The Institutional Veil in Public International Law

This book deals with the nature of international organisations and the tension between their legal nature and the system of classic, state-based international law. This tension is important in theory and practice, particularly when organisations are brought under the rule of international law and have to be conceptualised as legal subjects. The position is complicated by what the author terms 'the institutional veil', comparable to the corporate veil found in corporate law. The book focuses on the law of treaties, as this pre-eminently 'horizontal' branch of international law brings out the problem particularly clearly. The first part of the book addresses the legal phenomenon of international organisations, their legal features as independent concepts, the history of international organisations and of legal thought in respect of them, and the development of contemporary law on international organisations. The second part deals with the practice of international organisations and treaty-making. It discusses treaty-making practice within organisations, judicial practice in interpretation of organisations' constitutive treaties, and the practice of treaty-making by organisations. The third and final part analyses the process by which international organisations have been brought under the rule of the written law of treaties, offering a practical application of the conceptual framework as previously set out. Part three is at the same time an analytic overview of the drafting history of the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations. This is a profound and penetrating examination of the character of international organisations and their place in international law, and will be an important source for anyone interested in the future role of organisations in the international legal system.

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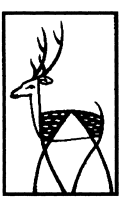
The Institutional Veil in Public International Law

International Organisations and the Law of Treaties

CATHERINE BRÖLMANN



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Amsterdam
1st September 2006

Summary Contents

Contents

List of Abbreviations

ACC	Administrative Committee on Coordination (now the United Nations System Chief Executives Board (CEB) for Coordination)
AFDI	Annuaire Français de droit international
American JIL	American Journal of International Law
ARIEL	Austrian Review of International and European Law
ASIL	American Society of International Law
British YIL	British Yearbook of International Law
Cardozo LR	Cardozo Law Review
CMLRev	Common Market Law Review
Columbia LR	Columbia Law Review
CTS	Consolidated Treaty Series (Oceana)
CW	Committee on the Whole (UN diplomatic conference)
EBRD	European Bank for Reconstruction and Development
EC	European Community
ECHR	European Court for Human Rights
ECOSOC	Economic and Social Council
EPIL	Encyclopedia of Public International Law
EU	European Union
European JIL	European Journal of International Law
FAO	Food and Agricultiral Organization
GAOR	General Assembly Official Records (UN)
German YIL	German Yearbook of International Law
Harvard ILJ	Harvard International Law Journal
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICCPR	International Covenant on Civil and Political Rights
ICLQ	International and Comparative Law Quarterly
IDI	Institut de droit international
IFC	International Finance Corporation
IGO	(International) Intergovernmental Organization
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
ITU	International Telegraphic Union

Journal HIL	Journal for the History of International Law
LNTS	League of Nations Treaty Series
LoN	League of Nations
Martens NRG	Martens Nouveau Recueil Generale
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
Nordic JIL	Nordic Journal of International Law
NVIR	Nederlandse Vereniging voor Internationaal Recht
OAS	Organization of American States
OECD	Organization for Economic Cooperation and Development
OPCW	Organization for the Prohibition of Chemical Weapons
OSCE	Organization for Security and Cooperation in Europe
ÖZöRV	Österreichisches Zeitschrift für öffentliches Recht und Völkerrecht
PCIJ	Permanent Court of International Justice
RdC	Recueil des Cours
RDI	Rivista di Diritto Internazionale
RGDIP	Révue générale de droit international public
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UN(GA)	United Nations (General Assembly)
UNHCR	United Nations High Commissioner for Refugees
UNIDO	United Nations Industrial Development Organization
UNTS	United Nations Treaty Series
UPU	Universal Postal Union
Virginia JIL	Virginia Journal of International Law
WHO	World Health Organization
WMO	World Metereological Organization
YILC	Yearbook of the International Law Commission
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZöR	Zeitschrift für öffentliches Recht

1

Introduction

THE MOST CONSPICUOUS non-state actors in international law since World War Two are international intergovernmental organisations. Organisations are involved in almost all fields of human cooperation, where they present themselves not only as institutional fora for states, but also as independent international actors.

This book looks at the role of international organisations in international law, and their conceptualisation as legal actors. It proposes that the dual image of organisations – open structures that are vehicles for states and at the same time closed structures that are independent legal actors – has resulted in a transparent legal set-up (symbolised by what is termed the 'institutional veil') with member states and other component elements of the organisation to some extent legally visible behind the legal veil that clothes it. This particular condition of organisations has not been fully acknowledged and, moreover, cannot fully be accommodated in the current one-dimensional system of international law. This set-up is a factor in several contemporary debates, with the legal responsibility of organisations in the context of military operations as a topical example. The complexity of these debates is however, difficult to grasp without taking account of the conceptualisation of organisations as legal subjects generally.

The conceptualisation of international organisations as legal subjects is best examined in the context of a branch of international law which counts as 'classic' and fundamental. The law of treaties eminently qualifies in that respect. It has added practical relevance since international actors conduct a large part of their formal international relations through the conclusion of treaties.

The codification of international law with respect to treaties concluded by international organisations (IGO treaties) in the '1986 Vienna Convention' is a landmark of the canonisation of organisations as international subjects. It has, however, been a notoriously difficult process. IGO treaties were a recurring subject of discussion in the course of preparation of the 1969 Vienna Convention on the Law of Treaties, and when this Convention had its scope definitively limited to inter-state treaties, it was the topic of another seventeen years of work before resulting in a final text.

Why has this process been so problematic? Incidental references to that question mention the 'special nature' of agreements concluded by international organisations, or the functional character of organisations, but without much detail. This book takes a closer look at the 'legal nature' of international organisations and examines on that basis their compatibility with the law of treaties and with international law in general. It turns out that the answer to the question posed above is more complex than it may seem at first sight. As is argued, the 'transparency' of international organisations as legal actors, and their ensuing layered character, makes them less than well-suited for the law of treaties system (or any classic voluntarist system for creating legal norms).

This book takes a threefold approach. It surveys the often counteracting principles that have complicated and shaped the conceptualisation of international organisations as subjects of international law. It looks at the different ways in which organisations are involved in treaty practice. And, finally, it examines the place which is accorded to international organisations in the law of treaties – this examination takes the form of an analysis of the 1986 *Convention on the Law of Treaties Between States and International Organizations or Between International Organizations* in relation to the classic inter-state law of treaties. The last Part is therefore at the same time an analytic overview of the drafting (hi)story of the law of treaties of organisations.

* * * *

The logical point of departure for an assessment of IGO treaty-making is treaty-making by states. In fact, this frame of reference was explicitly chosen for the second law of treaties convention. The stated aim of the International Law Commission was to bring IGO treaties under the *existing* system, established by the 1969 Convention. It means that the drafting process of the 1986 Convention, even more so than academic debate, essentially revolved around the question as to what extent international organisations could be equated with states – the traditionally closed, billiard ball subject of international law.

That question, it will be argued, brings out the fundamental tension between the layered nature of international organisations and the one-dimensional law of treaties system. The law of treaties, given the nature of the contractual instrument, is strictly based on the principle of consensualism and by consequence is geared to equal legal partners. International organisations, however, 'are neither sovereign nor equal', as it was put in one lapidary statement by ILC Rapporteur Paul Reuter.[1]

[1] YILC 1977, Vol II (Part One), at 120, § 6.

What does this mean exactly? To be sure, the 'inequality' of states and organisations, both as a philosophical conviction and as a legal construct, is part of the framework of classic international law doctrine, in which the territorial state holds a central position and the international organisation has a servicing and functional role. However, this perspective has lost some of its power over the years. The ending of the Cold War is one reason why the idea of international organisations conducting relations on an equal footing with states no longer makes feelings run as high as in the 1960s and 1970s. At that time, as one commentator put it, an important factor in the failure to include IGO treaties in the 1969 Vienna Convention was uncertainty as 'to what extent . . . international organizations *should* be able to participate as equal units within the international legal system'.[2] This question has lost its edge with the political and doctrinal changes of the 1990s – notably the turn of events in the former socialist states and the attenuation of the doctrine of state sovereignty – but not its substance.

The problem of organisations as subject of the law of treaties is less yielding when approached in terms of the legal system itself. On a systemic level, the tension between the transparent nature of organisations and the binary set-up of international law (the tension between sovereignty and law) remains. The law of treaties, as with certain other branches of international law, proceeds from the legal equality of actors. The primary condition for upholding this equality is legal impermeability. This allows for the application of objective, 'external' criteria, while divergent institutional characteristics and factual circumstances are rendered invisible to the general legal order. This is how in international law Liechtenstein and the United States are construed as being equal; or how a Western-style parliamentary democracy and an absolute monarchy can reach formal agreement on mutually applied conditions notwithstanding different domestic legal requirements.

Apart from the obvious functional delimitation of international organisations, it is not certain that they vary more strongly in their institutional structures than do states. Rather, the fundamental difference between IGOs and states seems to be that international organisations lack the *legal* impermeability of states. To the late-modern lawyer the state may appear as a corporate entity in the same way as an international organisation, but from a formal perspective the state's internal structure is screened off from international law until it opens up of its own accord.

For international organisations, on the other hand, that is not the case. As mentioned above, this particular condition may be summarised as legal transparency, and is expressed by the metaphor of the 'institutional veil'. It

[2] Günther Hartmann, 'The Capacity of International Organisations to Conclude Treaties' in Karl Zemanek (ed), *Agreements of International Organisations and the Vienna Convention on the Law of Treaties,* 1971, 127-163, at 129 (emphasis in the original text).

can be traced to a number of factors, which are partly of a systemic nature (for example, the IGO's sectoral design, or the dictate of a dualist vision of the law, in which every rule must be either national or international); partly doctrinal (for example, the view that an organisation is a treaty, which is ruled by the will of the parties); and partly political or philosophical (for example, the argument that organisations should not assume too many powers because of a democratic deficit. The most important factor is perhaps the oscillation between the organisation's open and closed images and in a general sense the functionalist tendency towards the 'open' view of organisations as vehicles for state action. This is expressed for example in the statement by Professor Alvarez that:

> …IOs are not intended to be proto-states or governments in the making. They were and are established for limited purposes – primarily, to facilitate the making of some treaties, to focus debate and make recommendations to governments and to serve as venues for settling disputes on closely circumscribed topics. They are institutions of limited and delegated powers, lacking the plenary rights of sovereigns under international law ….[3]

The layered character of organisations ensuing from the organisation's transparent nature is at odds with the one-dimensional structure of the law of treaties system. It will be argued that this tension, while never quite acknowledged or rendered explicit, is the primary factor to have animated discussions and shaped their outcome. This process is embodied in the 1986 Vienna Convention.

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How has the law of treaties in relation to international organisations been addressed by legal scholarship? In general, the treaty-making practice of states *within* the framework of an international organisation has received the most attention; that is, treaties in regard of which the organisation fulfills a forum role but to which it is not itself a party. In the case of prominent political organisations such as the United Nations, the Council of Europe, the Organization of African Unity or the Organization of American States, this function has resulted in a wealth of 'law-making' multilateral instruments. These have generally overshadowed the discrete number of treaties, mostly with a more mundane content, concluded *by* those same organisations.

Scholarly interest in treaties concluded by organisations has been concentrated in roughly two periods: the 1960s, when the International Law Commission was grappling with the place of IGO treaties in the draft articles for the first Law of Treaties Convention; and in the 1980s, around the conclusion of the second Vienna Convention. Writings on the 1986

[3] José Alvarez, *International Organisations as Law-Makers*, 2005, at 15.

Vienna Convention mostly have the form of a textual commentary to the Convention, leaving scope for further thought on the background and systemics of the text. The 1960s, on the other hand, produced several monographic studies on the question of treaty-making by international organisations and its legal basis in particular. These works generally took the perspective of international institutional law or, more broadly, the law of international organisation. As this field of study proceeds from the internal structure of the organisation, it tends to regard international organisations as 'open' structures and to disregard the tension that comes into play when it comes to the external relations of organisations and concomitant legal fictions such as treaty-making capacity.

By contrast, this book considers international organisations from an external perspective and analyses the conceptualisation of organisations as actors in general international law, notably in the law of treaties. It does so by proceeding *within* the positivist framework that is the frame of reference for the majority of international lawyers and policy-makers. The aim is thus to give an immanent critique of international law and doctrine, and of the way in which these have included organisations.

For the purpose of clarity and analytical stability, the 'positivist paradigm' may at times be portrayed as more monolithic than would be warranted from a general point of view. 'The' positivist paradigm is not entirely closed off and is in constant movement; the identities of 'the' state and 'the' international organisation are continuously being re-negotiated. What matters in the present context is the *modus operandi* of the positivist system – voluntarist and based on state sovereignty. It is a system which may be unravelling at the seams, but which at present still sets the parameters for international legal relations. This 'continuing hold of legal positivism' (as referred to by Alvarez),[4] including its bearing on legal practice, is precisely why it is worthwhile to take the formal system as a point of departure in an examination of the concept and role of international organisations. At a more fundamental level, it makes clear how that formal system, while pressing organisations in the classic one-dimensional mould, is having its voluntarist premises gradually undermined by a tension of its own making.

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As argued above, the oscillation between the open and closed image of international organisations, and the tension between the transparent nature of organisations and the one-dimensional set-up of international law

[4] Alvarez, above, note 3, at 586.

amount to a systemic condition. This is a topical issue, for more reasons than just the formative effect of opposing convictions about the role of the state.

Next to the necessity to fill a conceptual lacuna regarding international organisations, the central issue in practice is that the flexible institutional veil creates uncertainties about accountability at the various levels of decision-making authority. The ultimate formal setting for problems of accountability, addressed in a brief *excursus* in the final chapter of this book, is the machinery of international legal *responsibility* as applied to organisations, currently under study by the International Law Commission. However, the challenges posed by the participation of organisations in the international system extend to the mechanisms of accountability in the broad sense. This includes the question of a possible binding effect of the organisation's obligations upon member states; or conversely, of the member states' obligations upon the organisation; or the question of the locus of accountability in the case of human rights violations – to name but a few recurring points of debate.

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This book is divided into three parts. Part One proposes a theoretical framework for the consideration of international organisations as actors in international law. Chapter 2 seeks to outline the nature of international organisations as legal entities. It addresses the definition of an 'international organisation' and three material characteristics that arguably render a core of the legal manifestation of organisations from an external perspective. Chapter 3 examines, from the point of view of doctrine and practice, the legal image of IGOs as legal actors in pre-United Nations international life. This is done by way of a brief survey of intellectual and doctrinal history up until World War Two. Chapter 4 then aims to do the same for the United Nations era, while putting less emphasis on the history of institutions – well-documented and well-known as it is – and more on the legal image of organisations as this emerges from several well-known points of doctrinal and theoretical debate revolving around the tenet of legal personality.

Part Two addresses the involvement of international organisations with treaty-making in the broad sense. It makes clear how the institutional veil changes appearance depending on the context. With some simplification one can say that when the organisation acts as a forum for treaty-making by states, the organisation manifests itself as an open system (Chapter 5). When the constituent treaty of an organisation is under review, the organisation appears as partly open and partly closed (Chapter 6). When the organisation is itself party to a treaty, it manifests almost entirely as a closed system in the way of a state (Chapter 7). These cases neatly illustrate the separate institutional order of organisations – posing a boundary to,

and exerting influence on, general international law, *in casu* the law of treaties, in various ways. They also show that the legal boundary of the organisation is never entirely open or entirely closed, but always more fuzzy than that of states. Chapter 7 then also provides the practical and doctrinal context for Part Three.

This final Part examines the law of treaties as applicable to treaties concluded by international organisations on the basis of the 1986 Vienna Convention. Chapter 8 describes the preliminary stage, which revolved around the question of whether treaties concluded by international organisations were to be included in the general law of treaties at all. This was a recurrent question during the preparatory work for the first Vienna Convention, until it was decided by the final vote to limit its scope to inter-state treaties. Chapter 9 addresses the collateral aspects of the second Vienna Convention – the organisation of the diplomatic conference, the method of drafting and the final clauses – on the points where these reflect the (ambiguous) role that was accorded to international organisations in the process. The text of the 1986 Convention and its *travaux préparatoires* are then considered in Chapter 10.

The work strategy of the International Law Commission, and later of the Diplomatic Conference, was to limit substantive review and discussion to the provisions of the 1969 Convention that had been specifically marked as 'problematic' for transposition to the new Convention. Combined with the drafters' objective to create one integral body of rules, this means that the preparatory work for the 1986 Convention was concerned only with those parts of the law of treaties in which the equation of organisations to states was considered difficult or controversial.

Chapter 10 focuses on these provisions. They constitute the essence of the 1986 Convention, in whichever form they have ended up in the final text, because they render the essence of the proces sof inclusion of organisations in the international law canon. As with the preparatory work for the 1969 Convention, discussion on these provisions can almost entirely be traced back to the specific features of organisations outlined in Part One, and to the contrast between the transparent nature of international organisations and the one-dimensional framework of the law of treaties. The economic drafting strategy chosen by the International Law Commission also means that, although not a classic article-by-article commentary, Chapter 10 may serve as a reasonably inclusive analysis of the 1986 Convention.

Chapter 11 – together with the Summarising Remarks to Parts One, Two and Three – contains concluding remarks. It puts together the main propositions of the book, and seeks to place these in a broader framework.

Part One

International Organisations as International Legal Actors

2

The Nature of International Organisations

THIS CHAPTER AIMS to describe the 'nature' of international intergovernmental organisations ('international organisations', 'organisations' or 'IGOs')[1] as legal entities by looking at three formal characteristics (viz used for the purposes of definition) as well as three material traits. The chapter proceeds in some detail, in order to provide the necessary formal and conceptual background to the rest of the book. After a set of preliminary remarks in the first section, which serve to set the parameters for this book and clarify its structure, the second section addresses the question of definition, as a set of formal(ised) features, and briefly discusses the related issue of classification.

The third section considers three material characteristics: functionality, centralisation and transparency. These are referred to as 'material' because they are not for the purpose of international law formally defining features. 'Functionality' refers to the fact that organisations are designed and defined on the basis of function rather than territory. 'Centralisation' denotes the degree of centralisation, or vertical dynamic, which each international organisation displays with respect to the general international legal order. 'Transparency', finally, is an endemic condition of intergovernmental organisations in general international law, partly due to the other two features counteracting: it indicates that organisations are neither entirely closed-off to international law in the way of states, nor entirely open, as instances of non-institutionalised inter-state cooperation would be.

[1] 'Institution' and 'institutionalised' are used in this book to denote all forms of association other than states, including IGOs and NGOs, which have some form of centralisation.

2.1 PRELIMINARY REMARKS

A few preliminary remarks are in order. In a general vein, the *caveat* in the previous chapter must be recalled: the voluntarist premises of current international law are at times somewhat overdrawn for reasons of clarity and analytical stability.

First, references to the 'closed' character of states are are made with the obvious qualification that the impermeability of the state's legal order has diminished since World War Two, notably through the individual becoming an addressee of international legal norms. That topic lies outside the scope of the following chapters and will not be addressed. At the same time this book to some extent positions itself in the debate, as it proceeds from the view that, while states are 'opening up' more and more, in a positivist perspective this happens on their own accord – by assuming treaty-based obligations, by (unwittingly) participating in the process of formation of customary law, or even by becoming bound to higher norms imposed by the international community – a community of which states are perceived as the ultimate building blocks.[2] Even though such a process may lead to a centralised legal order where in practice the voluntarist principle has withdrawn from sight (as for example in Western-style democratic states), in the formal framework this is essentially different from the top-down dynamic which lawyers resort to – as will be clear from the following chapters – when international organisations are brought under the rule of international law.

Second, a legal feature is, according to the contemporary majority view, not a natural phenomenon.[3] Therefore, apart from the fact that it cannot be detached from its relationship with other elements in the same system, in a sense it also does not exist outside its social and doctrinal contexts. For the purposes of this chapter, however, legal features are presented as much as possible as isolated traits.

Third, the outline given in sections 2.2 and 2.3 aims to delimit the object of study as well as, to some extent, to set out its theoretical premises. It is therefore fair to recall that like any other this description is based on a choice. However, it is submitted that the characteristics listed in this chapter comprise the core of organisations' legal identity in general international law.

Fourth, this study proceeds from the perspective of general international law, not international institutional law. The institutional variety among international organisations is taken into consideration only insofar as

[2] See section 10.3.2 below.

[3] Leaving aside the thorny issue of essential characteristics in general, the conventional character of *legal* phenomena is not controversial, as the fictional and situational character of law is generally undisputed.

general international law attaches legal consequences to it. This clearly proceeds from the idea that there is a distinction between these two branches of the law – related in turn to the assumption that the institutional law of an organisation constitutes a separate legal order. This is by no means a bold proposition, but one which is worth bearing in mind since it also implies an 'internal' (from within the organisation) and 'external' (from general international law) perspective.[4]

Finally, as the analysis in this book aims to operate within the positivist paradigm, it takes a black and white approach. It therefore does not do justice to the continuum of institutional forms (and the grey areas in which it may be uncertain whether an international creature is an IGO *vel non*), nor to the fluency of rule-making and norm-setting processes, nor to the blurring of external and internal operation of organisations.[5]

2.2 FORMAL ASPECTS

2.2.1 Definition

A specific definition may have limited usefulness for gaining 'a systemic or contextual understanding' of international organisations.[6] This said, a brief look at the familiar listings of definitional properties seems useful in several respects. It serves to identify the object of study and to increase analytical and conceptual clarity in its treatment. Such a definition may also contribute to an understanding of the legal nature of international organisations, all the more so because it is clearly tied in with doctrinal perspectives (addressed in Chapters 3 and 4) on organisations.

The claim that a definition could say anything about the 'nature' of organisations is problematic, considering their acknowledged conventional nature as creatures of law. Still, the practice of addressing legal constructs as objective social phenomena leaves room for both the nominal and the explanatory (or ontological) type of definition.[7] The institutional autonomy of organisations, which figures in all definitions of 'organisation', serves in both roles.

[4] Elaborated below in sections 2.3.2 and 2.3.3, and in ch 4. To mark this distinction, at times the term '*general* international law' is used to refer to 'international law'.

[5] Although these undoubtedly exist – see section 2.2.2 and cf eg José Alvarez, *International Organizations as Law-Makers*, 2005, at 11, 12.

[6] Cf White's observation regarding the relative usefulness of 'descriptive analyses' of international organisations (Nigel White, *The Law of International Organization* (2nd edn), 2005, at 1–2).

[7] Cf the *Oxford English Dictionary* (2nd edn 1989, s.v.) on the ontological and the semiotic (or explanatory versus nominal) type of definition: '6. a. To state exactly what (a thing) is; to set forth or explain the essential nature of. […] b. To set forth or explain what (a word or expression) means; to declare the signification of (a word)'; cf above note 3.

Likewise it is awkward to apply the distinction between a descriptive (describing what appears to be in reality) and a normative (stating what ought to be in order to qualify) definition in the traditional sense.[8] This is both because all legal phenomena have a normative basis to begin with, in the sense that they are brought about by some *rule*, and because any identification on the basis of a description of practice *or* a postulated set of conditions (or a combination of both) may have legal consequences, which are normative as such. In the case of legal phenomena – including regimes with 'objective' status such as organisations – it is therefore more useful to take any *legal* definition as 'normative'. Such a definition circumscribes a category (eg 'legal person') for the purpose of attaching certain legal consequences to it. In contrast, a descriptive definition would be of a purely nominal or explanatory character.[9]

As to the content, it has been stated that '[t]here is no legal or generally accepted definition of an international organization,[10] but this seems overtly pessimistic. Although the wording may vary, there does appear to be agreement on a set of core definitional elements, sufficient for the identification of an 'international organisation'.

Generally, definitions designed for international legal practice[11] do not enter into great detail, as they mostly have the single purpose of excluding non-governmental organisations. An example is the frugal Article 2(1)i common to the Law of Treaties Conventions of 1969 and 1986.[12] Likewise, implicitly, the UN Economic and Social Council with regard to the implementation of Article 71 of the United Nations Charter on consultative status of non-governmental organisations: 'Any international organisation which is not established by intergovernmental agreement shall be considered as a non-governmental organisation for the purpose of these arrangements'.[13]

[8] Compare the predominantly normative element of autonomy as a necessary condition for the quality of 'organisation', and the more descriptive element of inter-state creation, which has changed to include other subjects as this appeared in practice (see below).

[9] See above note 7.

[10] Eg Robin Churchill and Geir Ulfstein, ' Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law', 94 *American JIL* 2000, 623–659, at 632.

[11] 'Practice' refers to the practice of international relations as well as to conventional rules geared to regulating such relations – as opposed to primarily 'doctrinal' considerations.

[12] The provision reads '"International organization" means an intergovernmental organization.' See ILC Commentary to the (identical) final draft article, YILC 1966, Vol II, § 14, at 190; see also Commentary to the final draft articles for the second Vienna Convention,YILC 1982, Vol II (Part Two), at 21 (cf ch 10 below). Similar provisions in Art I(1)(1) of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (A/CONF.67/16) and Art 2(1)(n) of the 1978 Vienna Convention on Succession of States in respect of Treaties of 23 August 1978, 1946 UNTS, at 3.

[13] Resolution 288 (X) of 27 February 1950; amplified by Resolution 1296 (XLIV) of 25 June 1968: ' . . .[non-governmental organizations] . . .includ[e] organizations which accept

The encyclopedic *Yearbook of International Organizations* uses an equally scant standard combined with the subjective criterion of self-identification to identify intergovernmental organisations.[14]

The study on Responsibility of International Organizations taken up by the International Law Commission in 2000[15] is a notable exception. It envisages a rather detailed working definition, which is atypical but not surprising, since, as argued by the Special Rapporteur, for the establishment of responsibility it is especially important that the category be determined very precisely.[16] Article 2 reads: 'For the purposes of the present draft articles, the term "international organization" refers to an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.'[17]

Otherwise, it is possible that international practice in general simply has no need for a definition which specifies more than the organisation's intergovernmental nature. In this respect it is significant that the definition of international organisation has not been put to the (judicial) test. The present author is not aware of any cases before international courts or tribunals in which the (legal) qualification of an institution has been at issue. A recent, 'radically empirical' study[18] on the position of organisations before national courts tells us that this is little different in national law. When the question does arise, it concerns the distinction between intergovernmental and non-governmental organisations – in which cases, the author suggests, national judges are inclined to designate an institution as an 'intergovernmental organisation', as this allows for the attribution of immunity.[19]

members designated by government authorities, provided that such membership does not interfere with the free expression of views of the organizations'.

[14] See in *Yearbook of International Organizations* 2001 (Criteria for Types A to D: Conventional organisations): 'In practice therefore, the editors assume that an organization is intergovernmental if it is established by signature of an agreement engendering obligations between governments, whether or not that agreement is eventually published. If any organisation declares itself to be non-governmental, it is accepted as such by the editors. All organizations established by agreements to which three states or more are parties are therefore included' (http://www.uia.org//.htm). Following the adoption of ECOSOC Resolution 334 (XI) of 20 July 1950, it was agreed with the UN Secretariat in New York that bodies arising out of bilateral agreements should not be included in the *Yearbook*.

[15] Included by the Commission in its long-term programme of work on occasion of the fifty-second session, in 2000 (*Official Records of the General Assembly, Fifty-fifth session, Supplement No 10* (A/55/10), ch IX.1, para 729).

[16] The first draft articles adopted by the Commission and extensive commentary in YILC 2003, Vol II (Part Two) at 38–45, §§ 1–14; see also Henry Schermers and Niels Blokker, *International Institutional Law*, 1995, § 29A.

[17] See below note 37 and accompanying text.

[18] August Reinisch, *International Organizations before National Courts*, 2000, at 1.

[19] *Ibid*, at 170–171.

The definitions developed in doctrine have more facets, arguably for the aim of a normative and ontological scope. Michel Virally was one of the first scholars who took a general, systematic approach to international organisations from the viewpoint of 'the science of law,' with the aim to 'clarify the significance and bearing of the concepts that it employs'.[20] His definition, which remains authoritative,[21] presents an international organisation as 'an association of States, established by agreement among its members and possessing a permanent system or set of organs, whose task it is to pursue objectives of common interest, by means of cooperation among its members'.[22] Virally specifically distinguished five core traits in organisations: 'their inter-State basis, their voluntaristic basis, their possession of a permanent system of organs, their autonomy and their cooperative function'.[23]

In order to maximise the definition as a tool for identification in general international law, it is possible to focus on criteria that are a condition *sine qua non*. For example, within the framework of positive international law ('international law' meaning 'the law of peace') the 'inter-state basis' of organisations can be said to comprise all aspects of the 'voluntaristic basis' relevant in the context of the creation of an organisation. Since the reverse is not necessarily true, and both criteria are not needed in one definition, the inter-state basis will be taken as a core element. It may be noted that at the time of Professor Virally's writing, there was probably no evidence of other legal subjects establishing organisations.

From the external perspective, the 'cooperative function' also seems less distinctive, as the aim of cooperation inspires a whole range of international legal relationships, whether institutionalised or not.[24] Alternatively, the realist critic might argue that, once the organisation is in existence, if an 'objective of common interest' was shared by a minority of member states only this would not affect the association's identity of 'international organisation'. Professor Virally was of the view that only the 'cooperative function […] is the subject of controversy.'[25] This controversy, however, pertained to the field of international institutional law rather than general international law, and revolved around the question whether organisations

[20] Michel Virally, 'Definition and Classification of International Organizations: A Legal Approach' (1977), in Georges Abi-Saab (ed), *The Concept of International Organization*, 1981, 50–66, at 51.

[21] Quoted for example by White in the introductory section of his textbook; see above, note 6, at 2.

[22] Virally, 'Definition and Classification…', above note 20, at 51.

[23] *Ibid*.

[24] Although this element may be mentioned in the constitutive treaty. Cf the 1998 Rome Statute, by which the States parties established the permanent organ of the ICC whose task is to pursue their common interest 'to put an end to impunity for the perpetrators of [the] crimes and thus to contribute to the prevention of such crimes.' (Preamble, § 5).

[25] Virally, above, note 20, at 54 et passim.

aimed at 'integration' should be studied alongside classic organisations aimed at 'cooperation' as being of the same genus.[26]

What remains is a core definition of 'organisations' that i) have been created by states; ii) possess a degree of permanency; and iii) possess a degree of autonomy with respect to member states. The absence of the criterion 'created under international law' – both in the sense of 'based in' and 'governed by' international law – may be explained from the fact that in Virally's analysis this was considered a given because of the inter-state nature of the establishing act.

The criterion of autonomy reflects the independent status of the organisation vis-à-vis its member states, to which we will return later on. The element of permanency reflects the institutionalised character as opposed to other forms of international cooperation. Arguably this was a more meaningful criterion at the time of writing, when the dividing line between a diplomatic conference and an international organisation was less fuzzy than it has become in later years.[27] It is uncertain whether in the light of present-day practice 'a permanent system of organs' is to be considered an essential element of the definition of international organisation. Moreover, 'autonomy' is difficult to conceive without some form of permanency.

Definitions proposed in more recent writings essentially revolve around the same concepts. For example Klabbers, who proceeds from a purposely traditional formulation, subsequently to put it in perspective, mentions three defining elements: organisations are i) created between states; ii) are created by treaty; and iii) possess an independent will. Schermers and Blokker propose a definition of 'international organisation' which also contains three defining elements: an organisation is i) created by international agreement; ii) has at least one organ 'with a will of its own'; and iii) is established under international law.[28]

The latter definition is conceptually similar to the ones mentioned before and differs mainly in its flexible formulation. The 'agreement' mentioned first is not limited to the category of treaties proper; it may also be

[26] Virally, who considered the EC to be a particular kind of institution on the basis of its aim of 'integration' (rather than the 'cooperation' of regular international organisations), was of the opinion they should not be considered as being of the same genus (at 53–55); but see the opposite view, eg in Henry Schermers and Niels Blokker, *International Institutional Law*, 1995, §§ 27, 28. Incidentally, the drafting process of the second Vienna Convention – in which examples relating to the EC and to other organisations generally figure side by side without a principled distinction being made – seems to confirm the latter view (ch 10 below). Cf also Michel Virally, 'La notion de fonction dans la théorie de l'organisation internationale' in Suzanne Bastid (ed), *Mélanges offerts à Rousseau*, 1974, 277–300, at 288–290.

[27] On 'new' types of international organisations, see below note 52 and accompanying text.

[28] Schermers and Blokker, above, note 26, §§ 29–47.