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Notes on the inherent powers of international organizations

Abstract: The aim of this article is to present the main aspects of the concept of the inherent powers of international organizations. This is a topic of importance, yet it is often overlooked in the existing literature, which predominantly delves into attributed powers and implied powers of international organizations. The author discusses the essence of Finn Seyersted's concept of inherent powers and the doctrinal assessment of this concept. The author also presents the assessment of the concept of inherent powers made by legal scholars – their nuanced interpretations and acceptance – shedding light on the varying viewpoints on this concept.

Keywords: international organizations, powers, inherent powers, attributed powers, implied powers.

Introduction

In previous edition of the Adam Mickiewicz University Law Review, I examined the doctrine of the implied powers of international organizations.²

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2 Andrzej Gadkowski, "The doctrine of implied powers of international organizations in the case law of international tribunals", *Adam Mickiewicz University Law Review* 6. 2016: 45–59; Andrzej Gadkowski, "The Basis for the Implication of Powers of International Organizations", *Adam Mickiewicz University Law Review* 11. 2020: 69–82; Andrzej Gadkowski, "Limitation to the Implication of Powers of International Organizations", *Adam Mickiewicz University Law Review* 14. 2022: 103–118.

This paper takes a distinct turn, delving into the fundamental concept of the inherent powers of international organizations. Unlike implied powers, inherent powers are intrinsically linked to the essence of international organizations, particularly in the context of their international subjectivity. Essentially, these powers can be seen as the ‘primary powers’ of international organizations.

It is only on the basis of its legal powers that any international organization can function. This self-evident truth, however, requires us to know where organizations derive their powers from. Jan Klabbers, in seeking the answer to this question, stresses that it is a matter that ‘has puzzled the community of international institutional lawyers for decades and is likely to continue to do so’.³ Any discussion of the sources of international organizations’ powers must include the concepts of the international legal personality of these organizations. If an international organization has international legal personality, it may undertake independent activities on the international plane without the assistance of its member states. In a situation where states have established an international organization and vested it with specific tasks to be performed internationally, such tasks may not be completed if the organization were deprived of legal personality. If we accept the theory of the objective personality of international organizations, then we must also accept the existence of their inherent powers.⁴ These inherent powers derive from common international law and are vested in every international organization. The catalogue of inherent powers undeniably includes treaty-making powers, but, if we accept the theory of the functional personality of international organizations, which is dependent on the will of states, then we must also accept the existence of attributed powers, delegated by states. These powers are specified in an international organization’s statute or other constituent instrument. Based on the modified concept of attributed powers, a new construct has been raised and developed that signifies a departure from the restrictive in-

³ See Jan Klabbers, *An Introduction to International Organizations Law*. Cambridge, 2015, 51.

⁴ For more detailed discussion, see Andrzej Gadkowski, *Treaty-making powers of international organizations*. Poznań, 2018, 8 et seq.

terpretation of attributed powers as expressly granted powers: the concept of implied powers, which allows a more dynamic interpretation of attributed powers.⁵ At this point it is worth highlighting its two characteristics. Firstly, implied powers stem from the constituent instrument of an international organization and are derived from its functions and purposes. In this sense, implied powers do not stand in contradiction to the principle of attributed powers. Secondly, implied powers remain closely related to the principle of efficiency, that is, the so-called principle of *effet utile*, which is considered one of the fundamental principles of European Union (EU) law. The concept of implied powers is also distinctly emphasised in the case law of the Court of Justice of the European Union (CJEU).⁶

It should be stressed that the evolution and development of the above-mentioned concepts related to the powers of international organizations is reflected by international institutional law, and especially by the case law of international courts. The viewpoints presented in the doctrine also significantly influenced this development. Accordingly, opinions on these concepts will be presented below. This is of relevance since, e.g. the sources of the treaty-making capacity of international organizations should be sought in the concepts of attributed powers and inherent powers, as well as in the most recent of the three, the concept of implied powers.

The essence of Finn Seyersted's concept of inherent powers

The concept of inherent powers, closely related to the objective theory of the international personality of international organizations, modifies the traditional

5 Some views presented in the doctrine question this dichotomy in the powers of international organizations. M. Rama-Montaldo is of the opinion that both doctrines (of delegated powers and of implied powers) are 'really identical in their foundation and complementary in their effects'; see Manuel Rama-Montaldo, "International Legal Personality and Implied Powers of International Organizations", *British Yearbook of International Law* 44, 1970: 114.

6 Indeed, the case law of the CJEU provides, e.g. the essential basis for the concept of the EU's treaty-making powers, see: Gadkowski, "The doctrine of implied powers of international organizations in the case law of international tribunals", 45 et seq.

claim that the scope and nature of the powers of international organizations is determined by the will of states and specified in the constituent instrument of an organization. This idea is associated primarily with Finn Seyersted, according to whom international organizations, in fulfilling certain objective conditions stemming from the general rules of international law, become legitimate subjects of international law. An international organization, as a legitimate subject of international law, is thus vested with inherent powers that derive from the very existence of the organization and are inherent in the nature of its being an organization ('organizationhood'). Seyersted emphasised this view by expressing that:

organizations, like States, have an inherent legal capacity to perform any 'sovereign' or international acts which they are in a position to perform. They are in principle from a legal point of view general subjects of international law, in basically the same manner as States.⁷

Seyersted's view thus expressed means that international organizations and states remain on an equal footing from the point of view of their international legal capacities. It also means that the international legal personality of international organizations derives neither from the provisions of their constituent instruments nor from the intentions of the founding states. This personality is based therefore on the objective fact that the international organization exists and relies on 'general and customary international law'.⁸ Seyersted assumes that the objective international personality of international organizations implies the existence of the category of inherent powers. If the objective personality of international organizations is founded in general and customary international law, then international organizations possess the powers which

⁷ Finn Seyersted, "Objective International Personality of Intergovernmental Organizations. Do Their Capacities Really Depend upon the Conventions Establishing Them", *Nordisk Tidsskrift for International Ret* 34, 1982: 28–29.

⁸ Seyersted, "Objective International Personality of Intergovernmental Organizations", 28–29.

derive directly from their quality as an international person. Each international organization has certain powers that need not be expressed in its constituent documents because they result from the law of international organizations as part of general international law, or in Seyersted's words: 'the common law of international organizations'.⁹

Seyersted, however, indicates potential limitations of the inherent powers of international organizations. In addition to potential factual limitations which are not subject to legal assessment, Seyersted lists the limitations possible from an international point of view, as follows: '(a) negative provisions of the constitution forbidding the organization to perform certain acts; (b) the purposes of the organization; and the fact that; (c) no organization can make decisions binding upon the member States or exercise jurisdiction over their territory, nationals, or organs without special legal basis'.¹⁰

Accepting the uncompromising view that the inherent powers of international organizations exist makes any reference to the concept of implied powers doubtful or even unnecessary.¹¹ In Seyersted's opinion, given the dynamic development of international organizations, the concept of implied powers may be too blunt a tool for describing the true scope of the powers of international organizations.¹² He even called it 'a fiction of "implied powers"'¹³ and noted that even the International Court of Justice (ICJ) referred to this 'fiction' in the initial years of its activity. He referred especially to the 1949 *Reparation for injuries* advisory opinion, in which the Court stated that the United Nations could claim reparation under international law for damages suffered by its of-

9 Finn Seyersted, *Common Law of International Organizations*. Leiden, Boston, 2008, 29–36 and 357–358.

10 Comment see: Rama-Montaldo, 119.

11 For more detailed discussion, see Finn Seyersted, "Basic Distinction in the Law of International Organizations: Practice versus Legal Doctrine" in *Theory of International Law at the Threshold of the 21st Century. Essays in Honour of Krzysztof Skubiszewski*, ed. J. Makarczyk. The Hague, Boston, Lancaster, 1984, 692.

12 Finn Seyersted, "United Nations Forces: Some Legal Problems", *British Yearbook of International Law* 37. 1961: 455.

13 Seyersted, *Common law of International Organizations*, 65.

ficials and representatives in the performance of their duties for the organization.¹⁴ If we accept that the treaty-making powers of international organizations belong to the category of inherent powers, however, then the scope of the treaty activity of these organizations would actually be much wider than if based on their implied powers. Inherent treaty-making powers signify powers that are inherent to the organization, whereas implied treaty-making powers suggest powers derived from the constituent instrument and a scope determined by the statutory purposes and functions of the organization.¹⁵ We should also remember that Seyersted's concept of inherent powers requires no necessity test, which is a distinctive element of the concept of implied powers. According to him, the necessity test would prove too restrictive in the process of determining the powers of international organizations.¹⁶

Doctrinal assessment of the concept of inherent powers

An analysis of Seyersted's concept of the inherent powers of international organizations requires that we bear in mind that the opinions on the matter presented in the doctrine of international law remain very much divided. One commentator who believes that powers are inherent is Nigel White, who criticises the concept of implied powers and disputes its usefulness in treaty activities. Comparing the two, he highlights the advantages of the doctrine of inherent powers, arguing that it is thoroughly functional and reduces the control of the organizations' functioning to two issues: firstly, the act must aim to achieve the statutory purposes of the organization, and secondly, it may not be expressly prohibited.¹⁷ Some additional references to Seyersted's concept are to be found in the works of Rudolf Bernhardt, who also argues for the existence of the inherent powers of international organizations. These powers result from the nature of things and

14 Seyersted, *Common law of International Organizations*, 66.

15 See Chittharanjan F. Amersasinghe, *Principles of the Institutional Law of the International Organizations*. Cambridge, 2005, 256.

16 See Peter H. F. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities*. Dordrecht, Boston, 1994, 68 et seq.

17 Nigel D. White, *The Law of International Organizations*. Manchester, 2005, 87.

follow directly from the very existence of the organization. According to Bernhardt, inherent powers are less extensive than implied powers because they cannot lead to the imposition of additional obligations on the members of the organization. In contrast, powers that are implied, particularly from the purposes and functions of the organization, may increase the obligations of member states.¹⁸

Although Seyersted claims that Krzysztof Skubiszewski held a similar view, it would be wrong to say that Skubiszewski's opinion on the powers of international organizations supports Seyersted's. While Skubiszewski did not go so far as to reject the concept of inherent powers, he remained cautious about it.¹⁹ In Polish literature on international law this concept is discussed by Władysław Czapliński and Anna Wyrozumska, who explain the notion of 'shared minimal powers' of international organizations. According to Czapliński and Wyrozumska, there clearly exists a category of fundamental powers of international organizations that derives from the very existence of their international legal personality. The category of shared minimal powers consists of *ius tractatum*, *ius legationis* and *ius standi*.²⁰ This viewpoint clearly alludes to Seyersted's concept in which these powers are capacities that are inherent to their fullest extent in an organization (the treaty-making powers, the active and passive power of legation, and the capacity to bring international claims) unless they are expressly prohibited in the constituent instruments of this organization. Chittharanjan F. Amerasinghe, who also discusses Seyersted's concept, points out that such inherent capacities and powers would be independent from the purposes and functions of the organization.²¹

18 Rudolf Bernhardt in Rudolf Bernhardt, and Herbert Miehsler, *Qualifikation und Anwendungsbereich des internen Rechts internationaler Organisationen: Referate und Diskussion der 12. Tagung der Deutschen Gesellschaft für Völkerrecht in Bad Godesberg vom 14. bis 16. Juni 1971*. Karlsruhe, 1973, 27–28.

19 Krzysztof Skubiszewski, "Implied Powers of International Organizations" in *International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne*, ed. Y. Dinstein. Dordrecht, 1989, 862 et seq.

20 Władysław Czapliński, and Anna Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe*. Warszawa, 2014, 440.

21 Chittharanjan F. Amerasinghe, "International Legal Personality Revisited" in *International Legal Personality*, ed. F. Johns. Farnham, 2010, 255.

Criticism of Seyersted's concept of inherent powers, however, is far more common. Manuel Rama-Montaldo is one commentator who opposes it, arguing firstly that the way Seyersted puts the international personality of states and that of international organizations on an equal footing is risky. Indeed, the fact that international organizations have a legal personality does not necessarily imply that they may perform the same acts and fulfil the same capacities as states. If organizations indeed have certain capacities, they clearly do not include, for example, the right to maintain military forces or the right to operate ships under the flag of the organization. Rama-Montaldo thus concludes that '[t]his attempt to equate States and international organizations [...] leads to an arbitrary and artificial transfer of concepts from one sphere to the other; and not least; the concept of sovereignty'.²² Secondly, Rama-Montaldo points out that Seyersted's concept of inherent powers focuses on a dichotomy between the acts of international organizations and their purposes. The purposes of an international organization are determined by states and contained in the constituent instrument. According to Seyersted, only international organizations with the freedom to perform any sovereign or international act may decide on how these purposes are to be served.²³ Seyersted's concept, however, fails to account for the fact that the constituent instrument of a typical international organization is the result of the will of states that establish in this instrument the principle of 'the limitation of functional means', which is to say that the founding states of the organization determine not only its purposes but also the means of achieving them. Rama-Montaldo consequently rejects Seyersted's argument, which cites the 1962 *Certain expenses* advisory opinion, in which the ICJ concluded that 'when the organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is

²² Rama-Montaldo, 120.

²³ Rama-Montaldo notes that this view is shared by Ballardore Pallieri, *Diritto internazionale pubblico*. Roma, 1962, 178; see: Rama-Montaldo, 120.

not *ultra vires* the Organization'.²⁴ Seyersted takes this opinion as proof of his thesis that international organizations may perform all acts, and any limitations of powers must have a legal basis. However, Rama-Montaldo stresses that in this case, when justifying the legality of the action of UN forces, the Court did not have recourse to the concept of inherent powers of international organizations but to the purposes and functions of the latter. He quotes the following excerpt from the Court's opinion: '[t]he Court agrees that such expenditures must be tested by their relationship to the purposes of the United Nations [...] These purposes are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited'.²⁵ In his opinion 'the creation of armed forces by an organization is not a right or inherent power arising from international personality but a function which must be expressly or impliedly recognized in the constitutive document'.²⁶

The justification for the inherent powers of international organizations raises both doubts and questions. We must bear in mind, however, that the ICJ also took a position on the matter. Although in its judgment in the 1974 *Nuclear Tests* case the Court referred to its own jurisdiction, its view is usually interpreted in the wider context of the inherent powers of judicial bodies. International judicial bodies are created on the basis of an international agreement in order to fulfil special functions, namely judicial functions. In the opinion of the Court, this inherent jurisdiction stems from its very existence and is necessary in order to allow this institution to fulfil such judicial functions. In other words, inherent judicial powers are inherent in the nature of judicial bodies. Viljam Engström notes that without inherent powers the body would lose its judicial character.²⁷ The Court expressed its view on the matter as follows:

²⁴ ICJ Advisory Opinion, *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports 1962, 168.

²⁵ ICJ Advisory Opinion, 167–168.

²⁶ Rama-Montaldo, 122.

²⁷ Viljam Engström, *Understanding Powers of International Organizations. A Study of the Doctrines of Attributed Powers, Implied Powers and Constitutionalism – with a Special Focus on the Human Rights Committee*. Turku, 2009, 86.

‘the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the “inherent limitations on the exercise of the judicial function” of the Court, and to “maintain its judicial character”’.²⁸ Even if this view refers to the specifics of the Court’s jurisdiction as a judicial body, it may be interpreted in a wider context, namely that of international institutional law.

Concluding Remarks

Today, international organizations operate and perform their functions in all areas of international relations. States therefore are not only expanding their mandate but also granting international organizations new competences. As a consequence of having their own international personality, international organizations are subjects of international law, with their own rights and duties. Clearly, they are not – as was the opinion of F. Seyersted – general subjects of international law able to perform sovereign international acts in the same way as states. The particularly important capacities, such as, e.g. treaty-making capacity of international organizations, as international persons and subjects of international law, is derived from the general rules of customary international law. This inherent treaty-making capacity of international organizations seems understandable and justifiable given that international personality implies the active status of a legal person, i.e. acquiring rights and entering into commitments defined by international law. International organizations are active legal persons and this personality involves the ability to implement and develop their activity both under international law and the national laws of their member states.

²⁸ ICJ Judgment, *Nuclear Tests (Australia v. France)*, Judgment, ICJ Reports 1974, 259, para. 23.

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