CHAPTER 6

FORMAL INTERGOVERNMENTAL ORGANIZATIONS

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THOSE who design institutions, of whatever kind, will generally be torn between two contradictory imperatives. On the one hand, there is the desire to make the organization as effective and efficient as possible. It will be set up in order to 'get things done', and to do so with as little cost as feasible, in order to achieve maximum results. And yet, on the other hand, there is a realization that maximum results cannot be achieved by low costs alone; it is also important to hear what the relevant stakeholders have to say, and make sure that those who need to be involved can be involved. In a small pizza restaurant (this too is an organization, lest we forget) doing so may involve nothing more than setting up an ideas box for staff suggestions; with bigger entities, exercising public tasks may involve the creation of democratic organs.

Hence, in any organization, there is a constant tug-of-war ongoing between the imperative of effectiveness and the imperative of legitimacy, whether described as technocracy versus politics, Oakeshott's *universitas* versus *societas*, or, different in form but similar in inspiration, formalization versus deformalization.[1] Whenever

[1] See Michael Oakeshott, *On Human Conduct* (Oxford: Clarendon Press, 1975), 198–206; also Martti Koskenniemi, "The Fate of Public International Law: Between Technique and Politics," *Modern Law Review* 70 (2007): 1–30.

an entity is considered too formal, ways will be invented to circumvent formal procedures; and whenever it is deemed too informal, there will be a call to strengthen control over decision-making, or at least a call to broaden possibilities to influence decision-making.[2] And these, typically, take the form of formal procedures. International organizations then will exhibit both formal and informal elements, albeit in different quantities and mixes.[3]

With this in mind, it is not all that plausible to distinguish between formal and informal organizations—the latter even comes close to being a linguistic impossibility: any chosen form will somehow be 'formal', if words have any meaning.[4] In actual fact, international organizations typically display features of both formality and informality, and will do so in varying degrees. Still, there are two break-even points on the continuum between formal and informal: at one end, an organization that becomes too formal becomes redundant, if not in theory then at least in practice—it will collapse under the weight of its own formalism. At the other end, an entity that becomes too informal ceases to be an organization.[5]

What complicates things further is that the choice of a precise point on the continuum is not dictated by instrumental rationality alone. Given that politics is a messy business, decisions concerning institutional design tend to be influenced by numerous concerns, geopolitical, personal, or otherwise.[6] Surely no rational designer would have dreamt of giving five states a right to veto any decisions in the Security Council; permanent membership could be probably be justified on a rational basis (these were supposed to be the five states with special responsibilities for the maintenance of international peace and security[7]), but the veto serves no instrumental-rational purpose. It does, however, serve an eminently political purpose: it was considered the price to pay to get some of those five states on board to begin with and therewith give the United Nations (UN) the chance for

[2] Jackall suggests, likewise, that organizations cannot escape bureaucracy, and bureaucracy begets calls to prevent domination and privilege. See Robert Jackall, *Moral Mazes: The World of Corporate Managers*, Twentieth Anniversary Edition (New York: Oxford University Press, 2010).

[3] See Jan Klabbers, "Two Concepts of International Organization," *International Organizations Law Review* 2 (2005): 277–93. See also Jarna Petman, "Deformalization of International Organizations Law," in *Research Handbook on the Law of International Organizations*, ed. Jan Klabbers and Åsa Wallendahl (Cheltenham: Edward Elgar, 2011), 398–430.

[4] Note also that it would be extremely odd to refer to states as more or less "formal," yet states too are social constructs and thus subject, in principle, to the same political drives. Elsewhere I place states and their jurisdiction on a par with organizations and their powers: see Jan Klabbers, *International Law* (Cambridge: Cambridge University Press, 2013).

[5] A related perspective is that of organizations as more or less autonomous actors. For an exploration, see Richard Collins and Nigel White (eds.), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (London: Routledge, 2011).

[6] See generally Raymond Geuss, *Philosophy and Real Politics* (Princeton: Princeton University Press, 2008).

[7] See generally, e.g., Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2004).

relevance that the League of Nations never had. This, however, taps into political rationality rather than instrumental rationality. Likewise, the expansion eastwards of the European Union (EU) over the last decade cannot immediately be explained on the basis of the EU treaties and the stated desire to form an 'ever closer union' between the member states—if anything, it works in the opposite direction, diluting such unity as there was among the original six member states.[8] Yet, the eastward expansion finds its rationale in making a return of communism impossible by bringing a number of relatively poor states into the embrace of the West—even at the cost of diluting the EU. And by the same token, the involvement of the World Trade Organization (WTO) with intellectual property rights (in the form of the Trade-Related Aspects of Intellectual Property Rights Agreement) owes more to the lobbying of a handful of industrial sectors than to any particular rational concern: arguably, strengthening the World Intellectual Property Organization (WIPO) would have been just as plausible.[9]

In short, international organizations are not established, and do not function, in a political vacuum. Instead, they are set up to meet with particular historical circumstances following the desires (and whims perhaps) of particular actors and always have to make sure that both input and output legitimacy, so to speak, are sufficiently guaranteed lest they become irrelevant.[10] Input legitimacy depends, in part, on formal characteristics: for example, will all member states have a say in decision-making; and are parliaments and perhaps courts involved in controlling decision-making processes? Output legitimacy, on the other hand, depends predominantly on the work the organization does and whether it leads to desired results.

International law, it would seem fair to say, treats all organizations as 'formal', regardless of their precise degree of formalization, provided a certain threshold of 'organizationhood' is met. Where exactly the threshold is placed is debated, but the term 'informal international organization' is, legally, close to meaningless: at best it functions as a shorthand way of indicating that the entity concerned is not highly formalized. But it does not mean, contrary to the suggestion implicit in the term, that there exist two categories of international organization, subject to two distinct international legal regimes or, worse still, subject to two distinct normative regimes one of which (relating to formal entities) would be international law, while the other (relating to informal entities) would be something else—which would raise serious questions as to what that 'something else' could possibly be.

[8] Indeed, every expansion of the EU, including its first expansion when the United Kingdom, Ireland, and Denmark joined in 1973, has been said to dilute the Union.

[9] The story is well-told in Susan K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge: Cambridge University Press, 2003).

[10] The terms are borrowed from Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: Oxford University Press, 1999). I should add though that in particular my conceptualization of input legitimacy is not identical to Scharpf's.

This chapter will therefore treat the formal–informal distinction as one of degree within international law, merely signifying that some organizations have attained (or suffer from) a higher degree of institutionalization than others. On the highly formal end of the continuum one can find entities such as the EU, the UN, and the World Bank, although here too elements of informality are present, and sometimes very visibly so, such as the informal arrangement that the president of the World Bank will be American.[11] On the more informal end of the continuum one can find entities such as the Council of the Baltic Sea States or the Contact Group on Piracy off the Somali Coast, although here too some formalities will be present, if only in relation to such questions as who gets to preside meetings, how administrative matters are taken care of, the right to attend meetings, and who gets to launch initiatives. Typically, all organizations occupy a position on the continuum between formal and informal, and much the same even applies to the individual organs of organizations: the UN Security Council too displays both formalization and deformalization, or informality perhaps.[12] Examples of the latter include the increased relevance of Presidential Statements (not mentioned in the UN Charter), the way the voting procedure over time has changed to make abstentions by permanent members possible, and the well-known 'pre-cooking' of decisions by the permanent members prior to involving the elected members.

It is sometimes suggested that 'informal' equals 'extra-legal', but this must be rejected, at least for two reasons. First, it may be doubted whether it is even possible to establish an international organization on an extra-legal basis. The claim is sometimes heard with respect to the Organization for Security and Co-operation in Europe (OSCE) and the Financial Action Task Force (FATF), but in both cases the claim is less than plausible. The OSCE works much like any other international organization: it has a constituent document, organs and programmes, staff, headquarters, and operations in a number of states. To claim that it is extra-legal would somehow mean that it remains outside (and above) the law. Surely however, were the OSCE to be engaged in wrongdoing it could not escape being held responsible by claiming that it is extra-legal; and surely, being held responsible cannot depend on the self-characterization of an entity to begin with. And while the FATF is a strange creature, set up by the G7 and located within and administered by the Organisation for Economic Co-operation and Development, it too functions much like a regular organization.[13]

[11] See generally Jacob Katz Cogan, "Representation and Power in International Organization: The Operational Constitution and its Critics," *American Journal of International Law* 103 (2009): 209–63.

[12] See, e.g., Edward C. Luck, *UN Security Council: Practice and Promise* (London: Routledge, 2006), 16–20.

[13] For earlier discussion, see Jan Klabbers, "Institutional Ambivalence by Design: Soft Organizations in International Law," *Nordic Journal of International Law* 70 (2001): 403–21.

Second, even if it would make sense to claim that an entity would somehow remain outside the law, such entities can still display greater or lesser degrees of formalization. The FATF seems fairly strongly formalized: it has a Secretariat, it meets at regular intervals, there are procedures to provide for the presidency and vice-presidency, et cetera. The most curious aspect of its existence is perhaps that its life-span is not unlimited: it operates on mandates that are valid for a number of years. This may be seen as a sign of de-formalization (if no longer deemed desirable, it can easily be disbanded), but that only strengthens the general point that all institutional structures will combine elements of the formal and the informal.

The law of international organizations is too vast a topic to be comprehensively covered in a chapter such as this.[14] Instead, I will explore to what extent the formal-informal distinction affects foundational decisions: the decision to set up an organization, to grant or withhold international legal personality, and to endow it with specific powers. These are not the only topics that could be discussed, nor are they even, for the everyday life of an international organization, necessarily the most relevant: it may well be argued (as will be suggested below) that international legal personality is not all that important. They do however have a bearing on the threshold between 'organizationhood' and 'non-organizationhood', and therewith merit attention in a chapter on 'formal international organizations'.

Why Create an International Organization?

Theorists of international relations or world politics have presented various possible reasons why states may wish to set up an international organization and, often enough, these reasons tend to be traceable to the positions those theorists occupy on international relations generally.[15] So-called realists generally pay little attention to international organizations; one of the classic texts of the genre hardly mentions them[16] and, to the extent that realists do pay attention to international organizations,

[14] For a more comprehensive overview, see Jan Klabbers, *An Introduction to International Organizations Law*, 3rd ed. (Cambridge: Cambridge University Press, 2015), and for a far more comprehensive overview, see H. G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity*, 5th ed. (Leiden: Martinus Nijhoff, 2011).

[15] Kingsbury has astutely observed that much the same applies to the writings of international relations specialists on compliance. See Benedict Kingsbury, "The Concept of Compliance as a Function of Competing Conceptions of International Law," *Michigan Journal of International Law* 19 (1998): 345–72.

[16] See Kenneth N. Waltz, *Theory of International Politics* (New York: McGraw Hill, 1979).

they tend to treat them as epiphenomenal and having little influence on the behaviour of states. The one exception realists generally allow for is that of the military alliance: such alliances are considered as useful vehicles for the furtherance of state interests,[17] even if most realists would tend to see military alliances as fleeting forms of cooperation, useful only until the next shift in the balance of power. All this follows directly from the basic premise of realism: states are engaged in a struggle for survival, and therefore only interested in increasing and cementing their absolute power. As a consequence, realists have little patience with the formal–informal distinction: if organizations are by definition epiphenomenal or close to epiphenomenal, then it hardly matters how they are set up. Formalities, moreover, will have to give way to political realities: to the limited extent that realists would form an opinion on the formal-informal distinction, they would hold that power trumps procedure.

Liberal institutionalists, as the label suggests, are less dismissive of international organizations.[18] They agree with realists that international affairs are about power, but differ on two counts. First, for institutionalists, power does not only come out of the barrel of a gun, but may also include economic or social power. Second, they hold that a relative (as opposed to absolute) increase in power may also be considered satisfactory. Thus, for them, international organizations can play a useful role in getting things done: they can help create stable expectations; and they can help reduce transaction costs. The result, though, is highly instrumental: if the same—or better—can be achieved by other means, then states may be tempted to opt for such other means. Not surprisingly then, it is in this tradition in particular that discussions on the extent of formalization and questions of institutional design tend to be most prominent.[19]

A less (or perhaps differently) instrumental approach is offered by constructivists. Their basic premise is that the global order is a social construct: norms and institutions help structure the world and give meaning to it. In this view, international organizations are useful as forums for discussing and influencing opinion, or as places where standards for behaviour can be created, monitored, and maintained. Organizations, moreover, can learn and adapt, and come to play a role of their own in world politics that is no longer solely reducible to the aggregate or mean interests of their member states. Here then, there may be close attention for insights from academic disciplines such as organizational sociology.[20] That is not to say that constructivism ignores other factors: leading constructivists have observed, for instance, that several organizations have predominantly been created with a view

[17] Morgenthau, for instance, paid close attention to NATO. See Hans J. Morgenthau, *Politics among Nations*, 2nd ed. (New York: Knopf, 1955).

[18] Arguably the classic text is Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984).

[19] The standard reference is Barbara Koremenos, Charles Lipson, and Duncan Snidal (eds.), *The Rational Design of International Institutions* (Cambridge: Cambridge University Press, 2004).

[20] See Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Princeton: Princeton University Press, 2004).

to protecting the domestic status of political elites in their member states;[21] thus, organizations can be put to political use.

In a sense, the perspective of international lawyers is closest to constructivism. International law conceptualizes international organizations as independent creatures with an identity of their own, often (though not invariably) symbolized in the possession of international legal personality. Most international lawyers would agree with the view that international organizations are established by their member states in order to perform certain tasks that those member states are unable or unwilling to perform on their own. According to the leading theory of functionalism,[22] then, international organizations are almost by definition working for the common good, and should not be hindered in their work: this would explain, for example, such phenomena as the recognition that international organizations may have implied powers (as will be discussed below) and will typically be granted tax breaks and immunity from suit before domestic courts.

With some tasks, the need for collective action or management seems quite obvious: it is next to impossible for state A to guarantee that parcels sent from it arrive soundly at their destination in state B without B's cooperation, and with 200 states, such cooperation is probably best achieved through an international organization. While it is not unthinkable to have a network of identical bilateral agreements between 200 states relating to postal matters (after all, the law on extradition, for example, is still largely structured along bilateral lines), it was realized early on that an institutional form would much facilitate things. Likewise, the management of international or transboundary waterways, railway traffic, and other forms of communication is no doubt much easier to achieve through an institution than through series of bilateral agreements. It is hardly a coincidence that the first organizations arose, during the nineteenth century, in relation to transport and communication.[23] As a result, many have held that cooperation on technical, non-divisive, non-political issues, might be easiest to achieve,[24] and functionalist integration theory predicted

[21] See Michael Barnett and Etel Solingen, "Designed to Fail or Failure of Design? The Origins and Legacy of the Arab League," in *Crafting Cooperation: Regional International Institutions in Comparative Perspective*, ed. Amitav Acharya and Alastair Iain Johnston (Cambridge: Cambridge University Press, 2007), 180–220.

[22] On functionalism and its intellectual history, see Jan Klabbers, "The Emergence of Functionalism in International Institutional Law: Colonial Inspirations," *European Journal of International Law* 25 (2014): 645–75; also Jan Klabbers, "The EJIL Foreword: The Transformation of International Organizations Law," *European Journal of International Law* 26 (2015): 9–82.

[23] For a useful overview, see Bob Reinalda, *Routledge History of International Organizations: From 1815 to the Present Day* (London: Routledge, 2009); the intellectual origins are nicely sketched in Mark Mazower, *Governing the World: The History of an Idea* (London: Allen Lane, 2012). See also, for a neo-Gramscian view, Craig N. Murphy, *International Organization and Industrial Change: Global Governance Since 1850* (Cambridge: Polity, 1994).

[24] Indeed, the work of international organizations has always been presented as a-political. See already Paul S. Reinsch, *Public International Unions, Their Work and Organization: A Study in International Administrative Law* (Boston: McGinn & Co., 1911).

that eventually, technical cooperation might 'spill-over' into other walks of life. This too was based on a constructivist insight *avant la lettre*: states would over time learn to appreciate the values of cooperation and come to act accordingly.[25]

Legal Personality

The law of international organizations is not governed by a single universal legal instrument nor even by a clear and universally accepted set of customary international legal rules. Typically, organizations have their own 'internal' systems of rules, while their relations with the outside world tend to be governed by international law—the same international law, by and large, that relates to the activities of other actors operating in the international sphere.[26]

The question of when and whether an international organization comes into existence is answered on the basis of general international law, and there is widespread consensus among international lawyers that the criteria set by international law are neither strict nor precise. Generally speaking, it would seem that the literature accepts a set of four requirements: international organizations, so it is suggested, are typically (1) set up between states, (2) on the basis of a treaty, with (3) at least one organ which (4) is supposed to have a distinct will from the organization's member states. I will briefly discuss these below, as well as two other possible criteria that are sometimes mentioned in connection with the legal existence of international organizations: recognition and the public nature (*vel non*) of the organization's tasks. Before doing so, however, the confusing relationship between existence and legal personality of international organizations needs to be discussed, because it is especially on this point that symbolic battles between formalization and deformalization often play out: those who advocate a low degree of formalization often also (and not surprisingly) advocate that the organization not be given international legal personality.

While legal personality under domestic law is considered very relevant for international organizations (this would allow them to rent buildings, hire staff, participate in legal proceedings, etc.), personality under international law may not be all

[25] A sophisticated recent constructivist contribution is Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organization* (Oxford: Oxford University Press, 2011).

[26] See Jan Klabbers, "The Paradox of International Institutional Law," *International Organizations Law Review* 5 (2008): 151–73; and Jan Klabbers, "Theorising International Organisations," in *The Oxford Handbook of the Theory of International Law*, ed. Anne Orford and Florian Hoffmann (Oxford: Oxford University Press, 2016), 618–34, suggesting that organizations are subject to three different legal dynamics: their relations with member states, their internal relations, and their external relations.

that relevant. There is some empirical support for this proposition: most constituent documents will either contain a grant of personality under the domestic law of the organization's member states or will contain a clause on the specific legal capacities of the organization under domestic law. By contrast, clauses explicitly granting international legal personality have traditionally been few and far between, which might suggest both that personality was not considered all that relevant and that a grant of personality was considered more or less redundant. Both suggestions are plausible.

Personality under international law is a problematic concept and, with respect to international organizations, often considered of limited relevance. This finds its cause in at least two related circumstances. First, organizations need powers (competencies) to act. When a power to act externally is granted (e.g. the power to conclude treaties), a separate grant of international legal personality may not be required: the power to conclude treaties presupposes—or implies—personality. The reverse, incidentally, does not hold true: a grant of personality does not automatically imply any particular powers.[27] As a result, it is more useful (one is tempted to say 'functional') to endow an organization with specific powers than to endow it with a general grant of international legal personality that will need further elaboration in the form of specific powers.

Second, for a long time it was thought that organizations could do no wrong: they were created in order to help achieve the 'salvation of mankind' and for this, no personality would be required.[28] The one exception, generally acknowledged, would relate to the financial institutions: in their case, a grant of personality would at least 'presumptively shield the member states from liability'.[29] More recently, another reason for attaching importance to international legal personality has been put forward: under the articles on responsibility of international organizations, adopted by the International Law Commission in 2011, it transpires that organizations can only be held responsible in their own right if they possess international legal personality, as only international legal persons can engage in internationally wrongful acts.[30]

The International Court of Justice addressed the question of the UN's legal personality in a 1949 advisory opinion brought on by the death of a UN-appointed mediator in the Middle East. In *Reparation for Injuries*, it specified that the UN was to be regarded as a legal person, both by its member states but also, more importantly

[27] With this in mind, it is curious to realize that the WTO has expressly been granted international legal personality without having any external powers. Unless and until such powers are granted, its legal personality remains an empty shell, the meaning of which is best seen as symbolic: it symbolizes that the WTO is an entity separate from its member states. Intriguingly, this in itself denotes a tension with the WTO's oft-heard claim to be "member-driven" rather than bureaucracy-driven.

[28] The reference to the "salvation of mankind" stems from Nagendra Singh, *Termination of Membership of International Organisations* (London: Stevens and Sons, 1958), vii.

[29] See C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed. (Cambridge: Cambridge University Press, 2005), 68.

[30] See Art. 2(a) of the Articles on the Responsibility of International Organizations.

perhaps, by third states.[31] That member states are to accept the legal personality of their own creation is perhaps no cause for surprise, although it does suggest that legal personality is not something member states can easily withhold from their creations.

While the Court did not provide much by way or argumentation on legal personality vis-à-vis member states, it did provide an argument as to why the UN's legal personality would also be opposable to non-member states. The argument, however, is very much geared to the particular characteristics of the UN, and thus not entirely capable of generalization. The Court applied an inductive approach and derived the personality of the UN first and foremost from the UN's activities: these included treaty-making and could thus only be explained by means of the existence of legal personality. And to bolster its conclusion, the Court handily referred to the power of numbers: fifty states, representing the vast majority of then existing states, had the power to bring into being a new international legal person, whose personality would also be opposable to non-members.

Reparation for Injuries can be interpreted in several ways. One reading, plausible in its own right, is that it supports the proposition that eventually the existence of legal personality depends on the legal system concerned, *in casu* international law. On such a reading, the intentions of the founders may have probative value, but will not be decisive. Alternatively, *Reparation for Injuries* can be read as supporting the proposition that, to the extent that the founders' intentions are decisive, these manifest themselves through the specific powers granted to international organizations. Thus, on this reading, if an organization has been granted treaty-making powers, it can only mean that its founders intended their creation to have international legal personality. Since few organizations are purely internally focused, a strong presumption persisted that organizations would almost by definition possess international legal personality, even without an explicit provision to this effect in their constituent treaty.[32] After all, even the conclusion of a headquarters agreement—probably the most common manifestation of treaty-making by international organizations—would presuppose personality. And indeed, given the scarcity of clauses granting international legal personality, it could hardly be otherwise.[33]

This changed some two decades ago when, in the midst of much legal confusion, the EU was created as a new entity without an explicit grant of personality, giving rise to the proposition that therefore, it would not possess legal personality. Legally the argument was never very convincing, all the more so as that same EU was supposed to have a foreign policy and a migration policy—both would seem highly

[31] See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174.

[32] See further Jan Klabbers, "Presumptive Personality: The European Union in International Law," in *International Law Aspects of the European Union*, ed. Martti Koskenniemi (The Hague: Martinus Nijhoff, 1998), 231–53.

[33] The main exceptions include the financial institutions, where a specific clause of personality is usually explained as flagging the limited liability of member states.

implausible in the absence of international legal personality, at least on the theory that such personality is somehow a condition for action. Still, the putative legal personality of the EU came to symbolize the abdication of sovereignty of member states, and the argument that the EU lacked international legal personality thus acquired considerable political traction, even if not all international lawyers agreed.

Perhaps the current law is best presented as follows. There is a strong presumption that once an organization is created, it will be a legal person for purposes of international law, but the presumption can be rebutted, for example when the member states explicitly withhold personality, but this is rare, perhaps even non-existent. It can also be rebutted when organizations are not expected to have external affairs and have no intention of concluding even a headquarters agreement in their own name. Rare as this may be, there was consensus that this description fitted the Benelux for most of its existence, until its constitution was reformed in 2008,[34] and to some extent it may apply to an entity such as the Council of the Baltic Sea States, which does not have a headquarters agreement itself but whose Secretariat has a separate headquarters agreement with Sweden.[35] Finally, the presumption can be rebutted (if this is the proper way to put it) if the entity in question does not quite add up to an international organization. This is probably the most often encountered situation: states set up an entity for cooperative purposes, but in such a loose format that doubts remain whether the entity is an international organization properly speaking—whatever that may mean. And if the entity fails to meet the threshold for organizationhood, it would seem to follow that it cannot aspire to international legal personality either. One set of examples may include the various Committees of the Parties or Meetings of the Parties set up under multilateral environmental agreements. These are institutionalized in the descriptive sense of the term (e.g. they meet regularly, have a Secretariat, and produce documentation of normative relevance) but are often seen as falling just a few inches short of being a 'proper' organization.

The Traditional Elements

Entities are generally considered international organizations (formal organizations, if you will), if they are set up by states, on the basis of a treaty, with at least one organ

[34] Art. 28 of the 2008 Treaty revising the Benelux Treaty (in force since 2012) grants Benelux international legal personality with a view to acquiring privileges and immunities.

[35] For more details, see Jan Klabbers, "Ostseerat," in *Enzyklopedie Europarecht*, I: *Europäisches Organisations- und Verfassungsrecht*, ed. Armin Hatje and Peter-Christian Müller-Graff (Baden-Baden: Nomos), 1163–71.

that, in turn, has a will that is distinct from the will of its member states (a *volonté distincte*).[36] Those criteria are, however, highly flexible, and may give rise to much oscillation between formalization and deformalization. Intriguingly perhaps, the designation used by the founders may provide clues as to the desired degree of formalization, but is not considered to be of much legal relevance. Entities called Study Group or Network may well have a looser structure than those referred to as Union or Organization,[37] but are nevertheless usually considered international organizations and may even be explicitly endowed with international legal personality.

Entities set up by, or involving, other international organizations may well be international organizations, despite the general requirement that members be states: the WTO is an example (one of its founding members is the EU), and perhaps the most intriguing example is the Joint Vienna Institute, set up exclusively by other international organizations in 1992 to provide training to state officials from the formerly communist states of Eastern Europe. Likewise, international organizations can encompass territorial units that are not considered independent states (Taiwan, Hong Kong, and Macau are members of the WTO), or can encompass organs of states or even non-state entities: Interpol was created by police officials, the Bank for International Settlements used to have private shareholders, and the European Committee for Standardization was set up by national standardization bodies rather than states per se.

While it is the case that most international organizations are set up on the basis of a treaty,[38] this is not invariably the case. Indeed, it is often held that states have the choice between using a legally binding instrument and a non-legally binding instrument, and the OSCE is often considered to be set up on the basis of such a non-legally binding document. Other organizations have been created on the basis of a resolution adopted by an existing organization, and the Nordic Council was set up by parallel decisions taken by the parliaments of the Nordic states.

The requirement that an organization possesses at least one organ helps to distinguish institutionalized cooperation from non-institutionalized cooperation. Put

[36] See Klabbers, *An Introduction to International Organizations Law*, 6–14. The list combines proposed requirements explored by other authors.

[37] The International Jute Study Group, its informal designation notwithstanding, is explicitly granted international legal personality in Art. 16 of its constituent instrument.

[38] Somewhat curiously at first sight, Schermers and Blokker list as separate requirements the existence of a treaty, and the entity being governed by international law. This seems curious in that treaties are by definition governed by international law, but becomes more plausible upon realizing that the drafters of a treaty can create an entity by treaty (the treaty will be governed by international law), but stipulate that their creature is a creature under some system of domestic law: an example sometimes mentioned is the Basle-Mulhouse airport, governed by French law but set up on the basis of a treaty between France and Switzerland. This does however presuppose a distinction between the legal instrument used (the treaty) and the entity set up by it (the organization), which may give rise to further issues: if, e.g., the organization dissolves, does therewith the treaty also come to an end? The example is mentioned in Schermers and Blokker, *International Institutional Law*, 47.

differently, a group of states meeting annually does not amount to an organization, but the same group of states meeting annually as the plenary organ of an organization (the organ in which all member states are represented) does amount to an organization. Often, at least two organs will be present: a plenary and a secretariat. The plenary will decide on activities, while a permanent secretariat can be entrusted with recurring tasks: preparing the agenda, sending out the invitations, providing translation, etc.

The fourth requirement is that of the *volonté distincte*: at least one of the organs ought to have a distinct will from the aggregate wills of the member states. While the first three requirements are predominantly formal in nature, this requirement taps into substance, and doing so immediately encounters problems. Taken literally, the *volonté distincte* can only mean that the organ in question can take binding decisions by majority vote. After all, decisions taken by unanimity or consensus are indistinguishable from the aggregate wishes of the member states, and with non-binding decisions it becomes problematic to speak of a *volonté*, whether *distincte* or otherwise. Empirically, however, few organizations (or organs thereof) can boast a *volonté distincte* conceptualized in this way: the Security Council can take binding decisions, as can the EU and, concerning air traffic over the high seas, the International Civil Aviation Organization, but the total number of organizations that can do so is rather small. Hence, interpreted this way, the fourth requirement would mean that there are really only a handful of international organizations.

Not surprisingly then, this requirement is usually interpreted in a more relaxed sense: as long as there is an impression that the organization is more than a vehicle for its member states, it is taken to have the required *volonté distincte*. This, obviously, might apply quite often: a meeting persuading a single member state to soften its stance on topic X, Y, or Z can already be said to have a *volonté distincte* in this loose sense, and perhaps this is as it should be. After all, organizations are not just decision-making devices, but also settings where states can socialize, debate, and aim to persuade one another: the formal and the informal vie for prominence. More technically, even though law-making proper by organizations remains rare, typically organizations can and do set binding internal rules through majority decision-making: rules on the budget, the admission of new members, or the appointment of high officials. Such internal administrative acts (if that is the proper way to classify them) may then be seen to manifest the *volonté distincte*.

At the end of the day, the four requirements mentioned play but a limited role in the identification of organizationhood.[39] As a result, additional factors are

[39] There is a parallel here with statehood, where the Montevideo criteria play but a limited role. For in-depth discussion, see Karen Knop, "Statehood: Territory, People, Government," in *The Cambridge Companion to International Law*, ed. James Crawford and Martti Koskenniemi (Cambridge: Cambridge University Press, 2012), 95–116.

sometimes invoked. Two of these require separate discussion: recognition of the organization's existence by third parties, and the possibly public nature of the organization's task.

Explicit acts of recognition of international organizations are rare, although acts of non-recognition may be somewhat more common: for a long time the USSR refused to recognize the European Economic Community (EEC), even to the point of refusing to bring a claim after an EEC driver had caused a traffic incident in Brussels, out of fear that pressing a claim could be interpreted as implied recognition.[40] Nonetheless, it is sometimes posited that an organization can hardly be said to exist in any meaningful way unless others want to engage with it. Sensible as this position is, it does not amount to all that much: the very act of engaging with an organization presupposes some kind of recognition. If state A concludes a treaty with organization X, this is taken both as evidence and as constitutive of A's recognition of X. Whereas unrecognized states can have all sorts of relationships with each other without this affecting the formal absence of recognition,[41] such is not the case in the law of international organizations. This reflects the fact that organizations enjoy a secondary status in international affairs: they are formal in nature, and they lack territory, population, and natural resources: states may need to have 'back channel' relations with unrecognized states for strategic, economic, or other reasons, but it will be very rare indeed that any state will need to 'back channel' with, say, WIPO, or the World Meteorological Organization. Either way, since engagement with an organization manifests recognition while being constitutive of it, as a criterion to distinguish organizations from non-organizations, or formal from informal ones, it is not all that helpful.

The more interesting criterion would be the public nature of the organization's tasks. After all, it is commonly understood that private for-profit companies cannot be seen as international organizations. If organizations are seen as a force for the common good, as many would intuitively accept, then insistence on a public task might be warranted. On several occasions, courts have indeed hinted at such a conception: a local court in Paris, the EU courts on a few distinct occasions, and the Permanent Court of Arbitration have all held, in pertinent cases, that one of the decisive elements behind an international organization was the presence of a public task.[42] And while an entity is perhaps allowed to make a little profit, as long as it does so in executing a public task it must still be considered an international organization.

[40] I have been unable to find substantiation for the story, and cannot exclude it being apocryphal. Yet, the attitude would make sense and, as they say, one should never let the facts get in the way of a good story.

[41] The *locus classicus* is B. R. Bot, *Nonrecognition and Treaty Relations* (Leiden: A.W. Sijthoff, 1968).

[42] The relevant case law is discussed in Jan Klabbers, "Unity, Diversity, Accountability: The Ambivalent Concept of International Organisation," *Melbourne Journal of International Law* 14 (2013): 149–70.

Although an insistence on public tasks may work in particular settings, it is not all that helpful as a general criterion, largely because all organizational tasks can be seen to include a public element. Perhaps the most obvious example of an organization having first and foremost the protection of the interests of its member states in mind is the Organization of the Petroleum Exporting Countries (OPEC); hence, there is some merit in the suggestion that OPEC is an interest club or lobby group first and foremost, and should not be considered an international organization. And yet, not only does OPEC's constitutional document refer to some public tasks, it is also the case that OPEC does what it does for its member states with a view to enhancing the well-being of those member states. Hence, it exercises a public task, no matter how limited the 'public' concerned may be.[43]

Powers?

Terms such as tasks and functions are often used interchangeably with terms such as powers and competencies, and not just in the literature but in the relevant case law as well. This reflects a large measure of conceptual confusion which, in turn, provides the space for all sorts of arguments concerning the desired degrees of formalization or informality. Moreover, as already alluded to, powers and functions both constitute legal personality, and are manifestations of personality.[44]

Powers are generally thought to flow from delegation by member states,[45] and are usually thought to be conferred in two ways. First, powers can be granted explicitly. Thus, the Food and Agriculture Organization (FAO) has the power (its constitution speaks of 'function') to 'recommend national and international action' relating to, for example, the conservation of natural resources,[46] while the powers of the World Health Organization (WHO) include the power (again, the constitution speaks of 'function') 'to promote and conduct research in the field of health'.[47] Such power grants may give rise to interpretative debates (e.g. does the

[43] OPEC currently has twelve member states (Indonesia appears to have suspended its membership and is not counted), and it seems fair to suggest that in most of them, the well-being of the state coincides with the well-being of a fairly small elite. See http://www.opec.org/opec_web/en/about_us/25.htm.

[44] For a useful recent monograph, see Viljam Engström, *Constructing the Powers of International Institutions* (Leiden: Martinus Nijhoff, 2012).

[45] See generally Darren G. Hawkins et al. (eds.), *Delegation and Agency in International Organizations* (Cambridge: Cambridge University Press, 2006); Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (Oxford: Oxford University Press, 2005).

[46] Art. I(2)(c) FAO. [47] Art. 2(n) WHO.

WHO's power include the power to conduct studies into tobacco advertising?), but their existence as such is beyond dispute—even if the power would never be used.

Alternatively, powers can be granted by implication, the underlying assumption being that the member states would have granted such powers expressly if only they had thought of them. Hence, the International Court of Justice (ICJ) has repeatedly confirmed that such implied powers arise 'by necessary intendment': like express powers, they are somehow deemed to derive from the intentions of the organization's founders.[48]

The main practical question then is how such powers can be implied: what is the basis for their implication? In the leading *Reparation* opinion, the ICJ linked implied powers to the functions of the organization: the organization has implied powers to the extent necessary to function effectively or achieve its tasks. There are few activities imaginable that could not be seen to fall under this broad formula, especially as the functions of organizations are typically cast in broad terms. Thus, to provide a hypothetical example, the UN could be deemed to have the implied power to organize Miss Universe contests, on the theory that such contests help to bring nations together and therewith can be expected to contribute to the maintenance of international peace and security and the development of friendly relations among states.[49]

It has sometimes been argued that powers depend not so much on specific grants or delegations by member states, but rather depend on 'organizationhood': once organizationhood is established, the organization would automatically possess whatever powers it needs, unless its constitution would explicitly prohibit it.[50] The thought is not all that eccentric: it is generally assumed, for instance, that courts have certain powers which inhere in the judicial function, regardless of whether their founding documents refer to them, such as the power to hear expert testimony, or the power to render interlocutory measures.

Still, the notion of inherent powers of international organizations meets with a few formidable obstacles. First, there are no clear indicia of organizationhood. Hence, a debate on the inherent powers of entity X will always be vulnerable to the argument that entity X might not even qualify, for whatever reason, as an international organization. That may not be terribly problematic when it concerns highly formalized entities (the UN, the EU), but will be difficult along the frontier between organizationhood and non-organizationhood.

Second, the notion of inherent powers is hard to align with the general relevance ascribed in international law to the intentions of the drafters of treaties, including

[48] See the discussion in Klabbers, *An Introduction to International Organizations Law*, 63–4.

[49] These are among the purposes of the UN as mentioned in Art. 1, paras 1 and 2, UN Charter.

[50] This is usually associated with the work of Seyersted. For a posthumously published synthesis, see Finn Seyersted, *Common Law of International Organizations* (Leiden: Martinus Nijhoff, 2008).

treaties establishing international organizations. Surely, states would find it difficult to accept that the European University Institute in Florence (which is set up as an international organization) would have the power to engage in military activities due to the mere circumstance that its constituent document does not prohibit it from doing so. The underlying presumption with international organizations generally is, true or false, that they follow a functionalist logic: they are set up by states in order to achieve certain specified results, through the powers those states have delegated to these creatures. Inherent powers simply do not fit the functionalist model,[51] unless limited to administrative matters. Thus, a claim that organizations have the inherent power to conclude a headquarters agreement may be plausible; a claim that they can engage in military action unless otherwise specified is not—the latter is the sole prerogative of organizations with a military function, whether as alliances or as peacekeeping entities.[52]

If powers are typically granted either explicitly or by implication, an important additional source (in particular given the tension between formalization and deformalization) resides in informal amendment—in fact, there are but fuzzy lines between legal phenomena such as implied powers, subsequent interpretation, and informal amendment. The textbook example is the transformation of the North Atlantic Treaty Organization (NATO) since the end of the Cold War from a defensive alliance to a global police force. This took place through informal means, in particular the adoption of a series of strategy documents rather than formal amendments of NATO's constituent document. In doing so, the parliaments of NATO's member states were hardly (or not at all) consulted, and much the same applies to judicial institutions.[53]

What applies to NATO also applies elsewhere. Kirgis has drawn attention to the changes in the scope of activities the Security Council can undertake,[54] and others have made the more general observation that amendment can take place formally, but that informal amendment will continue to exercise a huge attraction for decision-makers.[55]

[51] It is fair to say, incidentally, that Seyersted was the only non-functionalist specialist in the law of international organizations of his generation.

[52] To be sure, Seyersted suggests that some activities need to be based on specified powers (i.e. not all powers are inherent), but does not specify what these are. He does seem to think that international legal personality inheres in organizationhood: see Seyersted, *Common Law of International Organizations*, 31.

[53] See generally Stefan Bölingen, *Die Transformation der NATO im Spiegel der Vertragsentwicklung: Zwischen sicherheitpolitischen Herausforderungen und völkerrechtlicher Legitimität* (Saarbrücken: VDM Verlag, 2007).

[54] See F. L. Kirgis, "The Security Council's First Fifty Years," *American Journal of International Law* 89 (1995): 504–39; see also José E. Alvarez, *International Organizations as Law-makers* (Oxford: Oxford University Press, 2005).

[55] See Ralph Zacklin, *The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies* (Leiden: Sijthoff, 1968).

Conclusion

International law provides little support for a hard-and-fast distinction between formal and informal international organizations. To the extent that the terms are useful, it is to signify a relative value: some organizations exhibit a higher degree of institutionalization than others or, differently put, the mixture of formal and informal elements in any organizational design may locate the organization on different points on a continuum between formal and informal. It is doubtful, however, whether this has any immediate legal ramifications.[56]

This chapter has suggested that the distinction between formal and informal meets with little resonance in the law of international organizations or, more accurately, that while founding actors can opt for higher or lower degrees of formalization or institutionalization, their intentions have little direct bearing on the legal nature of the organization per se. Legal personality under international law is, as noted, both evidenced and constituted by the facility of engaging in external action: an organization does not become 'more formal', or 'more institutional' if it is granted personality, nor does it becomes less formal or less institutional if personality is withheld. Likewise, the established requirements for organizationhood do not seem to signify all that much: they are too loose and flexible to allow for any strict conceptualization of the formal and the informal.

Finally, the question of the powers of organizations is inconclusive as well. It is generally acknowledged that organizations derive their powers from some kind of delegation by their member states, either expressly or by implication (or, throughout their existence, through informal amendments), with possibly some administrative powers inhering in organizationhood. In a quasi-Kelsenian way, it may be said that the organization is the sum total of its powers,[57] and while the sum total can be high or low (and this would seem to depend on the institutional design), it cannot be formal or informal, legal or extra-legal.

All this leaves unaffected, of course, that constituent documents can display greater or lesser degrees of formalization. Some constitutions have highly formalized amendment provisions and are thus notoriously difficult to amend: the UN is a classic example, demanding the approval of the five permanent members of the

[56] There are, obviously, non-immediate ramifications. Thus, in a highly formalized institution, judicial review of decision-making may be a possibility, because in such an organization there may be a judicial organ, and some procedure for judicial review may have been envisaged. Judicial review in such a setting is, however, neither a direct nor a necessary consequence of a high degree of formalization.

[57] Kelsen famously held that the state was pure legal abstraction, the sum of its rights and obligations under international law; see Hans Kelsen, *Introduction to the Problems of Legal Theory*, trans. B. L. Paulson and S. L. Paulson (Oxford: Oxford University Press, 1992).

Security Council.[58] In some cases decision-making by the organization is subject to parliamentary control and possibly also hemmed in by judicial review: here the EU is the classic example. In some cases there may be strict conditions set for aspiring new members, whereas others are more welcoming, and in some organizations the functions are open-ended while in others they are more strictly written down. All these variations (and more) are possible, and tend to be informed by a mixture of instrumental, functionalist concerns and political concerns, informed by existing political configurations. But the claim that the very existence of an international organization in law is subject to the same variation is implausible.

[58] Although it is arguable that here the problem is not formalization per se, but rather the precise contents of the provision, giving a veto to a handful of states.