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International Organizations as a Forum for the Contestation of Sovereignty

The meaning of the concept of sovereignty is largely contingent upon the text in which it figures. There is no objective concept that is universally applicable[1] and yet it is of fundamental importance to the concept of a State and indeed of modern political knowledge. Much of the literature on sovereignty in international legal journals has been devoted to discussing the relationship between sovereignty and international law and organizations and the limitations that are said to flow therefrom for the exercise by the sovereign State of its governmental powers within, and external to, its territory. This approach has often led to international organizations being viewed with suspicion, and as being problematic, from the perspective of the State, since certain domestic commentators consider that these organizations involve the 'loss' of a State's sovereignty.[2] 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 the binding nature and scope of obligations that are imposed on States as a result of the organization's exercise of conferred powers.

The approach adopted herein is different. It involves a focus on sovereignty as an essentially contested concept and contends that this characterization of sovereignty has a number of important consequences for our discussion of the exercise by international organizations of conferred powers of government. A number of these consequences are set out in this chapter and demonstrated in a number of the chapters that follow.

I. SOVEREIGNTY AS AN ESSENTIALLY CONTESTED CONCEPT AND INTERNATIONAL ORGANIZATIONS

1. 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

[1] Cf. A. James, *Sovereign Statehood: The Basis of International Society* (1986), pp.14–22; and J.S. Barkin and B. Cronin, 'The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations', 48(1) *International Organization* (1994), p.107.

[2] 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 J. Jackson, 'The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results', 36 *Columbia Journal of Transnational Law* (1998), p.157 at p.186.

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,[3] the concept of sovereignty, as the ultimate and supreme power of decision, can be both analysed and qualified from the perspective of what can be called its 'contested elements': such elements as legal *v* political sovereignty, external *v* internal sovereignty, indivisible *v* divisible sovereignty, and governmental *v* popular sovereignty.[4] 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.[5] Being used here is the notion of an essentially contested concept as it is used in the philosophy of language.[6] 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 is itself*. . . . To claim that a concept is [essentially] *contestable* is to make the analytical claim that debates about the criteria of correct application of a concept are inconclusive. . . . disputes about the meaning of the concept go to the heart of the matter and can generate *rival paradigms and criteria of application* and that . . . it is part of the *very nature* of the concept to be contested and to raise questions as to its nature.[7]

This is central to sovereignty's contribution: that the very existence of the concept of sovereignty generates continual arguments as to its core criteria.

[3] S. Krasner, *Sovereignty: Organized Hypocrisy* (1999), p.9.

[4] S. Besson, 'Sovereignty in Conflict', 8(15) *European Integration online Papers* (2004), http://eiop.or.at/eiop/texte/2004-015.htm, Sections 3.2.1.1–3.2.1.5.

[5] On sovereignty as an essentially contested concept, see G. Sorensen, 'Sovereignty: Change and Continuity in a Fundamental Institution', 47 *Political Studies* (1999), p.590 at p.604; and, importantly, for detailed consideration of how the concept of sovereignty fulfils the three pre-conditions 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* n.4, Sections 3.1–3.3.

[6] For the original promulgation of the idea of essentially contested concepts, see W.B. Gallie, 'Essentially Contested Concepts', LVI *Proceedings of the Aristotelian Society* (1956), p.167; and for its subsequent development and application in varying contexts, see, for example, J. Kekes, 'Essentially Contested Concepts: A Reconsideration', 10(2) *Philosophy and Rhetoric* (1977), p.71; J. Gray, 'On the Contestability of Social and Political Concepts', 5(3) *Political Theory* (1977), p.331; W. Connolly, *The Terms of Political Discourse* (1993, 3rd edn), p.10 *et seq*; J. Gray, 'On the Contestability of Social and Political Concepts', 5(3) *Political Theory* (1977), p.331; and J. Waldron, 'Is the rule of law an essentially contested concept?', 21(2) *Law and Philosophy* (2002), p.137.

[7] Besson, *supra* n.4, Section 2.1. Original emphasis. For a similar view, see J. Gray, 'On the Contestability of Social and Political Concepts', 5(3) *Political Theory* (1977), p.331 at p.344.

For example: What are the conditions for the existence and exercise of sovereignty? Who should exercise sovereignty and what form should these entities take?

2. 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'.[8] 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.[9]

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 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? It is suggested 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.

[8] Gallie, *supra* n.6, pp.176–177. Cf. 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.' (E. Garver, 'Rhetoric and Essentially Contested Arguments', 11(3) *Philosophy and Rhetoric* (1978), p.156 at p.162.)

[9] Waldron, *supra* n.6, pp.157–158.

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 characterizing 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 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. Moreover, as explained below in Section II, with 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 the 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 emphasized, 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.

3. *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 put forward by other States during the organization's exercise of governmental powers, but this contestation and its outcome on the international plane inevitably affect domestic conceptions of sovereignty.[10] 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.[11]

When considering the contestation by a State of the exercise by international organizations of sovereign powers it is important not to treat the State in this context as being a unitary rational actor with a one-dimensional set of preferences. The contestations of sovereignty which continue to take place on the domestic plane between domestic arms of government remain important, even where an organization has been given a binding power of decision in the exercise of conferred powers.[12] It is an important part of the thesis being advanced in this work that the contestations of sovereignty which 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 are powers reserved to government; who exercises which of them, and how should they be exercised?

[10] 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.' (H.H. Koh, 'Transnational Legal Process', 75 *Nebraska Law Review* (1996), p.181 at p.205.)

[11] W. Wade, 'Sovereignty—Revolution or Evolution?', 112 *Law Quarterly Review* (1996), p.568; but cf. T. Allan, 'Parliamentary Sovereignty: Law, Politics, and Revolution', 113 *Law Quarterly Review* (1997), p.443.

[12] International organizations possess such binding powers of decision in cases where States have 'transferred' powers to organizations: on the elements of transfers of powers, see Section I in Chapter 3 and Chapter 6.

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. This is demonstrated in the case of a number of international organizations in Chapters 5–6, below.

Moreover, the extent to which the domestic arms of government contest sovereignty domestically is arguably a reliable indicator of the extent to which they may seek to contest the exercise of sovereign powers by an organization. This will in turn depend on a number of legal and political constraints that operate within a State. For example, the extent to which the judiciary within a State contests conceptions of sovereignty will largely depend on whether there is a constitutional court that has compulsory jurisdiction to exercise judicial review of legislative and executive acts. Similarly in the case of the legislature of a State, the degree to which it may contest the exercise of sovereign powers domestically, and also within international organizations, may be said to depend on such factors as the degree to which it is controlled by the government (where, for example, the legislative process is not autonomous), the extent to which the legislature is circumscribed by constitutional limitations from engaging in such contestation, or indeed the extent to which the legislature has delegated its powers to the government.[13] These issues are considered below in Chapter 6.[14]

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 good example of this is provided by the US projection onto other States of the value of 'corporate economic autonomy' through first the General Agreement on Tariffs and Trade ('GATT') and then the World Trade Organization ('WTO'), an issue considered in detail in Chapter 6.[15]

This brings us to the important question of sovereign values.

[13] In a number of States the legislature delegates to the executive certain legislative powers in order to implement domestically the obligations flowing from membership of international organizations. For example, within Spain the legislature has delegated powers to the government for the purpose of applying European Community law and the Spanish government has, pursuant to these delegated powers in Act 47/1985, enacted delegated legislation for the adjustment of Spanish law to Community requirements: see E. Garcia de Enterria and L. Ortega, 'European influences on the national administrative laws from the point of view of the Member States: Spanish Report' in J. Schwarze, ed., *Administrative Law under European Influence: on the Convergence of the Administrative Law of the EU Member States* (1996), p.695 at pp.697–698.

[14] In the case of contestation by a State's judicial arms of government, see Section II(1) in Chapter 6; and in the case of contestation by a State's legislature, see Section II(2) in Chapter 6.

[15] For extended consideration of this value and its projection by the US, see Section II(2)(ii) in Chapter 6.

4. 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 an evaluation of a state of affairs on the basis of sovereignty's incorporated values. What lies behind the prima facie categorical use of central political and legal concepts like sovereignty 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.[16]

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.[17] 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[18]—and some may even say accurate—list and indeed based on what has been 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

[16] Besson, *supra* n.4, Section 3.1. For the normative character of essentially contested concepts, see also W. Connolly, *The Terms of Political Discourse* (1993, 3rd edn), p.22 and Waldron, *supra* n.6, pp.149–150.

[17] But cf. the fascinating analysis of the period 1870–1914 in M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001), pp.98–178.

[18] Cf. Joseph Weiler's proposed sovereign principle or value of 'constitutional tolerance' within the EU: see J.H.H. Weiler, 'Federalism Without Constitutionalism: Europe's *Sonderweg*' in K. Nicoladis and R. Howse, eds., *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (2001), p.54 at pp.62–70.

exercise of *sovereign* powers when this is in accord with sovereign values, otherwise the exercise of public powers is something entirely distinct from the exercise of sovereign powers and 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.[19]

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[20]—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. A practical consequence of this approach for international organizations is set out in Section II 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 sovereignty—and the ability and legitimacy of an international organization to exercise sovereign powers—becomes problematic.[21] It is in part

[19] W.M. Reisman, 'Sovereignty and Human Rights in Contemporary International Law', 84 *AJIL* (1990), p.866 at p.872. Emphasis added.

[20] See J. Alvarez, 'The New Treaty Makers', 25 *B.C. Int'l & Comp. L. Rev.* (2002), p.213; T. Franck, 'Can the United States Delegate Aspects of Sovereignty to International Regimes?' in T. Franck, ed., *Delegating State Powers: The Effect of Treaty Regimes on Democracy and Sovereignty* (2000), pp.4–5; P. Sands and P. Klein, eds., *Bowett's Law of International Institutions* (2001, 5th edn), p.275 *et seq*; J. Klabbers, *An Introduction to International Institutional Law* (2002), pp.91, 205; D. Anderson, 'Law-Making Process in the UN System', 2 *Max Planck Yearbook of United Nations Law* (1998), p.23; and Chayes and Chayes, *The New Sovereignty*, pp.226–227.

[21] 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. (P. Katzenstein, R. Keohane, and S. Krasner, '*International Organization* at Its Golden

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. This controversial approach is considered in more detail in Chapter 6.[22] 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[23] against those who advocate its abolition.[24]

5. *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.[25] 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.[26] 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 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

Anniversary' in P. Katzenstein, R. Keohane, and S. Krasner, eds., *Exploration and Contestation in the Study of World Politics: A Special Issue of International Organization* (1999), p.1 at p.35.) For a similar approach, see R. Goodman and D. Jinks, 'Toward an Institutional Theory of Sovereignty', 55 *Stanford Law Review* (2003), p.1749 at pp.1752–1753.

[22] See Section II(1) in Chapter 6.

[23] Another argument in favour of retaining the concept of sovereignty is because of its important role in the management of inequality between States, see B. Kingsbury, 'Sovereignty and Inequality', 9 *EJIL* (1998), p.599.

[24] See N. MacCormick, *Questioning Sovereignty* (1999), Chapter 8. However, even MacCormick's approach to, and critique of, sovereignty seems dependent on a particular conception of sovereignty (see H. Lindahl, 'Sovereignty and the Institutionalization of Normative Order', 21 *Oxford Journal of Legal Studies* (2001), p.165 at p.166 at p.175) and as such he is engaged in the process of contestation of the concept.

[25] J. Bartelson, *A genealogy of sovereignty* (1995), p.6. [26] *Ibid*, p.6.

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 Rosseau 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.[27]

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 an institutional forum for the contestation and formulation of such values?[28]

It is the first claim being advanced in this chapter that the very existence of international organizations performs an important ontological function since these organizations provide a forum, transcendental to the State, where conceptions of sovereignty—and more specifically the content of sovereign values—can be contested and formulated on the international plane. This is demonstrated below in Chapter 6. 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. In the case of one of our types of conferrals of powers—'transfers' by States of powers to international organizations[29]—this has often been taken further by the provision within the organization of a dispute settlement body which is given the authority to render binding interpretations of the organization's constituent treaty and the scope of obligations thereunder

[27] J. Bartelson, *A genealogy of sovereignty* (1995), p.232.

[28] 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.' 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-discrimination.' This does not, however, mean that there are not significant problems with this Draft Constitution and indeed with the EU's human rights policies: see *infra* nn.37–38 and corresponding text in Chapter 6.

[29] On transfers of powers, see Chapter 6.

for member States. These decisions represent in substance a determination by a dispute settlement body of the values that underlie the sovereign powers being conferred by States on organizations. A good example of this is provided by the case of the WTO dispute settlement system, considered in more detail in Chapter 6.[30] However, suffice to note that even these decisions of the WTO dispute settlement body remain at a political level subject to contestation within the WTO[31] and also within member States. An example of the latter is provided by the approach of the US Congress to the WTO dispute settlement system: that it is only the US Congress that can decide how it will, if at all, change US law to comply with a specific panel or Appellate Body decision in a case.[32]

There is, however, an additional layer of complexity that exists when international organizations perform this ontological function. 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 (for example, 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 (having to make up its mind: will it participate in EMU) 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.

The second claim being advanced in this opening chapter is that the extent to which a State can contest sovereign values within the context of an international organization will depend largely on the degree (or type) of conferrals of powers that have been made to the organization. A detailed typology of conferrals of powers and the consequences of these different types of conferrals for the State-organization relationship is set out in Chapter 3. These types of conferrals also affect the extent to which a State is free to reject within its

[30] See Section II(2)(ii) in Chapter 6.
[31] See *infra* n.53 and corresponding text in Chapter 6.
[32] For extended consideration of the contestation by the US Congress of values being applied by the WTO, see Section II(2) in Chapter 6.

domestic legal order the outcome of the process of contestation that has taken place within an international organization.

The third, and final, claim made in this chapter is that domestic public and administrative law principles are prima facie applicable to the exercise by international organizations of conferred sovereign powers.

II. THE PRIMA FACIE APPLICATION OF DOMESTIC PUBLIC AND ADMINISTRATIVE LAW PRINCIPLES TO INTERNATIONAL ORGANIZATIONS

It is the inextricable link between domestic public law and the activity of governing[33] that mandates in general terms the application of domestic public law principles to those international organizations that exercise conferred powers of government.

Moreover, 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[34] 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.[35] 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, it may be recalled from above that an international organization can only be said to exercise *sovereign* powers when this is in accord with their underlying sovereign values.[36] The incorporation of these values in domestic public and administrative law principles is another reason that mandates in general terms the application of these principles to the

[33] As Martin Loughlin states: 'public law . . . must be conceived as an assemblage of rules, principles, canon, maxims, customs, usages, and manners that condition and sustain the activity of governing.' (M. Loughlin, *The Idea of Public Law* (2003), p.30.)

[34] Cf. N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (1999), p.25.

[35] 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: A. Adsera, C. Boix, and M. Payne, 'Are You Being Served? Political Accountability and Quality of Government', 19(2) *The Journal of Law, Economics, & Organization* (2003), p.445.

[36] See *supra* Section I(4).

exercise by international organizations of conferred sovereign powers.[37] 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 generally be suitable for transplantation to the law of international organizations.[38] An example of this is provided in our discussion in Chapter 4 of the private law relating to agency and its potential application to the relationship between an organization and States.[39]

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.[40] 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 indirectly, by domestic legislatures in the process of contestation of sovereignty on the international plane—an issue considered in detail in Chapter 6.[41] 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.

[37] 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 T. Tridimas, *The General Principles of EC Law* (1999), p.4 *et seq*; and M. Aznar-Gomez, 'The 1996 Nuclear Weapons Advisory Opinion and *Non Liquet* in International Law', 48 *ICLQ* (1999), p.3 at p.6. For more general support for this kind of approach, see I. Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (1998), p.213.

[38] 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', *Report of the Institut de droit International, Annuaire de l'Institut de Droit International*, (66-I, 1995), p.251 at p.287, and E. Raftopoulos, *The Inadequacy of the Contractual Analogy in the Law of Treaties* (1990), p.201 *et seq*.

[39] See *infra* n.9 in Chapter 4.

[40] Judgment of 12 October 1993, (*Maastricht*), 89 *BverfGE* 155, paras.438–439 as translated and contained in A. Oppenheimer, ed., *The Relationship between European Community Law and National Law: The Cases*, (1994), p.526 at p.556.

[41] See Section II(2) in Chapter 6.

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?[42] The general applicability of domestic public and administrative law principles to international organizations does not, of course, mean that these principles apply automatically to the exercise of conferred powers by an organization. There are two reasons for this.

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 arguably only 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[43] and thus a formal source of law applicable to international organizations:[44] otherwise the domestic law analogy can only be of gentle persuasive value.[45]

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 Cooley found that WTO Panels and the Appellate Body should not have recourse by analogy to the US administrative law

[42] The general importance of this type of enquiry has recently been highlighted by Sir Robert Jennings: see R. Jennings, 'Book review of *The Spirit of International Law*', 97 *AJIL* (2003), p.725 at p.727.

[43] A legal principle does not, however, need to be universally recognized to constitute a 'general principle of law': M. Mendelson, 'The Subjective Element in Customary International Law', 66 *BYBIL* (1995), p.177 at p.191.

[44] General principles of law, as a source of international law, are applicable to international organizations: see H. Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989, Part Eight', 67 *BYBIL* (1996), p.1 at p.13; and H. Schermers and N. Blokker, *International Institutional Law*, (2003, 4th edn), p.997. 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, ICJ Reports*, 1980, p.72 at pp.89–90 (para.37); and R. Higgins, *Problems and Process: International Law and How We Use It* (1994), p.46.

[45] For exposition of the more general role of analogical reasoning in the context of international law, see V. Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?' in M. Byers, ed., *The Role of Law in International Politics* (2000), p.207 at p.210; and, in a judicial context, see J. Raz, *The Authority of Law* (1979), pp.201–206.

concept of judicial deference to agency decisions[46] when determining the scope or standard of review to be afforded national court decisions.[47]

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.[48] Such a limitation, however, is arguably relevant only in the case where States have 'delegated' powers to an organization, a category whose contours are clarified below in our typology of conferrals by States of powers on international organizations.[49]

[46] 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: D. Barron and E. Kagan, 'Chevron's Nondelegation Doctrine', 2001 *Sup. Ct. Rev.* (2001), p.201; R. Anthony, 'Which Agency Interpretations Should Bind Citizens and the Courts?', 7 *Yale Journal on Regulation* (1990), p.1 at p.3; R. Pierce, '*Chevron* and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions', 41 *Vanderbilt Law Review* (1988), p.301; T. Merrill, 'Judicial Deference to Executive Precedent', 101 *Yale Law Journal* (1992), p.969; and D. Spulber and D. Besanko, 'Delegation, Commitment, and the Regulatory Mandate', 8 *Journal of Law, Economics, and Organization* (1992), p.126 at pp.132–133, 144–146.

[47] 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.' (S. Croley and J. Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments', 90 *AJIL* (1996), p.193 at p.209.)

[48] See D. Sarooshi, *The United Nations and the Development of Collective Security* (1999), Chapter 1.

[49] On the elements of delegations of powers as delineated in our typology, see Section I in Chapter 3.