international organizations. They are about the central problem of sovereignty: what

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7. As Harold Koh has observed more generally: "Once nations begin to interact, a complex process occurs, whereby international legal norms seep into, are internalized, and become embedded in domestic legal and political processes." Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181, 205 (1996).

8. See Sir William Wade, *Sovereignty—Reduction or Evolution?*, 112 *LAW Q. REV.* 568 (1996); but see T. R. S. Allan, *Parliamentary Sovereignty: Law, Politics, and Revolution*, 113 *LAW Q. REV.* 443 (1997).

are powers reserved to government; who exercises which of them; and how should they be exercised? And it is largely for this reason that the domestic arms of government seek to engage in the contestation of sovereignty within international organizations that exercise governmental powers.

Let us now turn to consider briefly how to fit what I have just called the central problem of sovereignty with our general characterization of sovereignty as an essentially contested concept.

### *C. The Nation-State as 'Exemplar'*

An important element of W.B. Gallie's original formulation in 1956 of an essentially contested concept is that its contestation proceeds by a process of imitation and adaptation from an "exemplar."<sup>9</sup> Jeremy Waldron has added an important and useful qualifier to this element when, in a discussion of the Rule of Law as an essentially contested concept, he states:

In Gallie's original exposition, essential contestability was associated with the existence of an original exemplar, whose achievement the rival conceptions sought to characterize and develop. . . . But I am suggesting, now, that *reference back to the achievement of an exemplar* may be too narrow an account of what gives unity to a contested concept. Perhaps there is no exemplar of the Rule of Law, but just a problem that has preoccupied us for 2,500 years: *how can we make law rule?* On this account, the Rule of Law is a solution-concept, rather than an achievement-concept; it is the concept of a solution to a problem we're not sure how to solve; and rival conceptions are rival proposals for solving it or rival proposals for doing the best we can in this regard given that the problem is insoluble.<sup>10</sup>

This approach is useful since it provides a constant touchstone for the essentially contested concept in question, which brings those contesting the concept always back to the reason for the concept's existence or, put differently, back to the problem that the concept was in the first place invented to try and solve. This does not in any way detract from the

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9. Gallie, *supra* note 5, at 176–77. Compare Garver who states: "Gallie is right to say that an exemplar can give unity to an essentially contested concept, but it can do so only because an exemplar is a kind of essentially contested argument. It is not the fact that there was a Roman Republic that gave unity to disputes about sovereignty in the eighteenth century, but the fact that the Roman Republic [itself an essentially contested concept] was appealed to and recognized as authoritative." Eugene Garver, *Rhetoric and Essentially Contested Arguments*, 11 PHIL. & RHETORIC 156, 162 (1978).

10. Waldron, *supra* note 5, at 157–58.

dynamic and lively contestation of the core criteria that arguably make up a complex concept like sovereignty. But the identification of the central issue does provide a general conceptual framework within which these contestations can take place and, moreover, provides a basis for distinguishing the relevant from the irrelevant during contestation. What then is the central problem of sovereignty about which there is continual contestation? I have already suggested above that it is the following: what are powers reserved to government; who exercises which of them; and how should they be exercised? As such, the contours of the conceptual framework generated by this core problem clearly allow us to speak of the concept of sovereignty within the context of international organizations exercising conferred powers of government.

However, to dispense entirely with Gallie's notion of an exemplar, as implicitly suggested above by Jeremy Waldron, may detract somewhat from the explanatory power of an essentially contested concept. The obvious 'exemplar' in the case of contestations of sovereignty within international organizations is the Nation-State. Instead, however, of characterising the nation-State as an 'exemplar' it may be more accurate to describe it as being a reference point since it does not provide the desired end-point but rather the starting point for the contestation of sovereignty within international organizations.

The contestation of the concept of sovereignty has always moved to a more transcendent level of human institution: from the family unit to the tribe to the City-State to the region to the institution of independent and sovereign nation-States and now, finally, to international organizations. The initial content of the concept of sovereignty to be contested at each new, higher, level has usually taken as its starting point of reference the position attained within the lower level. In this regard the contestation of sovereignty on the international plane is no different: the Nation-State is the starting point of reference for the concept of sovereignty to be contested within international organizations. It is for this reason in large part that the debate, for example, about the legitimacy of the exercise by international organizations of governmental powers (the so-called "democratic deficit") is largely framed by reference back to the exercise of these powers within the Nation-State.<sup>11</sup> Moreover, as explained below in Section III, with

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11. On the problematic issue of the lack of a democratic mandate for international organizations exercising powers of government, there are at present two areas of proposed reform to address this democratic deficit of organizations.

The first involves proposals for reform of international organizations. The most advanced and sophisticated proposals in this area relate to the European Community due to the broad scope of the governmental powers being exercised by the EC that has stimulated a substantial body of academic scholars writing in the area of EC institutional law. *See, e.g.,*

Francesca Bignami, *The Administrative State in a Separation of Powers Constitution: Lessons for European Community Rulemaking from the United States*, Jean Monnet Working Paper No. 5/99, available at <http://www.law.harvard.edu/programs/JeanMonnet/papers/99/990501.html>; Philip Craig, *Democracy and Rulemaking Within the EC: An Empirical and Normative Assessment*, Jean Monnet Working Paper No. 2/97, available at <http://www.law.harvard.edu/programs/JeanMonnet/papers/97/97-02-.html>; Sverker Gustavsson, *Reconciling Suprastatism and Democratic Accountability*, Jean Monnet Working Paper No. 11/99, available at <http://www.law.harvard.edu/programs/JeanMonnet/papers/99/991101.html>; Jean-Claude Piris, *Does the European Union have a Constitution? Does it need one?*, Jean Monnet Working Paper No. 5/00, available at <http://www.law.harvard.edu/programs/JeanMonnet/papers/00/000501.html>; Philip Norton, *National Parliaments and the European Union: Where to From Here?*, in *LAWMAKING IN THE EUROPEAN UNION* 209 (Paul Craig & Carol Harlod eds., 1998); Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489, 524 (2001); J.H.H. Weiler, *The State "überalles": Demos, Telos and the German Maastricht Decision*, Jean Monnet Working Paper No. 6/95, available at <http://www.law.harvard.edu/programs/JeanMonnet/papers/95/9506ind.html>; J.H.H. Weiler et al., *European Democracy and its Critique: Five Uneasy Pieces*, Jean Monnet Working Paper No. 1/95, available at <http://www.law.harvard.edu/programs/JeanMonnet/papers/95/9501ind.html> (Sept. 1995); Philip Raworth, *A Timid Step Forwards: Maastricht and the Democratisation of the European Community*, 19 EUR. L. REV. 16 (1994).

The second area of proposed reforms in order to address the democratic deficit of organizations is focused largely on States ensuring that their domestic political processes allow for an input by parliament into the formulation of government policy on action within an international organization. The legislative scrutiny processes which operate within several States over proposed governmental action in, *inter alia*, international organizations may be of some use here, even though it has not had a good record to date in terms of parliament being able to exercise effective control over governmental action. For discussion of the procedures and practice of scrutiny carried out by national parliaments over their executive governments when acting in the EC Council, see Laura Yli-Vakkuri, *Parliamentary Control and Intergovernmental Agreements between the Member States of the European Union: Finnish Perspectives*, in *INTERNATIONAL LAW ASPECTS OF THE EUROPEAN UNION* 301 (Martti Koskenniemi ed., 1998); MAGDALENA M. MARTIN MARTINEZ, *NATIONAL SOVEREIGNTY AND INTERNATIONAL ORGANIZATIONS* 169–211 (1996). However, in respect of this scrutiny Martin Martinez concludes:

[I]n the great majority of European countries, Parliamentary control over the executive concerning community affairs has proved to be clearly insufficient. With the only exceptions of Denmark and the United Kingdom, bodies within National Parliaments specialising in Community affairs instead of exercising an "a priori" control over the executive are simply "receivers" of ex-post fact[o] information. They do not contribute effectively in the shaping of their Government's policy stances on the Community.

*Id.* at 212. For criticism of the utility of this mechanism of accountability, see Stein, *supra* at 524.

To date, however, there has been a serious question whether a system of parliamentary scrutiny and control over governmental action can ever be truly effective: thus, for example, in the context of UK parliamentary scrutiny and control over the exercise of rule-making by the UK government—a power which has been delegated by parliament to government. See ROBERT BALDWIN, *RULES AND GOVERNMENT* 65–72 (1995); J. D. Hayhurst & Peter Wallington, *The Parliamentary Scrutiny of Delegated Legislation*, in *PUBLIC LAW* 547 (A.W. Bradley ed., 1988). But compare the relatively new and active House of Lords Select Committee on the Scrutiny of Delegated Legislation which was first established in November 1992 and given a permanent status in November 1994. On this Scrutiny Committee, see C.M.G. Himsworth, *The Delegated Powers Scrutiny Committee*, in *PUBLIC LAW* 34 (Dawn Oliver ed., 1995); and on the



conferrals by States of governmental powers on international organizations, the general starting point for the limitations on the exercise of these powers are largely those that attach to the use of these powers within the national polity.

This approach that the sovereignty of States is only the starting point of reference for contestation within international organizations, does not, it should be emphasised, mitigate the important role of States *as actors* in contesting sovereignty within international organizations. The lower level of government has in history always played an active and important role as a safeguard against the capacity of the more recently established, higher, level of government to establish and enforce problematic conceptions of sovereignty. This is particularly relevant in the context of global institutions where maintaining the system of national autonomy is so essential if the evils of excessive centralization are to be avoided. The general point has been made by Martti Koskenniemi in the context of statehood: "Statehood survives and should continue to survive for the foreseeable future because its formal-bureaucratic rationality provides a safeguard against the totalitarianism inherent in a commitment to substantive values, which forces those values on people not sharing them."<sup>12</sup> This brings us then to the important question of sovereign values.

#### D. *The Normative Character of Sovereignty and the Question of Values*

The concept of sovereignty has always been associated with an entitlement to exercise governmental powers in the internal and external domain, but this has always been subject to sovereign values that have conditioned its exercise. Put in more conceptual terms, sovereignty possesses an important normative character. As Samantha Besson observes more generally:

As 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. These values are diverse and include, among others, democracy, human rights, equality and self-determination. . . . Concept determination amounts therefore to more than a mere description of the concept's core application criteria; it implies

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work of the Committee of European Affairs of the Danish Parliament, see Ib Martin Jarvad, *The Committee of European Affairs of the Danish Parliament (the Folketing)*, in *LAWMAKING IN THE EUROPEAN UNION* 223 (Paul Craig & Carol Harlow eds., 1998).

12. Martti Koskenniemi, *The Future of Statehood*, 32 *HARV. INT'L L.J.* 397, 407 (1991).

an evaluation of a state of affairs on the basis of sovereignty's incorporated values. Despite the rhetoric that currently dominates political and legal analysis, the pervasive clarity of central political concepts like sovereignty therefore remains a myth. What lies behind the *prima facie* categorical use of these concepts are not facts that should be established, but conceptions and interpretations that should be evaluated and maybe amended in order to account better for the values encompassed by these concepts. It follows therefore that the determination of the concept of sovereignty cannot be distinguished from the values it entails and from the normative discussion that generally prevails about it.<sup>13</sup>

An early starting point for the concept of sovereignty focused mainly on paradigms involving the formulation and application of such statal values as exclusive control by a State of its territory and non-intervention in the internal affairs of other States.<sup>14</sup> Today, however, through a process of contestation the concept in the Western liberal tradition has arguably been broadened both to include other actors and also to contain values such as legitimacy, autonomy, self-determination, freedom, accountability, security, and equality that are core to a modern conception. This is not a static or exhaustive<sup>15</sup>—and some may even say accurate—list and indeed based on what I have said earlier it could not be: it is continually subject to contestation and change. The point is though that these, or indeed other, values do provide sovereignty with a normative character which can be used to evaluate a state of affairs within a society or, in our case of an international organization, between societies.

To take Besson's work one step further, the incorporation of these values as an integral part of the concept of sovereignty allows the argument to be made that the exercise of public powers of government can only be considered an exercise of *sovereign* powers when they are in accord with sovereign values, otherwise the exercise of public powers is something entirely distinct from the exercise of sovereign powers and

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13. Besson, *supra* note 3, at ¶ 4.1. For the normative character of essentially contested concepts, see also WILLIAM E. CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* 22 (3rd ed. 1993), and Waldron, *supra* note 5, at 149–50.

14. But compare the fascinating analysis of the period 1870–1914 in MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* 98–178 (2001).

15. Compare Joseph Weiler's proposed sovereign principle or value of 'constitutional tolerance' within the EU: see J.H.H. Weiler, *Federalism and Constitutionalism: Europe's Sonderweg*, Jean Monnet Working Paper No. 10/00, Sec. III, available at <http://www.jeanmonnetprogram.org/papers/00/001001.html>.

can even be considered as a violation of sovereignty. As Michael Reisman has stated in relation to this limiting—but also implicitly evaluative—characteristic of one of his proposed sovereign values:

International law is still concerned with the protection of sovereignty, but, in its modern sense, *the object of protection is not the power base of the tyrant who rules directly by naked power or through the apparatus of a totalitarian political order, but the continuing capacity of a population freely to express and effect choices about the identities and policies of its governors.* In modern international law, the ‘unilateral declaration of independence’ by the Smith Government in Rhodesia *was not an exercise of national sovereignty but a violation of the sovereignty of the people of Zimbabwe.* The Chinese Government’s massacre in Tiananmen Square to maintain an oligarchy against the wishes of the people was a *violation of Chinese sovereignty.* The Ceausescu dictatorship was a *violation of Romanian sovereignty.* . . . Fidel Castro *violates Cuban sovereignty* by mock elections that insult the people whose fundamental human rights are being denied, no less than the intelligence of the rest of the human race.<sup>16</sup>

This feature of sovereign values being an integral part of the concept of sovereignty is of particular importance to our discussion of conferrals by States of sovereign powers—which include the full range of executive, legislative, and judicial powers of the State —<sup>17</sup> on international organizations, since in order for an organization to be said to exercise *sovereign* powers then it must ensure that this is in accord with sovereign values. The practical consequence of this approach for international organizations is set out in Parts III and IV below. This approach to sovereign values does raise a potential problem though at one level, for the internationalist, since so long as different societies possess differing approaches to these core values of sovereignty then a truly shared sense of

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16. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 Am. J. Int’l L. 866, 872 (1990)(emphasis added).

17. See ABRAHAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 226–27 (1995); JAN KLABBERS, *AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW* 91, 205 (2002); PHILIPPE SANDS & PIERRE KLEIN, *BOWETT’S LAW OF INTERNATIONAL INSTITUTIONS* 275 (Phillippe Sands & Pierre Klein eds., 5th ed. 2001); Jose E. Alvarez, *The New Treaty Makers*, 25 B.C. INT’L & COMP. L. REV. 213 (2002); David H. Anderson, *Law-Making Process in the UN System—Some Impressions*, 2 MAX PLANCK Y.B. U.N. L. 23 (1998); and Thomas M. Franck, *Can the United States Delegate Aspects of Sovereignty to International Regimes?*, in *DELEGATING STATE POWERS: THE EFFECT OF TREATY REGIMES ON DEMOCRACY AND SOVEREIGNTY* 1, 4–5 (Thomas M. Franck ed., 2000).

sovereignty—and the ability and legitimacy of an international organization to exercise sovereign powers—becomes problematic.<sup>18</sup> It is in part this issue that led the German Constitutional Court to retain for itself the competence to decide whether the exercise by the European Community of conferred powers are in conformity with German fundamental rights.<sup>19</sup> But, to reiterate for present purposes, it is precisely the stimulation of this kind of debate—what are sovereign values and how are they to be reconciled in the case of conflict—which is the vital, and indeed unique, contribution that is made by the essentially contested concept of sovereignty. This understanding of sovereignty's role together with its important ontological function provide a cogent counter-argument<sup>20</sup> against those who advocate its abolition.<sup>21</sup>

### E. *The Ontological Function of Sovereignty*

The process of contestation of the concept of sovereignty involves, in almost circular fashion, a set of ontological and legitimating decisions. The first is ethical; deciding who *We* are: who is a friend, who is an enemy, and who is a stranger.<sup>22</sup> The other is metahistorical; where we came from, how we became friends, how we got here, where we are, and where we are going in the future.<sup>23</sup> It is obvious as such that the concept of sovereignty is inextricably intertwined with identity and history. But to put the point differently, the essentially contested nature of the concept of sovereignty means that it continually generates

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18. But maybe this is to overstate the actual position, since there would seem to be identifiable commonalities that exist within 'world culture.' Katzenstein, Keohane, and Krasner cite work by sociologists, led by John Meyer, who have demonstrated a large degree of similarity in formal national practices relating to issues as diverse as censuses, social security, education, and science despite significant variations in national socio-economic and ideological characteristics. Peter J. Katzenstein, et al., *International Organization and the Study of World Politics*, 52 INT'L ORG. 645, 675 (1998). For a similar approach, see Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749, 1752–53 (2003).

19. MAASTRICHT TREATY 1992 CONSTITUTIONALITY CASE, Case Nos. 2 BvR 2134 & 2159/92, reprinted in *THE RELATIONSHIP BETWEEN EUROPEAN COMMUNITY LAW AND NATIONAL LAW: THE CASES 556* (Andrew Oppenheimer ed., 1994).

20. Another argument in favour of retaining the concept of sovereignty is because of its important role in the management of inequality between States. See Benedict Kingsbury, *Sovereignty and Inequality*, 9 EUR. J. INT'L L. 599 (1998).

21. See generally NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH* (1999). However, even MacCormick's approach to, and critique of, sovereignty seems dependent on a particular conception of sovereignty, see Hans Lindahl, *Sovereignty and the Institutionalization of Normative Order*, 21 OXFORD J. LEGAL STUD. 165, 166, 175 (2001), and as such he is engaged in the process of contestation of the concept.

22. JENS BARTELSON, *A GENEALOGY OF SOVEREIGNTY* 6 (1995).

23. *Id.*

discussion on, and contributes to the formulation, formation, and identification with, the concept of a community. Sovereignty has been used to constitute societies but also to exclude from societies. History is replete with decisions that give identity to the *We* as opposed to the *Other* by focusing on geographical or other perceived differences between parts of humanity based on such factors as ethnicity, language, tribe, and even, it must be said with a degree of ironic circularity, nationality. This stimulation of ontological decisions by the essentially contested nature of sovereignty poses, according to some, an inherent conflict at the core of modern conceptions of the concept. Jens Bartelson, for example, observes:

Man, as the hero of modernity, made the state out of conflict, but out of the state inevitably arises a new state of conflict; man, in his quest for sovereignty, has pushed the tragedy of his political predicament out of his hands by making the Other the condition of possibility of his essential sameness within the state. From Rousseau on, early-modern strategies of peace have no option left save to proceed by domestic analogy when it comes to international transformation; at the same time, the dialectic of conflict can only constitute harmony out of conflict by the logic of sublimation; as Hegel remarked on the possibility of a federative solution to the problem of transcendence: “even if a number of states join together as a family, this league, in its individuality, must generate opposition and create an enemy.” Thus, it appears as if the modern promise of transcendence is based upon an ontology whose inherent dialectic continuously pours cold water on the hope of its immanent fulfilment.<sup>24</sup>

Is it possible that the next stage of contestations of sovereignty may, ontologically, focus on the constitution of communities based on the extent to which different persons accept and apply values as opposed to differences based on, for example, tribe, ethnicity, and nationality? And the next question is can international organizations provide such a forum for the contestation and formulation of such values?<sup>25</sup> This emphasis on

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24. *Id.* at 232.

25. This certainly seems to be the approach adopted—but only in part (a State still must be ‘European’)—by the Draft Treaty Establishing a Constitution for Europe which provides in Article 1(2) as follows: “The Union shall be open to all European States which respect its values and are committed to promoting them together.” Draft Treaty Establishing a Constitution for Europe, 2003 O.J. C 169/1, available at [http://europa.eu.int/futurum/constitution/table/index\\_en.htm](http://europa.eu.int/futurum/constitution/table/index_en.htm). Article 2 of the Draft Treaty goes on to provide: “The Union’s values. The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-

international organizations as an institutional forum for such contestations is important. It is useful here to borrow from Martti Koskenniemi who states: "Today, the ascertainment of universal values remains a search for compromise between conflicting value systems. In this political struggle something like a formal, procedural state system helps to prevent adherents to opposing values from resorting to corporal violence."<sup>26</sup>

There is, however, an additional layer of complexity that exists in the case of international organizations. The very existence of international organizations as necessarily a forum for contestation may lead to the solidification of conceptions of sovereignty within a State in response to this *Other*. This may on the one hand seem to compromise the contribution of that State and its peoples to the formation of a common approach to an issue since it may have forced them to adopt, sometimes prematurely, a position on an issue in response to its being raised within the context of an international organization (e.g., the UK 'opt-outs' from various EU issues such as European Monetary Union). But on the other hand the very consideration of an issue at the international level requires a State to have to formulate its approach or response to an issue (e.g. having to make up its mind; will it participate in European Monetary Union) and even a decision not to participate represents a contribution to the process of contestation of sovereignty on the international plane. Such an approach to sovereignty exemplifies the virtue encapsulated in the concept of unity in diversity. Peoples are free to identify themselves as members of a community by virtue of their acceptance of certain values, but what is often more important than the actual content of the values is their common acceptance of a process of contesting these values, thereby allowing the members of the same community to place differing emphasis on the content of even the same value.

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discrimination." *Id.* This does not, however, mean that there are not significant problems with this Draft Constitution and indeed with the EU's human rights policies. For a number of important reform proposals to address these deficiencies, see Philip Alston & J.H.H. Weiler, *An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights*, in *THE EU AND HUMAN RIGHTS* 3 (Philip Alston ed., 1999); and for more general discussion of the EU's approach to human rights, see, for example, ANDREW CLAPHAM, *HUMAN RIGHTS AND THE EUROPEAN COMMUNITY: A CRITICAL OVERVIEW* Vol. I (1991); Gráinne de Búrca, *Fundamental Human Rights and the Reach of EC Law*, 13 *OXFORD JOURNAL OF LEGAL STUD.* 283 (1993); Paul Craig, *Constitutions, Constitutionalism, and the European Union*, 7 *EUR. L. REV.* 125, 141-50 (2001); Koen Lenaerts, *Fundamental Rights to be Included in a Community Catalogue*, 16 *EUR. L. REV.* 367 (1991); and *THE EUROPEAN UNION AND HUMAN RIGHTS* (Nanette A. Neuwahl & Allan Rosas eds., 1995).

26. Martti Koskenniemi, *The Future of Statehood*, 32 *HARV. INT'L L. J.* 397, 402 (1991).

This emphasis on the essentially contested nature of sovereignty does not discredit realist explanations. To the contrary, in the process of contesting conceptions of sovereignty on the international plane it is likely that more powerful States will be able to project their approach to specific values to a much greater degree than will less powerful States. A possible example of this is the US projection of the value of democracy through the United Nations.<sup>27</sup>

To summarize, the first claim being advanced is that the very existence of international organizations performs an important ontological function since these organization's provide a forum, transcendental to the State, where conceptions of sovereignty—and more specifically the content of sovereign values—can be contested on the international plane. This is, moreover, arguably a positive development since simply transposing domestic conceptions of sovereignty onto the international plane is not always appropriate and indeed on the international plane the value may be developed more extensively than is possible at the national level.

Let us now turn to discuss my second claim; that domestic public and administrative law principles are *prima facie* applicable to the exercise by international organizations of conferred sovereign powers.

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27. This arguably occurred when the US pushed for the adoption by the UN Security Council of resolution 940 which provided, in operative paragraph 4, as follows:

*Acting* under Chapter VII of the Charter of the United Nations, [the Security Council] authorizes Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment that will permit implementation of the Governors Island Agreement, on the understanding that the cost of implementing this temporary operation will be borne by the participating Member States.

S.C. Res. 940, U.N. SCOR 1994, 49th Sess., 3413th Mtg., ¶ 4, U.N. Doc. S/RES/940 (1994), available at <http://www.un.org/Docs/scres/1994/scres94.htm>. This decision by the Security Council—which was directed at ensuring the return to power of the democratically elected government of President Aristide—was especially significant since it may have even involved China, for example, acting against its egoistic interest by not vetoing the Security Council resolution that authorized military action to restore democracy—at the least a very significant concession by the Chinese Government in the light of its recent history.

### III. THE *PRIMA FACIE* APPLICATION OF DOMESTIC PUBLIC AND ADMINISTRATIVE LAW PRINCIPLES TO INTERNATIONAL ORGANIZATIONS

The contestation of sovereignty within a large number of States has led to the development of values that, to varying degrees, impose constraints on the exercise of sovereign powers at the domestic level. Consider, for example, the value of accountability. In most States this value has come to be regarded as being inextricably interlinked with the exercise of sovereign powers at the domestic level<sup>28</sup> through a long and arduous process of contestation, and the value is often reflected in constitutional and other public law constraints on the exercise of such powers.<sup>29</sup> The conferrals by States of their powers on international organizations free from the normative limitations that constrain the exercise of these powers at the national level is to dispense with by the stroke of a pen the limitations on governmental tyranny that peoples have fought hard to win within their domestic polity. But more fundamentally, we recall from above that an international organization can only be said to exercise *sovereign* powers when this is in accord with their underlying sovereign values. The incorporation of these values in domestic public and administrative law principles mandates in general terms the application of these principles to the exercise by international organizations of conferred sovereign powers.<sup>30</sup> It is the governmental nature of these powers that allows us to distinguish between the types of domestic law that prove useful as a source of analogy. In particular, domestic private law which regulates private rights and powers will not

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28. Cf. NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH* 25 (1999).

29. A possible reason why accountability for the exercise of governmental powers has emerged as an important sovereign value is that it appears to contribute to the quality of governance within a polity. See, for example, Adsera, Boix, and Payne who contend, based in part on statistical analysis, that the quality of government hinges on the extent to which citizens can make their politicians accountable for their actions. Alicia Adsera et al., *Are You Being Served? Political Accountability and Quality of Government*, 19 (2) J. LAW, ECON. & ORG. 445 (2003).

30. See, for example, the jurisprudence of the European Court of Justice which has had recourse by analogy to the domestic public law systems of EC Member States in order to ascertain the relevant principle which should apply in particular cases; see TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EC LAW* 4 (1999); and Mariano J. Aznar-Gomez, *The 1996 Nuclear Weapons Advisory Opinion and Non Liqueur in International Law*, 48 INT'L & COMP. L.Q. 3, 6 (1999). For more general support for this kind of approach, see IAN BROWNLIE, *THE RULE OF LAW IN INTERNATIONAL AFFAIRS: INTERNATIONAL LAW AT THE FIFTIETH ANNIVERSARY OF THE UNITED NATIONS* 213 (1998).



generally be suitable for transplantation to the law of international organizations.<sup>31</sup>

Conferrals by States of powers on international organizations often affect, arguably even undermine, the separation of powers within States, especially between the executive and legislative branches of government since it is the executive branch which represents the State in the organization when decisions are being made concerning the use of powers that may otherwise have been the prerogative of the legislature. This provides at least a partial explanation of why the German Constitutional Court—the *Bundesverfassungsgericht*—in its *Maastricht* decision sought to ensure that the German legislature (the *Bundestag* and *Bundesrat*) exercised control over the content of the powers being conferred by Germany on the EU by giving the legislature the competence to specify by statute the powers being conferred.<sup>32</sup> In this respect, the view being advanced here that domestic public and administrative law principles are of general application to the exercise by international organizations of sovereign powers is important, since it allows the participation, albeit indirect, by domestic legislatures in the process of contestation of sovereignty on the international plane. This participation by domestic legislatures is of crucial importance if international organizations—as an emerging additional layer of government—are to engage in a deeper, and thus more meaningful, contestation of the concept of sovereignty within their respective spheres of concern.

All of this, however, raises the key question: *to what extent* is it appropriate to employ domestic public and administrative law principles when constructing the normative framework that governs the exercise of sovereign powers by international organizations?<sup>33</sup> The general applicability of domestic public and administrative law principles to international organizations does not, of course, mean that a State's domestic legal framework governing the exercise of a power can be considered to apply automatically to the exercise of the same or analogous power by an organization. There are two reasons for this.

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31. On the inappropriateness of applying private law analogies to international organizations more generally, see R. Higgins, Final Report of the Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations Towards Third Parties, in 66-I ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, 201 (1995), and EVANGELOS RAFTOPOULOS, THE INADEQUACY OF THE CONTRACTUAL ANALOGY IN THE LAW OF TREATIES 201 (1990).

32. Bundesverfassungsgericht [BVerfGE][Federal Constitutional Court] 89, 155 (438–39), *reprinted in* THE RELATIONSHIP BETWEEN EUROPEAN COMMUNITY LAW AND NATIONAL LAW: THE CASES, *supra* note 19, at 554–56.

33. The general importance of this type of enquiry has recently been highlighted by Sir Robert Jennings. See Robert Y. Jennings, *The Spirit of International Law*, 97 AM. J. INT'L L. 725, 727 (2003) (book review).

First, when States establish an international organization they are agreeing to be bound by certain common obligations which flow from the treaty: as such, there cannot be a presumption that the treaty is to be applied in a different way to member States depending on their domestic public or administrative law systems and the way in which the conferred governmental power or an analogous power is treated under these various systems. A domestic public or administrative law principle is only arguably applicable to the exercise by an international organization of governmental power where this principle can be identified as applying to the particular power within the domestic public and administrative law systems of a number of member States, since only then can it be considered as a general principle of law<sup>34</sup> and thus a formal source of law applicable to international organizations;<sup>35</sup> otherwise the domestic law analogy can only be of gentle persuasive value.<sup>36</sup>

Second, the constituent treaty itself will specify certain competences and institutional and other limitations which attach to the exercise of the power in question, and these may be of such a nature that it is inappropriate to use a domestic law analogy. For example, it was by engaging in this type of enquiry that Jackson and Croley found that WTO Panels and the Appellate Body should not have recourse by analogy to the US administrative law concept of judicial deference to agency decisions<sup>37</sup>

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34. A legal principle does not, however, need to be universally recognized to constitute a 'general principle of law.' Maurice Mendelson, *The Subjective Element in Customary International Law*, 66 BRIT. Y.B. INT'L L. 177, 191 (1995).

35. General principles of law, as a source of international law, are applicable to international organizations. See Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960–1989, Part Eight*, 67 BRIT. Y.B. INT'L L. 1, 13 (1996); and HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW* 833 (4th ed. 2003). This approach assumes however that international organizations are subject more generally to international law: on this, see Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (WHO v. Egypt), 1981 I.C.J. Pleadings 72, at 89–90 (March 25, 1951); and ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 46 (1994).

36. For exposition of the more general role of analogical reasoning in the context of international law, see Vaughan Lowe, *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS* 207, 210 (M. Byers ed., 2000); and, in a judicial context, see JOSEPH RAZ, *THE AUTHORITY OF LAW* 201–206 (1979).

37. In particular, the decision of the US Supreme Court in the case of *Chevron USA Inc. v. Natural Resources Defence Council, Inc.*, 467 U.S. 837 (1984) where the Court decided that US Government agency interpretations of the Statutes they administer are to be accepted by the US Courts as binding in certain cases. For comment on this decision, see for example: Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 3 (1990); David J. Barron & Elena Kagan, *Chevron's Non-delegation Doctrine*, 2001 SUP. CT. REV. 201 (2001); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L.

when determining the scope or standard of review to be afforded national court decisions.<sup>38</sup>

An example of a case where a domestic public law principle can, arguably, be applied to international organizations is when ascertaining the contours of the normative framework that governs an organization's competence to sub-delegate its powers.

#### IV. THE SUB-DELEGATION BY INTERNATIONAL ORGANIZATIONS OF GOVERNMENTAL POWERS

Considerable attention has been paid in the literature to the issue of the domestic competence of various States to confer powers of government in the first place on international organizations<sup>39</sup> and the related

REV. 301 (1988); and Daniel F. Spulber & David Besanko, *Delegation, Commitment, and the Regulatory Mandate*, 8 J.L. ECON. & ORG. 126, 132–33 & 144–46 (1992).

38. John Jackson and Steven Croley state:

In stark contrast to administrative agencies, GATT/WTO members are not specifically charged with carrying out the GATT/WTO. To be sure, members are obligated to fulfil their responsibilities under the WTO Agreement. In that limited sense, GATT/WTO members are charged with administering the GATT/WTO. But no country or combination of countries was ever delegated the responsibility of implementing the WTO Agreement in the way that administrative agencies are charged with implementing their statutes. Countries party to an antidumping dispute are not delegates whose technical expertise specially qualifies them to make authoritative interpretive decisions. They are, rather, interested parties whose own (national) interests may not always sustain a necessary fidelity to the terms of international agreements. Thus, while there may well be reasons for panels to defer to an authority's permissible interpretation of the WTO Agreement, expertise of parties to a panel dispute is probably not among them. The same is true for the argument from democracy. Indeed, this argument cuts in the opposite direction from *Chevron*, once transplanted to the GATT/WTO context. Unlike agencies, national authorities that are parties to an antidumping dispute are not accountable to the GATT/WTO membership at large. GATT/WTO panels, not disputing parties, are the membership's delegates. ... The argument in *Chevron* that judges should defer to the interpretive decisions made by those accountable to the citizenry's representatives simply has no analogue in the GATT/WTO anti-dumping context.

Stephen Crowley & John Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 209 (1996).

39. On the competence of States to confer powers on international organizations, see in the case of the US, Thomas Franck, *Can the United States Delegate Aspects of Sovereignty to International Regimes?*, in *DELEGATING STATE POWERS: THE EFFECT OF TREATY REGIMES ON DEMOCRACY AND SOVEREIGNTY* 1 (2000). See also Curtis Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003); Lori Fisler Damrosch, "Sovereignty" and *International Organizations*, 3 U.C. DAVIS J. INT'L L. & POL'Y 159, 165–166 (1997); Michael Glennon & Allison Hayward, *Collective Security and the Constitution: Can the Commander in Chief Power Be Delegated to the United Nations?*, 82 GEO. L.J. 1573 (1994); David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L.R. 1697 (2003);

issue of the “democratic deficit” (the need for legitimate governance) of these organizations in the exercise of these governmental powers.<sup>40</sup> Our present enquiry though, is restricted to considering two different, innovative, issues.

First, to what extent is it appropriate to apply the *delegatus non potest delegare* maxim to the sub-delegation by an international organization of governmental powers?<sup>41</sup> This requires examination of two preliminary issues: whether the *delegatus non potest delegare* maxim can be considered to be a “general principle of law” recognized by States in their internal legal orders, and thus a formal source of international law which is applicable to international organizations; and whether the reasons for the existence of the maxim in domestic constitutional law provide a justification for the application of the doctrine within the context of international organizations.

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Julian Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L.R. 71 (2000); and John C. Yoo, *The New Sovereignty and the Old Constitution: the Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87 (1998). In the case of Germany, see Georg Nolte, *Constitutional Implications of German Participation in Treaty Regimes*, in DELEGATING STATE POWERS: THE EFFECT OF TREATY REGIMES ON DEMOCRACY AND SOVEREIGNTY 261 (Thomas M. Franck ed., 2000). In the case of France see Alain Pellet, *A French Constitutional Perspective on Treaty Implementation*, in DELEGATING STATE POWERS: THE EFFECT OF TREATY REGIMES ON DEMOCRACY AND SOVEREIGNTY, *supra* note 39, at 279. For a useful summary of the domestic constitutional requirements that need to be fulfilled for the conferral of powers to an international organization in Bulgaria, Hungary, Czech Republic, Poland, Russia, and Romania, see Eli Salzberger & Stefan Voigt, *Economic Analysis of Constitutional Law: On Constitutional Processes and the Delegation of Power, with Special Emphasis on Israel and Central and Eastern Europe*, 3 THEOR. INQ. L. 207, 253–257 (2002).

40. See, e.g., Kalypto Nicolaidis & Robert Howse, *This is my EUtopia . . . : Narrative as Power*, 40 J. COMMON MKT. STUD. 767, 769 (2002).

41. The preliminary question which arises here is why would an international organization want to sub-delegate its powers in the first place. There are three reasons that may briefly be put forward here.

The first is that it may be due to the lack of ability of an organization to carry out in practice the mandate for which powers have been delegated. For example, in the context of the UN and its peace and security mandate under Chapter VII of the Charter, the Security Council has had to sub-delegate many of its powers in this area to UN Member States and regional organizations simply because it has lacked the military capability to act to maintain or restore international peace. The provisions of Article 43 of the UN Charter which were intended to provide the Council with such a military capability have not been implemented by Member States due to political reasons, and as such the Council has had to sub-delegate its Chapter VII powers to UN Member States and regional organizations for military enforcement action to be carried out in practice. Secondly, it may even be an attempt by an organization to transfer political responsibility for any consequences flowing from the exercise of the powers in question to another entity. *Cf. infra* note 59 and accompanying text (discussing a purported transfer of legal responsibility). Thirdly, it may represent a sophisticated attempt by Member States to regain control over the exercise of a power they had initially conferred on an international organization.

Only after having made these preliminary determinations is it possible to go on to consider our second issue of what limitations on the "general competence"<sup>42</sup> of an international organization to sub-delegate does the doctrine prescribe as necessary.

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42. Principal organs of an international organization do possess a 'general competence' to sub-delegate their powers. The existence of such a general competence as part of the corpus of the law of international organizations was affirmed by the European Court of Justice in, among others, the case of *Meroni v. High Authority*, where the Court found that the High Authority could sub-delegate certain of its powers under the Treaty of Rome even where the Treaty did not expressly provide for such a delegation. Case 9/56, *Meroni v. High Authority*, 1958 E.C.R. 133, 151. See also the Opinion of the Advocate-General in this case who acknowledges the existence of such a general competence in the context of international organizations; Case 10/56, Opinion of Advocate-General Roemer in *Meroni v. High Authority*, 1958 E.C.R. 177, 190; the *Köster* case, *Einfuhr-und Vorratsstelle für Getreide und Futtermittel v. Köster, Berodt & Co.*, 1970 E.C.R. 1161; and K. Lenaerts, *Regulating the Regulatory Process: "Delegation of Powers" in the European Community*, 18 EUR. L. REV. 23 (1993).

Moreover, the existence of this general competence is further substantiated by reference to an analogous general principle of public and administrative law which exists in various domestic systems of government. The general principle of law is that an organ of government possesses a general competence to sub-delegate its powers, subject to constitutional constraints, to other entities. The status of this principle as a general principle is validated by the fact that executive and legislative organs of government within a large number of States—from both common and civil law systems—have the competence to sub-delegate their powers to other entities. See, for example, the legal position in the following States: Australia, G. Sawyer, *Australia*, in INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE, INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, NATIONAL REPORTS, pt. A, A-52 (V. Knapp ed., 1971); Belgium, René David, *Sources of Law*, in INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE, INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, THE LEGAL SYSTEMS OF THE WORLD 3-52 (René David ed., 1984); Canada, see for example the case of *Gavin v. The Queen*, 23 I.L.R. 154 (Sup. Ct. P.E.I. 1956)(Can.); France, see Article 38 of the 1958 French Constitution, FR. CONST. art. 38, reprinted in S. FINER ET AL., *COMPARING CONSTITUTIONS* 224-225 (1995); see also Xavier Blanc-Jouvar & Jean Boulouis, *France*, in INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE, NATIONAL REPORTS, *supra*, pt. E/F, F-51, F-53, and B. RUDDEN, *A SOURCE-BOOK ON FRENCH LAW: PUBLIC LAW: CONSTITUTIONAL AND ADMINISTRATIVE LAW PRIVATE LAW: STRUCTURE*, CONTRACT 24 (1991); Germany, see Articles 80 and 129 of the German Basic Law, Arts. 80 & 129 GG, reprinted in S. FINER ET AL., *COMPARING CONSTITUTIONS* 164, 198-199 (1995); see also Uwe Kischel, *Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law*, 46 ADMIN. L. REV. 213 (1994); Greece, Charalambos Fragistas, *Greece*, in INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE, NATIONAL REPORTS, *supra*, pt. G/H, G-50; Iceland, Thór Vilhjálmsson, *Iceland*, in INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE, NATIONAL REPORTS, *supra*, pt. I, I-2; India, P.K. Irani, *India*, in INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE, NATIONAL REPORTS, *supra*, pt. I, I-9; Ireland, Paul O'Higgins, *Ireland*, in INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE, NATIONAL REPORTS, *supra*, pt. I, I-64, I-65 and the Irish High Court case of *The State (at the Prosecution of Brendan Devine) v. Larkin and Others*, 70 I.L.R. 110, 113-114 (High Ct. 1975)(Ir.); Italy, Mauro Cappelletti & Pietro Rescigno, *Italy*, in International Association of Legal Science, National Reports, *supra*, pt. I, I-94; USA, see, e.g., KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* 149-150 (2nd ed. 1978), and Kischel, *supra*; and Japan, see Yosiyuki Noda, Japan, in International Association of Legal Science, National Reports, *supra*, pt. J/K, J-7; Y. Abe, [Delegation to Local Governments and Substitute Performance], 57 HORITSU JIHO LEGAL REV. 4 (1985); and Article 18 of the Japanese Import Trade Control Order, Final Amendment, art. 18 (1987), in *Japanese Notification of Laws, Regulations, and Administrative Procedures Relating to the WTO*

*A. Application of the Non-Delegation Doctrine  
to International Organizations*

The *delegatus non potest delegare* maxim, or what is otherwise known as the non-delegation doctrine, deals with the extent to which the exercise of a power delegated to one entity may be sub-delegated by that entity to another (the delegatee).<sup>43</sup> As de Smith, Woolf, and Jowell state in their work *Judicial Review of Administrative Action*:

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 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 . . . .<sup>44</sup>

In US constitutional law the maxim has been used in two ways. First, the courts have used it as a basis for invalidating delegations of governmental power.<sup>45</sup> This extreme approach has rarely ever been used. Second, and much more commonly, the maxim has been used as an element of statutory interpretation, leading, with other reasoning, to narrower constructions of statutory authority than might otherwise be derived. This has certainly been the recent approach of the US Supreme Court when dealing with issues of delegation.<sup>46</sup> The Court has, however,

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*Committee on Safeguards, G/SG/N/1/JPN/2* (July 17, 1995), which gives the Minister of International Trade and Industry the competence to delegate various powers to the Director-General of Customs: contained in the Japanese notification of Laws, Regulations, and Administrative Procedures Relating to Safeguard Measures to the WTO Committee on Safeguards.

43. See John Willis, *Delegatus Non Potest Delegare*, 21 CANADIAN B. REV. 257, 257 (1943).

44. STANLEY DE SMITH ET AL., *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* 357–358 (5th ed. 1995).

45. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 432–433 (1935). However, in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 671 (1980) it was only Rehnquist, Justice who held that the Statute, *in casu*, violated the non-delegation doctrine.

46. Two examples suffice to illustrate the approach. In *Nat'l Cable Television v. United States*, 415 U.S. 336 (1974), the Court refused to read literally the Independent Offices Appropriations Act of 1952 when it was applied to the Federal Communications Commission (FCC) which sought to impose fees on community antenna television. The Act prescribed that in deciding, among other things, to impose fees, “value to the recipient, public policy or interest served” should be taken into consideration. The party seeking to invalidate the provision, argued that the fixing of a fee that took into consideration public policy or interests served could be regarded as a levying of taxes. See *id.* at 340–342. The power to tax, it was said, is one of those essential legislative functions that Congress is not

required that Congress stipulate clearly the objective for which power is being sub-delegated or what the Court has called an 'intelligible principle.' As the Court in the case of *Loving v. United States* stated:

It does not suffice to say that Congress announced its will to delegate certain authority. Congress as a general rule must also "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, 72 L. Ed. 624, 48 S. Ct. 348 (1928); *Touby*, 500 U.S. at 165. The

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allowed to delegate. *Id.* The Court used statutory interpretation to side-step the issue when it stated "[i]t would be such a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power that we read 31 U.S.C. § 438a narrowly as authorizing not a 'tax' but a 'fee.'" *Id.* at 341. The Court found therefore that it was unnecessary to reach the delegation question and that "the hurdles revealed . . . lead us to read the Act narrowly to avoid constitutional problems." *Id.* at 342. The Court went on to read the challenged section of the Act as not relevant to the case. *Id.* at 343. In other words the Court, by narrowly construing the fee so as not to be a tax, thereby avoided altogether the issue of the validity of the delegation of powers.

A similar approach was adopted by the US Supreme Court in *Industrial Union Department*, where the Court dealt with the question whether the delegation, under section 3(8) of the Occupational Safety and Health Act of 1970, of the power to "assur[e], to the extent feasible . . . that no employee will suffer material impairment of health or functional capacity" required the agency to find a significant risk of harm before making a rule. *Indus. Union Dept.*, 448 U.S. at 612. In doing so, the Court rejected the opposing argument made by the government on the basis that otherwise "the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional . . . . A construction of the Statute that avoids this kind of open-end grant should certainly be favored." *Id.* at 646.

This approach of the Court has been fiercely criticized by David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1271-74 (1985). Moreover, Manning, in a critique of this narrow interpretative approach by the Supreme Court, states:

The nondelegation doctrine serves important constitutional interests: It requires Congress to take responsibility for legislative policy and ensures that such policy passes through the filter of bicameralism and presentment. The Court, however, has been reluctant to enforce this doctrine directly, largely out of concern that aggressive enforcement of that doctrine will hamper Congress's ability to exercise its constitutional powers and will strain the Court's capacity to make principled judgments about excessive delegations. Although the Court has chosen instead to promote non-delegation interests through the canon of avoidance, this strategy produces significant pathologies of its own. . . . [W]hen the Court departs from its usual methods of interpretation to avoid a serious nondelegation question, it runs the risk of departing from congressional commands in the process. If the aim of the nondelegation doctrine is to force Congress to take responsibility for legislative policy, the Court's avoidance strategy defeats, at least as much as it promotes, that constitutional objective.

John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 277. See also Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1721-23 (2002)(calling for the abolition of the non-delegation doctrine in all forms from the context of US constitutional law).

intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes. *Field*, 143 U.S. at 693–694. Though in 1935 we struck down two delegations for lack of an intelligible principle, *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 79 L. Ed. 1570, 55 S. Ct. 837 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 79 L. Ed. 446, 55 S. Ct. 241 (1935), we have since upheld, without exception, delegations under standards phrased in sweeping terms. See, e.g., *National Broadcasting Co. v. United States*, 319 U.S. 190, 216–217, 225–226, 87 L. Ed. 1344, 63 S. Ct. 997 (1943) (upholding delegation to the Federal Communications Commission to regulate radio broadcasting according to “public interest, convenience, or necessity”). Had the delegations here called for the exercise of judgment or discretion that lies beyond the traditional authority of the President, Loving’s last argument that Congress failed to provide guiding principles to the President might have more weight. We find no fault, however, with the delegation in this case.<sup>47</sup>

A similar concept of a non-delegation doctrine—which at a minimum requires the stipulation of standards by which the exercise of sub-delegated power can be evaluated—is applied to sub-delegations of governmental power in a variety of States that represent both common and civil law systems.<sup>48</sup> As such, it is contended that the non-delegation doc-

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47. *Loving v. United States*, 517 U.S. 748, 771–72 (1996). For employment of this approach by the Supreme Court, see *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 472–75 (2001).

48. Uwe Kischel, when comparing the delegation of legislative power to agencies in US and German law, finds five general points of agreement. Kischel, *supra* note 42, at 239. First, the legislature cannot delegate as it pleases. Second, the legislature must provide the administration with guidance on how to carry out their authorization to make rules. Third, the existence of such guidance will be the standard by which to determine the legality of the delegation. Fourth, the standard is not immutable but may depend on the field of law to which the authorization pertains as well as on the possible impact of the regulations. Fifth, certain core legislative functions, especially those mentioned in the respective constitutions, cannot be delegated at all. *Id.* See also *supra* notes 45–47 and corresponding text (Application of the doctrine in the US). For examples of English law cases where the non-delegation doctrine was used to hold actions to be unlawful “because the effective decision was taken by a person or body to whom the power did not properly belong,” see WILLIAM WADE & CHRISTOPHER FORSYTH, *ADMINISTRATIVE LAW* 349–350 (7th ed. 1994). See also in the context of English law: Mark Freedland, *The Rule Against Delegation and the Carltona Doctrine in an Agency Context*, PUBLIC LAW 19 (1996); and David Lanham, *Delegation and the Alter Ego Principle*, 100 LAW Q. REV. 587 (1984). For discussion of the application of the doctrine in Australia, see also David Malcolm, *The Limitations, if Any, on the Powers of Parliament to Delegate the Power to Legislate*, 66 AUSTRALIAN L.J. 247 (1992); and Marlon L. Dixon,



trine exists as a general principle of law and thus in formal terms is applicable to international organizations.<sup>49</sup> There are, in addition, two more specific reasons why the non-delegation doctrine is applicable to international organizations.

First, the fundamental object and purpose of the doctrine is applicable to international organizations. The object and purpose of the *delegatus non potest delegare* maxim is to ensure that powers are being exercised by the entity to which those powers have been initially delegated.<sup>50</sup> The reason for this is that the naming of a person to exercise power by the entity that initially delegates power involves an implicit assumption that the person was chosen due to particular institutional or other characteristics.<sup>51</sup> In the US, this type of institutional approach was used by the Supreme Court in the case of *Immigration and Naturalization Service v. Chadha* to strike down a “legislative veto” exercised by the House of Representatives (a one-House legislative veto) over an act of the Executive.<sup>52</sup> The Supreme Court found that the exercise of a legis-

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*Delegation, Agency and the Alter Ego Rule*, 11 SYDNEY L. REV. 326 (1987); and in Canada, see John Mark Keyes, *From Delegatus to the Duty to Make Law*, 33 MCGILL L.J. 49 (1987). In the case of France, see, for example, the decision of the *Conseil Constitutionnel*: Cons. Const., June 26, 1986, D. 1986, 61; in the case of Brazil, see INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE, INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, NATIONAL REPORTS *supra* note 42, at B-43-B-44.

49. On the applicability of general principles of law to international organizations, see *supra* notes 34–36.

50. Thus Wade and Forsyth in the context of English administrative law state the following: “[a]n element which is essential to the lawful exercise of power is that it should be exercised by the authority upon whom it is conferred, and by no one else.” WADE & FORSYTH, *supra* note 48, at 347.

51. This issue of institutional competence also arose in the context of the International Criminal Tribunal for the former Yugoslavia in a decision on a motion in *The Prosecutor v. Tihomir Blaskic*, where the majority of the Appeals Chamber found that the Presiding Judge or a Judge designated by the Presiding Judge of the Trial Chamber could conduct *in camera* proceedings to examine documents that involved issues of national security in order to determine whether the documents were relevant to the case and, if so, whether they should be redacted for purposes of the trial. However, Judge Karibi-Whyte in dissent on this modality of examination of sensitive documents states: “There is no provision of the Statute or Rules which enables less than three members of the Trial Chamber to conduct all or any part of the proceedings. It seems to me logical, and follows inevitably, that all the members of the Trial Chamber must be involved in every decision in the proceedings before the Trial Chamber. . . . where a Statute vests jurisdiction in a body, to be exercised as such a body without limitation or qualification, the exercise of such jurisdiction can only be by such body as constituted. The exercise of the powers vested in the body is not delegable to any member or part of the constitutive body without express authorisation.” *Prosecutor v. Tihomir Blaskic*, IT-95-14, Appeals Chamber Division of 29 October 1997, separate opinion of Judge Adolphus G. Karibi-Whyte, ¶ 10, available at <http://www.un.org/icty/blaskic/appeal/decision-e/71029JTK.html>.

52. *Imm. Nat. Srv. v. Chadha*, 462 U.S. 919 (1982). On the way in which a legislative veto over Executive action would previously have taken place, see Emily S. McMahon, *Chadha and the Nondelegation Doctrine: Defining a Restricted Legislative Veto*, 94 YALE

lative veto in the case of Mr. Chadha—who was seeking to remain in the United States—was “essentially legislative in purpose and effect.”<sup>53</sup> Having characterized the legislative veto as an exercise of legislative power, the Supreme Court struck it down since it held that the lawful exercise of legislative power could only be in accordance with the institutional processes stipulated by the Constitution—by a law passed by both Houses of Congress and submitted to the President for her or his signature or veto—and not, as took place *in casu*, by action of a purported one-House legislative veto.<sup>54</sup> In the context of a sub-delegation of power, this type of approach has been developed by Freedman who contends that if a court were to conclude:

[T]hat the Framers regarded the proper exercise of a specific legislative power as closely dependant upon the unique institutional competence of Congress, the non-delegation doctrine would prohibit Congress from delegating that power to another. In these circumstances, the act of delegation would so alter the manner of the power’s exercise that the resulting arrangement would no longer be compatible with the Framers’ reasons for vesting the power in an institution whose character and nature are defined in the special ways—of political responsiveness and broad based diversity—that those of Congress are. The informing principle of institutional competence as a guide to the constitutionality of the delegation of legislative power thus focuses on the tension between the

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L.J. 1493, 1494–95 (1985). On the *Chadha* case, see also Thomas M. Franck & Clifford A. Bob, *The Return of Humpty-Dumpty: Foreign Relations Law After the Chadha Case*, 79 AM. J. INT’L L. 912 (1985).

53. *Chada*, 462 U.S. at 952. The US Supreme Court cited as evidence of the veto’s legislative character its alteration of the legal rights of persons outside the legislative branch and its determination of policy. *Id.* at 952, 954.

54. *Id.* at 955–58. This approach was, moreover, confirmed by the Supreme Court in the *Loving* case where it stated:

By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable. Article I’s precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking. See *Chadha*, *supra*, at 951. Ill suited to that task are the Presidency, designed for the prompt and faithful execution of the laws and its own legitimate powers, and the Judiciary, a branch with tenure and authority independent of direct electoral control.

*Loving*, 517 U.S. at 757–58.

nature of the particular power delegated and the character of the particular institution chosen to exercise it.<sup>55</sup>

Application of this concept of institutional competence to the law of international organizations is validated by an understanding of the process of establishment of an international organization. An international organization is established by the negotiation, conclusion, and adoption of a constituent treaty by States. The delegation of power to an organ of an international organization is only after careful consideration by the States which negotiated the constituent treaty.<sup>56</sup> In many cases the delegation of power to a particular organ is due to its peculiar institutional characteristics. Accordingly, the concept of institutional competence—and thus the non-delegation doctrine—is arguably of general application to international organizations. In the context of the sub-delegation of powers by an international organization, this does not necessarily prohibit such sub-delegations but it does impose limitations on this process.<sup>57</sup>

The final reason why the *delegatus non potest delegare* maxim is arguably applicable to the sub-delegation of powers by an international organization is the notion of accountability. An important reason for the non-delegation doctrine is to ensure that the entity to which power has initially been delegated remains accountable for the way in which the power is being exercised.<sup>58</sup> What is meant by this concept of

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55. James O. Freedman, *Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307, 336 (1976). This approach reflects more generally the scholarly concept of 'structural due process' or 'due process of lawmaking'. With regard to the application of this concept to sub-delegations in the US and German Law contexts, see Kischel, *supra* note 42, at 248–249. On the issue of due-process more generally, see generally DANIEL A. FARBER & PHILIP P. FRICKEY, *Law and Public Choice* 118–131 (1991); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L.L. REV. 269 (1975).

56. This idea was expressed in a different form by President Winiarski in the *Expenses* case when he stated:

[T]he fact that an organ of the United Nations is seeking to achieve [one of the UN's purposes] . . . does not suffice to render its action lawful. The Charter, a multilateral treaty which was the result of prolonged and laborious negotiations, carefully created organs and determined their competence and means of action.

Certain Expenses of the United Nations, 1962 I.C.J. 151, 230 (July 20).

57. See *infra* Part IV.B.

58. See, for example, the statement by Justice Harlan in the US Supreme Court case of *Arizona v. California*, 373 U.S. 546, 626 (1963)(Harlan, J., dissenting in part); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, at 319, 323 (2000); and Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 429 (1998). For a consideration of the various attempts made to reconcile accountability concerns raised by Congressional delegations of discretionary power to government agencies, see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331 (2001).

accountability is that the delegatee remains politically and legally responsible for the way in which delegated powers are being exercised,<sup>59</sup> and thus the delegator has a legal basis to bring the delegatee to account for the way in which the powers are being exercised.<sup>60</sup> This concept of accountability already has application in the context of international organizations since an organization is legally responsible under its constituent treaty to its Member States for the way in which it exercises its delegated powers,<sup>61</sup> and this provides a legal basis for Member States

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Barron and Kagan use an interesting variation of this accountability argument in the context of US administrative law to advance the following cogent view when considering to what extent should the courts defer to agency decisions:

We contend that the deference question should turn on a different feature of agency process, traditionally ignored in administrative law doctrine and scholarship—that is, the position in the agency hierarchy of the person assuming responsibility for the administrative decision. More briefly said, the Court should refocus its inquiry from the “how” to the “who” of administrative decision making. If the congressional delegatee of the relevant statutory grant of authority takes personal responsibility for the decision, then the agency should command obedience, within the broad bounds of reasonableness, in resolving statutory ambiguity; if she does not, then the judiciary should render the ultimate interpretive decision. This agency nondelegation principle serves values familiar from the congressional brand of the doctrine, as well as from *Chevron* itself: by offering an incentive to certain actors to take responsibility for interpretive choice, the principle advances both accountability and discipline in decision making.

David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 204 (2001).

59. As the Appeals Chamber of the UN War Crimes Tribunal for the former Yugoslavia stated in respect of the powers of the UN Security Council:

Support for the view that the Security Council cannot act arbitrarily or for an ulterior purpose is found in the nature of the Charter as a treaty delegating certain powers to the United Nations. In fact, such a limitation is almost a corollary of the principle that the organs of the United Nations must act in accordance with the powers delegated them. It is a matter of logic that if the Security Council acted arbitrarily or for an ulterior purpose it would be acting outside the purview of the powers delegated to it in the Charter.

Prosecutor v. Tadic (Jurisdiction), 105 I.L.R. 420, 432 (Int'l Crim. Trib. for the Former Yugo. 1995).

60. This concept of legal accountability is more specific than that of accountability of international organizations more generally for the exercise of their powers: on this broader issue of accountability. See Malcolm Shaw & Karel Wellens, *Report of the International Law Association Committee on Accountability of International Organizations*, in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTY-EIGHTH CONFERENCE 584, 596–601 (1998).

61. There are two more aspects of this issue of accountability of an international organization in the exercise of its delegated powers worth noting. First, it does not mean that the international organization is accountable for the exercise of these powers only to those States which took part in the establishment of the organization: the Negotiating States. A Negotiating State is defined in Article 2(1)(e) of the 1969 Vienna Convention on the Law of Treaties as ‘a State which took part in the drawing up and adoption of the text of the treaty.’ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 333. The

to contest the way in which delegated powers are being exercised by the organization. But it is precisely the ability of States in practice to ensure this accountability that is often compromised when an organization sub-delegates its powers. This is to speak of accountability on the international plane: the accountability of an organization to its Member States. But what is just as, if not more, important is the accountability for the exercise of governmental powers that a State owes to its people,<sup>62</sup> especially if one adopts the approach that a State acts as an agent for its people on the international plane.<sup>63</sup>

To return to our more general point and to conclude on this section, the reasons underlying the *delegatus non potest delegare* maxim, and thus the maxim itself, apply to the sub-delegation of powers by international organizations. However, just as in domestic constitutional law the application of the maxim does not necessarily, or even usually, prohibit a sub-delegation of powers by an international organization, since there exists a general competence of organizations to sub-delegate their powers. The application of the maxim does, however, impose significant limitations on an organization's competence to sub-delegate powers.

### B. *International Organizations and the Restrictive Effect of the Non-Delegation Doctrine*

The application of the non-delegation doctrine to an international organization arguably imposes a number of restrictions on the competence of an organization to sub-delegate its powers. First, an organization may be prohibited from sub-delegating certain of its pow-

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organization is accountable for the exercise of its delegated powers to all its Member States. This of course includes States which joined as parties after it was established. Second, accountability cannot be to individual Member States. The nature of the delegation of powers by States to an international organization is such that States acting collectively decide through the constituent treaty to confer powers upon an organization. Thus as States become a party to the constituent treaty they decide to join other Members in delegating their power to the organization. Accordingly, accountability for the way in which powers are exercised by organs of an organization can only be to the collective of Member States. This may cause difficulties when deciding how an international organization is accountable in practice to Member States. The plenary organ of an organization may be of some use in this respect since it contains the totality of membership of the organization and may thus represent a convenient forum for the exercise of this accountability. However, whether the plenary organ could exercise such a function in formal terms would depend on the constituent treaty of the specific organization.

62. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1435-36 (1987).

63. Compare, however, the problem that many States governments are not democratic or otherwise lack domestic legitimacy and thus there is a real issue of the extent to which the State does in fact act on behalf of its peoples. See Philip Allott, *The International Court and the Voice of Justice*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 17, 28 (Vaughan Lowe & Malgosa Fitzmaurice eds., 1996).

ers. Second, an organization can only sub-delegate broad powers of discretion subject to certain conditions. Finally, when powers are being sub-delegated the limitations on the exercise of the power by the organization must also be imposed on the delegatee.

### 1. An Organization May Be Prohibited from Sub-Delegating Certain of Its Powers

Whether an organ of an organization will be proscribed from sub-delegating certain of its powers will depend on an analysis of its constituent treaty. This exceptional case will exist where it is clear that States delegated the power to the organization on the condition that it would not be sub-delegated. This condition may be provided for in express terms or may be ascertained, by implication, where it is clear that States delegated the power to the organization on the understanding that it could be exercised only by a particular organ in accordance with the stipulated decision-making processes of the organ. As Franck, for example, has stated in the context of the UN:

To [sub-]delegate is sometimes advantageous; more often it is simply unavoidable. On occasion, however, [sub-]delegation is specifically proscribed. In the Cyprus case the Security Council entrusted the Secretary-General specifically and personally with the good-offices mandate. Thus although he has a Special Representative in Cyprus, he himself has met frequently with each of the parties or has brought them together to negotiate in his presence. In the *Rainbow Warrior* case, too, he was assigned an arbitral function in his personal capacity, which therefore could not be [sub-]delegated.<sup>64</sup>

### 2. The Sub-Delegation of Broad Discretionary Powers

The non-delegation doctrine requires that, in general, broad powers of discretion should not be sub-delegated. It is contended that this operates as a general rule of the law of international institutions which governs a sub-delegation of powers. The general rule was confirmed by the European Court of Justice (ECJ) in the case of *Meroni v. High Authority*<sup>65</sup> where the ECJ found that the consequences resulting from a sub-delegation of powers are very different depending on whether it involves clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria

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64. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 210 (1995)

65. Case 9/56, *Meroni v. High Authority*, 1958 E.C.R. 133.

determined by the delegating authority, or whether it involves a discretionary power, implying a wide margin of discretion.<sup>66</sup> The court held the following, “[a] delegation of the first kind cannot appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the second kind, since it replaces the choices of the delegator by the choices of the delegate[e], brings about an actual transfer of responsibility.”<sup>67</sup>

*In casu*, the ECJ went on to find that the only lawful sub-delegation of powers as authorized by Article 3 of the EC Treaty is that which relates to clearly defined executive powers, the use of which must be entirely subject to the supervision of the High Authority, the entity purporting to sub-delegate powers.<sup>68</sup> However, it was not the actual sub-delegation of a discretionary power that was the concern of the court, but the following: “To delegate a discretionary power, by entrusting it to bodies other than those which the Treaty has established to effect and supervise the exercise of such power each within the limits of its own authority, would render that guarantee ineffective.”<sup>69</sup> The problem was that the High Authority could not under the terms of establishment of the subsidiary organs exercise direct authority and control over them in terms of being able to change their decisions. From the tenor of this part of the ECJ’s judgment it seems clear that if the High Authority had retained the right to change the decisions of its subsidiary organs, then the sub-delegation would have been lawful.<sup>70</sup> The rationale for this being,

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66. *In casu*, the Court found that there were no objective criteria by which the subsidiary organs could take decisions and accordingly that they had to exercise a wide margin of discretion in carrying out the tasks entrusted to them by the High Authority. *Id.* at 154.

67. *Id.* at 152.

68. *Id.*

69. *Id.*

70. The Court states: “In reserving to itself the power to refuse its approval, the High Authority has not retained sufficient powers for the delegation resulting from Decision No 14/55 to be contained in the limits defined above.” *Id.* at 154.

Moreover, under UK law an otherwise invalid delegation of power to a private party may be saved if the delegator reserves a power to review a decision. *See DE SMITH ET AL.*, *supra* note 44, at 365; *Ex parte Blackburn*, 1 W.L.R. 550 (1976). The Court of Appeal held in *Blackburn* that the power of review may be vested in someone other than the delegator provided that the body given the review power is one to whom the power could lawfully be delegated. This latter part of the Court’s judgment has already been applied in the UN context. In the *Application for Review* case the International Court of Justice engaged in the inquiry, and found, that the General Assembly had the implied power to create a Committee which was established to review decisions of the Administrative Tribunal. *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, 1973 I.C.J. 166 (Advisory Opinion of July 12). Similarly, within the US the presence of administrative safeguards for the exercise of a delegated discretionary power has been held to be important. For example, in the case of *Amalgamated Meat Cutters v. Connally*, the District Court for the District of Columbia decided to uphold the constitutionality of the Economic Stabilization Act of 1970 on the basis of the substantial and procedural safeguards the Act contained

presumably, that if the High Authority had retained such a right then the institutional safeguards inherent in its decision-making processes<sup>71</sup> could be said to have been effectively guaranteed since they could have been brought to bear on a decision of the delegatee at the delegator's discretion.

This point about the institutional decision-making processes of the delegator being brought to bear, or at least having the potential to do so, on a decision of the delegatee is thus of fundamental importance to the legality of a sub-delegation of a broad discretionary power by an international organization.

### 3. The Limitations on the Exercise of a Power Must Be Imposed on the Delegatee

The third restriction is that when an organ of an international organization sub-delegates a power, the limitations pertaining to the exercise of this power that exist under the constituent instrument must be imposed also on the exercise of the power by the delegatee. If this were not the case then the organ of an organization would be purporting to sub-delegate a power greater than that which it is given by its constituent treaty.<sup>72</sup>

This limitation was recognized and applied by the ECJ in the *Meroni* case when it found that the purported sub-delegation of power by the High Authority to two subsidiary organs was unlawful since the obligations and restrictions which applied when the High Authority was exercising its power to impose fines were not applicable when the

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which were designed to prevent the administrative abuse of power. *Amal. Meat Cutters v. Connelly*, 337 F.Supp. 737, 764 (D.D.C. 1971). Judge Leventhal especially emphasized judicial review, congressional oversight, the procedural requirements of the Administrative Procedure Act, and previous and expectable future administrative experience in administering price controls that would lead to the development of more precise standards. *Id.* at 746-63.

71. The importance of the decision-making processes of an organ of an international organization as being part of its institutional characteristics has been emphasized by the International Court of Justice in the *Voting Procedure* case. Advisory Opinion, *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa*, 1955 I.C.J. 67 (June 7); see also the separate opinion of Justice Basdevant, *id.* at 82; Judge Lauterpacht, *id.* at 108-13; Judge Fitzmaurice in the *Namibia* case, Advisory Opinion, *Legal Consequences of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276*, 1971 I.C.J. 16, 285-86 (June 21).

72. This is a corollary to the principle that an organization cannot sub-delegate powers which it does not itself possess. See HANS Kelsen, *THE LAW OF THE UNITED NATIONS* 142 (1950); and SCHERMERS & BLOKKER, *supra* note 35, at 1688. This principle in turn derives from the general principle of law *nemo dat quod non habet*: one cannot give what one does not possess.



subsidiary organs exercised the power.<sup>73</sup> The fact that the subsidiary organs could take decisions which were exempt from the conditions to which they would have been subject if they had been adopted directly by the High Authority gave the subsidiary organs in reality more extensive powers than those which the High Authority itself possessed under the treaty. Accordingly, the court found that this aspect of the sub-delegation of power was unlawful.<sup>74</sup> To conclude on this point, an organ of an international organization cannot sub-delegate a power without imposing on the delegatee those limitations which the constituent treaty stipulate as necessary when the power is being exercised.

To summarize, there are three main consequences of the application of the non-delegation doctrine to the general competence of international organizations to sub-delegate their powers. First, an organization may be prohibited from sub-delegating certain of its powers. Second, a broad discretionary power can only be sub-delegated when an organization retains such a degree of authority and control over its delegatee that it can change its decisions at any time. Third, when powers are being sub-delegated the constraints that restrict the organization in the exercise of the power must also be imposed on the delegatee's exercise of the power.

These limitations operate in all cases where an international organization purports to sub-delegate its powers, and as such should be taken into account by an organization when deciding whether, and how, to sub-delegate its powers to other entities. They should also prove important to States when debating issues of sub-delegation within the deliberative organs of an organization and before international and na-

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73. Case 9/56, *Meroni v. High Authority*, 1958 E.C.R. 133, 149. In particular, under Article 15 of the ECSC Treaty the High Authority must give reasons for its decisions, but this obligation was not imposed on the two subsidiary organs. Moreover, the decisions of the subsidiary organs were not made subject to review by the European Court of Justice: a condition which applied to the exercise of power by the High Authority. *Id.*

74. As the Court held: "Even if the delegation resulting from Decision No 14/55 appeared as legal from the point of view of the Treaty, it could not confer upon the authority receiving the delegation powers different from those which the delegating authority itself received under the Treaty." *Id.* at 150.

Moreover, as the Advocate-General had earlier stated in his Opinion in the case: "At the very least, however, it is necessary to require that the guarantees laid down by the Treaty as to legal protection shall continue to exist even in the case of delegation. . . . The High Authority cannot evade those guarantees by leaving it to agencies to which powers have been delegated to adopt in its own place the decisions . . . ." Opinion of Advocate-General Roemer in *Meroni v. High Authority*, 1958 E.C.R. 177, 190. Accordingly, the Advocate-General went on to state: "Thus the decisive element is whether the guarantees of legal protection to be found in the Treaty also exist in the case of a delegation of powers." *Id.* at 194.

tional courts<sup>75</sup> where the legality of such sub-delegations may be called into question.

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75. The difficulty that arises in the context of an international organization is that there is not always a judicial forum to challenge the exercise by an organization of delegated powers. On the more general issue of available remedies against international organizations, see KAREL WELLENS, *REMEDIES AGAINST INTERNATIONAL ORGANIZATIONS* (Cambridge University Press)(2002).