

## The 'Federal Analogy' and UN Charter Interpretation: A Crucial Issue

*Gaetano Arangio-Ruiz\**

### **I. Introduction**

The wealth of literature sparked by the so-called revitalization of the United Nations (UN) Security Council following the end of the Cold War indicates a healthy and growing interest among international legal scholars in the question of the legality of UN action or inaction. This trend is supported by the almost simultaneous occurrence of the fiftieth anniversary of the UN Charter. The present article does not directly examine the problem of the legality of UN action, but rather deals with just one aspect, however fundamental, of that issue, with particular reference to the Security Council. Its focus is upon the analogy between the UN Charter and federal constitutions, upon which a number of officials and scholars seem to rely, more or less explicitly, in order to establish a legal basis for that expansion of the Security Council's sphere of action which, for better or worse, we have witnessed over the past few years. As is well known, it is in effect this analogy which, it is claimed, gives legitimacy to the application of the doctrine of implied powers to extend the field of action of international bodies, notably the UN, beyond the areas expressly covered by the provisions of their constituent instruments.

In relation to the UN, the federal analogy may be justified, marginally, within the framework of operational activities carried out by the Organization under the legal cover not so much of the Charter but of more or less special agreements with the state(s) whose territory or people are to be affected. However, for the Charter provisions concerning the Organization's statutory functions *vis-à-vis* the member States, the analogy is, in this author's opinion, both undemonstrated and implausible. It cannot be assumed, therefore, that the doctrine of implied powers is applicable as an interpretive tool of the Charter for the determination of the powers of the political organs of the UN. In the case of the Security Council, the analogy is even less justified than it may be for other bodies, and is more dangerous for the preservation and development of the rule of law in the 'organized international community'. My aim

\* Professor of International Law, Law Faculty, University of Rome.

in writing in this forum, prompted also by my recent experience as the International Law Commission's Special Rapporteur on state responsibility, is not to draw conclusions on an issue which I intend to delve into more deeply than is possible in an article, but to stimulate a serious discussion of the federal analogy as an alleged basis for the application of the implied powers doctrine to the role of the UN, and particularly of the Security Council.

## II. *Prima Facie* Data

It is common knowledge that the *locus classicus* of the doctrine of implied powers is the constitutional practice of the United States of America. It is on the basis of this doctrine that the Congress and the President have gradually extended their powers at the expense of those reserved to the states by the 1791 Constitution; it is also common knowledge that this process has gone so far as to prompt a judge of the United States Supreme Court to declare that the idea that congressional and presidential powers derive from the Constitution is a mere fiction.

Now, according to the adherents of what I refer to, for the sake of brevity, as the 'constitutional' theories of the UN,<sup>1</sup> the Charter presents sufficient similarities to federal constitutions, and especially to that of the United States, to justify – and to justify *in law* – the application to UN organs of that same doctrine of implied powers which provided the basis for the gradual extension of powers of the two most important organs of the United States central government. Justice Holmes' famous statement would thus apply just as well to the UN Charter as it does to the Constitution of the United States.<sup>2</sup> Indeed, the UN Charter has also created a 'being', an 'organism – this we can all readily see. Hence, according to the 'constitutionalists', the doctrine of implied powers would also apply to the organs provided for by the Charter. Practice shows that those states which prevail by number or voting rights in the political organs of the UN do not fail to exploit the doctrine of implied powers whenever they find it convenient, without much concern for the need to justify its application. It is mainly international legal scholars who seek that justification. Anxious as they are to be able to extend to their own discipline the most refined tools developed in the theory and practice of public law within national legal orders, the great majority of international law scholars seem ready to do their utmost to invent any theory that may help demonstrate the legality of the conduct of UN organs. In the 1960s and 1970s, those members of the Assembly prevailing by number resorted to the implied powers doctrine in an attempt to justify a legislative or quasi-

<sup>1</sup> See Section III of this article.

<sup>2</sup> 'When we are dealing with words that are also a constituent act, the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it had taken a century and has cost their successors much sweat and blood to prove that they created a Nation.' *Missouri v. Holland*, US Supreme Court. 252 U.S. 416, at 433.

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legislative function for that body. In the Security Council some states seem now to be increasingly inclined to rely, more or less explicitly, on the same doctrine to justify a broadening of the Council's powers, taking them far beyond what this author believes to lie within that body's tasks according to any reasonable interpretation of the Charter.

Supporters of the federal or quasi-federal nature of the UN Charter would surely not be short of arguments based on 'circumstantial evidence'.

Firstly, the Charter does establish an institutional union of states. This places the UN in a very general category to which, albeit to qualitatively different extents, both the confederation and the federal state also seem to belong. Secondly, since the confederation sub-species, even more than that of the federal state, offers concrete models characterized by various degrees of centralization or decentralization, the possibility of generic *rapprochements* cannot be denied *a priori*. It follows that, however small the degree of similarity may have been between the Charter and a federal constitution in 1946, and however small it may be today after the real or presumed evolution of the Charter in response to the vicissitudes of half a century, one consideration cannot easily be set aside: that only history will tell whether, in which ways, and to what extent a comparison of the Charter to a constitution may be justified. While we cannot fail to agree with Leo Gross' comment that 'the United Nations is not like the United States *even in its infancy*', we must by the same token also agree with him when he adds:

The possibility, of course, cannot be excluded that after a century, and, as Mr. Justice Holmes said, much sweat and blood – not to mention Sir Winston Churchill's tears – the United Nations will acquire the degree of integration which will make the comparison with the federalism of the United States more tenable.<sup>3</sup>

Open-mindedness is also impelled by the fact that such a perceptive observer of the League of Nations as Sir Alfred Zimmern, while recognizing (unlike a number of contemporary scholars) that international law did not have a 'constitution' up until the First World War, seemed by implication to suggest that the Covenant had perhaps marked a first step towards the closing of what he viewed as a 'constitutional' gap.<sup>4</sup> *A fortiori* one may be inclined to think, as indeed many appear to do, that that step was taken after the Second World War with the creation of the new 'being' or 'organism' whose fiftieth anniversary is now being celebrated.

What should one say, then? Are the majority – the 'constitutionalists' – right? And if so, to what extent?

In response to the claim that the 'being' or 'organism' created by the Charter presents the features of a constitutional structure – an assertion which manifestly implies the federal analogy – one might be content to counter, continuing on the

3 Gross, 'The International Court of Justice and the United Nations', 120 *RCADI* (1967, 1) 403 (emphasis added).

4 A. Zimmern, *The League of Nations and the Rule of Law* (1936) 277 *et seq.*

same line of 'circumstantial evidence', with a series of equally straightforward considerations.

(i) On a par with the League of Nations, the UN is not a 'super-state'. This was stated by the International Court of Justice in 1949 and was confirmed by the same body on another occasion;<sup>5</sup> furthermore, the head of the US delegation to the San Francisco Conference had already assured the President of the United States to the same effect.<sup>6</sup>

(ii) The degree of centralization of the UN is so far removed from that of a federal state that it does not even approach that of a confederation. Pursuing the comparison with the North American Union, the UN does not even achieve the degree of integration of the Articles of Confederation: an instrument to which the name of constitution was most likely given only after it had been surpassed by events and when the elites of the thirteen colonies had espoused the idea that the Articles should be completely superseded by a true constitution.<sup>7</sup>

(iii) The Charter disqualifies itself as a constitution in that it expressly reserves, together with equality, the sovereignty of all member States (Article 2.1) and their domestic jurisdiction (Article 2.7). This point was firmly stressed by Dulles at San Francisco, when he observed (in defence of his preferred formulation of Article 2.7) that the UN was to deal only with governments.<sup>8</sup> A federal state, and even an

5 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports (1980) 89-90, para. 37 citing the Court's analogous *dictum* in *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports (1949) 179.

6 U.S. Department of State, *Charter of the United Nations: Report to the President on the Results of the San Francisco Conference* by the Chairman of the United States Delegation, the Secretary of State, 26 June 1945, Publication 2349, Conference Series 71, at 157-8.

7 This calls for qualification. Although generally referred to as 'the Confederation', the Articles did contain elements transcending a merely inter-state compact. Such was the case with a number of powers attributed to the Congress. In addition, and most importantly, the Articles were drawn up within a body composed of men who emanated less indirectly from the peoples of their respective communities of origin than is the case with governmental delegates to an inter-state body. Be that as it may of such constitutional elements, what matters most for comparative purposes is that an inter-individual constitutional fabric in a material sense had already started developing among the peoples of the 13 colonies (together with the very idea of an American 'nation') at least from the time of the First Continental Congress of 1774 and the early 'Association'. That process continued, albeit not without a number of crises, until the Philadelphia Constitutional Convention of 1787 and beyond. It is thus clear that two sets of normative phenomena were concurring within American society during the founding period. On the one hand, there were the tendentially egalitarian, international-type relations among the 13 political units, as formally governed by the 'Association' and later by the Articles; on the other hand, there was the inter-individual legal fabric, at first barely going beyond the *milieu* of, and around, the First Congress but later gradually embracing all the peoples of the Thirteen as one nation. By 1791 this latter phenomenon had prevailed over the former, after a period of more or less critical coexistence. Recent works by J.N. Rakove, *The Beginnings of National Politics: An Interpretative History of the Continental Congress* (1979), *idem*, 'The Collapse of the Articles of Confederation', in J.J. Barlow, L.W. Levy and K. Masugi (eds.), *The American Founding* (1988), and E.S. Morgan, *The Birth of the Republic, 1763-1789* (3rd ed., 1992) confirm the opinion which the present writer drew long ago (See G. Arangio-Ruiz, *Rapporti contrattuali fra Stati e organizzazione internazionale* (Archivio Giuridico Filippo Serafini, Sixth Series, 1-2, 1950) 105-114, para. 29) from the older works by J. Fiske, A.W. Small and M. Hockett. See also Jensen, 'The Articles of Confederation', in B. Ollman and J. Birnbaum (eds.), *The United States Constitution* (1990).

8 UNCIO VI, 508.

'advanced' confederation, as may be seen in the Articles of Confederation, goes beyond governments.

(iv) The only point which would seem to lessen the gap between the Charter and a confederal pact (although remaining very far from a federal constitution) is the provision – *rara avis* – for the direct availability of armed forces on the part of the Organization. One might be tempted to equate this with what was achieved by the North American Union during the war of independence, even prior to the entry into force of the Articles of Confederation; namely, the possibility of direct recourse to armed force by the Congress, under the command of George Washington who was directly appointed by that body. Apart from the fact, however, that only under certain highly problematic conditions would the Charter provisions in question be sufficient to qualify the UN as a constitutional fabric under international law, it is well known that the implementation of those provisions remains highly improbable.<sup>9</sup>

### III. The Theoretical Test of the Analogy

Moving away from merely circumstantial evidence, the real test as to whether the federal analogy thesis holds with respect to the UN is the degree, if any, to which the Charter affects the legal structure of the relations of the member States with each other. The problem is whether the rules laid down in the Charter and the organs operating in implementation thereof modify to any degree the kind of egalitarian, essentially horizontal relations existing among states under general international law and ordinary treaty rules. It is, in other words, a question of determining whether – and possibly to what extent – the Charter brings about any 'verticalization' in the relations of the member States *inter se* and with the UN that may justify the federal analogies assumed by the constitutional theories. This is the point that requires verification. And to do so it is indispensable to carry the analysis beyond the generic data considered so far.

Such an analysis must be conducted within the broader framework of that general international law with respect to which (according to the constitutional theories) the Charter would have brought about structural innovations of an institutional nature. It is therefore necessary to consider, first of all, at least some of the most crucial aspects of the concept of general international law wherein the constitutional theories of the Charter are presumably rooted.

Constitutional conceptions of the UN, as this author rightly or wrongly understands them, are based upon those theories which envisage the whole of international law as a kind of decentralized public law of the legal community of mankind. In particular, three interrelated corollaries of such theories stand out as a premise of the constitutional conception of the UN.

9 This issue is discussed further in Section IV.

The first corollary is that, as a legal community, the universal human society is not, *per se*, inorganic. On the contrary, it is, in its own way, organized. In legal terms, it is organized into separate, autonomous political communities governed by their respective states. Within the framework of this conception, each state appears to be a juridical subdivision of the universal legal community, legitimized as such to rule over its respective national society. The situation of states under international law would thus be qualitatively not dissimilar to the situation of municipalities, provinces, regions, *départements*, cantons and *Länder* – or the member states of a federation – legitimized by national law as autonomous institutions for the governance of the respective state subdivisions. In other words, states are viewed, implicitly or explicitly, as organs of international law, the latter being understood, as noted, as the public law of the legal community of mankind. Compared with the major forms of association – the unitary state, the federal state, the confederation – the international legal community would be characterized, according to this vision, by a higher degree of decentralization of the governmental functions attributed by international law to states. One of the most egregious examples of this construction is Georges Scelle's theory of *dédoublement fonctionnel*: a *dédoublement* by virtue of which each state would operate simultaneously as internal legislator and international legislator – but in either role it would be acting in the legal capacity of a decentralized organ of an international law conceived as the constitutional law of mankind. In conclusion, the 'constitutionalists' assume that legal organization would already exist not only within national societies under national law, but also in the universal human society as governed by international law. Hence, according to this view, some degree of organization, however rudimentary, would pre-date the League and the UN.

The second corollary is that every agreement between states constitutes an inter-institutional act, deriving that character from the public law nature of the contracting states in their capacity as decentralized organs (first corollary) of the universal legal community. It follows that agreements between states would be suitable law-making instruments by means of which states could establish further organs, transferring to them a part of their functions in such a way as to reduce the degree of decentralization of the universal public law. The Charter would supposedly have had just such an effect.

The third corollary is that international law is essentially inter-individual. Consequently, not only states, but also peoples themselves, would form the 'constituency' of international law.<sup>10</sup> Building on the public law nature of the agreements establishing international organs, this last point completes the picture by automatically involving the peoples, and the individuals composing them, in the compacts concluded by states, as their trustees, to institute new organs in addition to existing (state) ones.

10 I use the elementary distinction between a 'constituency' of states and a 'constituency' of individuals as used, for instance, by Corbett, 'Social Basis of the Law of Nations', 85 *RCADI* (1954. I) 479.

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As the public law of mankind, international law would thus be endowed, on a par with the law of any integrated society, with the following three features: (a) an original organic context; that is to say, a legal organization into states, and therefore a first basic step in organization; (b) a suitable constitutional instrument – the treaty – to reduce the degree of decentralization; and (c) an inter-individual constituency, forming both the addressees of the actions of the international organs as well as the human resources to staff the mechanisms of those organs. There would thus exist in international society, albeit in a rudimentary fashion, the essential legal and sociological conditions which enable national societies to modify any part of the central or peripheral organization of the state and its subdivisions.<sup>11</sup>

Hence, naturally, the constitutional nature of the UN Charter – and, in particular, two further, more specific assumptions: (i) that the UN membership is bound by the Charter into a community embracing the member States and their peoples in a qualitatively similar sense to the way in which a legal person or any subdivision of national law embraces its members; (ii) that such a community is so personified as to be placed by international law over and above states in the same sense as legal persons of national law are placed 'over and above' their members or subjects. I place these two interrelated corollaries under the single heading of the 'personified corporate body analogy'.<sup>12</sup>

As I have discussed the constitutional theory of international law and its corollaries elsewhere,<sup>13</sup> I need not develop the whole argument here. I shall thus limit myself to stating that the above-mentioned corollaries collapse at the same time as the unproved notion that international law is the public law of mankind. Against such a notion stand, together with an impressive body of scholarly opinion, countless facts which demonstrate that international law is a body of *sui generis* rules governing relations between states as factual, independent entities. In the international community one fails to find the 'original' organization, so to speak, which the constitutionalists imaginatively seem to perceive in a coexistence of states as presumed organs of international law. Nor do the further corollaries come to light: neither the 'natural' capability of inter-state compacts to modify the decentralized structure of the supposed legal community of mankind by placing international bodies above states (or states above states), nor the inter-individual nature of international law, thanks to which the peoples would be 'naturally' available to staff international organs and to be the direct addressees of the organs' action.

11 This point was perhaps made clearer in a paper given at the XIIth Congress of the AAA ('Association des Auditeurs et Anciens Auditeurs' of the Hague Academy): Arangio-Ruiz, 'Reflections on the Problem of Organisation in Integrated and non Integrated Societies', 44 *Riv. DI* (1961) 585.

12 *Infra*, Section V.

13 Arangio-Ruiz, 'The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations', 137 *RCADI* (1972, III) with an Appendix on 'The Concept of International Law and the Theory of International Organization', 629 *et seq.*, revised in *Idem*, *The UN Declaration on Friendly Relations and the System of the Sources of International Law* (1979) 199 *et seq.*; *Idem*, 'Le Domaine réservé. L'organisation internationale et le rapport entre droit international et droit interne. Cours général', 225 *RCADI* (1990, VI) 402 *et seq.* especially 435 *et seq.* Still valid (although to be revised) is Arangio-Ruiz, *Rapporti contrattuali*, *supra* note 7, at 7-158.

In relation to corollary one, the notion that states are organs of international law is based on an undemonstrated assimilation of sovereign states with the autonomous subdivisions (and legal persons) of national law. A host of data that need not be reiterated here indicate that states are factual entities characterized by independence (or 'negative' sovereignty), and not by autonomy in a proper legal sense. The states of international law possess none of the features of autonomy of national law subdivisions<sup>14</sup> – and this proves that in no sense are they creatures of international law.<sup>15</sup> In relation to corollary two, inter-state agreements are mere 'private' law contracts, capable as such of creating right/duty relationships between the contracting states, but incapable *per se* of modifying the structure of inter-state relations by placing organs above states or peoples, let alone by placing certain states above other states. Finally, in relation to corollary three, individuals and peoples remain subject to the exclusive control of their respective states. They are, as it were, internationally accessible, for whichever purposes, only upon the consent or concurrence of the states to which they belong.

The same facts that disprove the theories of international law as the public (or constitutional) law of the legal community of mankind prove *ad abundantiam* the essentially enduring correctness of the concept of international law as put forward by scholars such as Oppenheim, Triepel and Anzilotti. Having argued in support of that position (not without trying to strengthen it on some points), I shall confine myself here to reiterating, in the words of T.E. Holland,<sup>16</sup> that:

[t]he Law of Nations is but private law writ large. It is an application to political communities of those legal ideas which were originally applied to the relations of individuals. Its leading distinctions are therefore naturally those with which private law has long ago rendered us familiar.

For the present purposes, I only believe it necessary to stress, in addition to the above-mentioned factual nature of states as international persons, one essential point. Unlike the private law of national communities, which is conditioned and guaranteed by a public law, international law (referring to general international law

14 Neither the delegation of powers to the agents of the autonomous entity nor the direct subjection of the agents to the law of the whole (national) community. Any student of public law is familiar with this notion. Whatever the term used, it is something quite different from the independence of the average sovereign state.

15 Some of the 'constitutionalists' contend that the situation indicated in the text is no longer what it used to be. This is because 'l'Etat au sens du droit des gens' tends nowadays to become, they say, 'l'Etat des Nations Unies' (in that the quality of state would become the effect rather than the condition of admission to the UN). Whether it applies only to the states established through decolonization or to all states (such as the newest states ensuing from the dismemberment of the USSR or Yugoslavia), this sounds more than a bit like the story of the Baron who would have miserably drowned in the mud 'if the enormous strength of his arms had not allowed him to grasp his Zopf ("la queue de son chignon") and pull out of the swamp not only himself but also the horse' (my translation from an Italian version (1988, Ch. I) of G.A. Bürger's *Wunderbare Reisen zu Wasser und zu Lande: Feldzüge und Lustige Abenteuer des Freiherrn von Münchhausen* (being an expanded edition of the original R.E. Raspe's *Baron Münchhausen's Narrative of his Marvelous Travels and Campaigns in Russia* (1785). For the UN to possess a comparably proportional strength should it not have been set up by entities other than 'Etats au sens du droit des gens'?

16 T.E. Holland, *Studies in International Law* (1898) 152.



and ordinary treaty law, and leaving aside for just one moment controversial constituent instruments like the Charter) stands only on its own feet, with no public law above and around it. It need hardly be underlined that the concept formulated above by Holland remained, expressly or implicitly, the prevailing doctrine until well after the establishment of the League and the UN, and this despite the grafting of either constituent instrument into the system's body.<sup>17</sup>

As a legal system (Jean Combacau is quite right in saying it is not a *bric-à-brac*), general international law has, in its way, a constitution. But it is such an inorganic constitution that neither Zimmern (1938) nor Lauterpacht (1927 and 1947) nor Fitzmaurice (1971)<sup>18</sup> seemed to recognize its presence prior to the Covenant or the Charter. This constitution probably consists of what Hart calls 'the rule of recognition' (identifying the primary rules) and the principle of the legal equality of states. One should add perhaps the merely negative principle reflecting the maxim *superiorem non recognoscentes*.

Within such a rudimentary framework, it is extremely difficult to imagine that a mere inter-state compact like the Charter, drawn up without the least participation of peoples, could exert the constitutional force indispensable to bring about either the supra-ordination of UN organs to the member States and their peoples, or any similarly significant change in the composition and structure of the system.

#### IV. A More Direct Test: 'Relationnel' and 'Institutionnel' in the UN

A useful technical tool which may assist in approximating an answer to the question is the distinction between *relationnel* and *institutionnel*: terms which give a better idea of the distinction in French than in Italian or English.

Clearly, the *institutionnel* is not lacking. It is obviously present within the structure through which the UN functions; that is, the UN apparatus, including on the one hand the Organization's staff and, on the other, the groups of individuals participating in the various organs as state delegates or in a personal capacity. Taken together, the members of the Secretariat and those of collective bodies make up an inter-individual *milieu* within which hierarchical organization is no less present than it is within a national parliament or a diplomatic conference. The presence of public law is manifest in the Staff Regulations, the Staff Rules and other norms created within the apparatus by enactment or custom. It seems evident, however, that any relationships of supra- and sub-ordination in the apparatus involve only individual members, not the states that

17 The grafting can be perceived, for example, by comparing footnote 2 of H. Lauterpacht's, *Private Law Sources and Analogies of International Law* (1927) at 82, on the one hand, with the rest of the 300-page book; or, in the same author's 1947 edition of Oppenheim's *International Law, I (Peace)*, the paragraphs defining the 'Law of Nations' (esp. para. 7 *et seq.*) on the one hand, with the paragraphs devoted to international organization (166 *et seq.*), especially the UN (para. 168); on the other hand:

18 See Zimmern, *supra* note 4, Lauterpacht, *supra* note 17, and G. Fitzmaurice, *infra* note 25.

some of them represent. The same public law nature clearly characterizes the equally inter-individual rules governing those components of the UN's apparatus which operate in the field, when the Organization carries out operational activities in the territory of one or more – *consenting* – states.<sup>19</sup> The situation is quite different, however, with regard to member States' relations with the Organization; and this should be readily perceived, despite the ambiguities created by explicit or implied assumptions of the constitutional theories.

Analysis of the relations between the UN and the member States does not demonstrate that the former is really vested with powers *vis-à-vis* the latter. To be sure, the situation of addressees of deliberations issued by UN organs – particularly binding decisions – is generally described in terms of subjection of states to the UN. But this is a matter of linguistic convenience. It does not appear to reflect a real alteration of the essentially inter-state nature of the relations governed by the Charter as part of international law.

For instance, the decisions by which the General Assembly determines the contributions due from member States to cover the Organization's expenses obligate each state *vis-à-vis* the other states.

It is true that Article 19 of the Charter provides that if a member defaults on payment for two years, it 'shall have no vote' in the Assembly. However, leaving aside the fact that this automatic sanction has not been applied even to seriously defaulting states, and leaving aside the fact that implementation of this sanction would necessitate one or more states taking the initiative and the majority of the Assembly voting in favour, even the most ardent constitutionalist should not fail to wonder how the UN could act in the event that the debt remained unpaid despite the sanction.<sup>20</sup>

What could the UN do? Put forward a request for payment, surely, but what else? Absent any right to institute proceedings before the ICJ, I find it difficult to envisage the UN obtaining submission of the issue to an arbitral tribunal. Still less can I see the UN resorting to countermeasures – namely, reprisals – against the evader. Only the other member States would be entitled, according to general international law, to adopt countermeasures. Thus, the creditors in the true sense – those able to exact payment – would seem to be the member States rather than the UN.

This state of affairs does not prove, it would seem, that the UN is legally supraordinated to the member States. If anything, it demonstrates rather that the UN is subordinate to the member States. This point will be developed in Section V below.

The situation seems not to be significantly different as regards the obligation of states to comply with Security Council decisions relating to non-military measures, under Article 41 of the Charter. Again, any reaction to non-compliance remains in the hands of states, as does the implementation of measures decided upon.

<sup>19</sup> This point will be taken up in more detail below.

<sup>20</sup> On the magnitude of payment default see S.M. Schwebel, 'Fifty Years of the World Court: A Critical Appraisal', Address to the Annual Meeting of the ASIL, Washington, DC, 28 March 1996.

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At first glance, things may seem different when it comes to military measures under Article 42, as the Security Council may have direct recourse to such course of action. But this provision – the most significant in the Charter for an evaluation of the UN's own capacity for action – has remained a dead letter, and seems bound to remain such despite the end of the Cold War. Failure to implement the provisions of Article 43 *et seq.*, which lay down, among others, the obligation of member States to make armed forces available to the Council, not only casts doubt on the existence of any degree of institutionalization of collective security in the hands of the UN, but has also resulted, not infrequently, in situations showing the lack of any semblance of such an accomplishment. Whenever the Council has recognized the possible need for military measures, it has resorted to the device of authorizing willing member States (often interested in the question on their own account) to use their military forces under their own control and command. In effect, there has not yet been one instance of direct exercise of military coercion on the part of the Council against a state; and only a case of that kind would prove the effective existence, in the hands of the UN, of a power of military coercion.

One reads in scholarly commentaries that, by renouncing the use of force under Article 2(4) and attributing to the Council the tasks envisaged in Chapter VII and Article 24, notably in Article 42, states have 'delegated' to that organ a previously exclusive state(s) *function* of maintaining peace and security, if necessary through military force. Apart from the fact that it is difficult to believe that general international law attributed to states a *function* of collective security in an objective technical sense, other than a simple freedom of, or right to, self-defence (which casts doubt upon the alleged 'delegation'), one fails to see how a function can be considered to have been acquired by the Council while that organ is not provided with any means to perform it. It is difficult to see in what sense the UN Charter would have transferred or created a collective security function in the sense in which one speaks of a function in public law.

The practice of authorizing military action by states – and by willing and possibly interested states – a practice characterized by the absence of any adequate control on the part of the UN regarding the 'whether', 'when', 'what', 'how much' and 'how long' of military measures (nor regarding the aftermath of the action once it has been discontinued or concluded), seems to indicate that little organizing has been done in that respect, except on paper.

Military force remains in the hands of states, particularly in the hands of some states. Thus, the system does not go far beyond the vesting of some states with rights, faculties or obligations, which appear to be quite similar, in good legal substance, to those embodied or implied in an *unequal alliance* treaty. The only institutional element seems to be the Security Council's *casus foederis* determination. But even that element is quite conceivable, *mutatis mutandis*, within the framework of an unequal alliance: the *casus foederis* determination could well be effected by a more or less representative

*ad hoc* or permanent collective body, whose decision should not necessarily be exempt from some control on the part of the less equal allies.

One is thus bound to conclude that even in the area in which, according to the constitutional theories, the Charter has been most innovative, we remain, despite the Charter (the only exception being the presence of an apparatus), in the sphere of *relationnel*: unless, of course, one attributed to the UN the questionably *institutionnel* element represented by the political and military weight of some states, a confusion which seems not infrequently to occur in the literature.<sup>21</sup> The point of UN 'supremacy', regarding the Council's decisions as well as the Assembly's, will be taken up again below.

## V. The 'Special' Community Concept and the 'Personified Corporate Body' Model

The argument tentatively developed in the preceding paragraphs would seem to be questioned, however, by the two further assumptions of the constitutional theory outlined above in Section III. I refer to the various formulations of the 'organized community' concept and what I call the 'personified corporate body model'.

(i) According to the most common formulation of the first assumption, the entry into force of the UN Charter and its implementation created a 'special' community composed of the UN members, such community being characterized by a relatively higher degree of centralization.<sup>22</sup> According to the second tenet, this special community was endowed, through a choice of the founders implied in the Charter, with a corporate personality placing the UN 'over and above' the member States, if not over *any states*<sup>23</sup> – although it is not quite clear whether the proponents of this argument are referring to a constituency of states, of individuals, or both. In my opinion, however, it does not appear that these assumptions can be of any help to the constitutional theories.

The concept of community is abused by adherents to the constitutional theories, even in areas other than international political organization. Some scholars actually go so far as to assert that any treaty – bilateral or multilateral – establishes a community among the contracting states. Some speak of the Universal Postal Union as establishing a 'universal postal community' operating over a universal 'postal territory'. And some authors envisage the Statute of the ICJ as establishing a 'judicial community'. A par-

21 See Section VI below.

22 Ago, 'Comunità internazionale universale e comunità internazionali particolari', 5 *La Comunità internazionale* (1950).

I leave out in principle, for present purposes, that variation of this 'particular' or 'special (UN) community' notion, namely, the further idea that the Charter would have been from the outset, or would at some time have become, *the* constitution of the universal community of states or peoples as it would result from, or manifest itself in, general international law.

23 That would seem to be the case for those who envisage the Charter as *the* constitution of the universal international community, as mentioned in note 22 *supra*.

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ticularly broad use of the special community concept was proposed – surprisingly – by Roberto Ago.<sup>24</sup>

Confining our discourse to the UN, the presence of a community seems both superfluous and implausible. The futility of the notion of a community underlying the Charter, or created thereby, is plainly evident if we consider such elementary legal situations as those characterizing the various types of inter-state arbitration and judicial settlement by the ICJ. Whether an inter-state arbitral award emanates from an *ad hoc* tribunal composed of private parties, as is mostly the case, or from a third state, its binding character rests neither upon the authority of an arbitral or judicial community established between the litigating states by the *compromis*, nor upon an authority exercised over the parties by the tribunal or by the arbitrating state *per se* or as an organ of any such community. Rather, it follows simply from the obligation undertaken by the parties toward each other to abide by the decision: a contract, or at most a customary rule. The same can be said, *mutatis mutandis*, about judgments of the ICJ.

If such is the case, one fails to see in what sense the situation is any different where, *ceteris paribus*, in the place of an arbitral tribunal, a third state or the ICJ, one finds a number of organs set up or referred to in a single constituent treaty such as the Charter. My belief is that it is not. The question whether such a treaty creates a community (possibly with authority) concerns the relationship among the member States *inter se*, and between the international organ and the member States. It is not a question of relationship between the organs. Whether an organization is mono-organic or pluri-organic may mean much for the variety of its tasks or its efficiency; it does not make any difference, however, to the question under discussion. Equally not decisive are both the multilateral character of the constituent instrument and the permanent nature of the organs. Although the Statute of the ICJ is a multilateral treaty establishing a permanent organ, nobody really believes that that statute creates a 'judicial community' in any proper sense of the term.

Thus, just as there is no need or evidence of a community – of given states, or of a part or the whole of mankind – underlying an arbitral award or a Court judgment for it to perform its dispute-settling function, there is no need or evidence of such a community behind an Assembly deliberation under Article 17.2 of the Charter or a Security Council deliberation under Article 39, 41 or 42, for either deliberation to produce its contractual effects. This applies *a fortiori* to recommendations.

Turning to the implausibility of the creation of a community, the essential point is that the constituent treaty is not the appropriate legal instrument to produce such a prodigy. Within the framework of a law of nations, understood as the law of relations among political units constituted in fact and coexisting as equals in the universal society of men but outside a supposed inter-individual legal order 'of the whole' expressed by that society, any organization set up by inter-state compact bears within itself – whatever its merits or shortcomings – an original flaw, inherent in the nature of the

24 *Supra* note 22.

transaction by which it was established: the inter-state treaty. And the inter-state treaty is a far less sophisticated instrument than the constitutionalists seem to believe it to be; it is only a 'private' law pact among sovereigns.

I must reiterate my disagreement, in this regard, with Judge Fitzmaurice's only partial rejection of the 'Organized World (or International) Community Argument' in 1971.<sup>25</sup> If the world community 'as a sort of permanent separate residual source or repository of powers and functions' was not there in 1946 (as Fitzmaurice admitted) for the purposes of an *inherent* continuity of the UN in 'powers and functions' of the League, it was not there either – due to the inter-state and inorganic nature of the 'world community' – for the purpose of setting up the League or the UN as a *being* endowed with powers and functions of a constitutional nature over the member States. For such a result to be attained, the world community should have been 'a separate juridical entity with a personality over and above' states: which according to Fitzmaurice (and myself) it was not. In my view, therefore, no 'over and above' entity could really be created, in 1919 or 1945, by a mere inter-state treaty.

Be that as it may, the intentions of the contracting sovereigns were made clear, in 1945, by the reservations I referred to in Section II above. They demonstrate that states did not intend to assume, once the compact was in force, that status which is typical of the member states of a federation – namely, the status of subdivisions or partial communities within a larger one. An egregious example is the status that the thirteen founding members of the American Union had attained, in a measure, even as early as at the time of the Articles of Confederation.<sup>26</sup> On the contrary, the founders of the UN intended to remain, and remained, what they were prior to the treaty.<sup>27</sup>

Why, then, should the UN be conceived as a community? States and their peoples seem to remain in their respective places, and in the same condition they were respec-

25 In his dissenting opinion on the ICJ's Order No. 1 of 26 January 1971 (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*), ICJ Report (1971) at 220 *et seq.*). Judge Fitzmaurice rejects the 'Organised World (or International) Community Argument "as it had" emerged in the course of the South West Africa cases (Ethiopia and Liberia v. South Africa, 1960-1966)' in support of an *inherent* continuity between the League of Nations and the United Nations, as being only different expressions of the same overriding idea': an argument 'obviously directed to supplying a possibly plausible foundation for something that has no basis in concrete international law'. According to Sir Gerald, the argument 'had no such basis because the so-called organized world community is not a separate juridical entity with a personality over and above, and distinct from, the particular international organizations in which the idea of it may from time to time find actual expression. In the days of the League there was not (a) the organized world community, (b) the League. There was simply the League, apart from which no organized world community would have existed. The notion therefore of such a community as a sort of permanent separate residual source or repository of powers and functions, which are re-absorbed on the extinction of one international organization, and then automatically and without special arrangement, given out to, or taken over by a new one, is quite illusory' (cited Opinion at 241). The point is discussed more thoroughly in Arangio-Ruiz, 'The Normative Role', *supra* note 13, at 682-684; and *Idem*, *The UN Declaration*, *supra* note 13, at 252-254.

26 *Supra* note 7.

27 This shows that the acceptance or refusal of the concept of states as *provinciae* of the international community, or *organs* of international law, is more than a mere technicality.

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tively in before San Francisco; though this does not make the operation any less real or vital, of course, for what it is.

(ii) More delicate is that further aspect of the corporate body model concerning the legal personality of the UN, whether as a community of the member States (or their peoples) or just as the UN. The personified corporate body model is misleading as it all depends entirely on the kind of personality one speaks of. International personality is not infrequently mentioned or implied as one of the signs that the Organization is endowed, *inter alia*, with authoritative functions.<sup>28</sup> But this is questionable.

The personality of the UN derives from the same rules or principles which determine the legal personality of any other international person, be it a state, an insurgent party, a government in exile or the Holy See. Indeed, there can hardly be any question that the UN in fact exists as an entity materially able – in certain matters – to act and manifest a will in such conditions of independence as to participate, *per se*, in international legal relations. Matters in which the United Nations reveals such a capacity obviously include the ability to contract with regard to headquarters and other objects, privileges and immunities, the rights and duties connected with diplomatic relations, the rights and duties connected with the treatment of members of UN staff, and so forth. Capacity to contract will obviously be instrumental, in its turn, to the acquisition by agreement of further rights and duties. The legal personality of the UN must be qualified, however, with respect to both its source and its nature.

As regards the former, we have stressed long ago that the international personality of the UN is not a legal effect of the constituent instrument. Naturally, such an instrument has a role, in that it was by carrying out the provisions of the Charter that the organs were actually set up. This role, however, is not *direct* in the same sense that the legal personality of a legal person originates with an *acte de fondation* or *association* under a national law, by operation of general or *ad hoc* authoritative enactments; nor is it direct in the same sense that a piece of legislation is the source of the personality of a province or other subdivision of national law. The Charter was the legal basis upon which the Organization could be materially constituted. As noted, personality derived, for the entity actually established, from general international law. We disagree, in this respect, with the relevant part of the Court's 1949 opinion.

Even more importantly, the international personality of the UN must also be qualified with regard to its nature. Indeed, to say that the UN is a person does not imply that

28 For example, it was reported to the President of the United States in 1945 that Article 104 dealt not with what is called the 'international personality' of the Organization because 'the Committee which discussed this matter (*viz.* the Belgian proposal that the Charter specify 'that the organization ... possesses international status, together with the rights this involves' (United Nations Conference on International Organization, Doc. 2 G/7 (k)(1), in UNCIO 3, 343) was anxious to avoid any implication that the United Nations will be in any sense a super-state' (*Report to the President, supra* note 6, at 157 and 158). (A super-state might want, *inter alia*, to legislate.) A relationship of the UN's international personality with the idea of a super-state comes up again in the ICJ's Opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949), at 179: in concluding that the organization was an international person, the Court felt it not superfluous to add that 'that was not the same thing as saying that it is a state, which it certainly is not.... Still less is it the same thing as saying that it is a "super-state", whatever that expression may mean'.

the Organization is endowed with a *functional* personality – not, anyway, with that *kind* of functional personality which is typical of public and private juridical bodies or subdivisions of municipal law. Here again we must reiterate disagreement with the motivation of the ICJ in the *Reparation* Opinion. Contrary to the Court's *obiter dicta* in that Opinion, the Organization's personality exists as a primary personality, quite similar, as noted above, to the personality of any other (primary) international person. As such, that personality manifests itself only in the sphere of *droit relationnel*. *Per se*, it does not imply any supra-ordination of the Organization to the member States, in the sense of a supremacy to which one alludes when evoking the notion of a super-state. The belief that the treaty brings about *per se* the compound effect of legal personality and legal authority is, once again, a consequence of an unwarranted municipal law analogy.<sup>29</sup>

It follows, in my view, that also with respect to personality, as well as with respect to community, the position of the UN does not differ from that of an arbitral tribunal or an arbitrating state. If there is otherwise no personality, as is most probably the case with the arbitral tribunal, the lack of such quality has no negative impact on the binding character of the award, as it derives from the agreement between the litigating states. Conversely, the presence of international personality, in the case of an arbitrating state, does not alter the situation in a contrary, positive sense. That state has no more claim to the parties' compliance than a tribunal has.

Similarly, the possession of international personality, while useful for other purposes, does not significantly affect, *vis-à-vis* the member States, the position of the UN. Of course, international personality allows the Organization to participate in legal relationships essential to its existence and operation. In turn, this will affect the Organization's functioning indirectly. However, in so far as the functioning *per se* is concerned, the Organization does not operate as a *person* in legal authority – or, to use Fitzmaurice's words once again in a different connection, 'over and above' states – more than does the arbitral tribunal or an arbitrating third state.<sup>30</sup>

The international personality of the UN is thus not *functional* in the same sense as the personality of municipal corporations. Behind the obligations incumbent upon each member of the UN we do not find the Organization as the *agent* of the allegedly organized international community. There is the authority of international law, and, underlying that, the rights, the *facultés*, the powers of the other member States, namely of the other parties to the Charter.

The elements collected in the preceding pages seem to indicate that although the UN is without doubt an organization, having its legal statute in the Charter (and in that sense a constitution of its own), the Charter is not 'the constitution' or 'a constitution' of the community of the member States or of the community of all existing states, let

29 Arangio-Ruiz, *Rapporti contrattuali*, *supra* note 7, at 130 *et seq.*; *Idem*, 'The Normative Role', *supra* note 13, at 675 *et seq.* and *Idem*, *The UN Declaration*, *supra* note 13, at 245 *et seq.*

30 Of course, this has nothing to do with - and does not exclude - the legal personality of the Organization in its own internal system and in the legal system of any member State (Article 104), notably in the legal system of *Etats de siège*.



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alone the community of mankind. In other words, the UN is not an organization of the member States themselves, almost as if they were in some measure absorbed or dissolved in it; nor is it, despite the bold lie with which the text of the UN Charter begins – 'We the Peoples' – an organization of the peoples of the member States, as a single people. The member States remain, under the Charter, the separate, independent political entities they were beforehand, in their mutual relations as well as in relation to the UN; and they remain also – this is of paramount importance – subject to general international law and endowed with the rights deriving therefrom. Indeed, they would have remained sovereign political entities, given the way that the Organization was set up, even if the Charter did not state so, or stated so less clearly than it actually does.<sup>31</sup> The peoples, for their part, remain under the predominant control of the member States, despite the ever-growing number of obligations to which states are subject, under customary or treaty law – including UN-sponsored international instruments – regarding the treatment of their subjects.

Rather than organizing the member States or their peoples, the UN organizes a portion of the relations and cooperation among the member States. Like other international bodies, the UN carries out international activities in a narrow sense on the basis of the Charter, as well as operational activities on the basis of instruments *substantially supplementing* the Charter.

In the first capacity, UN organs function, *vis-à-vis* states, as another kind of instrument, in addition to ordinary diplomatic organs, of essentially unaltered egalitarian relations among the states themselves. In envisaging the accomplishment by UN organs of what we call international activity in a narrow sense – namely addressing decisions or recommendations to member governments for the purposes and the effects indicated in the Charter – states have organized their relations in a different way, while remaining merely juxtaposed as before.

In the second capacity, the UN operates (as well as the so-called supra-national institutions) *vis-à-vis* the subjects of states, or *vis-à-vis* the subordinate organs of states (and even *vis-à-vis* the states themselves as legal persons of municipal law) as organs of the states involved, so empowered to function by virtue of the national legal systems of those states as adapted to the relevant international agreements. By occasionally using UN organs for such operational activities, states deal in a different manner with some of their internal and/or external affairs; such affairs remain, however, under their

31 I refer to sovereignty in the sense of independence and the factual existence of states as subjects of international law. I do not use the term in the sense in which sovereignty is understood, in my view ambiguously, as exemption from, or non-subjection to, obligations deriving from international law (Arangio-Ruiz, *Le domaine réservé*, *supra* note 13, at 439-448). The important distinction between the two concepts of sovereignty seems not to have been taken into adequate consideration in the course of the American Society of International Law's 88th Annual Meeting which focused on the 'transformation' of sovereignty (*ASIL Proceedings* (1994) *passim*, esp. 51 *et seq.*). The 'holes' in sovereignty due to the extension of the area of international obligation (which merely affect the liberty of states) are one thing; the 'holes' in sovereignty-independence are another. The latter are not only far less conspicuous (to say the least) but they do not seem, in fact, to affect the sovereignty-independence of all states in the same way. Some states actually appear to be, *de facto*, more affected by them than others; and, frequently, to the advantage of those which, *de facto*, are less affected or totally unaffected.

ultimate political and legal control, except in the measure in which the relevant *ad hoc* arrangements envisage a vicarious UN role.

Once the false notions of the community and of its functional personification are set aside, it may clearly be seen that in setting up the UN the founding states organized *neither* the universal society of men and women (or the regional society of their peoples) *nor* the so-called 'society of states'. However important, what they did was something less than any of the above.

It thus seems reasonable to believe that the UN system has brought about, on the one hand, a huge legal phenomenon of a contractual, inorganic, 'private' law nature: the rules of the inter-state compact and the egalitarian right/duty relations arising therefrom among the member states. This is a monumental phenomenon because of the dimensions of the entities involved and the interests at stake, but not for its normative quality or 'weight'. It is still the *relationnel* of Holland's 'private law writ large'. On the other hand, there is a tiny phenomenon – microscopically small by comparison with that just mentioned and with the phenomenon that under certain conditions one would wish to see – of a public law, institutional nature: the inter-individual law of the UN apparatus.

The theoreticians of the Charter as a constitution and of the federal analogy do not seem to perceive the difference and the vast hiatus existing between the two phenomena. They interpret the first phenomenon in a public law light on the basis of the second, constructing in this way a single imaginary edifice in which the colossal proportions of the 'private' law relations among sovereign states and the public law nature of the apparatus' internal relations are, so to speak, summed or multiplied together. A hybrid, confusing theoretical construction, the result of which is the notion that the UN Charter is the constitution of an international society ambiguously understood as a legal community of the member States or their peoples, of all states, or of mankind – it is not clear which.

## VI. Some Immeasurable Differences

Turning specifically to the federal analogy, the differences between a federal state and the UN – very few of which seem to be fully appreciated by the prevailing doctrine – are so immense that to perceive them fully, let alone illustrate them, is almost as difficult as grasping astronomical distances.

In describing the UN, the difference deriving from the fact that it has no direct power over the peoples of the member States is commonly pointed out. Direct power over individuals is indeed one of the most important features of federal states compared with confederations. Direct power over the nation is precisely the element which facilitates a federal government in expanding its powers at the expense of its member states because it can directly address the nation's needs and expectations. It is this obvious gap which is stressed when we all lament that UN organs are not

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endowed with the powers of the so-called supra-national organs. It is this same gap that was denounced by Hamilton and the other federalists as they sought to persuade their countrymen of the necessity to move to a true constitution.

But it is not only on account of this immense, and in a sense unidirectional, gap, that the federal analogy does not hold water; although that gap, too, is of considerable relevance. Of far greater importance is the fact that the peoples themselves took no part in the foundation of the UN; nor do they have, subject as they are to their respective states, any direct voice in the procedure or the merits of an extension of the powers of UN organs. As emanations of states, and not of peoples, UN organs are subject only to the control of state governments. No similar mechanism may be found in the UN system, for instance, to the control that the people of the United States, the real *constituency* of the legal order of the American nation, exercises in so many ways over the conduct of the central organs, *including* any actions which may amount to an extension of powers of the President or Congress. The guarantees provided by such controls to the American nation are hardly conceivable in an inter-state system like the United Nations. The peoples have no decisive say in the matter of respect for the 'purposes and principles' of the Charter on the part of UN organs.

But that is not all.

There are indeed, if possible, even more astronomical differences between a federal constitution and the UN Charter, in one crucial sense – in particular, in relation to the Security Council.

Within the framework of a national constitution, political majorities normally become minorities, and vice versa, over time spans usually lasting not more than a few years. State powers under the constitution are exercised over time by different parties, factions and individuals. Even in a dictatorship, change will inevitably occur because the dictator, a mortal being, is obviously subject to a 'time span'. Any extension of powers of a federal state's central organs – by effect of the doctrine of implied powers – will profit whichever party, faction or person rules in the future.

Very little of this is conceivable within the society of states; a point which appears, however, not to enjoy the consideration it deserves by scholars and governments, including, quite surprisingly, many of those UN member governments which are not among the states classed as 'strong'. It is states, not individuals or groups, which compete for power positions in the international society. At first sight, one may suppose that there is no difference here to national societies. But within the inter-state system the differences in size and weight among the fifty, hundred or two hundred co-existing state units – which translate into factual differences in power – are tendentially permanent. Significant changes in the relative weights of states normally require periods of time measurable not in years, or even in decades, but in centuries.

It follows that any distribution of normative, judicial or executive powers agreed upon by the founders of an international union presents a degree of permanence utterly incompatible with any notion of alternation in the exercise of the assigned powers. This is clearly the main reason for the limitations placed on the powers of the restricted or-

gans of inter-state unions; it is the reason for the reservation of sovereign equality; it is also the reason for the reservation of domestic jurisdiction. And it is for this same reason that no state – other than the strong – should readily accept the application of the implied powers doctrine in the restricted and most authoritative organ, where the strong are represented in conditions of privilege.

Indeed, there is even more to it than this. The absurdity of the federal analogy is underlined by the drastic dissimilarity between the parties involved in an inter-state compact, on the one hand, and in a federal constitution, on the other. The organs of a federal government are composed of individuals who are *not* the member state's delegates. Therefore, any extension of federal powers does not amount to an extension of the powers of given member states in relation to the others. It is an extension of the powers of individual federal officers over the nation. It is a strengthening of the pre-eminence of an entity – the federal government – which is not itself a state, but a set of institutions operated by individuals. In the United States, for example, an extension of the powers of federal organs at the expense of the member states has not consisted in an increase in the power of the biggest, most populated or richest among the individual states. No one in the United States would consider, in the context of a hypothetical, absurd reform of the Constitution, the possibility that California, New York, Pennsylvania, or any other state be attributed or otherwise acquire a greater legal power with respect to the other member states.

Thus, while it is understandable that greater responsibilities were entrusted to certain states at the time of establishment of a body such as the UN, particularly in consideration of actual and specific security exigencies, it is not equally understandable, if at all, that the privileged members could feel entitled to seek, and the non-privileged members should be obliged to accept, extensions of powers which the latter have no possibility of ever exercising. The more so in the absence of adequate opportunities for alternation and effective controls by a judicial organ or a more representative political body.

It does not seem that the constitutional conceptions of the Charter can find valid argument in the position of hegemony held by certain states – the strong – within and outside the walls of the UN. The presence of the strong within the UN apparatus – taken together with the particular tasks entrusted to the Council and the binding effect of that organ's decisions, especially the possibility of recourse to armed force – is viewed by a considerable part of the doctrine as a decisive element in support of the thesis that the Charter is an instrument of a constitutional nature. I believe, rather, that it argues the contrary.

(i) Hegemony is not, so to speak, an 'institute' of international law. On a par with war, which is, or was, tolerated but not legitimized as a means of changing legal rules or situations, hegemony is not legitimized by general international law, except in the minds of those who identify law with might or who consider law to be a direct product thereof.<sup>32</sup> In fact, hegemony would appear to be even less palatable to international law, which has as one of its fundamental – and probably constitutional – norms the principle

32 An example from the many can perhaps be seen in the book by B. Stern, *Les aspects juridiques de la guerre du Golfe* (1991) 488 *et seq.*, esp. 490 *et seq.*

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of the sovereign equality of states. It is difficult to concede, therefore, that the exercise of hegemony by one or more states introduces an element of legal verticalization into international law. Broadly speaking, the relations between the *fürhende* state(s) and the *geführte* state(s)<sup>33</sup> do not approach the level of a legally institutionalized supremacy. Eluding legal definition and failing to alter the legal equality principle, they remain on the political plane.

The egalitarian nature of the system is not altered, according to the prevailing doctrine, even by hegemonic situations formalized by an unequal alliance or protectorate treaty. Far from being viewed as a legal sanction of constitutional supremacy of the strong ally or protector, situations created by such treaties are generally envisaged as merely contractual limitations of the liberty of the protected or otherwise weaker state or states. Of course, an unequal alliance or protectorate treaty may well prove to be a step towards a constitutional integration of the states involved. Should some such process materialize, however, it would automatically transcend the plane of international legal relations to enter the plane of public law relations within the framework of the larger community resulting from the more or less unequal fusion of the peoples and structures of the interested states. It is by no means guesswork, therefore, to hold that international legal relations remain, in the final analysis, essentially egalitarian.

(ii) The hegemony exercised by given states – singly or in concert – on a merely historical and political plane should not be confused with the special position awarded such states by the Charter within an apparatus such as that of the UN. One frequently reads that the basis of the constitutional characterization of the UN is to be found in the pre-eminent nature of the 'directorship' of the five, four, three, two, or even only one major power. One also reads that international organizations like the League and the UN find their institutional precedents in the Concert of Europe and in the international conferences in which that Concert manifested itself.

Such a notion is misleading. It generates the impression that the hegemony and the treaty establishing an international organization somehow reinforce each other, in the sense that the directorship of the strong states lends to the organization an institutional authority which a mere pact between states would not be in a position to bestow, while the inter-state compact – the Charter in our case – confers a juridical legitimation upon the supremacy of the directorship which general international law denies.

The fact that given states provide greater input than others in the adoption of a UN resolution does not alter the legal nature of the resolution in relation to its addressees: the resolution remains what it is according to the Charter, namely a complement of right/duty relationships created by the Charter as a treaty.

If the strong states succeed in obliging a recalcitrant member to comply with a resolution that they themselves have an interest in seeing implemented, the resolution itself does not by virtue of this acquire a higher degree of legal authority than it possesses by virtue of the Charter. The legal force of the resolution rests merely upon the treaty; any

33 Unable to find an English equivalent I use H. Triepel's terms: see *Die Hegemonie: ein Buch von Geführten Staaten* (1938).

authoritative actions on the part of the strong remain *outside* the Charter system. Such actions simply qualify, under given conditions, as part of a general international law which still exists, as lawful countermeasures – by the strong, *no more* than by other states – aimed at securing compliance with treaty obligations.

## VII. Some Concluding Thoughts

By way of conclusion, it may be useful to explain, in practical terms, the argument I have tried to develop in this article.

Salient episodes in the process of revitalization of the Security Council's role following the end of the Cold War include, in the order in which some of them spring to mind: the Gulf crisis, the Lockerbie affair, the Yugoslav crisis, the civil war in Somalia, the Haitian crisis and Rwanda. In not a single one of these cases has the problem of the delimitation of powers of the Security Council or of the UN as a whole failed to be raised; and I am not alone in believing that the Security Council has operated *ultra vires* in more than one instance or phase. Nevertheless, the work of the commentators, which should serve, together with the vigilance of states, to verify the conformity of UN action with the Charter and with general international law, has left, in this writer's opinion, a great deal to be desired. And this, I believe, is especially due to the prevalence in international legal literature of the distorted, though allegedly progressive, conception of the Charter as discussed in this article.

The principal consequence of this situation is that the strong states are encouraged to pursue choices and actions which are legally (and sometimes politically or morally) questionable. At the same time, the only subjects who have a voice in such matters and might resist – namely the governments of the other states – are discouraged rather than spurred on in the direction of opposition.<sup>34</sup> Not that I am under any illusions as to the influence that international legal scholars may exert on governments. It is possible, however, that the voice of international jurists could at least bear some weight in inducing those responsible for the action or inaction of the Security Council to respect the limits of the tasks legally attributed to that body (and to themselves). It is to be hoped, at the very least, that those international legal

34 It seems appropriate to note, in this connection, that adherents to constitutional theories (with the federal analogy and the implied powers doctrine) are not helped by the UN policy pursued by the governments of some of the main powers, and particularly by the government of the leading international power; even less by some of that country's current right-wing politicians. By frequently humiliating the majority of the UN constituency and by using the Organization, for good or bad, as an instrument of unilateral or small minority pursuits, the governments in question contradict not only the constitutional or federal analogy but even the multilateral conception of the Charter and of the organism it created. Quite strangely, the United States establishment, in particular, does not seem to draw much inspiration, in its dealings with the UN, from the glorious and fascinating history of constitutional development of the North American Union, especially between 1774 and 1791. Be that as it may, the world should draw one lesson from that history: namely, that constitutions are made by human beings for human beings to rule properly over human beings (possibly under their control), not by states for states to rule over states, let alone without any control.

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scholars who remain reluctant to express criticism do not succumb too easily to the temptation to which I alluded at the outset – that is, the temptation to develop the subtlest arguments in order to justify any action or inaction of the UN. In my view, this is especially true, as far as the Security Council is concerned, of Western scholars, who seem to be more willing to recognize implied powers of the Security Council than they are for other UN organs.<sup>35</sup>

Let me recall two significant examples. It is common knowledge that the governments of the Third World and Communist countries maintained in the 1960s and early 1970s (not without some support on the part of various international lawyers) that a normative function should be recognized as belonging to the General Assembly as a matter of implied power. Such argument referred specifically to the question of the normative force of the General Assembly's declarations of principles. It was widely held then that, since the development of certain areas of international law was of vital interest to the international community and as the Assembly was, so to speak, the 'most representative' organ of that community – two points on which one and all could agree – then that organ should be recognized as being endowed with an implied power to adopt – under certain voting or consensus conditions – norms binding on states. I dealt with this theme, in a course at the Hague Academy, in 1972 and maintained the lack of substance of that notion on the very basis of a criticism of the constitutional theories of international law and organization. I well remember the approval, which in some instances was enthusiastic, with which my attempt at demonstration was received. The authoritative Australian scholar Julius Stone wrote in such glowing terms of my position that I would well wish someone to read those pages at my funeral.<sup>36</sup>

A rather different experience has befallen this author in the course of the past three years when he found himself contesting certain applications of the doctrine of implied powers to the Security Council. As Special Rapporteur for the ILC on state responsibility, I was charged with the difficult task (1994-96) of proposing draft articles to cover, also by some progressive development, those most serious among international unlawful acts which are singled out as crimes of states in Article 19 of Part One of the ILC project. Conscious of the need that at least the determination of

35 Despite the widespread view, in the words of Koskeniemi, that '[t]extual constraint [to the Security Council's 'authority'] is practically non-existent' (Koskeniemi, 'The Police in the Temple. Order, Justice and the UN: A Dialectical View', 6 *EJIL* (1995) 325, at 327), the present author does not believe that the 'Purposes and Principles' of Articles 1 and 2 and the concept of a 'threat to the peace' of Article 39 are so 'indeterminate' as to be of no use to lawyers in seeking out normative limits to that 'authority'. The trouble is that international lawyers do not probe deeply enough into those provisions, into the whole Charter and into general international law; particularly into the latter, which is still there. But be that as it may of 'textual' constraint, one limit does surely exist to the possibility of the lawful expansion of any UN organ's 'authority'; that limit resides in the realization that expansion cannot rely, as a matter of legal principle and method, on totally or largely false federal analogies and implied powers doctrines. I refer again to the literature cited in note 13 *supra*.

36 J. Stone, *Israel and Palestine* (1981) 40-41, 126-127 and 186; and *Idem*, 'Conscience, Law, Force and the General Assembly', in G.M. Wilner (ed.), *Jus et Societas, Essays in Tribute to Wolfgang Friedmann* (1979) 335-337. I refer here, of course, to that eminent author's views relating to the general legal problem of the effects of General Assembly declarations under international law.

the existence/attribution of a crime not be left to the discretion of single states, I proposed that that determination should be entrusted, in a preliminary political phase, to the General Assembly or to the Council (one or the other, at the discretion of the accusing state(s)); and, in an ultimate decisive legal phase, to the International Court of Justice. My aim in involving the ICJ was to avoid leaving such determination in the hands of political bodies alone; and by also entrusting the Assembly with a preliminary determination of *fumus criminis*, I sought to avoid creating, in favour of the Security Council's permanent members (and their clients), an unjustified immunity from possible charges of criminal conduct.

Unfortunately, this proposal provoked a clash with some members of the Commission – particularly with one – according to whom it was not necessary to disturb either the ICJ or the General Assembly. Their argument centred on the idea that, since most crimes – and not just aggression – constitute a threat to the peace under Chapter VII of the Charter, there was no need for a convention on state responsibility to include provisions in the matter of state crimes. The competence of the Security Council would be quite sufficient for both the determination of existence/attribution of a crime to a state as well as decisions on the consequences in terms of Chapter VII measures. In response to the objection that the Council's task is limited to maintaining the peace and does not extend to acting as judge, the above unmentioned colleague argued, in substance, that the subject was covered by the Council's implied powers, which he recognized as extending to both the judicial and the legislative function. Not only did the argument that the Charter is not, or is not quite, a constitution go completely unheeded, but so too did the point that it would be more logical (while ensuring that the last word would remain with the Hague Court) to vest the General Assembly, or at least *also* the General Assembly, with the competence to make the preliminary determination of *fumus* of existence/attribution for crimes other than aggression, namely the crimes against self-determination, against human rights or the environment.

I need hardly add that my unmentioned colleague managed to prevail almost entirely, thanks not only to the absence of various members and to what rightly or wrongly seemed to me a certain inertia on the part of others, but also thanks to the argument that my proposals would require modifications to the Charter: a point with regard to which I had not been able to persuade the Commission to hold a discussion worthy of the importance of the issue.<sup>37</sup> The matter of crimes has remained, it is

37 The situation looked so grim to the present author that he resigned from the post of Special Rapporteur before the ILC Drafting Committee began to finalize the articles relating to crimes. In addition to what I believed to be a preconceived refusal on the part of the majority of the ILC to at least engage in a serious discussion of the Special Rapporteur's concern regarding the autonomy of the law of responsibility from the law of collective security (and still more from incursions of the Security Council founded on arbitrary interpretations of the Charter), there were also other factors which led to my decision to resign. The fact that, for reasons beyond my control, my candidacy as a member of the ILC for the five-year period 1997-2001 was not to be renewed, which meant that I could not have maintained the role of Special Rapporteur on the draft Convention for the second reading, weakened my position just at the time when the first reading of the draft was being completed, with the finalization



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true, in the state responsibility project; but the relevant part of the draft does not envisage the slightest role for either the General Assembly or the Court. Mention is not even made of the Security Council. In point of fact, this organ is not referred to because, according to the majority of the Commission, the Council is supposed to deal with state crimes in the exercise of powers implicitly granted it by the Charter within the framework of its competence to provide, under Articles 24 and Chapter VII, for the maintenance of international peace and security.<sup>38</sup>

It should be added, before closing, that the concerns that have prompted this piece of writing are not confined to the doctrine of implied powers and the dangers of its abuse; dangers for which too many of my colleagues do not seem to perceive the necessity to find some remedy.

As far as international legal scholars are concerned, I find two tendencies dangerous – and both are also present within the Italian School of international law. The first is the tendency to justify in law anything that happens in the UN by assuming too easily either the modification or abrogation of Charter rules by tacit agreement or through the formation of customary rules; rules which, if need be, would change when the UN practice changes direction. I would feel more confident about the future of the UN if, every so often, one were to find that there had been no modification of the law, that the article of the Charter had not disappeared, but that it had suffered, purely and simply, a breach; and likewise, that no customary rule had come into being or vanished.

The second tendency finds expression in a recently published book,<sup>39</sup> which expounds, in more than one of its chapters, a thesis which in a certain manner adds – alongside the problems I fear may derive from the doctrine of implied powers – the possibly greater problems which could arise from combining the privileged condition of certain states in the Security Council with the condition of strength they would also enjoy legally, according to opinions expressed in the book, under general

of those provisions on international state crimes which raised the question of the delimitation of the powers of the Security Council.

I could no longer make use, then, of the continuity of the position of Special Rapporteur, a fact which in the previous session had enabled me to obtain from the *plenum*, albeit with difficulty, the handing down of the proposed articles to the Drafting Committee. Other factors also worked in favour of positions of the kind held by the above-mentioned colleague prevailing in the project: the absence from the session of numerous members of the ILC; the general fatigue (frequent in the last year of the five-year mandate); and the imminence of the elections for the successive quinquennium. I could not avoid the impression that in the ILC, as in the whole of the UN, certain 'strong' influences make themselves felt more than is desirable.

38 The implied subjection of the law of state responsibility to the possible incursions of a restricted political body which has no competence in the area of state responsibility was aggravated by the fact that the ILC state responsibility project also included a general provision under which the 'legal consequences of an internationally wrongful act of a State set out [in Part Two of the project]' are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security. I refer to Article 39 of the project as adopted by the ILC in July 1996: a provision originally proposed by a previous Special Rapporteur (at a time prior to the revitalization of the Security Council's role which came about after the end of the Cold War) and strongly opposed by the present writer over a number of years.

39 P. Picone (ed.), *Interventi delle Nazioni Unite e diritto internazionale* (1995).

international law itself. These states would apparently operate, '*uti universi*', both on behalf of the international community as a whole, and on behalf of the UN. The fabric of international law – that law which our law professors described to us as being essentially horizontal and inorganic – would thus attain a considerable degree of what some of the authors of the book call the 'verticalization' of international law inside and outside the UN.

This idea frightens me even more than the constitutional theories of the Charter and the federal analogy. In the first place, the process is extended from the Charter to general international law, where one loses even the minimal anchorage that the other doctrinal tendency preserves, albeit formally, in the written document. In the second place, while the constitutional theories have at least the merit of drawing inspiration (albeit in words) from a model of inter-individual social organization, capable in theory of developing towards more acceptable forms of coexistence, the assumed 'verticalization' tends, if I understand it correctly, to present the whole structure of international law, including the UN Charter, as a monstrous pyramid of states placed at different levels, one above the other, according to the relative degree of strength of each unit. This amounts to a translation of hegemony into legally sanctioned hegemony.<sup>40</sup>

Positions such as these cannot fail to influence to some degree the lay world: – and here I am thinking particularly of governments and the media. As regards the former, it must be borne in mind that control of the legality of action of the UN can only come from governments – and from the governments of states other than the strong ones. In UN circles, in New York as in Geneva, it is increasingly assumed that *nothing* can be done at the UN without the consent of certain states.

One wonders what encouragement to resist abuse can ever come, to the governments of the small or weak states, from theories according to which the strong would have acquired the legal powers of a world directorate without being subject to all the obligations of common members, and without submitting to any duty to account for their actions to the states in relation to which they would exercise, through the Council, allegedly legislative and adjudicatory functions not contemplated in any provision of the Charter.

Less fanciful and more realistic legal constructions would also contribute to improved information for the public. Too often the general public receives uncritical presentations of the restricted organ of the UN as a 'directorate', as the most powerful 'organ of the new international order' or as the 'embryo of world government'. People of goodwill rightly place their hopes in the United Nations. But much remains to be done, in a rigorously critical sense, if one does not wish those hopes to be disappointed.

40 In the matter of state crimes, for example, this theory would totally endorse the, in my opinion, retrograde solution adopted by the ILC in the project's articles, referred to above and in notes 37 and 38 *supra*.

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This writer is well aware that the constitutional theory (with the consequent federal analogy) has found support not only among a number of governments, but also in not insignificant, although mostly advisory, *dicta* of the ICJ. At the same time, the governments which might have been expected to put up some resistance to the most striking of recent instances of trespassing by the Security Council have seemed to be inclined, instead, to acquiesce.

The few relevant pronouncements made by the ICJ – a highly respectable body which international legal scholars should not, however, feel obliged to consider any less fallible than the Pope – do not seem to involve issues of a dimension comparable to the crucial general issue which is at stake when discussing the merits of the federal analogy and the applicability of the implied powers doctrine to the UN. This latter issue is nothing less than the question whether the 'being' or 'organism' created at San Francisco in fact possesses the genes or the DNA of the world government to be. Be that as it may, there are also signs of reaction on the part of dissenting judges, some scholars and a few governments – signs which should give cause for serious meditation among the adherents to the federal analogy thesis and which give this author cause for encouragement to further pursue his investigation.

As regards governments, it is possible that the passivity displayed by many of those governments which would have reason to resist the misuse of the implied powers doctrine may be traceable to ephemeral causes. One cause could be an inadequate perception of the present and future implications of the doctrine for the preservation and promotion of the rule of law in the inter-state system. Another reason might be what I would call the 'parliamentary analogy syndrome': that is, the illusion which persons acting as delegates or experts in a UN body may readily develop that they are involved in the work of one or the other of the branches of a real world parliament: a syndrome that may well lead to acquiescing, for the sake of supposedly progressive steps towards world government, to abusive interpretations of the Charter. Both of these factors would surely be reduced if scholars were more willing to voice adequate criticism whenever necessary.<sup>41</sup>

Be that also as it may, even if one were to admit, on further reflection, that a certain federal analogy may be justified in the Charter, the considerations developed in the preceding pages should serve at least to prompt some moderation. Surely, it is one thing to use the doctrine of implied powers for a broad interpretation of powers actually attributed to an organ by the Charter *within the overall function* that that organ is called on to perform; it is another thing to use that same doctrine to justify the exercise by an organ of a function which is not envisaged, either for the UN as a whole or for that organ in particular. A more accurate study of American constitu-

41 An additional factor may also be the belief among some young Third World participants in UN bodies - pointed out to me as a curiosity by that keen observer of international legal and political affairs, who was Roberto Ago - that any international law in existence since 1946 is the law of the UN Charter; a naive (although somewhat understandable) belief which may lead the lawyer delegate to put all his eggs into the more easily manipulable 'UN law' basket, while neglecting the support offered - to new states as well as the old - by a hopefully well alive general international law.

tional practice, which I have not as yet been able to undertake, could most likely throw more light on the difference.

A distinction also needs to be made between one political organ and the other, and between the kinds of action to be deployed. It is one thing to overtly apply the doctrine to an organ representing on a general and equal basis the entire UN membership (where all concerned can see and judge); it is another thing for it to be applied by and within a body whose membership is of restricted composition and which displays unequal voting rights. Again, it is one thing to broaden the scope of a recommendatory function; it is another to broaden the scope of decision-making. The current trend quite clearly appears to present a danger of undermining the statutory structure of an organization which, according to widespread opinion, was conceived as a *forum* for discussion and cooperation among equal states – including the implementation of what I consider to be the unequal alliance element of Chapter VII – and not as the embryo of a super-state.

The crucial point is that it is very hard to conceive as a normal development of the 'organism' created by the Charter the fact that the Security Council turn itself *proprio motu*, and without adequate control by the entire membership, from the *gendarme* that the founders are generally considered to have created, into the supreme legislative, judicial and executive organ of a super-state. It seems reasonable to assume that, had the founders envisaged the possibility of such a dramatic development, they would have provided for adequate guarantees. If any governments are really inclined to transform the UN into a super-state, they should call upon the whole membership to participate in a properly prepared constitutional reform, however difficult that would surely be. But what no government should seek to do is to use the UN as an instrument of its own foreign policy. To do so could seriously undermine the future of the 'organism' created at San Francisco, whatever its true nature may be.