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Summary

I

Since the beginning of the 20th century, international organisations have become important actors in international relations and have emerged as new objects and subjects of public international law. International organisations serve as fora for discussions and diplomatic dialogue, promoting cooperation and integration, initiating and stimulating the law-making process, and organising international humanitarian aid, as well as acting as guardians of public international law. Thus, international organisations fulfil a plethora of tasks.

Given that, one should ask how and by whom these tasks are defined and attributed to international organisations. The question arises whether and to what extent the definition and attribution of tasks leads to the powers or competencies of international organisations.

Following the terrorist attacks of September 11, 2001, the United Nations Security Council, in Res. 1368 (2001), regards

“such acts, like any act of international terrorism, as a threat to international peace and security”.

With Resolution 1373 (2001), the Security Council passed a multitude of measures on various levels, imposing several duties on states to combat terrorism effectively on various levels, including prevention and early warning, measures against financial and/or logistical support for terrorists, and the improved exchange of information. To put it simply, the Security Council put the International Convention for the Suppressing of the Financing of Terrorism – not yet in force at that time – into practice.

Res. 1373 (2001) has, therefore, law-making effects and the Security Council has done what states were unable or unwilling to do until then. The active role of an international organisation and one of its main organs sheds light on the issue of international organisations' competencies.

II

The powers of legal subjects are one of the major structural elements of any legal order. Whereas states are primary subjects of public international law possessing a full range of powers or competencies, international organisations derive their status as legal subjects and their powers from their creators, states. This study develops a theory of the powers of international organisations. We deal with the question how powers of international organisations are established and developed, how powers are distributed – vertically – between the organisation and its members and – horizontally – between the organs.

The powers of international organisations are attributed to them by a founding treaty or by other special statutory acts, but new situations and problems can lead to new tasks and ask for new powers. Not being vested with *Kompetenzkompetenz*, international organisations must develop their existing powers, find implied powers in their charters and statutes, respectively, or, eventually, the member states must attribute new powers to them by a special act, such as a treaty amendment.

This book also considers questions of legitimacy deriving from the relationship between growing integration and decreasing state sovereignty.

Literature has dealt with these questions either in a more basic way in textbooks on public international law – or with a narrower focus – when dealing with special questions such as illegal acts of international organisations or certain resolutions of the United Nations Security Council.

A general theory of the powers of international organisations provides the instruments for analysing this form of international co-operation in order to understand more profoundly and deal adequately with the conditions, effects, and problems of international organisations.

This analysis has to be undertaken from a legal perspective that includes elements from other disciplines. A fruitful approach should integrate historical and comparative aspects, elements of foreign policy analysis and should build on insights of organisation theory.

III

The idea that European states should co-operate in order to create and secure peace dates at least back to the 17th century, when the Duke de Sully sketched out his ‘Grand Dessin’ followed among others by Abbé

de Saint Pierre's 'Projet pour rendre la paix perpétuelle en Europe' (1713) and by Immanuel Kant's famous book, 'Perpetual Peace' of 1795. During the 19th century, European States established a system of balance of power, regulating their affairs by ad hoc conferences. After the Congress of Vienna (1815), the German Confederation constituted an international institutionalised solution for the German question. German governments co-operated in the Federation which acted through permanent organs, whilst more specialised organs in the field of military and judicial co-operation were created on an ad hoc basis. Economic co-operation could only be institutionalised after 1834, when the German Zollverein was established. The unified custom area to a certain degree paved the way for national unification in 1871.

On the European level, modern international co-operation between states began with internationalised river regimes on the Rhine and on the Danube. A railway regime followed. The International Telegraphic Union (1865) and later the Universal Postal Union (1874) were the prototypes of today's international organisations. The Administrative Unions that still exist today possess a plenary organ, a smaller, restricted organ and a secretariat that acts permanently. It is this structure that was adopted by the League of Nations (1919), the first international organisation with a universal approach, with founding members from all parts of the world and mandated with a broad-ranging set of tasks.

After World War II, the United Nations Organisation was modelled upon the League but its Charter sought to avoid – at least to some extent – the flaws in the Covenant of the League of 1919. The organs' powers are separated more clearly and the prohibition of the use of force is a cornerstone of the whole system.

In post-war Europe, six States founded the European Community for Coal and Steel (1952) in order to avoid further conflicts on what were important industries and coal deposits located in the border area of France, Belgium, Luxemburg, and Germany. The ECCS was the starting point for an international organisation *sui generis* with a supranational element and, consequently, with a more far-reaching integration.

IV

Today, international organisations are typically clearly structured, fulfilling a special purpose and are, therefore, vested by the founding treaty with certain powers. These powers are defined with regard to

member States and are distributed between the organs of the international organisation. It is the attribution of powers that underlies the principle of conferral: international organisations do not have a *Kompetenzkompetenz*.

As the problems faced by international co-operation grow and become more complex, the structure of international organisations and the list of issues they are dealing with have simultaneously grown. But the readiness of states to co-operate and to invest in an international organisation depends on a variety of factors. The social and functioning competence of the states representatives are of relevance, as are political conditions in member states, the states' foreign policy options, and international relations as a whole.

The United Nations is designed as a modern international organisation and covers a broad range of tasks. It is based on a legal order which is rather complex. This orientation towards the rule of law becomes particularly obvious if one takes into account the International Court of Justice. This Court, serving as the principal judicial organ of the United Nations, is strongly connected with the organisation and differs from the Permanent Court of International Justice, its predecessor, in numerous respects. The organisation's broad range of competencies makes it possible for the United Nations as a whole and for its organs to cope with all relevant issues and questions and to address them in the place and with the mandate of the member states.

Within the UN System, the Security Council bears primary responsibility for international peace and security. The Security Council, as a non-plenary organ, decides with majority and has the power to adopt decisions which are legally binding on member states. This combination has strengthened the UN compared to the League of Nations; however the veto-power of the five permanent members brings back elements of power-based policy characterized by the ideology of "realism". Nevertheless, the member states of the Council have shown their willingness to co-operate after 1991, when more than 40 years of confrontation ended and a phase of efficient governance by the UN and the Security Council could be observed. Indeed, the Security Council has developed new forms of action by setting up the International Criminal Tribunals for the former Yugoslavia and for Rwanda, by passing targeted sanctions, by establishing UN protectorates in Kosovo (UNMIK) and in East-Timor (UNTAET), and finally, by reacting jointly to the terrorist attacks on September 11, 2001.

In each case, the UN Security council adopted a resolution as it had done many times before. Each situation dealt with constituted a threat

to peace and international security, and, the provisions of the UN Charter were respected. But, seen from a broader perspective, something new has happened, particularly when the Security Council adopted Resolution 1373 and acted as a quasi-legislator, creating new international law: the balance of competencies between the UN and its organs on the one hand and the member states on the other was disturbed. The issue of controlling the Security Council with judicial means has become more pressing and has been dealt with before courts. These steps have been undertaken in special regimes offering remedies to individuals and characterised by a very strong devotion to the rule of law: under the auspices of the European Convention on Human Rights with its specialised European Court on Human Rights and within the European Union, where the European Court of Justice has the power to control the lawfulness of community acts.

The European Union is a category of its own compared to classical international organisations. The Union's tasks cover a plethora of issues that normally fall into a state's competency. Its organs decide in many cases by majority and they have legislative powers. The so-called secondary EU law is binding on member states and, under certain circumstances, on EU individuals. Furthermore, EU law overrides national law. The EU's legal order follows a concept of separation of powers that is further developed than in most other international organisations. This renders a special quality to the issue of competencies: arising conflicts can be solved in a judicial manner by the European Court of Justice.

V

If the competencies of an international organisation and its organs are clearly laid out in the founding treaty, their actions will be well-structured, foreseeable and transparent. Other actors on the international level – member states, other states, other governmental and non-governmental organisations and individuals – will profit and better understand what this organisation does. Besides the founding treaty and other legal instruments, which set out competencies explicitly, an international organisation may have implied powers.

Competencies and their structure are an important element of the constitutionalisation of international organisations and may contribute to further progress in this area. One important purpose of competencies is

to secure the functioning of the organisation as a whole should one organ temporarily fail to work properly. In this particular situation, another organ should be competent to take over the other's tasks or this competence may fall back to the member states.

As the legislative competency is no longer restricted to the internal affairs of the international organisation but can affect directly member states and in some cases even individuals, it deserves greater attention. Judicial control is, therefore, not only discussed in academic circles but has emerged as an important element of multi-level governance.

Conflicts resulting from and referring to competencies are normal elements of the "constitutional life" of international organisations. They have to be resolved in the interest of the organisational order and in the interest of member states. Normally, the organ which made use of a competency is entitled to review the relevant action. In the end, this control is to be exercised by the member states. If there are several organs, the question arises whether they are entitled to control each other. This again is not only an issue of competencies but also of hierarchy. In case an organisation has a judicial organ, it is not necessarily competent to review the other organs' actions, as the case of the International Court of Justice shows. If an action was taken without the relevant competency, it is unlawful. If it was apparently *ultra vires*, the action is null and void and member states or other organs of the respective international organisation are not bound by this action.

Today, competencies of international organs cover more issues than in the middle of the 19th century, when these organisations emerged. Competencies are thus broader, but also more far-reaching, as their effects are much more concrete with regard to the national legal orders. Their density is higher as well as they cover more details of a single issue. In sum, competencies show the degree of integration already reached in an international organisation. Thus, competencies of international organisations tend increasingly to get in conflict with state sovereignty. As a result, states and organisations are in permanent struggle to find a balance between these two points.

The competencies of international organs are both an important element in the political sphere and a legal category. They are part of the process of constitutionalisation of public international law on the one hand and are affected by the fragmentation of this legal order on the other. The legal and judicial control of competencies is, therefore, very important and, over time, has become an emerging reality. This control and the relevant mechanisms will be further developed and refined, thus giving more relevance and efficacy to competencies. International or-

ganisations, member states and individual will profit from this development.