THE *BUSTANI* CASE BEFORE THE ILOAT: CONSTITUTIONALISM IN DISGUISE?

I. INTRODUCTION

One of the better qualities of Karel Wellens's recent monograph on remedies against international organizations is that, at least nominally, his is a lengthy plea for a constitutional approach towards international organizations.[1] Whereas traditionally international lawyers (and much of international law perhaps as well) would approach organizations from a functional perspective,[2] in Wellens's view such an approach is no longer advisable, if it ever was: it would fail to do justice to, eg, human rights considerations, as it would often be open to organizations to argue that its functional interests ought to prevail over human rights considerations.[3]

While it seems fair to state that Wellens does neither succeed in consistently upholding his constitutional approach nor in outlining it with great precision,[4] the very idea of a constitutional approach is refreshing and much needed if only because, as the present author has argued elsewhere, the functional necessity approach is fraught with problems and ready to be replaced.[5] The main problem perhaps is that the functional necessity approach is, almost by definition, incapable of setting limits to the activities of international organizations. Despite valiant efforts in the literature to suggest that everything that is not functionally necessary would be difficult to justify,[6] practice nonetheless suggests that it is well-nigh impossible to demonstrate that a certain activity is not necessary from a functional perspective.[7]

A constitutional perspective, then, is in principle to be welcomed. Such a constitutional perspective does not necessarily have much to do with whether or not an

[1] See K Wellens *Remedies Against International Organizations* (Cambridge CUP 2002).

[2] See, eg, HG Schermers and NM Blokker *International Institutional Law* (3rd edn Dordrecht Martinus Nijhoff 1995), at 9–10, under explicit reference to M Virally 'La notion de fonction dans la théorie de l'organisation internationale' in S Bastid et al *Mélanges offerts à Charles Rousseau: la communauté internationale* (Paris Pedone 1974) 277–300. Traces of a functional necessity approach can also be found in Virally's earlier *L'Organisation mondiale* (Paris Armand Collin 1972).

[3] See Wellens, above n 1, at 14–16. See also the seminal paper by M Singer 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns' 36 Virginia Journal of International Law (1995) 53–165.

[4] Indeed, he often resorts to the very type of functional necessity reasoning he would so much like to get rid of. See Wellens, above n 1, eg, at 219. In all fairness though, it would seem that his main ambition was to present an analytical model for remedies rather than establish a full-fledged constitutional approach to international organizations and their activities.

[5] See J Klabbers *An Introduction to International Institutional Law* (Cambridge CUP 2002), 36–9.

[6] The most sophisticated of such attempts is probably P Bekker *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Dordrecht Martinus Nijhoff 1994).

[7] See also Klabbers 'The Changing Image of International Organizations' in JM Coicaud and V Heiskanen (eds) *The Legitimacy of International Organizations* (Tokyo United Nations University Press 2001) 221–55.

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international organization ought to have a formal, written constitution,[8] but is first and foremost concerned with subjecting organizations to some rendition of the rule of law and interested in placing limits on the activities of organizations,[9] in much the same way (too much the same way, perhaps?) as constitutional States are generally held to be States whose acts are limited by law.[10]

To the extent that a constitutional approach relies not only on limits set in an organization's constituent document but relies also on limits emanating from general international law, an obvious question will be whether and if so, why, such general international provisions would apply to organizations to begin with. In other words: why would organizations be bound by rules of international law, assuming that they have not become parties to the relevant conventions?

The answer is by no means obvious and poses a serious challenge to any constitutional approach which would rely on external limits. To be sure, norms of jus cogens would by their very nature bind organizations, but whether such norms exist is still controversial, as is the matter of which norms precisely would be of jus cogens character. Another option could be to further develop and broaden the 'succession' theory first developed by the Court of Justice of the European Community and holding that the organization can succeed, in limited circumstances, to obligations previously resting on its Member States.[11] Surely though, care must be taken to assure that those Member States themselves are not released from their obligations, as is the case in the ECJ's succession theory. Either way, it is clear that the position of international organizations in international law is an awkward one, and the awkwardness is caused in part by the circumstance that organizations, unlike States, cannot be considered as unitary actors: their Member States always shine through.[12] Problems remain, therefore, concerning the basis of obligation for international organization.

Nonetheless, despite the fact that a constitutional approach is still in the process of development in the various ivory towers of Academia,[13] it might be interesting to see

[8] Organizations may well be constitutional without a written constitution; see, eg, JHH Weiler 'In Defence of the Status Quo: Europe's Constitutional *Sonderweg*' in JHH Weiler and M Wind (eds) *European Constitutionalism Beyond the State* (Cambridge CUP 2003) 7–23.

[9] It is probably no coincidence that a number of authors have started to argue, without casting it in overly theoretical terms, that organizations are also bound by general international law (and thus subject to external limits on their activities). See, eg, S Skogly *The Human Rights Obligations of the World Bank and International Monetary Fund* (London Cavendish 2001), and M Darrow *Between Light and Shadow: The World Bank, The International Monetary Fund, and International Human Rights Law* (Oxford Hart Publications 2003). Others have argued that specific organs ought to be subjected to judicial review, thus again displaying a constitutional approach of sorts. See, eg, M Bedjaoui *The New World Order and the Security Council: Testing the Legality of Its Acts* (Dordrecht Kluwer 1994).

[10] See, eg, WI Jennings *The Law and the Constitution* (3rd edn London University of London Press 1943). For a critical analysis of the rule of law, see M Loughlin *Swords & Scales: An Examination of the Relationship Between Law & Politics* (Oxford Hart Publications 2000).

[11] The Court first developed this in joined cases 21–24/72, *International Fruit Company v Produktschap voor Groenten en Fruit* [1972] ECR 1219, and has kept it limited to situations in which the Member States had conferred exclusive powers on the EC.

[12] For a lucid analysis, see CM Brölmann 'A Flat Earth? International Organizations in the System of International Law' (2001) 70 Nordic Journal of International Law 319–40.

[13] This may help explain why the present paper adopts the broad working definition of a constitutional approach as having something to do with placing limits on the possible range of activities of international organizations. Which precise limits it concerns, where those limits themselves stem from, and who gets to apply them, are all questions which will have to await answers.

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whether there are already instances in legal practice which may contribute to such an approach. One such possible instance is the decision of the International Labour Organization Administrative Tribunal (ILOAT) in *In re Bustani*, a decision taken on 16 July 2003.[14] The remainder of this note is devoted to a discussion of this judgment and some of its possible ramifications in light of a possible constitutional approach to the law of international organizations.

What makes the *Bustani* case particularly interesting is that is the sort of case that has undeniable political overtones. Mr Bustani was employed as the Director-General of the OPCW and saw his contract terminated prematurely. This raised the question of whether he was to be regarded as a regular staff member of the OPCW (in which case the normal legal protection of staff would come into play) or whether his was rather to be viewed as a political appointment which would not be subject to the normal rules of staff protection. The treatment of a person in Bustani's position may tell us something about the possible 'constitutionalization' of the law of international organizations. In addition, the case is of interest in what it says (between the lines, to some extent) concerning the legality of decisions of international organizations, a constitutional topic if ever there was one.[15] Thus, while the case is not nearly of the political significance of, say, the *Lockerbie* case,[16] it may nonetheless help illustrate the possibilities for a constitutional approach to international organizations.

II. THE CASE

In May 1997, José Mauricio Bustani was appointed as the Director-General of the Organization for the Prohibition of Chemical Weapons (OPCW), an international organization located in The Hague and founded on the basis of the 1993 Chemical Weapons Convention (CWC).[17] His term was supposed to end in 2001, but the Conference of the States Parties, the OPCW's highest (and plenary) body, decided in May 2000 to renew Bustani's contract for another four years. It did so following, as prescribed in the CWC, the recommendation of the OPCW's Executive Council.

Still, in March 2001 Bustani had apparently lost some of his popularity: he was accused of mismanaging the OPCW with respect both to personnel and finances; he was deemed guilty of polarizing things and, generally, stood accused of betraying the trust and confidence placed in him by the CWC's Member States. As the United States' permanent representative to the OPCW, Donald A Mahley, put it, the issue had become

[14] Judgment No 2232. The Tribunal's judgments are easily accessible at <http://www.ilo.org/public/english/tribunal> (last visited 6 Oct 2003).

[15] See, eg, GR Watson 'Constitutionalism, Judicial Review, and the World Court' (1993) 34 Harvard International Law Journal 1–45. On judicial review and constitutionalism more generally, see JH Ely *Democracy and Distrust: A Theory of Judicial Review* (Cambridge MA Harvard University Press 1980).

[16] Then again, the *Lockerbie* case never lived up to its promise and was withdrawn from the ICJ in Sept 2003.

[17] The CWC is helpfully reproduced in (1993) 32 International Legal Materials 800. For a useful overview of the OPCW (including its institutional aspects), see EPJ Myjer 'The Organization for the Prohibition of Chemical Weapons: Moving Closer Towards an International Arms Control Organization? A Quantum Leap in the Institutional Law of Arms Control' in EPJ Myjer (ed) *Issues of Arms Control and the Chemical Weapons Convention* (The Hague Martinus Nijhoff 2001) 61–139.

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one of 'abdication of transparency, of responsibility, and of judgement'.[18] Reportedly, Bustani had even threatened to encourage inspections of chemical industries in the Convention's main donor States, such as the US.[19]

Eventually, the US introduced a motion of no confidence at the Executive Council, calling for Bustani to resign. The motion was, however, defeated, as it failed to meet the required two-thirds majority. Subsequently a special meeting of the plenary Conference of States Parties was called for (again on US initiative) on 22 April 2002. The Conference adopted a decision to terminate Bustani's contract, effective immediately. It is this decision that Bustani appealed against before the ILOAT, not asking to be reinstated but, instead, asking for salary due over the remainder of his contract, costs, and a hefty one million euros to compensate for moral damage. Bustani made clear however that this compensation, if awarded, would be donated to a charity.[20]

III. JURISDICTION

Viewed as a possible exercise in constitutionalism, perhaps the most interesting aspect of the *Bustani* case is how the Tribunal assumed jurisdiction. The main problem in this respect was whether Bustani ought to be regarded as a staff member of the OPCW, or whether instead he would better be viewed as a political official who ought to be relieved of his tasks not so much on the basis of poor performance (although that too might come into play) but rather on the basis of a lack of political support.

Had Bustani been a typist or a translator in the employ of the OPCW, clearly he would have fallen within the ambit of that organization's Staff Regulations and Interim Staff Rules. Accordingly, the Tribunal would have had no problem establishing jurisdiction *ratione personae*. Yet, it is less obviously clear that Directors-General are to be considered as staff members, and at any rate the OPCW argued before the Tribunal that Bustani ought not to be regarded as a staff member.[21] Moreover, the decision to terminate his contract was not an administrative decision (which would have facilitated the ILOAT's jurisdiction) but rather a political decision. Indeed, the OPCW pointed out that there is at least one organization which has made it explicit that its head official could be subjected to the ILOAT's jurisdiction.[22] This would suggest that the executive heads of international organizations are not normally to be regarded as mere staff members and will only come within the jurisdiction of administrative tribunals on the basis of an express provision to that effect.

Bustani, by contrast, rejoined that under the term of the Headquarters Agreement between the OPCW and the Netherlands he is explicitly regarded as an 'official' of the

[18] See Ambassador Mahley's Opening Statement to the Conference of States Parties, 21 Apr 2002, available at the website of the US Department of State: <http://www.state.gov>. A more detailed paper outlining Bustani's activities can be found at the same site as a fact sheet titled 'Preserving the Chemical Weapons Convention: The Need for a New Organization for the Prohibition of Chemical Weapons' (OPCW) Director-General (dated 1 Apr 2002) (last visited 6 Oct 2003).

[19] See 'US Initiative to Oust OPCW Director-General' in (2002) 96 AJIL 711–12, at 711.

[20] See In re Bustani, above n 14, para B.

[21] Ibid, para C.

[22] Ibid. This other organization, so the ILOAT clarified, is UNESCO, which decided in 1999 to insert such an explicit provision in the contract with its Director-General.

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OPCW, as are all members of the Technical Secretariat of that organization. According to his contract, moreover, he was to receive benefits and entitlements in accordance with the Staff Regulations and the Interim Staff Rules.[23]

The problem of how Bustani was to be regarded owes much, of course, to the ambiguous role of a Director-General,[24] and it is this very ambiguity that also bedevilled the US when sketching the ideal role of the OPCW Director-General.[25] In a wonderfully revealing document, the US continuously shifted from a conception of the Director-General as a staff member to a conception of the Director-General as having a political role. Thus, while the Director-General must implement the policies established by the organization's other organs and report to those other organs, 'he is not a mere functionary who is restricted to following explicit orders'. Instead, he should show initiative, be energetic and creative and endowed with vision. Yet, he must also 'respect the limits established by the Convention and not "push the boundaries" or freelance on controversial issues'. And while thus administering, he should nonetheless 'seek to unite the Member States', rather than let them unite on their own. In short, he is a staff member with a political role; he is a political official with some non-political duties. The Director-General is expected to be both political and non-political at the same time; he is expected to be both staff and non-staff at the same time.[26]

The Tribunal reached the conclusion that Bustani clearly was to be considered an 'official' under the terms of the ILOAT's own Statute as well as according to the standard usage attached to the term 'officials': this would normally include an organization's Director-General.[27] This finding still left open that jurisdiction could nonetheless have been excluded by the OPCW's Regulations but this, so the ILOAT found, was not the case. The Chemical Weapons Convention itself speaks of the Director-General 'and the other members of the staff',[28] which would suggest that the Director-General is a staff member among other staff members: *primus inter pares*, at best.[29] While the ILOAT had earlier insisted that its jurisdiction should not be overly broadly construed,[30] it nonetheless found that it could exercise jurisdiction over Bustani's complaint, despite the contestation thereof by the defendant. And as far as jurisdiction *ratione materiae* was concerned, the Tribunal found that a decision to terminate an official's appointment is clearly a decision of an administrative nature, even though it may have been influenced by political considerations.[31]

[23] See *In re Bustani*, above n 14, para D.

[24] This tension is perhaps most clearly visible with respect to the Secretary-General of the United Nations. For a brief discussion, see Klabbers, above n 5, at 173–5.

[25] See 'The Role of the Director-General', statement by US permanent representative Donald A Mahley, 23 Apr 2002, available at <http://www.state.gov> (last visited 6 Oct 2003).

[26] Incidentally, the question of to whom staff rules etc apply does not seem to be a major preoccupation in studies of the employment law of international organizations. Cf eg, CF Amerasinghe *The Law of the International Civil Service As Applied by International Administrative Tribunals*, 2 vols (Oxford Clarendon Press 1988), and MB Akehurst *The Law Governing Employment in International Organizations* (Cambridge CUP 1967).

[27] See *In re Bustani*, above n 14, para 7.

[28] Art VIII, para 46 CWC.

[29] See *In re Bustani*, above n 14, para 8.

[30] The Tribunal (above n 14, para 9) refers to Judgment No 605, *In re Madureira* (1984), in which it held that its jurisdiction would not normally cover housing disputes unrelated to employment terms, and Judgment No 967, *In re Antal* (1989), in which it held that choice of forum clauses are not lightly to be implied in employment contracts.

[31] See *In re Bustani*, above n 14, para 10.

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The OPCW also argued that Bustani's case would not have been admissible or receivable, partly for want of jurisdiction (this was something the Tribunal did not need to address separately), partly because he had not exhausted the internal mechanisms provided for by the OPCW. Clearly, though (and again paying tribute to the curiously ambiguous role of a Director-General), those internal mechanisms would end with a decision taken by the Director-General. This being the case, Bustani could be forgiven for not utilizing the internal mechanisms: he could hardly have been expected to submit his case to his successor. And since only the Conference of States Parties could have quashed the impugned decision (which was not likely, as it was this Conference's own decision), clearly some other avenue must be open to Bustani.[32]

IV. MERITS

As is so often the case, once the Tribunal assumed jurisdiction, its decision on the merits was almost a foregone conclusion (after all, it would hardly have gone through the trouble of claiming jurisdiction in controversial circumstances just to deny the main claim). On the merits, Bustani argued that there were a lot of things wrong with the impugned decision. He argued that it had been taken following a flawed procedure, in that the convening of a Special Session of the Conference was not in accordance with the Rules of Procedure of the Conference. He also claimed that the Conference had not been granted the authority to terminate contracts; that the decision lacked a valid legal basis and was insufficiently motivated, and that it amounted to a misuse of authority in that it was taken under pressure from the United States which had threatened to paralyse the OPCW by withholding contributions.[33]

The Tribunal shared Bustani's opinion that the reasons for his dismissal had been very vague, at least as those reasons were recorded in the contested decision itself which only spoke of lack of confidence. The charge that confidence is lacking, so the Tribunal suggested, is a charge that one can hardly argue with. Yet, a possibility to argue against a no confidence decision would be all the more imperative given the independence of organizations and their leading functionaries. The independence of organizations is an essential guarantee for the civil servants concerned but also 'for the proper functioning' of the organizations concerned. One of the guarantees of that independence, so the ILOAT argued, is that people are appointed for a limited time only; as a result, to give the appointing organs an unfettered discretion to terminate appointments would not be a good idea, as the Tribunal put it in the strongest of terms: it 'would constitute an unacceptable violation' of the principles underlying the activities of international organizations. Should, on occasion, such a situation arise involving grave misconduct, then the principles of due process would have to be taken into account.[34] As it was, Bustani had not had the benefit of procedural guarantees, and since the charge against him was vague, the Tribunal felt the impugned decision should be set aside.[35] Given this outcome, the ILOAT did not see the need to address Bustani's other pleas. In the end, the Tribunal awarded him the remainder of his salary, the costs (set at 5,000 euros), as well as 50,000 euros in moral damages (a far cry from the one million he had asked for).[36]

[32] Ibid, para 13.
[33] Ibid, para 14.
[34] Ibid, para 16.
[35] Ibid, para 17.
[36] Ibid, paras 17–18 and dispositif.

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V. A CONSTITUTIONAL APPROACH IN DISGUISE?

The Tribunal managed rather expertly to navigate some treacherous waters. On the merits, it could avoid saying anything too definite about the legality of action taken by organs of international organizations by limiting itself to stating that the terms of the impugned decision had been a bit too vague to justify taking a measure of this magnitude (and here it is useful to remember that this may well have been the first time in history that a Director-General of an international organization is ousted prematurely).[37]

Thus, it did not need to say anything on the validity of a decision taken by the Conference of States Parties or the competence of the Conference to take the decision to begin with;[38] it did not need to say anything on the legality of the Conference's decision; and it could avoid the controversial political issue of whether the Conference had been deciding under duress.

And on jurisdiction too, the Tribunal sailed a careful course. It decided to treat Bustani as a staff member, not so much on the basis of any OPCW rules, but rather on the basis of its own Statute and the general usage of the term. That is both safe, in the sense that the ILOAT can thus hardly be accused of misconstruing any OPCW instruments, and smart, paving the way for similar future cases and positing the ILOAT's own Statute as a forceful presumption relating to jurisdiction. And in order to treat Bustani plausibly as a staff member (which the Tribunal had to do, lest jurisdiction would become problematic), it isolated the political aspects of his role from the administrative aspects.

Yet, from the perspective of a possible constitutional approach, the Tribunal took the easy way out: it did not confront head-on the question whether organizations can oust their Directors-General once faith in them has dissipated, and it did not impose its own authority on the underlying political issue. The case can not, in other words, be read as providing full support for the thesis that political decisions are susceptible to legal review.[39] And that would have been too much to expect, of course: the jurisdiction of administrative tribunals is premised on the existence of a staff challenge. Hence, in order to say anything at all and to provide at least a minimum of legal protection to Bustani, the Tribunal had little choice but to construe his case as a staff dispute. Indeed, it had carefully hinted while addressing jurisdiction that it might not have much authority over decisions taken by legislative organs unless these were decision of an administrative nature.[40]

[37] There have been other clashes between Member States and Directors-General. These usually either fizzle out, or result in the person concerned not being reappointed (Boutros-Ghali comes to mind), or end with the Member State withdrawing. An example of the latter is the US withdrawal from UNESCO over American displeasure with the way UNESCO was run under M'Bow. For more details, see TM Franck *Nation Against Nation: What Happened to the UN Dream and What the US Can Do About It* (Oxford OUP 1985), at 265–6. The US only rejoined in the autumn of 2003 after almost two decades of absence.

[38] When addressing jurisdiction though, it dismissed as 'not applicable' the OPCW's argument that precedent would suggest that the ILOAT has no jurisdiction to address the legality of decisions taken by legislative organs. See *In re Bustani*, above n 14, para 10. The OPCW had referred to Jugdment No 209, *In re Lindsey* (no 2), (1973).

[39] Szasz has argued that occasionally political decisions may be challenged incidentally before administrative tribunals. See PC Szasz 'Adjudicating Staff Challenges to Legislative Decisions of International Organizations', in G Hafner et al (eds) *Liber Amicorum Professor Ignaz Seidl-Hohenveldern in Honour of his 80th Birthday* (The Hague Kluwer 1998) 699–720.

[40] See *In re Bustani*, above n 14, para 10. See also above, n 36.

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In the end, the Tribunal's approach looks ambivalent. On the one hand, it explicitly grounds its finding that due process had been warranted on the independence of international civil servants which, in turn, was considered necessary for the functioning of international organizations. On the other hand, by subjecting the decision to oust Bustani to some form of legal scrutiny it can be seen as supportive of a constitutional approach, if not in name then at least in action (and action, as they say, often speaks louder than words).

By connecting the requirement of due process to the functioning of the organization, the ILOAT introduced the functional necessity approach into the reasoning. That is not surprising, of course: the functional necessity approach has for a long time been the only prism through which to study international organizations and their activities.

Yet, the functional necessity approach has the serious drawback of favouring the interests of the organization over those of others for, as Nagendra Singh put it colourfully but in an accurate representation of a common sentiment: organizations contribute to the 'salvation of mankind'.[41] And if that is the case, how can they possibly be denied anything at all?

The Tribunal must have been well aware of this, and ended up using the functional necessity approach in, shall we say, a constitutional manner: functional necessity was utilized not so much to give the OPCW carte blanche, but rather in order to 'sell' its decision to the OPCW as being also in its own interest. The Tribunal cleverly suggested that due process will guarantee the very independence that is the lifeblood of international organizations; therewith, protection of staff members does not go against the interests of the organization but is, quite to the contrary, in the organization's best interest.

In recent years, the functional necessity approach has come under fire for a variety of reasons,[42] and in particular (but not exclusively) in respect of the responsibility of international organizations for internationally wrongful acts. After all, it is by no means self-evident why third parties (which may include Member States) would have to suffer merely for the sake of the functional necessity of international organizations.[43] For this reason, the very possibility of remedies against international organizations almost by definition presupposes a constitutional rather than a functional necessity approach. The *Bustani* case confirms this; while the Tribunal uses the language of functional necessity, it does so in constitutional fashion. Indeed, it can only use functional necessity as a consequence of the circumstance that it did not (and did not need to, perhaps) confront the underlying (political) issue in *Bustani* head-on. Intuitively, it would seem that a more overt recognition of the politics underlying the ousting of Bustani would have been more in line with a constitutional approach, yet under such a constitutional approach, recognition of political aspects would only have served to submit politics to the rule of law. With this in mind, in *Bustani* the ILOAT simply takes a shortcut: it submits a highly political decision to the rule of law (some version of the rule of law,

[41] See N Singh *Termination of Membership of International Organisations* (London Stevens & Sons 1958), at vii.

[42] See Klabbers 'The Life and Times of the Law of International Organizations' (2001) 70 Nordic Journal of International Law 287–317.

[43] See, eg, M Hirsch *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles* (Dordrecht Martinus Nijhoff 1995); A Reinisch, *International Organizations before National Courts* (Cambridge CUP 2000) and, in Dutch, R Lawson *Het EVRM en de Europese Gemeenschappen* (Deventer Kluwer 1999).

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at any rate) by stripping the political decision of its political elements and without saying that it does so, and that amounts in effect to constitutionalism in disguise.

VI. BY WAY OF CONCLUSION

Useful as it may have been to decide the *Bustani* case in an expedient and fair manner, whether the ILOAT's strategy of adapting functional necessity to constitutionalism will hold good in the long run or in situations where political and non-political elements can less easily be separated remains to be seen. With international organizations no longer automatically being regarded as essential for the 'salvation of mankind' and, more practically, with international organizations taking on all sorts of more or less extracurricular activities (think only of the United Nations administering Kosovo and East-Timor), it is to be expected that at some point a more principled approach will be warranted. After all, such an approach could potentially be helpful in determining whether, eg, economic sanctions ought to be taken against a State (or continued) even if this would entail massive suffering: an obligation to respect human rights might militate against imposing sanctions all too lightly.

Whether such an approach will be dubbed 'constitutional' does not appear to be all that relevant, although that term, with all its connotations about the rule of law and the liberal *Rechtsstaat*, would seem to be the most favoured one at present.[44] What is relevant, however, is what such a possible constitutional approach will contain, and in particular whether it will allow for a critical analysis of the activities of an organization which have received the full support of the organization's membership.[45] The *Bustani* case does not provide much insight yet; its main contribution is that it illustrates that the classic functional necessity approach (as classically applied without constitutional elements) is not very useful anymore, if it ever was.

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[44] Others have generally advocated a more politically sensitive 'culture of formalism', on the thought that while politics will not readily accept being subjected to any rule of law, it is nonetheless important to avoid or counter decision-making of the type where the end justifies the means. See M Koskenniemi *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge CUP 2002), esp at 494–509.

[45] The classic ultra vires doctrine is rather impotent when confronted with general acceptance of an act or activity by the membership of the organization. See Klabbers, above n 5, esp at 241–3.

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