

THE TELEOLOGICAL TURN IN THE LAW OF INTERNATIONAL ORGANISATIONS

TIM CLARK* 

Abstract International organisations are inherently purposive actors within the international legal system, created and empowered by States to pursue finite common objectives. This teleological dimension has come to play a prominent role in the way in which international law rationalises international organisations, with their purposes given a significant, often determinative, role in delimiting their competences. This article argues that this is the product of a conscious shift in legal reasoning that took place in the aftermath of World War II. Through an analysis of a series of key post-War decisions, it identifies the common features of this ‘teleological turn’ and, disentangling it from other forms of legal reasoning, examines its unique underlying logic and normative claims. It demonstrates that while the teleological turn offers prospects for the systemic development of international governance, an increasingly abstract approach to the concept and identification of an organisation’s ‘purpose’ raises a number of unresolved questions which cast a shadow of indeterminacy over the law of international organisations.

Keywords: public international law, international organisations, teleology, treaty interpretation, object and purpose, International Court of Justice, European Court of Justice.

I. INTRODUCTION

In today’s world, international organisations are the Rorschach Test of the global community. Much like Dr Rorschach’s ambiguous ink-blot,¹ the way in which different actors respond to international organisations—and the images of threat or opportunity they see reflected in them—reveals as much about their own perspective on supranational governance as it does about the organisations themselves. The nationalist sees an existential threat to

* PhD Candidate, University of Cambridge, tdc35@cam.ac.uk. I am grateful to Eyal Benvenisti, Fernando Lusa Bordin, Michael Waibel, and two anonymous reviewers for their invaluable feedback on earlier versions. A working version of this article was presented at the Annual Conference of the Society of Legal Scholars in September 2020, and I thank the participants for their helpful comments. My research is funded by the Cambridge Trust and Cambridge Australia Scholarships.

¹ H Rorschach, *Psychodiagnostik* (2nd edn, Hans Huber 1932).

sovereignty,² the diplomat sees a carefully negotiated contractual bargain, the cosmopolitan sees the ‘highest secular cause on earth’, a ‘road to the future’ leading to ‘the world as it ought to be’.³ This polarisation is particularly acute at present. The seventy-fifth anniversary of the United Nations has produced a narrative of renewed multilateralism, with the fulfilment of ‘the promise of the nations united’ presented as the only answer to humanity’s shared challenges.⁴ At the same time, a new wave of scepticism of multilateral institutions and their mandates is breaking across the West. The Trump Administration gave notice of the United States’ withdrawal from the World Health Organization (WHO), having raised concerns as to its ability to fulfil its purposes,⁵ following on the heels of its withdrawal from UNESCO and the Human Rights Council⁶ and an aborted attempt to withdraw from the Universal Postal Union.⁷ Meanwhile, across the Atlantic, the British Prime Minister has framed Brexit as a process of ‘recaptured sovereignty’ in the face of an organisation which has ‘evolved ... in a direction that no longer suits [the United Kingdom]’,⁸ while the German Constitutional Court has revived its long-standing rivalry with the European Court of Justice (ECJ), rejecting an ECJ judgment endorsing the European Central Bank’s Public Sector Purchase Programme in the face of claims that the intergovernmental bank had exceeded its monetary policy mandate.⁹ That international organisations can engender this diversity of reactions reflects their complex ontology as legal actors that are, on the one hand, created to autonomously pursue specific functions or objectives and yet, on the other, are designed to operate within a carefully controlled sphere of limited powers delegated by States. The central thread that runs through this dual nature, however, is that all international organisations are created for a *purpose*.

This article explores the way in which international law has made use of this purposive nature to empower and regulate international organisations through the use of teleological reasoning; that is, forms of legal argument or justification that ‘[make] some essential use of the notion that something ... is an end or goal to which something else is, or is seen as, a means’.¹⁰ The idea that these

² ‘Bolton’s Remarks on the International Criminal Court’ (*Just Security*, 10 September 2018) <www.justsecurity.org/60674/national-security-adviser-john-bolton-remarks-international-criminal-court/>.

³ Remarks of Arthur Sweetser to UN staff: see IL Claude Jr, *Swords into Plowshares* (3rd edn, Random House 1964) 405. On this sentiment generally, see J Klabbers, ‘The EJIL Foreword: The Transformation of International Organizations Law’ (2015) 26 EJIL 9, 29.

⁴ UNGA Res 75/1 (21 September 2020) UN Doc A/RES/75/1.

⁵ J Galbraith, ‘Contemporary Practice of the United States’ (2020) 114 AJIL 765.

⁶ J Galbraith, ‘Contemporary Practice of the United States’ (2018) 112 AJIL 107; J Galbraith, ‘Contemporary Practice of the United States’ (2018) 112 AJIL 745.

⁷ J Galbraith, ‘Contemporary Practice of the United States’ (2020) 114 AJIL 128.

⁸ E Courea, ‘Boris Johnson heralds “recaptured sovereignty” after Brexit’ (*Politico Europe*, 31 January 2020) <www.politico.eu/article/boris-johnson-heralds-recaptured-sovereignty-after-brexit/>.

⁹ 2 BvR 859/15, Judgment of the Second Senate (5 May 2020).

¹⁰ JL Mackie, *The Cement of the Universe: A Study of Causation* (Oxford University Press 1980) 272.

organisations are purposive creatures is, of course, a familiar one, and has long given both the theory and practice of international organisations in international law a decidedly teleological flavour. On the theoretical plane, purpose permeates functionalism, the predominant theory within this field, and the principal–agent paradigm by which it frames the relationship between the States who delegate certain functions and the organisations that perform them.¹¹ Meanwhile, doctrinal literature over the decades has observed the idiosyncratic methods used to interpret the constitutions of international organisations—in particular, the emphasis given to their object and purpose and to the subsequent practice of the organisation’s organs¹²—as well as individual doctrines produced by such interpretation.¹³

The focus of this article, however, is on international law’s teleological approach to international organisations as a phenomenon in and of itself; a phenomenon which is not necessarily coterminous with processes of constitutional interpretation. Far from an inevitable consequence of their purposive nature, this article argues that the weight given by international law to the purposes of international organisations underwent a conscious shift in the aftermath of World War II. This ‘teleological turn’ was marked by an abandonment of the traditional lenses of contract and sovereignty through which international organisations had typically been viewed in favour of a supranational perspective which saw them not just as a means to an end, but as an end in themselves. By examining this teleological turn, it is possible to both interrogate its underlying logic and assumptions, and identify the questions it raises as to indeterminacy, legitimacy, and wider prospects for the systemic development of international governance.

This article begins by exploring the claim that international organisations are inherently purposive, and the central role of their purposes in the tension between the contractual and constitutional aspects of their nature (Part II). Part III then explores how the role given to these purposes has changed over time. Focusing on a series of key post-War decisions from the early years of the two major supranational projects of the time—the UN and the European

¹¹ Klabbers (n 3) 10, 27. This principal–agent paradigm is also reflected in the ICJ’s jurisprudence, referred to by the Court as the ‘principle of speciality’: see *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, 78; *Jurisdiction of the European Commission of the Danube* (Advisory Opinion) PCIJ Rep Series B No 14, 64.

¹² See, eg, E Gordon, ‘The World Court and the Interpretation of Constitutive Treaties’ (1965) 59 AJIL 794; E Lauterpacht, ‘The Development of the Law of International Organization by the Decisions of International Tribunals’ (1976) 152 Recueil des Cours 377, ch IV; T Sato, *Evolving Constitutions of International Organizations* (Kluwer 1996); C Brölmann, ‘Specialized Rules of Treaty Interpretation: International Organizations’ in D Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012); P Quayle, ‘Treaties of a Particular Type: The ICJ’s Interpretive Approach to the Constituent Instruments of International Organizations’ (2016) 29 LJIL 853.

¹³ See, eg, V Engström, *Constructing the Powers of International Institutions* (Nijhoff 2012) on the doctrine of implied powers or JHH Weiler, ‘The Transformation of Europe’ (1991) 100 Yale LJ 2403 on foundational European doctrines such as direct effect and supremacy.

Economic Community (EEC)—it draws on commonalities in the reasoning of the International Court of Justice (ICJ) and the ECJ, arguing that they reflect a shift from existing forms of purposive interpretation to a broader form of teleological reasoning. Part IV offers an assessment of the underlying logic and implications of this ‘teleological turn’, looking beyond the immediate examples of the ICJ and ECJ to consider the theoretical and practical questions it raises. Part V concludes.

II. INTERNATIONAL ORGANISATIONS AS PURPOSIVE CREATURES

International organisations are inevitably created for a purpose. Unlike States—whose existence is a *sine qua non* of the international legal system—or natural persons, they emerge from the conscious choice of existing legal actors to establish a new entity for a particular reason. In this sense, their purpose is implicit in their creation; ‘the end is in the beginning’, to borrow from Samuel Beckett.¹⁴ The ‘purpose’ of an international organisation refers to the ultimate objective(s) that it was created to pursue, a concept captured succinctly by the Rapporteur at the San Francisco Conference, who described the UN’s ‘purposes’ as:

the raison d’être of the Organization. They are the aggregation of the common ends on which our minds met; hence, the cause and object of the Charter to which member states collectively and severally subscribe.¹⁵

In and of itself, this does little to distinguish international organisations from other legal constructs. After all, all law is purposive to some degree; legislation, contracts, and trusts are all created for the sake of achieving particular objectives.¹⁶ However, the concept of purpose has a particular ontological significance when it comes to international organisations, insofar as it plays a key constitutive role in the two elements which define these actors as a unitary category.

Over the past century, attempts to define international organisations have drawn on various characteristics, including the circumstances of their establishment,¹⁷

¹⁴ S Beckett, *Endgame* (Faber 2009) 41.

¹⁵ ‘Report of Rapporteur of Committee 1 to Commission I’ in *Documents of the United Nations Conference on International Organization* (United Nations 1945) vol 6, 447. A similar description can be found in *Reservations to the Convention on Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23.

¹⁶ See generally A Barak, *Purposive Interpretation in Law* (Princeton University Press 2005).

¹⁷ These circumstances include the nature of their founding members, their founding instrument and/or the legal system under which they are constituted: see, eg, ILC, ‘Draft Articles on the Responsibility of International Organizations’ in *Yearbook of the International Law Commission 2011* (United Nations 2011) vol II(2), 40 (DARIO) art 2(a); F Seyersted, *Common Law of International Organizations* (Nijhoff 2008) 39; JE Alvarez, *International Organizations as Law-makers* (Oxford University Press 2005) 6; F Morgenstern, *Legal Problems of International Organizations* (Grotius 1986) 19; R Higgins, *Problems and Process* (Oxford University Press 1994) 46.

nature of their membership,¹⁸ their autonomy,¹⁹ their legal personality,²⁰ their ‘public interest’ functions,²¹ their permanence,²² and their pursuit of shared purposes.²³ Together, these elements offer a relatively comprehensive list of common features, although in many cases they blur the line between those elements which are fundamental to the nature of international organisations and those which are simply a *consequence* of their nature.²⁴ This multitude of characteristics, however, obscures the simpler reality of two fundamental elements which subsume many of these features and together define the nature of international organisations. They are the two characteristics reflected in the moniker ‘international organisation’; that is, international organisations are ‘international’ (established by States under international law) and they are ‘organisations’ (autonomous institutional entities).²⁵ As will be seen, these two elements sit in tension with one another, but are united in their shared dependence on purpose.

A. The ‘International’ Element: Purpose and Contract

The first element of an international organisation is that it is ‘international’. This does not speak to the territorial scope of its activities, but rather reflects the fact that these organisations owe their existence to binding agreements (almost invariably treaties)²⁶ struck between States²⁷ under international law. It is this intergovernmental collaboration which distinguishes international organisations from other forms of international association, such as non-governmental organisations or transnational corporations.

¹⁸ *In re Hashim* (1995) 107 ILR 405, 421; P Reuter, *International Institutions* (George Allen & Unwin 1958) 214; Lauterpacht (n 12) 388; M Virally, ‘Definition and Classification: A Legal Approach’ (1977) 29 *International Social Science Journal* 58, 59.

¹⁹ *ZM v League of Arab States* (1993) 116 ILR 643, 644–5; C Brölmann, ‘The Legal Nature of International Organisations and the Law of Treaties’ (1999) 4 *Austrian Review of International and European Law* 85, 89; Alvarez (n 17) 6; Seyersted (n 17) 39; Lauterpacht (n 12) 388; Morgenstern (n 17) 22; Reuter (n 18) 214.

²⁰ DARIO art 2(a).
²¹ *Reineccius v Bank for International Settlements* (Partial Award) (2002) 23 RIAA 183, [113]–[118]; J Klabbers, ‘Unity, Diversity, Accountability: The Ambivalent Concept of International Organisation’ (2013) 14 *Melbourne Journal of International Law* 149.

²² P Reinsch, *Public International Unions: Their Work and Organization* (Ginn 1911) 126; Virally (n 18) 59; Reuter (n 18) 214–15.

²³ Virally (n 18) 59.
²⁴ For example, the possession of legal personality is arguable a *consequence* of an international organisation’s institutional autonomy, rather than an essential constituent element: see FL Bordin, *The Analogy between States and International Organizations* (Cambridge University Press 2018) 73.

²⁵ This bipartite approach was adopted, inter alia, by Reuter (n 18) 214–18 and Bordin (n 24) 75. See also Kerr LJ in *Maclaine Watson v Department of Trade and Industry* (1988) 80 ILR 48, 65.

²⁶ A commonly cited exception to the treaty norm is UNESCO’s practice of proposing statutes for new international organisations which enter into force once a certain number of States indicate their acceptance (see ILC, ‘Comments and Observations received from International Organizations’ (12 May 2006) UN Doc A/CN.4/568/Add.1, 6–7). The effect, however, is the same. The relevant question is not one of form, but rather whether a binding agreement has been reached.

²⁷ Or, rarely, by other international organisations exercising powers delegated by States: see, eg, the Agreement for the Establishment of the Joint Vienna Institute, annexed to UN Doc E/1994/115 (24 June 1994).

The agreements establishing international organisations represent a careful balancing of rights and obligations at both a horizontal level (between the contracting States) and a vertical level (between those States and the new organisation). Thus, for example, the States will delegate certain powers to the organisation and establish mechanisms by which those powers are to be exercised (vertical) while also allocating financial obligations and agreeing to recognise certain acts of the organisation as valid and binding as between themselves (horizontal). Since the earliest discussions of the nature of international organisations before international courts, it has been recognised that—as with any binding agreement—their establishment entails the surrender of a certain degree of sovereignty, which States are unwilling to relinquish lightly.²⁸ These sovereignty costs vary. At their most benign, they may involve the acceptance of an obligation to contribute financially to the organisation, or a commitment to recognise certain organisational acts as binding within fields of technical cooperation. But they can also involve more intrusive commitments, such as the surrender (*inter partes*) of rights under customary international law.²⁹

These costs are not borne altruistically. Rather, they can only be explained by reference to the purposes which States expect these organisations to achieve. To use an imperfect analogy, the pursuit (and eventual attainment) of an international organisation's goals operate as a form of consideration which States receive in exchange for the surrender of a measure of sovereign autonomy.³⁰ On the vertical level, the organisation's purposes also operate as the basis for, and limits of, the delegation of certain functions by the States to the organisation, forming a principal–agent relationship in which these purposes demarcate a careful balance between powers delegated and powers reserved.³¹ The consequence of these contractual origins is that the purposes of an international organisation, and the means by which they may be pursued, are negotiated, carefully calibrated and, above all, finite.

B. The 'Institutional' Element: Purpose and Constitution

The second element of an international organisation is that it is 'institutional'. The key requirement here is *independence*; that is, international organisations have a single, autonomous will distinct from that of their members, rather than

²⁸ See, eg, *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture* (Acts and Documents) PCIJ Rep Series C No 1, 174.

²⁹ For example, the surrender of immunity *ratione personae* for heads of State and other senior officials before the International Criminal Court: see Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 27(2).

³⁰ On this trade-off, see, eg, *Certain Expenses of the United Nations* (Advisory Opinion) [1962] ICJ Rep 151, 304 (Dissenting Opinion of Judge Bustamante).

³¹ See (n 11) and accompanying text.

acting collectively on behalf of each of them.³² This is not to say that they are free from all constraints, or enjoy the plenary powers of States.³³ What it *does* mean is that, as the Permanent Court of International Justice (PCIJ) observed, within the constitutional and functional limits laid down for it by its creators, an international organisation is free to exercise its powers to their full extent *as it sees fit*, in pursuit of its purposes.³⁴ This independence is essential for two reasons. First, it allows international organisations to take decisions without the imprimatur of each of its members at every juncture.³⁵ Second, the value of international organisations as a form of international cooperation depends on their autonomy, as it is their independence from any individual State, and their centralisation of action, which enables them to resolve collective action problems and minimise transaction costs.³⁶

Certain institutional requirements flow from this autonomy, notably the necessity of independent organs through which this will may be exercised on a continuous basis.³⁷ However, an institutional framework can only go so far in enabling an international organisation's autonomy. It is here that *purpose* once again takes on a central role, as the exercise of independent will depends on an organisation possessing an understanding of its purpose(s). Its will must be capable of being *directed* at something. Without an awareness of its own longer-term objectives, an organisation would lack the capacity to assess the merits of any course of action, leaving it in an aimless stasis. In this sense, the purposes of an international organisation, given to it by its creators, serve as a vivifying force that transforms its legal institutional structures—the bones of the organisation—into a living institution capable of independent action.

In light of this institutional element, it is clear that alongside their contractual dimension, international organisations also have a *constitutional* dimension, insofar as the agreements establishing them are intended to constitute a new internal legal order which is both empowered and circumscribed by the purposes it is designed to achieve. It is this aspect which prompts the tendency to describe the agreements establishing these organisations using constitutional terminology, a linguistic choice which brings with it certain hermeneutic assumptions.³⁸

³² A El-Erian, 'First Report on Relations between States and Inter-governmental Organizations' in *Yearbook of the International Law Commission 1963* (United Nations 1963) vol II, 165, paras 40–5.

³³ As the ICJ has emphasised: *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 179.

³⁴ *European Commission of the Danube* (n 11) 64.

³⁵ *Reparations* (n 33) 180.

³⁶ K Abbott and D Snidal, 'Why States Act through Formal International Organizations' (1998) 42 *Journal of Conflict Resolution* 3, 8. See also J Klabbbers, 'The Life and Times of the Law of International Organizations' (2001) 70 *Nordic Journal of International Law* 287, 311–12; M Barnett and M Finnemore, *Rules for the World* (Cornell University Press 2004) 22.

³⁷ See, eg, Virally (n 18) 60–1 and Reuter (n 18) 215.

³⁸ As Klabbbers, Peters and Ulfstein have pointed out, 'the qualification of a treaty as a constitution' gives rise to an assumption that teleological interpretation is required, despite there

C. *The Useful Tension in the Purposive International Organisation*

This, then, is the tension inherent in international organisations. They are *contractual*, in the sense that they are born out of a carefully negotiated outcome as to the purposes they are to pursue and the limited means by which they are to pursue them. But they are also *constitutional*, in the sense that, by design and necessity, the agreements establishing them serve as the ‘organic law’³⁹ of autonomous legal orders, suggesting the need for a degree of adaptability so as to sustain and facilitate the operation of a complex legal and institutional ecosystem over time.

This tension serves a useful function by squaring the circle of establishing an actor that is equal parts independent and restrained. International organisations enjoy an independent will, but not a truly ‘free’ will; unlike the will of a natural person, which might be directed towards any number of objectives, their ends are externally fixed. The key to this apparent paradox is the organisation’s purpose, which sits at the intersection of these two contradictory elements. It delimits the parameters of an international organisation’s delegated functions by defining the finite goals that it is designed to achieve; the goals for which its States have agreed to bear certain sovereign costs. At the same time, it facilitates independent action within those parameters, serving as the North Star towards which the new institution’s autonomous will can be directed and which will ultimately shape its normative agenda. The difficulty, of course, is that this important tension between the contractual and the constitutional is fragile. It depends on the maintenance of a careful balance between the two by the organisation, its member States, and those other actors (international and domestic courts, for example) who may interact with it.

This contract–constitution dichotomy has long been observed in both theory⁴⁰ and practice.⁴¹ But it is particularly relevant here as it not only explains the central (and conflicting) roles that purpose plays when it comes to international organisations, but is also the paradigm which shapes the rest of this inquiry. It explains why, when seeking to understand the legal rights and obligations of these actors, it is possible to speak about purpose using the language of both facilitation and limitation. This article traces the way in which these two halves of the essential tension at the heart of international

being inconsistent evidence as to whether this is a necessary consequence of an instrument’s constitutional nature: see J Klabbers, A Peters and G Ulfstein, *The Constitutionalization of International Law* (Oxford University Press 2009) 218.

³⁹ *Effect of Awards of Compensation made by the United Nations Administrative Tribunal* (Advisory Opinion) [1954] ICJ Rep 47, 77 (Dissenting Opinion of Judge Hackworth).

⁴⁰ See, inter alia, Brölmann (n 19) 103; C De Visscher, *Theory and Reality in Public International Law* (PE Corbett tr, Princeton University Press 1957) 253; J Klabbers, ‘Contending Approaches to International Organizations: Between Functionalism and Constitutionalism’ in J Klabbers and Å Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Elgar 2011).

⁴¹ Notably, by the ICJ in *Nuclear Weapons (WHO)* (n 11) 74–5.

organisations compete in international law, and the point at which their balance was upended.

III. INTERNATIONAL ORGANISATIONS AND THE TELEOLOGICAL TURN

According to the predominant periodisation of the history of international institutions, the establishment of the League of Nations in the aftermath of World War I represented the critical moment at which various inchoate ideas and structures in international law were finally transformed into the modern international organisation.⁴² This is certainly true from an institutional perspective; the League was unprecedented in its establishment of a permanent civil service and institutional machinery geared towards the continuous general political (rather than functional) cooperation of States.⁴³ However, the treatment of international organisations' powers, rights and obligations in international law—and the balance between the contractual and the constitutional—remained largely consistent across this juncture. This part argues that while these early years may have seen an *institutional* revolution, the critical moment from a jurisprudential perspective was the 'teleological turn' in the aftermath of World War II, when the purposes of international organisations came to be used as independent tools of institution-building rather than as interpretive aids. International law shifted from viewing international organisations as a means to an end to seeing them as an end in and of themselves, and set about *developing* international law to better suit the multilateral priorities of the post-War era.

These early post-War decades are generally accepted in the literature as an important period of growth for the law of international organisations, when scholars and courts alike began to pragmatically engage with questions relating to their functioning and place in the international legal system.⁴⁴ This part builds on these general analyses by focusing on the role of teleological reasoning and its use as a tool of institution-building. It begins by looking briefly at the dominant pre-World War II approach to international organisations (Section A), before identifying the post-War teleological turn, appearing first in the early jurisprudence of the ICJ (Section B) and then replicated and amplified in that of the ECJ (Section C). Section D distils the common features of this new approach.

⁴² David Kennedy offers the most detailed appraisal of this supposed juncture between chaos and institutionalised order, and its prevalence in scholarship: see D Kennedy, 'The Move to Institutions' (1987) 8 *Cardozo L Rev* 841.

⁴³ GJ Mangone, *A Short History of International Organization* (McGraw-Hill 1954) 128, 139; PB Potter, 'Origin of the Term International Organization' (1945) 39 *AJIL* 803, 806.

⁴⁴ The leading work in this respect is that of Jan Klabbers, whose periodisation of the law of international organisations suggests these post-War years were characterised by comparative scholarship, optimism and pragmatic problem-solving by the courts: Klabbers (n 36) 298–307.

A. International Organisations Prior to World War II

The pre-League history of international organisations is typically told as a history of nineteenth-century public international unions,⁴⁵ although equivalent models of cooperation can be found in both the ancient world⁴⁶ and the Middle Ages.⁴⁷ These were the organisations established by States to coordinate action in various fields of cooperation, from communication to transboundary rivers, as the globalising force of the Industrial Revolution brought the world closer together. At the time, however, these organisations were not seen as the stirrings of supranational constitutionalism; rather they were an expression of sovereignty. This is apparent in Reinsch's early account of the new international unions, in which he draws a clear distinction between an idealistic cosmopolitanism and its vision of a global community, and the more limited internationalism of international organisations.⁴⁸ A globalised world brings with it new global risks, he reasoned, which States are unable to confront alone. Thus he concludes that the 'nation state still remains in the center of the stage' and 'merely utilizes these international organizations for the benefit of its own citizens and subjects'.⁴⁹ This rationalisation of international organisations as an expression of sovereignty recognises these early modern institutions as the continuation of ancient forms of cooperation; namely, the establishment of organisations through the agreement of independent political units, with the voluntary surrender of a degree of sovereign autonomy being exchanged for collectively-achieved benefits in areas of mutual interest.⁵⁰

The end of World War I saw a reshaping of the international institutional landscape, with the advent of the League of Nations and new examples of international cooperation—notably the ILO—with the capacity to directly impact areas of economic and social policy *within* States. At the same time, a new locus of transnational authority arrived in the form of the PCIJ, and the question of the nature of international organisations and their competences quickly entered the docket of the World Court. While this sudden rise in supranational organisation might seem like the logical time for a more constitutional understanding of international organisations to take root—and, indeed, did see a wider shift in scholarship and practice towards the language of constitutionalism⁵¹—the PCIJ's jurisprudence on the subject maintained a

⁴⁵ For a comprehensive early account of these unions, see Reinsch (n 22).

⁴⁶ The Ancient Greek city states formed organisations for the joint management of shared religious sites and collective security pacts: see AER Boak, 'Greek Interstate Associations and the League of Nations' (1921) 15 AJIL 375.

⁴⁷ Notably the Hanseatic League: see Mangone (n 43) 19–20; Reuter (n 18) 39.

⁴⁸ Reinsch (n 22) 141.

⁴⁹ *ibid* 134–7. This perspective was shared by Reinsch's contemporaries: see, eg, L Oppenheim, *The Future of International Law* (Clarendon Press 1921) 11, 16–17.

⁵⁰ On the same model in the context of the Ancient Greek associations, see Boak (n 46) 376.

⁵¹ See particularly GF Sinclair, *To Reform the World* (Oxford University Press 2017) 67–74.

careful balance between the contractual and the constitutional, remaining largely State-centric while making incremental concessions to institutional needs where strictly necessary. From its earliest decisions on the subject, the PCIJ was at pains to emphasise that when it came to interpreting their constituent instruments, it was uninterested in arguments relying on the *sui generis* nature of international organisations, whether those arguments favoured more restrictive interpretation,⁵² expansive teleological approaches,⁵³ or external political or social theories.⁵⁴ As far as the Court was concerned, these institutions were established by treaties, and it was simply interested in what the text of the treaty said.⁵⁵ In this sense, the Court was clearly sympathetic to the contractual side of international organisations, and had little interest in legal innovation.

Nevertheless, the Court's reasoning also reflects an awareness that these treaties established legal orders which were expected to function autonomously, often in spite of constituent instruments which could be laconic or ambiguous. Thus, for instance, it was willing to recognise that the ILO may exercise certain ancillary powers where they were *essential* to the performance of an express function.⁵⁶ Likewise, it was willing to draw on the purpose or spirit of particular institutions where necessary to resolve patent ambiguities arising from their constituent instruments, such as the upper limit of the jurisdiction exercised by the European Commission of the Danube (and the division of competences between the Commission and Romania as the territorial power)⁵⁷ or the process and responsibility for the referral of questions from the Mixed Commission for the Exchange of Greek and Turkish Populations to the President of the Greco-Turkish Arbitral Tribunal.⁵⁸ These were, however, only limited concessions to the constitutional side of the international organisation paradigm, drawing on teleological considerations to resolve ambiguities or lacunae only where such a resolution was essential to the exercise of the existing express powers or functions of the institution.⁵⁹

In fact, despite hints of teleological reasoning, the PCIJ was careful to maintain a balance between the contractual origins of international organisations and their constitutional needs. It recognised that there was a

⁵² *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture* (Advisory Opinion) PCIJ Rep Series B No 2, 23.

⁵³ *Interpretation of the Convention of 1919 Concerning Employment of Women during the Night* (Advisory Opinion) PCIJ Rep Series A/B No 50, 374–5.

⁵⁴ *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer* (Advisory Opinion) PCIJ Rep Series B No 13, 23.

⁵⁵ *Persons Employed in Agriculture* (n 52) 23.

⁵⁶ *Personal Work of the Employer* (n 54) 7, 18.

⁵⁷ *European Commission of the Danube* (n 11) 7, 55–64.

⁵⁸ *Interpretation of the Greco-Turkish Agreement* (Advisory Opinion) PCIJ Rep Series B No 16, 16–26. I am grateful to Reviewer 1 for this point.

⁵⁹ The distinction between this reasoning and the later reasoning of the ICJ and ECJ is considered in more detail in Part IV(A).

link between an organisation's competences and its purposes, and that the latter could be instrumental in resolving ambiguities regarding the former, but was also conscious of the fact that those same competences and purposes represented finite limits on sovereignty negotiated by contracting States.

B. The International Court of Justice and the United Nations

The establishment of the UN was greeted with an overwhelming sense of optimism and expectation.⁶⁰ It was perceived not merely as the establishment of a new international organisation, but rather as a turning point in human history. US lawmakers, who had only a few decades earlier united to prevent US participation in the League of Nations, welcomed the Charter as 'the greatest document of its kind that has ever been formulated', 'a turning point in the history of civilization' and 'the greatest and most hopeful public event in history' foreshadowing 'inexorable tides of destiny ... towards a golden age of freedom, justice, peace and social well-being'.⁶¹

For its early apologists, the UN represented not merely a functional means to an end, like those international organisations that had gone before it. Rather, the achievement of international *organisation* was an end in and of itself. This was mirrored in the work of international lawyers of the time. Hersch Lauterpacht, for instance, equated the establishment of a 'general political organisation of mankind' with the entire cause of international law, considering it to be a means by which the *law* could be perfected.⁶² The relevant question was not how this new vision of world organisation would fit within international law, but rather how international law could be reformed to fit with it.

These winds of change were not immediately apparent at the ICJ. Indeed, in its first advisory opinion, the Court's approach to the Charter was one of caution and continuity, following in the PCIJ's textualist footsteps and treating it as it would any other multilateral treaty, requiring 'a decisive reason' to depart from any 'interpretation other than that which ensues from the natural meaning of the words'.⁶³ The one hint of the changes to come, however, was in the individual opinion of Judge Alvarez, who set out his own vision of an emergent 'new international law' in which international organisations formed part of a 'universal international society' and must develop 'in accordance with the requirements of international life'.⁶⁴ According to Alvarez, this 'new international law'—which he developed through a series of judicial

⁶⁰ Klabbers (n 36) 300.

⁶¹ TM Franck, *Nation Against Nation* (Oxford University Press 1985) 8–9.

⁶² H Lauterpacht, *Oppenheim's International Law* (7th edn, Longmans 1948) vol 1, 335.

⁶³ *Conditions of Admission of a State to Membership in the United Nations* (Advisory Opinion) [1948] ICJ Rep 57, 61–3. See also *ibid* 83 (Dissenting Opinion of Judges Basdevant, Winiarski, McNair and Read).

⁶⁴ *ibid* 67–8 (Individual Opinion of Judge Alvarez).

opinions⁶⁵—required limits to the ‘absolute international sovereignty of States’⁶⁶ and existed ultimately for the purpose of bringing about the ‘well-being of the individual and of society’.⁶⁷ Most importantly, Alvarez regarded the ICJ’s role in this new international law as one of facilitation. The fact that the new law was ‘in formation’ required the ICJ ‘to develop it’ through its jurisprudence, while consciously avoiding the international law of the pre-War years.⁶⁸

As it happened, Judge Alvarez did not have long to wait to see his vision of a ‘new international law’ begin to take shape. Within a year of this first opinion, the Court issued its second—its landmark *Reparations* opinion—which had been requested by the General Assembly following a series of attacks against UN agents during the Arab–Israeli War in 1948. Faced with the financial burden of medical and funeral expenses and indemnity payments to bereaved families, the General Assembly sought the Court’s advice as to whether the UN was capable of bringing an international claim against a State responsible for the injury of one of its agents, for damage caused to either the UN itself or the victim.⁶⁹

This opinion is widely remembered for the Court’s affirmation of the UN’s international legal personality, and its consequent capacity to seek reparation for its own losses.⁷⁰ For present purposes, however, it is the Court’s second conclusion that is most relevant; namely that the UN was capable of claiming reparation for damage suffered by its agents on *their* behalf.⁷¹ In other words, the Court attributed to the UN the right to exercise diplomatic protection vis-à-vis its employees, which had until then solely been the responsibility of States with respect to their nationals.⁷²

It is the reasoning used by the Court to arrive at this conclusion, in a situation where the express terms of the Charter offered no answer, that is of particular interest. According to the Court, the ‘rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice’.⁷³ This is, in essence, a restatement of the functional view of international organisations that the PCIJ had adopted in *European Commission of the Danube*,⁷⁴ although it is notable that the Court acknowledged the possibility of implicit *purposes*, in addition to implicit powers or functions. Building on this

⁶⁵ See, in particular, his opinions in *Reparations* (n 33); *Effect of Awards* (n 39); *Genocide* (n 15); *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) [1950] ICJ Rep 4; and *International Status of South-West Africa* (Advisory Opinion) [1950] ICJ Rep 128.

⁶⁶ *South-West Africa* (n 65) 176 (Dissenting Opinion of Judge Alvarez).

⁶⁷ *Effect of Awards* (n 39) 70 (Dissenting Opinion of Judge Alvarez).

⁶⁸ *South-West Africa* (n 65) 176 (Dissenting Opinion of Judge Alvarez).

⁶⁹ UNGA Res 258 (III) (3 December 1948).

⁷⁰ *Reparations* (n 33) 179–80.

⁷¹ *ibid* 184. ⁷² *ibid* 196 (Dissenting Opinion of Judge Hackworth). ⁷³ *ibid* 180.

⁷⁴ *European Commission of the Danube* (n 11) 64.

foundation, however, the Court then set out its understanding of the doctrine of implied powers:

Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.⁷⁵

Considered in isolation, this doctrine has a compelling logic that can be tied back to orthodox methods of treaty interpretation. According to the Court's formulation (as opposed to its *application*) of the doctrine, a power may only be implied where it is *necessary* for the performance or achievement of an express power, function, or purpose.⁷⁶ According to this logic, an implied power is not invented to fill a lacuna; rather, it was always there to begin with as an integral, if implicit, component of the parties' express terms, without which those terms would be meaningless.⁷⁷ In this purest of forms, therefore, the doctrine of implied powers is little more than an application of existing notions of good faith treaty interpretation.⁷⁸ As a form of legal reasoning, it is ultimately based on textual, not teleological, considerations.

However, while the Court's justification for its doctrine of implied powers may have been expressed in terms of necessity, its actual reasoning reflects a different reality. According to the majority, the UN's implicit power to raise protective claims on behalf of its agents was necessitated by the purposes and functions of the UN, which required them to work in 'disturbed parts of the world'.⁷⁹ Given the requirement of independence incumbent on UN employees,⁸⁰ and the risk that their home States may be unable or unwilling to exercise diplomatic protection in connection with their UN missions, the majority concluded that the UN's member States *must* have intended to grant the fledgling organisation the legal capacity to bring diplomatic claims previously enjoyed only by States.⁸¹

The difficulty with this claim, of course, is that such a power is not necessary. The majority's reasoning conflates the necessity of overcoming a problem with the necessity of a particular solution.⁸² Thus, it is hard to disagree with the fact that UN agents in conflict zones should be able to rely on some form of protection. One solution to this problem was an implied power of functional diplomatic protection. This option was no doubt ideal from the UN's

⁷⁵ *Reparations* (n 33) 182.

⁷⁶ *ibid* 182, 184.

⁷⁷ As Judge Hackworth put it, '[t]he doctrine of implied powers is designed to implement, within reasonable limitations, and not to supplant or vary, expressed powers': see *Effect of Awards* (n 39) 80 (Dissenting Opinion of Judge Hackworth).

⁷⁸ See Part IV(A).

⁷⁹ *Reparations* (n 33) 183.

⁸⁰ UN Charter, art 100.

⁸¹ *Reparations* (n 33) 183–4.

⁸² Judge Badawi Pasha described this distinction in his dissent, arguing that the recognition of an implied power would require the Court to show 'that the *suitable protection* to be afforded by the Organization to its agent is precisely *the right to claim the reparation due to him*. This right is evidently not the only suitable method of protection': *ibid* 214 (Dissenting Opinion of Judge Badawi Pasha) (emphasis in original).

perspective,⁸³ and was certainly an *efficient* solution to a legitimate problem facing the organisation, but it was not *necessary*. For example, one simple alternative would have been for the UN to assure its agents of reparation under their employment contracts and then claim that amount as damage to the organisation from the offending State.⁸⁴ This would offer the same protection, in an arguably ‘more direct, more effective and more immediate’ manner, while remaining squarely within the power of the organisation to bring claims in its own right.⁸⁵ Alternatively, if member States *did* want to resolve the problem by delegating their power of diplomatic protection to the UN, it was always open to them to do so by express agreement.⁸⁶ Thus, while it may have framed its reasoning in the language of necessity, the test advanced by the Court in practice was one of expediency, resting not on the textual basis that an asserted power was essential to the fulfilment of the express terms of the Charter, but rather on the *teleological* ground that such a power would enhance the UN’s ability to fulfil its mission.

The significance of this jurisprudential development was not lost on the Court’s judges. Judge Alvarez, unsurprisingly, welcomed the decision as according with his vision of ‘the new international law’, describing it as an ‘exercise of the power, which I recognise the Court as possessing, to develop international law and to contribute to its creation’.⁸⁷ By contrast, a number of his fellow judges were less impressed, describing the majority reasoning as a ‘liberality of judicial construction’ transcending the text of the Charter⁸⁸ and an example of reasoning *de lege ferenda* which ‘introduce[d] a new rule into international law’.⁸⁹ Nor did its significance escape the attention of contemporaneous scholars, who presciently identified the ‘far-reaching consequences’ of the new principle of construction laid down for the Charter⁹⁰ and suggested that its ‘astonishing amount of progressive restatements of international law’ would see the opinion ‘referred to more and more’.⁹¹ Perhaps most telling of all was the reaction of the UN itself, which hailed the decision as one which ‘laid down a principle of

⁸³ I Kerno, ‘Court Opinion Gives Judicial Recognition’ (1949) 6 United Nations Bulletin 438.

⁸⁴ *Reparations* (n 33) 216 (Dissenting Opinion of Judge Badawi Pasha). ⁸⁵ *ibid.*

⁸⁶ *ibid* 204 (Dissenting Opinion of Judge Hackworth); *ibid* 217 (Dissenting Opinion of Judge Krylov). Indeed, some members of the Sixth Committee had earlier supported referring the question of a multilateral convention on the UN’s capacity to bring legal claims to the ILC: F Blaine Sloan, ‘Reparation for Injury to Agents of the United Nations’ (1949) 28 Neb L Rev 401.

⁸⁷ *Reparations* (n 33) 190 (Separate Opinion of Judge Alvarez). See also *South-West Africa* (n 65) 177 (Dissenting Opinion of Judge Alvarez).

⁸⁸ *Reparations* (n 33) 199 (Dissenting Opinion of Judge Hackworth). Judge Winiarski agreed.

⁸⁹ *ibid* 217–18 (Dissenting Opinion of Judge Krylov).

⁹⁰ Y Liang, ‘Reparation for Injuries Suffered in the Service of the United Nations’ (1949) 43 AJIL 460, 477.

⁹¹ E Hambro, ‘A Case of Development of International Law through the International Court of Justice’ in GA Lipsky (ed), *Law and Politics in the World Community* (University of California Press 1953) 250.

construction' and established principles that would 'lay a firm foundation for future development'.⁹²

This disconnect between the Court's language of necessity and the teleological approach that it applied in practice was further entrenched when the Court returned to the subject of implied powers five years later in its *Effect of Awards* opinion. The Court was asked whether the General Assembly could refuse to implement awards made by the recently established UN Administrative Tribunal,⁹³ requiring it to consider whether the General Assembly had the implicit power to establish a tribunal capable of issuing judgments binding on the UN itself. The UN's immunity before national courts and the lack of any express mechanism in the Charter for resolving 'inevitable' staff disputes risked leaving aggrieved staff members with no means of redress, a situation the Court considered to be inconsistent with the 'expressed aim of the Charter to promote freedom and justice for individuals'. Consequently, the Court concluded that such a mechanism was 'essential to ensur[ing] the efficient working of the Secretariat', and that the power to establish it arose 'by necessary intendment out of the Charter'.⁹⁴

As with its reasoning in *Reparations* that the UN's agents needed some assurance of protection in the field, this initial conclusion of the Court appears entirely reasonable. This is particularly so with respect to the establishment of the Administrative Tribunal, since the Charter itself confers on the General Assembly the express power to establish staff regulations⁹⁵ and 'establish such subsidiary organs as it deems necessary for the performance of its functions'.⁹⁶ Yet once again, as in *Reparations*, the Court conflated the necessity of overcoming a particular deficiency in the Charter with the necessity of a particular solution (viz the establishment of a tribunal *capable of binding* the UN). Certainly, the creation of such an independent judicial body may well have been the solution most aligned with the abstract organisational *telos* of promoting 'freedom and justice for individuals', but an ideal solution is not necessarily an essential one. In fact, as Judge Hackworth noted in his dissenting opinion, such an implied power was arguably in conflict with the terms of the *express* power of the Assembly to create *subsidiary* organs, which must by definition be subject to the Assembly's oversight.⁹⁷

Unlike its reasoning in *Reparations*, however, the Court confronted this issue directly, examining the argument that 'an implied power can only be exercised to the extent that the particular measure ... can be regarded as absolutely essential'.⁹⁸ In a marked softening of their own threshold for implied powers, the majority concluded that while:

⁹² Kerno (n 83) 439, 468.

⁹³ *Effect of Awards* (n 39) 48.

⁹⁴ *ibid* 57.

⁹⁵ UN Charter, art 101(1).

⁹⁶ *ibid* art 22.

⁹⁷ *Effect of Awards* (n 39) 80–1 (Dissenting Opinion of Judge Hackworth).

⁹⁸ *Effect of Awards* (n 39) 58.

[t]here can be no doubt that the General Assembly ... could have set up a tribunal without giving finality to its judgments ... the precise nature and scope of the measures by which the power of creating a tribunal was to be exercised, was a matter for determination by the General Assembly alone.⁹⁹

It is difficult to reconcile this approach with the Court's own 'necessary intendment' test for implied powers. Not only did the Court acknowledge that the power to establish a tribunal capable of binding determinations was not essential to resolve the gap in the Charter's express terms, it also clarified that the capacity to determine the necessary scope of implied powers rested with the organisation itself, rather than the Court.

Thus, in the space of five years, the ICJ succeeded in first weakening, and then severing, the textual connection between an international organisation and its purposes on the one hand, and its member States on the other, with the *Effect of Awards* opinion completing the legal development the Court had started in *Reparations*. Through the combined action of the two opinions, the Court established a new teleological approach to international organisations whereby legal outcomes could be justified, not on the basis that they were essential to operationalising a particular textual provision in a treaty, but because they were capable of advancing the wider objectives of the organisation.

C. The European Court of Justice and the European Economic Community

Barely a decade after the establishment of the UN, another major project of supranational governance was beginning. In 1957, six European States signed the Treaty of Rome, bringing into existence the EEC,¹⁰⁰ with the aim of establishing a common market between them, harmonising their economic policies and activities and bringing about economic expansion, stability, a rise in living standards and closer relations.¹⁰¹

Overseeing the 'interpretation and application' of the Treaty of Rome was the ECJ, continuing in a role it already fulfilled within the European Coal and Steel Community.¹⁰² As with the ICJ in the early years of the UN, the ECJ's jurisprudence was instrumental in shaping the new organisation. The most important of these early cases were *Van Gend en Loos*¹⁰³ and *Costa v ENEL*,¹⁰⁴ two landmark decisions which reshaped the new European legal order within the space of two years by establishing the doctrines of direct

⁹⁹ *ibid.*

¹⁰⁰ Treaty Establishing the European Economic Community (signed 25 March 1957, entered into force 1 January 1958) 298 UNTS 3 (Treaty of Rome). This treaty, in amended form, is now the Treaty on the Functioning of the European Union.

¹⁰² Treaty of Rome, art 164.

¹⁰³ Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

¹⁰⁴ Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.

effect and supremacy. These totemic cases have generated a voluminous body of literature in the decades since they were decided,¹⁰⁵ and the purpose of this section is not to revisit these decisions in detail. Rather, its purpose is to see how the teleological turn that began in the early years of the UN is replicated and amplified in the experience of the EEC and the ECJ.

The organisation that is now the modern EU is, of course, something of an outlier within the universe of international organisations. The degree to which it has succeeded in establishing a self-contained constitutionalised system has seen it described as more akin to a form of supranational federal order than an international organisation.¹⁰⁶ Likewise, Community lawyers have, since its earliest days, been at pains to insulate the EU from wider international law.¹⁰⁷ There is, of course, a certain sleight of hand to this. The foundations of its constitutional edifice remain treaties concluded under international law, and its self-contained system can only remain so for as long as its members are willing to operate within it, and to settle their differences within the boundaries of that system without resorting to the general law of State responsibility.¹⁰⁸ Even so, there is no denying that the EU today defies easy comparison to other international organisations.

As it happens, it is this *sui generis* nature that makes the example of the EEC and the ECJ valuable to the present analysis, since the very features which today distinguish it were a *product*, rather than a *cause*, of the teleological turn. The Treaty of Rome was not originally intended to be a vehicle for wider integration; it was the comparatively modest solution that emerged after the more radical attempt to establish a European Political Community had failed in 1954.¹⁰⁹ This was a treaty establishing an international organisation focused on economic integration; it was ambitious, certainly, but it was a limited ambition, at least on the part of its original members who ‘had not collectively embraced the notion of European constitutionalism’ and drew no distinction between European and international law.¹¹⁰ Rather, the very features that now distinguish the EU from other international organisations had their origins in the early years of the EEC, when its legal service,

¹⁰⁵ Two of the leading accounts of these cases and their constitutionalising role within the EEC are Weiler (n 13) and E Stein, ‘Lawyers, Judges, and the Making of a Transnational Constitution’ (1981) 75 AJIL 1. For more recent analysis, see, inter alia, M Rasmussen, ‘From International Law to a Constitutionalist Dream’ in I de la Rasilla and JE Viñuales (eds), *Experiments in International Adjudication* (Cambridge University Press 2019).

¹⁰⁶ See, eg, A von Bogdandy, ‘Neither an International Organization nor a Nation State: The EU as a Supranational Federation’ in E Jones, A Menon, and S Weatherill (eds), *The Oxford Handbook of the European Union* (Oxford University Press 2012); Rasmussen (n 105).

¹⁰⁷ Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* (Opinion of Advocate-General Roemer) [1963] ECR 16, 20; Rasmussen (n 105); M Rasmussen, ‘Revolutionizing European Law: A History of the *Van Gend en Loos* Judgment’ (2014) 12 ICON 136, 146–56.

¹⁰⁸ B Simma, ‘Self-contained Regimes’ (1985) 16 NYIL 111, 126–7.

¹⁰⁹ Rasmussen, ‘Revolutionizing European Law’ (n 107) 141; HW Briggs, ‘The Proposed European Political Community’ (1954) 48 AJIL 110. ¹¹⁰ Rasmussen (n 105) 287–8, 293.

together with the ECJ, used the reasoning characteristic of the teleological turn to construct a normative universe on the modest foundation of the Treaty of Rome. In these early cases it is possible to see a replication of the logic of the earlier ICJ jurisprudence, as well as an illustration of the full creative potential of this new teleological reasoning as a tool of institution-building.

The first of these cases, *Van Gend en Loos*, was referred to the ECJ under Article 177 of the Treaty of Rome—which permitted the domestic courts of Member States to seek preliminary rulings on questions relating to the interpretation of the Treaty—by the Dutch *Tariefcommissie*. A company, Van Gend en Loos, had challenged the application of a tariff applied to chemical imports from Germany on the basis that the rate applied was higher than the rate applicable at the time the Treaty of Rome came into effect, violating the stand-still provision in Article 12. Since the Treaty entered into force, the Netherlands had ratified a Benelux protocol which reclassified the chemical in question under a new tariff heading, resulting in the increase.¹¹¹

It is not the ECJ's interpretation of Article 12 that is important for present purposes, but rather the broader initial principle it was asked to resolve; namely, whether provisions of the Treaty—in this case Article 12—had direct effect within the domestic legal orders of Member States. In other words, did the Treaty create substantive rights for nationals of Member States which domestic courts were obliged to protect?¹¹² This is not a question which is resolved by the text of the Treaty, and it is telling that three of the (then) six EEC Member States made submissions to the Court insisting that Article 12 did *not* have direct effect, as did the Advocate-General.¹¹³ Other than Van Gend en Loos, the only advocate for direct effect was the EEC itself.¹¹⁴

To resolve this question, the ECJ drew extensively on the 'spirit' of the Treaty, including its objective of establishing a Common Market 'of direct concern to interested parties in the Community', its references to the 'peoples' of Europe in its preamble and the direct participation of individuals in organs such as the Assembly.¹¹⁵ It concluded that the EEC constituted a 'new legal order of international law', the subjects of which also included the nationals of Member States on whom Community law conferred 'rights which become part of their legal heritage'.¹¹⁶ As a result, clear, unconditional prohibitions like that of Article 12 created a negative obligation which nationals could benefit from irrespective of its domestic legislative implementation.¹¹⁷

This is the key innovation of the principle of direct effect. It pierces the traditional boundary between the domestic and international layers that is traditionally maintained by international law, which recognises that the question of *how* international obligations are implemented domestically

¹¹¹ *Van Gend en Loos* (n 103) 4–5.

¹¹² *ibid* 3.

¹¹³ *ibid* 7–9; *Van Gend en Loos* (Opinion of Advocate-General Roemer) (n 107) 24.

¹¹⁴ *Van Gend en Loos* (n 103) 6.

¹¹⁵ *ibid* 12.

¹¹⁶ *ibid*.

¹¹⁷ *ibid* 13.

should be resolved by the constitutional law of each State. While the idea of self-executing treaty provisions might be familiar to monist States, the idea of direct effect is anathema to dualist States who require a separate act of incorporation to integrate international obligations on the domestic plane.¹¹⁸

The ECJ extended this new constitutional reality a year later in its decision in *Costa*, which similarly arose through an Article 177 referral. Mr Costa had challenged the compatibility of a law nationalising the Italian energy market with certain provisions in the Treaty of Rome, and the Giudice Conciliatore in Milan sought an interpretation of the provisions from the ECJ.¹¹⁹ Italy, however, raised an important question of admissibility, claiming that the question before the Milanese court only involved the application of domestic law. It objected to a referral which, in its view, was asking the ECJ to determine the compatibility of an Italian law with the Treaty rather than resolve an interpretive question.¹²⁰ Complicating matters further was the position of Italy's Constitutional Court that the principle granting prevalence to later-in-time laws was 'inviolable', and that the Italian Constitution did not give any greater effect to the domestic law implementing the Treaty of Rome than to the later nationalisation law.¹²¹ This raised the prospect that in dualist States in which the Treaty was incorporated into domestic law through ordinary legislation, the effect of the Treaty could be undermined by later inconsistent legislation, a precedent that the Advocate-General suggested would lead to 'disastrous consequences' for the functioning of the EEC.¹²²

The ECJ responded by turning again to the 'spirit' of the Treaty and its overarching purpose in creating 'a Community of unlimited duration' in which Members have permanently limited their sovereign rights and 'created a body of law which binds both their nationals and themselves'.¹²³ The force of this new law 'cannot vary from one State to another in deference to subsequent domestic laws', the Court reasoned, 'without jeopardizing the attainment of the objectives of the Treaty'.¹²⁴

Directly contradicting the Corte Costituzionale, the ECJ consequently established the principle of supremacy as a cornerstone of the new European legal order. This principle complements the direct effect of EEC law by establishing a normative hierarchy in which the new 'Community law' was to prevail over inconsistent domestic law. As with the principle of direct effect, the significance of this doctrine depends largely on one's constitutional context. While the constitutions of some States give primacy to treaty law over domestic statutes, for many others, the consistency of a domestic norm with the

¹¹⁸ On self-execution vis-à-vis direct effect, see Weiler (n 13) 2418–19.

¹¹⁹ *Costa* (n 104) 588.

¹²¹ The Corte Costituzionale judgment is reproduced in *Costa v ENEL* [1964] CMLR 425, 430–6.

¹²² Case 6/64 *Flaminio Costa v ENEL* (Opinion of Advocate-General Lagrange) [1964] ECR 600, 605.

¹²³ *Costa* (n 104) 593–4.

¹²⁰ *ibid* 589.

¹²⁴ *ibid* 594.

State's international obligations is irrelevant to the question of its validity and application before domestic courts.¹²⁵

Neither of these two doctrines appear explicitly in the Treaty, yet their combined effect profoundly reshaped the relationship between the new supranational EEC legal order and the domestic legal orders of its Members. The ECJ had essentially created a new mechanism by which EEC-derived norms could be enforced through the private claims of individuals. Moreover, it co-opted domestic courts, whose decisions would typically exert a greater compliance pull on national authorities than the ECJ, to directly and preferentially enforce the organisation's norms, reducing the possibility that States might breach their new Community obligations.¹²⁶

The relevant issue here is not whether or not this development was a *desirable* outcome; the answer to that will depend largely on one's response to the Rorschach Test that is the modern international organisation. Rather, as with the UN and the ICJ, the question once again is whether this reimagining of the inter-State bargain establishing the EEC was a *necessary* outcome arising from the Treaty of Rome and its purposes. The answer, again, is inescapably that it was not. The Treaty of Rome already contained a mechanism for resolving situations in which a Member State failed to fulfil its Treaty obligations,¹²⁷ giving the Commission and other Members (but not individuals) the right to raise issues of non-compliance, which could ultimately be referred to the ECJ for binding determination. This is compatible with the orthodox understanding of the divide between the international and domestic planes. While States might be free to choose how to implement their EEC obligations on the *domestic* plane (or, indeed, to adopt potentially inconsistent subsequent legislation), they could be held accountable for any failures on the *international* plane, initially through the mechanism provided for in the Treaty and, ultimately, as a matter of State responsibility.¹²⁸

In adopting direct effect and supremacy, the ECJ was not curing a fatal flaw in the institutional regime but rather was adding a parallel process, this time using domestic courts, which offered a new mechanism for the efficient enforcement of EEC norms but which was entirely foreign to the system of compliance envisaged by the original States. It was a solution which certainly enhanced the efficacy of the organisation's supervision regime,¹²⁹ but was not essential to the attainment of its objectives.

¹²⁵ As Germany noted in its submissions in *Van Gend en Loos*: see *Van Gend en Loos* (n 103) 8–9.

¹²⁶ JHH Weiler, 'Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy' (2015) 12 *ICON* 94, 96–8; Weiler (n 13) 2421.

¹²⁷ Treaty of Rome, arts 169–71.

¹²⁸ William Phelan has suggested that direct effect and supremacy are necessary alternatives to inter-Member countermeasures, prohibited by the ECJ in the *Dairy Products* case: see W Phelan, 'Supremacy, Direct Effect, and *Dairy Products* in the Early History of European Law' (2016) 14 *ICON* 6.

¹²⁹ *Van Gend en Loos* (n 103) 13.

D. A 'New International Law' of International Organisations?

Was this really a 'new international law'? While the majority of the ICJ's judges may not have endorsed Judge Alvarez's open calls for judicial creativity and legal reform, their successive decisions in *Reparations* and *Effect of Awards* amounted to the same thing, marking a teleological turn in the law of international organisations which was subsequently replicated and amplified in the ECJ's early constitutionalising jurisprudence. Two salient features in particular are apparent in the experience of the ICJ and ECJ. The first is a shift from teleological *interpretation* to a broader form of teleological reasoning, stretching the distance between text and outcome to breaking point. The second (related) feature is the abandonment of *necessity* in favour of *expediency* as the link between purpose and outcome. These commonalities, and their implications, are explored further in Part IV.

At a broader level, this was not so much a 'new' international law as it was a reimagining of the place of law in international society, at a time in which that society was embarking on bold new projects of international governance. The teleological turn represented a shift from a State-centric contractual vision of international organisations, in which the law was expected to regulate a set of limited vertical and horizontal concessions of sovereignty, to an organisation-centric model of international organisations as nascent constitutional regimes, in which international law as a system was to serve a nurturing, institution-building role. It empowered the advocates of international organisations to use purpose to cloak the aspirational with the legal, offering a more efficient bridge between the *lex ferenda* and the *lex lata*. In an early defence of teleological approaches to the Charter, Judge Azevedo suggested that '[I]teral interpretation will not prevail, even through the sinister adage *fiat justitia pereat mundus*. The aims of the United Nations must be served so that mankind may flourish'.¹³⁰ This rejection of the maxim 'let justice be done, though the world perish' perfectly captures this new vision. Impartial fidelity to the law as envisaged by contracting States was no longer the order of the day; preventing the world from perishing was a more important goal, and international organisations were a vehicle by which it might be achieved.

IV. ASSESSING THE TELEOLOGICAL TURN

While the language of a 'new international law' implies change, the ICJ itself was eager to portray a sense of continuity with existing jurisprudence.¹³¹ Likewise, the idea that international organisations and their underlying treaties could be conceptualised through a constitutional paradigm was

¹³⁰ *Competence of the General Assembly for the Admission of a State* (n 65) 24 (Dissenting Opinion of Judge Azevedo).

¹³¹ *Reparations* (n 33) 182–3, citing the PCIJ's *Personal Work of the Employer* opinion.

emerging prior to World War II.¹³² So what changes, if any, actually emerged from the teleological turn?

This part considers this question, moving beyond the examples of the ICJ and ECJ to assess the challenges and implications of the teleological turn. Section A unravels the logic at its heart, arguing that it marked a shift from extant purposive interpretive practices in favour of a broader form of teleological reasoning. Section B then demonstrates how this logic—premised on an image of institutions with a single, objective purpose—is undermined by the reality of international organisations and the complex web of purposes they embody. Finally, Section C draws this analysis together, offering some conclusions as to the conceptual and practical significance of the teleological turn.

A. The Logic of Teleological Reasoning

The use of teleology as a tool of legal argument is not itself, of course, an innovation of either the teleological turn or the law of international organisations. Purposive forms of interpretation, in particular, are familiar to both domestic and international legal systems.¹³³ Within international law, this typically finds its form in the principle of ‘effectiveness’, often expressed through maxims such as *effet utile* or *ut res magis valeat quam pereat*.¹³⁴ However, these concepts—poorly defined and often used interchangeably¹³⁵—obscure a number of distinct variations on the idea of purpose and effectiveness.

Chief among these are two interpretive principles, which could be described as *absolute* effectiveness and *relative* effectiveness. Absolute effectiveness reflects the semantic idea that legal texts are intended to convey *some* meaning, and so an interpretation which would deprive a text of *any* meaning or effect should be rejected.¹³⁶ Relative effectiveness, by contrast, reflects the presumption that when faced with an ambiguity in the text of a legal instrument, the outcome that better effectuates the purpose of the relevant clause—or the instrument as a whole—should be preferred.¹³⁷ Both, however, are expected to remain within the bounds of a treaty’s text.¹³⁸ These principles are now codified in Article 31 of the Vienna Convention,

¹³² See, particularly, Sinclair (n 51) chs 1–2 on the emergence of this narrative in the context of the ILO.

¹³³ For a comprehensive comparative account in the domestic context, see Barak (n 16).

¹³⁴ See generally A Reinisch and C Braumann, ‘Effet Utile’ in J Klingler, Y Parkhomenko, and C Salonidis (eds), *Between the Lines of the Vienna Convention?* (Kluwer 2018).

¹³⁵ See, eg, the interchangeable use of all three in *Whaling in the Antarctic (Australia v Japan)* (Order of 6 February 2013) [2013] ICJ Rep 3, 34 (Separate Opinion of Judge Cançado Trindade).

¹³⁶ See, eg, *Cayuga Indians (Great Britain) v United States* (1926) 6 RIAA 173, 184.

¹³⁷ See, eg, *Free Zones of Upper Savoy and the District of Gex* (Order of 19 August 1929) PCIJ Rep Series A No 22, 13; *LaGrand (Germany v United States of America)* [2001] ICJ Rep 466, 502–3.

¹³⁸ See, eg, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)* (Advisory Opinion) [1950] ICJ Rep 221, 229.

absolute effectiveness being captured in the ‘good faith’ requirement and relative effectiveness in the ‘object and purpose’ element of the interpretive triptych of text, context, and purpose.¹³⁹

The early jurisprudence of the PCIJ is largely captured within these two interpretive principles of absolute and relative effectiveness. Under this orthodox approach, notions of purpose and effect played a valuable role in helping the Court to determine the meaning of an organisation’s constituent instrument, and resolve ambiguities or lacunae—the upper limit of the European Commission of the Danube’s jurisdiction, for instance—*where essential* to ensuring that express powers or functions were not negated entirely.¹⁴⁰ Its yardstick was one of necessity, which it used to draw logical links between text and outcome. Importantly, therefore, the normative foundation on which the legal outcome rested remained the treaty itself and the consent it embodied. The post-War jurisprudence of the ICJ and ECJ, however, strays well beyond these two interpretive principles into a third, more expansive, notion of effectiveness. It does so in two related respects.

The first is a shift from teleological *interpretation* to a broader form of teleological reasoning. The decisions of both the ICJ and ECJ in relation to the UN and EEC are typically framed as an interpretive exercise, albeit one in which particular emphasis is placed on the object and purpose of an organisation’s constituent instrument. In reality, however, the teleological turn sees the link between text and outcome break down. In *Reparations* and *Effect of Awards*, the ICJ effectively constructs new protective measures for the UN’s fledgling civil service which are absent from the Charter, with emphasis instead placed on the contribution of the outcome to the performance of the organisation’s mission. This is even more apparent in the ECJ’s jurisprudence. While *Van Gend en Loos* and *Costa* involved the interpretation of particular provisions of the Treaty of Rome to determine whether they had direct effect, the Court’s creation of the doctrines of direct effect and supremacy had no basis in the Treaty but were instead justified by reference to the overarching purpose of establishing the Common Market and supporting the functioning of the Community as a uniform independent legal order. These were not questions of the scope of an explicit power or an ambiguous provision; they were entirely new constitutional doctrines which fundamentally altered the understanding of what membership of the EEC required of Members vis-à-vis the relationship between the internal and supranational legal orders. This reasoning is still, in one sense, a form of interpretation, but has shifted from an act of ‘content-determination’ to one of ‘law-ascertainment’.¹⁴¹

¹³⁹ R Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press 2015) 179; ILC, ‘Draft Articles on the Law of Treaties with Commentaries’ in *Yearbook of the International Law Commission 1966* (United Nations 1966) vol II, 219.

¹⁴¹ On this distinction, see J d’Aspremont, ‘The Multidimensional Process of Interpretation’ in A Bianchi, D Peat and M Windsor (eds), *Interpretation in International Law* (Oxford University Press 2015).

The second, related to the first, is the abandonment of *necessity* in favour of *expediency* as the link between purpose and outcome. Both the ICJ and the ECJ sought solutions that were *expedient* for the organisation and its purposes, rather than considering whether they were rendered necessary by the text of the constituent instrument. This development is an important companion to the new form of teleological reasoning just identified, as it establishes that it is possible for a legal outcome to be justified not only where it is an *essential* consequence of an organisation's purposes, or is the more effective of the possible textual outcomes arising from an ambiguity, but also where it simply contributes to that purpose or to the organisation's agenda in its own right.

The teleological turn, therefore, sees a new form of legal reasoning applied in the context of international organisations which relies on purpose as an *independent* normative basis on which legal outcomes can be justified.¹⁴² A tenuous link to a treaty may be maintained, of course, since the purposes or objectives might be derived from a particular treaty provision. But even this link becomes frayed, with the ICJ's recognition in *Reparations* that an organisation may also have *implied* purposes, creating even greater distance between the original bargain of the constituent treaty and a legal outcome reached through teleological reasoning.¹⁴³ It is unhelpful, therefore, to frame this reasoning as an exercise of treaty (or constitutional) interpretation, as this implies that the normative foundation remains the original agreement between States. In reality, the teleological turn sees the task shift from clarifying the content of a fixed constitutional law of an international organisation—aided partly by its purposes—to qualifying new powers, doctrines, or other outcomes, as 'legal' by reason of their contribution to attaining the organisation's purpose; or, as one judge put it in his dissent in *Certain Expenses*, using the organisation's purpose as 'a legal justification for certain decisions, even if these are not in conformity with [its constituent instrument]'.¹⁴⁴

Reduced to its simplest form, then, this teleological reasoning involves (1) the identification of an organisation's purpose; and (2) the justification of a legal outcome on the basis of its capacity to contribute to the attainment of that purpose. Importantly, therefore, teleological reasoning not only involves the identification of a *purpose*, but also a determination as to how it might be (or should be) attained. Whether or not this reasoning is employed as the sole basis for a decision or merely in support of it, its logic rests on the same assumption; namely that if an outcome is capable of advancing an organisation's goals, then a normative argument can be made to justify that outcome. Unlike teleological *interpretation*, the normative heart of

¹⁴² Brölmann refers to a shift from a contractual to an institutional perspective on interpretation: Brölmann (n 12) 523.

¹⁴³ *Reparations* (n 33) 180. Implied purposes are discussed in more detail in Part IV(B)(1).

¹⁴⁴ *Certain Expenses* (n 30) 230 (Dissenting Opinion of President Winiarski).

teleological *reasoning* lies in the purposes themselves, not in any instrument or the agreement that it embodies.

B. *Three Multiplicities*

Once teleological reasoning is understood in this way, three complications become apparent which challenge its underlying logic. These complications—considered in turn below—suggest that while the teleological turn offers techniques for institution-building and reform, it also casts a shadow of indeterminacy over the law of international organisations.

1. *Multiple levels*

The first complication is that the purposes of an international organisation may exist at different levels of abstraction, with no single accepted method by which they may be identified.¹⁴⁵ At the most basic level, it is clear that an organisation's purposes may be *explicit*; that is, those expressly identified as such in its constituent instrument. As the ICJ has made clear, however, an organisation's purposes may also be *implicit*.¹⁴⁶ These purposes are those which, while not explicitly set out in the text, are identifiable on the basis of those purposes which *are* explicit, together with the text of the treaty and other relevant material. They remain, however, specific to the particular organisation itself. There is, however, a third and even more remote level of abstraction which is apparent, here referred to as 'macro-teleology'.¹⁴⁷ This refers to wider systemic objectives, whether of the member States of a given organisation¹⁴⁸ or of the international community as a whole,¹⁴⁹ towards which the efforts of the particular organisation might be expected to be directed.

The most prominent example of this macro-teleology in the ICJ's jurisprudence is found in the Court's use of systemic objectives to support its conclusion that the WHO lacked the competence to request an advisory opinion

¹⁴⁵ On the same phenomenon in the domestic context, see Barak (n 16) 113–15.

¹⁴⁶ *Reparations* (n 33) 180.

¹⁴⁷ This terminology is adapted from Mitchel Lasser's distinction between what he terms 'micro' and 'meta' teleology in the context of EU law and its interpretation by the ECJ: see M Lasser, *Judicial Deliberations* (Oxford University Press 2004) 207–8.

¹⁴⁸ For example, the reforming project of the then-EEC as a mechanism for the ever-closer union of Europe, attributed to the EEC Member States, was the overarching 'spirit' of the Treaty of Rome used to justify the ECJ's early teleological reforms, as seen in Part III(C).

¹⁴⁹ Judge Cançado Trindade, for example, argued in *Whaling in the Antarctic* that the purpose of the International Whaling Commission should be understood to be 'conservation-oriented' in light of a community-wide shift towards conservation evidenced by other, entirely separate, multilateral treaties: *Whaling in the Antarctic (Australia v Japan; New Zealand Intervening)* [2014] ICJ Rep 226, 357–8, 370 (Separate Opinion of Judge Cançado Trindade). This is despite the Commission initially having been established for the (contradictory) purpose of ensuring the sustainable exploitation of whale stocks, before the introduction of a commercial whaling moratorium in 1982: see the Dissenting Opinion of Judge Owada.

on the *Legality of the Use by a State of Nuclear Weapons*. The Court reasoned that in light of the WHO's role as a specialised agency of the UN, delimiting its powers involved consideration of 'the logic of the overall system contemplated by the Charter', with the WHO's 'wide international responsibilities' being 'restricted to the sphere of public "health"' so as not to 'encroach on the responsibilities of other parts of the United Nations system'.¹⁵⁰ In other words, the ICJ was willing to limit the WHO's competence by reference to the purposes of *other* international organisations, a conclusion that is all the more remarkable considering that while their work may be coordinated through the UN system, specialised agencies remain legally independent institutions. In one sense, this use of purposive arguments to curb, rather than bolster, the normative reach of an international organisation represents the inverse of the teleological turn identified earlier. On another reading, however, the ICJ's focus was simply on furthering the wider macro-teleological purposes of international governance by resolving potential competition between two international organisations, thereby enhancing the efficacy of the system.

The possibility that the purposes of international organisations may be identified beyond the explicit terms of their constituent instrument opens far greater possibilities for both their expansion and reform, particularly by reference to broader systemic objectives which they might, as a particular type of international legal actor (or simply by virtue of their membership in the international community) be expected to serve. However, this possibility also raises questions as to the potential indeterminacy of teleological reasoning where international organisations are expected to serve an increasingly abstract series of purposes.

2. *Multiple objectives*

At the very first sitting of the PCIJ, British representative Sir Ernest Pollock spoke of the need for the Court to keep in mind 'the general purpose' of moving towards an enduring peace, before concluding with a Shakespearean quote: 'So may a thousand actions once afoot end in one purpose / And be all well borne without defeat.'¹⁵¹ This rhetorical flourish embodies the fiction that pervades teleological reasoning; namely, that international organisations are unidirectional. International organisations, so the myth goes, are created with a particular goal in mind—whether world peace, trade liberalisation, or the harmonisation of communication standards—and this fixed point of reference can then serve as a normative basis for the attribution of particular powers, rights, or obligations.

¹⁵⁰ *Nuclear Weapons (WHO)* (n 11) 80.

¹⁵¹ 'Speech by Sir Ernest Pollock at the public sitting on June 15th, 1922' (Acts and Documents) PCIJ Rep Series C No 1, 43, quoting Shakespeare, *Henry V*, Act I, Scene 2.

But herein lies the second complication: international organisations do not serve just one purpose. In addition to the variety of explicit aims specified in their constituent instruments, they may also conceivably be expected to contribute to any number of other implicit or macro-teleological goals. Far from being single-minded functional instruments, existing for the attainment of a discrete delegated objective, modern international organisations sit at the centre of a web of potential goals. Moreover, these multiple objectives are not necessarily complementary, meaning that the pursuit of one may undermine another. As Jan Klabbers has observed vis-à-vis the EU, its purposes are as diverse as market integration, the prevention of war and closer political union, all of which ‘are capable of justifying radically different courses of action’.¹⁵²

Consider, for instance, the Inter-Governmental Maritime Consultative Organization, which the ICJ concluded had the general purpose of serving as a ‘consultative’ institution,¹⁵³ together with the objective of encouraging ‘the general adoption of the highest practicable standards in matters concerning maritime safety’ which it pursued through its Maritime Safety Committee.¹⁵⁴ When confronted with an ambiguity as to how to define the ‘largest ship-owning nations’ for the sake of constituting the Committee, the ICJ drew in part on the organisation’s consultative purpose—together with other textual and practice-based arguments—to justify the inclusion of Liberia and Panama on the Committee, despite the fact that their large registered tonnage was a product of their reputation as ‘flags of convenience’; in other words, their qualifying tonnage was arguably a product of their *minimisation* of maritime safety standards.¹⁵⁵ The Court’s decision may have enhanced the consultative objective, by ensuring the inclusion of those States with jurisdiction over much of the world’s registered tonnage, but arguably undermined the goal of maximising standards of maritime safety.¹⁵⁶

The possibility that international organisations might be directed towards multiple purposes, coupled with the availability of three different levels at which those purposes might be identified, is problematic insofar as it undermines the underlying claim of teleological reasoning that certain legal outcomes can and should be justified on the basis that they contribute to the

¹⁵² J Klabbers, ‘What Role for International Organizations in the Promotion of Community Interests? Reflections on the Ideology of Functionalism’ in E Benvenisti and G Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018) 98. Indeed, in *Van Gend en Loos*, the Advocate-General had warned that the adoption of direct effect in the case of Article 12—which the ECJ believed would contribute to the EEC’s purposes—would instead undermine its purpose of achieving a uniform development of the law: *Van Gend en Loos* (Opinion of Advocate-General Roemer) (n 107) 23–4.

¹⁵³ *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion) [1960] ICJ Rep 150, 170–1.

¹⁵⁴ Convention on the Intergovernmental Maritime Consultative Organization (signed 6 March 1948, entered into force 17 March 1958) 289 UNTS 3, art 1(a) (emphasis added).

¹⁵⁵ *Constitution of the Maritime Safety Committee* (n 153) 170–1.

¹⁵⁶ On this conflict, see *ibid* 175 (Dissenting Opinion of President Klaestad).

attainment of an organisation's goal. While the advancement of one purpose may offer a normative basis for a particular conclusion, its undermining of another equally valid purpose creates a countervailing normative force. Faced with any number of potentially contradictory explicit and implicit purposes, teleological reasoning demands value judgments from those who engage in it as they give preference to the attainment of certain goals at the expense of others.

3. *Multiple stakeholders*

The third complication is that no single stakeholder has a monopoly on resolving the questions of what purposes an organisation is (or should be) pursuing and, just as importantly, *how* those purposes should be achieved. Even where the pursuit of a single purpose may be agreed upon, the question remains as to the most effective path to achieving that end, as demonstrated by the various opinions in *Reparations* regarding the most efficient way to obtain compensation on behalf of UN agents. As Edvard Hambro observed to the Grotius Society in 1953, the conflicting views on purpose by the various members of the UN made effective interpretation of the Charter a challenge, since an 'interpretation may for one group of States in the United Nations seem to strengthen and give new life to the organisation whereas other members think it may ring the death knell'.¹⁵⁷

To some extent, divergence between stakeholders on such questions is to be expected in respect of any legal instrument, public or private. But it is felt particularly acutely in the case of an international organisation. In addition to the perspectives of its member States, domestic courts, and horizontal international courts or tribunals, there is the autonomous perspective of the organisation itself, expressed and actualised through its civil servants, institutions and those that advocate on its behalf. While that autonomy is bounded by the purposes it was created to pursue, it also means that the organisation itself will, by design, have its own perspective as to how best to characterise and apply its purposes.

There are murmurs of these diverse voices within the early UN; notably the excitement of Ivan Kerno, the UN's legal adviser, that the *Reparations* reasoning might serve as a 'firm foundation for future development',¹⁵⁸ together with the increasingly activist stance of many of the ICJ's judges who saw international law as a means by which international society could be proactively strengthened. But these murmurs were amplified significantly with the advent of the EEC, where it was the EEC legal service, under Michel Gaudet, that initially formulated the doctrines of direct effect and supremacy, urged their adoption by the ECJ, and enlisted civil society to help

¹⁵⁷ E Hambro, 'The Interpretation of Multilateral Treaties by the International Court of Justice' (1953) 39 *Transactions of the Grotius Society* 235, 239.

¹⁵⁸ Kerno (n 83) 468.

entrench this new constitutional vision of Europe which was entire absent from the Treaty of Rome.¹⁵⁹ Likewise, those ECJ judges who were sympathetic to greater European integration engaged in a period of activism in the aftermath of *Van Gend en Loos* to raise awareness and acceptance of this new development,¹⁶⁰ while Robert Lecourt, a judge in both *Van Gend en Loos* and *Costa*, followed the cases with an article whose title tellingly alluded to ‘judicial dynamics in the construction of Europe’.¹⁶¹ These internal actors not only had their own vision as to the purpose of the EEC, but also—more importantly—a firm conviction as to *how* that purpose could most effectively be achieved. Away from the dockets of international courts, these same dynamics are just as much at play in other international organisations, where purposive justification will often provide the path of least resistance for expansion and reform, compared to the more arduous process of formal amendment at the inter-State level.¹⁶²

Moreover, many of these actors may diverge significantly in the way in which they resolve these twin teleological questions of purpose and how to pursue it. While the organisation itself may be preoccupied with self-preservation or expanding its influence, other international actors could be concerned with broader systemic goals which they attribute to the organisation as a member of the international community, from defragmentation to the efficient allocation of functions between wider networks of international organisations. Meanwhile, State-centric actors might be more concerned with the narrower explicit purposes allocated to an organisation and, more importantly, to their attainment in a manner which involves the least possible infringement of sovereign autonomy. This is apparent from the *Van Gend en Loos* and *Costa* cases—marked by significant differences between Member States, judges, the EEC’s lawyers and domestic courts—but is also a feature of contemporary interactions between States and international organisations, the most recent example being the split between the German Constitutional Court and the ECJ over the scope of the European Central Bank’s mandate.¹⁶³

A particularly pronounced example of these teleological divisions can be found in the early decades of the World Bank; specifically, the approval by the International Bank for Reconstruction and Development (IBRD) of loans

¹⁵⁹ See M Rasmussen, ‘The Origins of a Legal Revolution – The Early History of the European Court of Justice’ (2008) 14(2) *Journal of European Integration History* 77 and Rasmussen (n 105) 294–6.

¹⁶⁰ Antoine Vauchez describes this as a process of ‘judicial ventriloquism’: A Vauchez, ‘The Transnational Politics of Judicialization’ (2010) 16 *ELJ* 1, 13–15.

¹⁶¹ R Lecourt, ‘La Dynamique Judiciaire dans l’Édification de l’Europe’ (1965) 64 *France Forum* 20.

¹⁶² A former World Bank General Counsel has described the ‘road for the expansion of Bank operations’ as being ‘paved by enabling legal opinions’ drawing links to the Bank’s purposes, from the Bank’s own civil service: IF Shihata, ‘The Creative Role of the Lawyer’ (1999) 48 *Catholic University Law Review* 1041, 1048. I am grateful to Reviewer 2 for this point. For a detailed study of these dynamics of expansion and reform, and the role of international organisations themselves, see Sinclair (n 51).

¹⁶³ 2 *BvR* 859/15 (n 9).

to South Africa and Portugal at a time when they were maintaining policies of apartheid and colonialism.¹⁶⁴ In resolutions condemning the conduct of Portugal and South Africa, the General Assembly called on States and international institutions to withhold assistance from the two governments,¹⁶⁵ and specifically called on the IBRD to ‘refrain from granting Portugal any financial, economic or technical assistance’.¹⁶⁶ A year later, with the Bank having continued to lend to both countries notwithstanding the position of the General Assembly, IBRD General Counsel Aron Broches faced a hostile session of the Fourth Committee.¹⁶⁷ Members of the Committee questioned whether the Bank’s lending ‘was consistent with its fundamental *and ultimate* objective ... to enhance the welfare of mankind through economic development’, and whether the Bank should be assessing the compatibility of loans with the UN’s objective of promoting ‘respect for human rights and fundamental freedoms’.¹⁶⁸ Notably, the UN’s Legal Counsel also weighed in, suggesting to the Committee that the largely identical membership between the Bank and the UN meant that the two should share ‘the same objectives’.¹⁶⁹

Broches, on the other hand, considered the Bank’s hands to be tied by the prohibition on political activity in its Articles of Agreement, and its requirement that only economic considerations be taken into account in its decision-making.¹⁷⁰ More broadly, though, the Bank saw itself as an institution designed to fulfil strictly limited purposes, and those purposes were its sole guide in carrying out its functions.¹⁷¹ While it was sympathetic to the ‘various aims’ of the UN, ‘[t]he Bank’s aims were more limited and it was not free to pursue the aims of the United Nations if in doing so it would come into conflict with the Articles of Agreement’.¹⁷² Although he acknowledged that the Bank might be seen to ‘have fallen short of its fundamental objectives’, there was nothing it could do absent constitutional amendment.¹⁷³

This episode captures the complications faced by teleological legal reasoning in the hands of multiple stakeholders, and in circumstances where international organisations can be said to pursue multiple purposes at multiple levels of abstraction. In addition to disagreement as to the purpose(s) of the Bank and their consequences, there was the question of wider implicit or systemic purposes—even those of another organisation—that some thought should

¹⁶⁴ On this episode generally, see ‘Consultation with the International Bank for Reconstruction and Development: Report of the Secretary-General’ [1967] UN Juridical Yearbook 108; Sinclair (n 51) 231–3. ¹⁶⁵ UNGA Res 2105 (XX) (20 December 1965).

¹⁶⁶ UNGA Res 2107 (XX) (21 December 1965).

¹⁶⁷ ‘United Nations: Statements of UN Legal Counsel and IBRD General Counsel on Relations of UN and IBRD and Effect of UN Resolutions’ (1967) 6 ILM 150.

¹⁶⁸ *ibid* 159, 168 (emphasis added). ¹⁶⁹ *ibid* 176. ¹⁷⁰ *ibid* 152–3.

¹⁷¹ Letter from the IBRD General Counsel to the UN Secretariat (5 May 1967), reproduced in ‘Consultation with the IBRD’ (n 164) 121.

¹⁷² ‘Statements of UN Legal Counsel and IBRD General Counsel’ (n 167) 168.

¹⁷³ *ibid* 160.

take precedence.¹⁷⁴ Moreover, these divisions over the purposes that should be guiding the IBRD, and how they should be achieved, ran not only between members of the Bank, but also between those members and the Bank itself, and between the Bank and another international organisation. It illustrates the way in which the outcomes that teleological reasoning may produce with respect to any given organisation—and the reception given to attempts to legitimise particular legal outcomes on the basis of such reasoning—will vary significantly depending on the actor(s) involved and their particular perspective on the purposes (or priorities between purposes) of the organisation.

C. The Problem (and Promise) of Purpose

Recall the dual nature of international organisations, with which this article began. Created by States to achieve particular objectives, they are simultaneously contractual creatures, owing their competences to a carefully calibrated balance between sovereignty costs and the fulfilment of specific purposes, and constitutional creatures, intended to exercise an autonomous will that is shaped and guided by the pursuit of those purposes. This complex ontology leaves international organisations vulnerable to critique on two contradictory fronts. For those who stare into the Rorschachian ink-blot of international organisations and see opportunity staring back at them, organisations will be open to the critique that they are ineffective where they fail to meet the (often lofty) expectations of their mandate. This is particularly acute in times of crisis, when the need for adaptation in response to unforeseen challenges can collide with the reality of functional limitation, as is all too familiar in the recent history of the WHO.¹⁷⁵ On the other hand, for those who see threat, international organisations risk provoking the critique that their evolution and autonomous pursuit of their purposes imperils State sovereignty. Neither the efficacy nor sovereignty critique can ever be fully satisfied, as to resolve one is to exacerbate the other. Efficacy demands empowerment while sovereignty demands restraint.

The common thread running through both aspects of an international organisation's dual nature, however, is its *purpose*. Its purpose motivates the surrender of sovereignty that creates it and guides the autonomous will that vivifies it. This is the reason why teleological reasoning is seen to offer such promise in the law of international organisations; it is capable of regulating the tension between these sovereignty and efficacy critiques by taking a purpose delegated by States and using it as a basis to adapt and equip organisations to effectively pursue their objectives in ever-changing

¹⁷⁴ Some have pointed to even broader systemic objectives that could or should have guided the Bank's conduct, such as the 'preservation and strengthening of international law' as a whole: SA Bleicher, 'UN v IBRD: A Dilemma of Functionalism' (1970) 24 *Intl Org* 31, 40–1.

¹⁷⁵ See, eg, E Benvenisti, 'The WHO – Destined to Fail?' (2020) 114 *AJIL* 588.

circumstances. Moreover, the regulative potential offered by purpose is not limited to its function as a tool of empowerment. It is equally applicable, albeit underutilised, as a source of obligation or restraint;¹⁷⁶ recall, for instance, the argument in the Fourth Committee that the IBRD's lending practices should be constrained by the broader objectives of the UN.¹⁷⁷

In practice, however, the teleological turn raises a number of theoretical and practical problems. The most obvious of these, of course—foreshadowed in the previous section—is indeterminacy. While the logic of teleological reasoning is sound in the context of an organisation with a single, expressly delegated purpose, it collapses when confronted with the complex web of potentially contradictory purposes, existing at various levels of abstraction, that surrounds international organisations in practice, and the multiple stakeholders who may well have very different visions for how those purposes should be pursued. These multiplicities raise a number of unresolved questions. To what extent, for instance, should (or must) international organisations be guided by wider systemic purposes, whether those of other organisations with similar membership or of the international community as a whole? Is it appropriate, in an ever-thickening global community, to continue to see international organisations as teleological silos, as Broches claimed to the Fourth Committee, or should we be looking to the systemic integration not just of norms, but of the objectives of different institutions? And these questions, of course, give rise to others. How are differences between these multiple purposes—explicit, implicit, systemic—to be resolved? Is it possible to speak of a hierarchy between the competing objectives of international organisations or, indeed, to identify preemptory *goals* towards which the efforts of the entire international community, and its institutions, are expected to be directed? The answers to these questions are beyond the scope of this article; but while it may offer opportunities for empowerment and reform, the teleological turn—for as long as these questions remain unresolved—leaves the law of international organisations with no clear benchmark by which the shape, extent and content of their legal regimes may be fixed.

And then there is the problem of States themselves. The teleological turn marked a significant reorientation towards the efficacy of international organisations which, whatever its benefits, inevitably comes at the expense of the sovereignty side of the equation. While this may not pose any difficulty where States approve of (or tacitly acquiesce to) the shifting functions of their organisations, teleological reasoning's stretching (or severing) of the link between text and outcome creates the risk of State backlash.¹⁷⁸ It also

¹⁷⁶ GF Sinclair, 'The Original Sin (and Salvation) of Functionalism' (2015) 26 EJIL 965, 972; Engström (n 13) 108.

¹⁷⁷ See Part IV(B)(3).
¹⁷⁸ As seen, most recently, in the German Constitutional Court's response to the ECB's Public Sector Purchase Programme: see 2 BvR 859/15 (n 9).

fails to account for the fact that sovereignty concerns, and the contractual aspect of an organisation's nature, serve an important function beyond merely the placation of States; they are the ultimate source of democratic legitimacy for the powers exercised by international organisations. While teleological reasoning that seeks to align an organisation's purposes with, for instance, wider systemic goals or values, might offer the prospect of enhancing its outcome-based legitimacy, it risks weakening the source-based legitimacy that comes from State consent.¹⁷⁹ At a more fundamental level, greater reliance on teleological reasoning as a tool of reform risks obscuring the role—and, indeed, the responsibility—of States in properly equipping the organisations they create with the powers and structures they need to effectively achieve their purposes.¹⁸⁰

V. CONCLUSION

The fundamental nature of international organisations remains the same as it was in the aftermath of World War II, even as the world around them has changed dramatically. As argued in Part II, international organisations exist in a space between their contractual origins and institutional reality, creating a tension which is an immutable element of their complex nature as purposive actors within the international legal system. This tension is all the more acute today, as the cosmopolitanism of that post-War era is long gone, replaced by a tide of scepticism of international institutions.¹⁸¹

This article has examined the way in which international law has balanced these two aspects in its use of purpose when rationalising the powers and obligations of international organisations and, in particular, a significant shift in the post-War years from the contractual to the institutional as international courts sought to buttress the complex and ambitious projects of international governance that were being established (Part III). This 'teleological turn' marked a departure from existing processes of constitutional interpretation—teleological or otherwise—in favour of a broader form of teleological reasoning in which the purposes of an international organisation, in and of themselves, took on new significance as a normative basis for legal outcomes. It offered a tool to legitimise incremental law reform, allowing the fleeting moment in which the will of States crystallises in the creation of a

¹⁷⁹ On the distinction between source- and outcome-based legitimacy, and the 'chain of legitimacy' between State consent and organisational action, see R Wolfrum, 'Legitimacy of International Law from a Legal Perspective' in R Wolfrum and V Röben (eds), *Legitimacy in International Law* (Springer 2008) 6–9. See also 2 BvR 859/15 (n 9) [98]–[105].

¹⁸⁰ See Benvenisti (n 175).

¹⁸¹ See generally Klabbers (n 36) 312–17. Klabbers identifies a parallel 'third wave' of scholarship on international organisations, geared towards a more conceptual approach and an attempt to 'rescue organizations from themselves'.

new purposive subject of international law to become a springboard for further expansion.

Disentangling this distinct form of teleological reasoning from broader processes of treaty or constitutional interpretation offers a clearer perspective on its underlying logic and normative claims and, perhaps most importantly, the unresolved theoretical and practical difficulties it poses (Part IV). At the same time, the collective challenges faced today—climate change, health, sustainable development, peace and security—make effective international cooperation as important now as it was in the post-War world. As the complex web of purposes and objectives that permeates the international legal system grows, the question—for States as much as for jurists or international organisations—is whether they can manage the relationships between them, and use them to better empower, regulate and align the efforts of the global community.