

INTERNATIONAL ORGANIZATIONS AND THEIR MEMBERS

‘INTERNATIONAL ORGANIZATIONS BELONG TO ALL MEMBERS AND TO NONE’ –

VARIATIONS ON A THEME

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The law of international organizations is a field of study full of themes with variations. With respect to a number of key chapters in this field, such as the legal status of international organizations, their institutional structure, powers, decision-making and decisions, sanctions, fundamental principles exist or are being developed. These principles or themes have a large number of variations in the rules and practice of individual organizations. Like in music, the variations in themselves may be interesting as such, but they can only be fully appreciated by not losing sight of the theme. Like in music, the themes in themselves may be interesting as such, but they can only be fully appreciated by also listening carefully to the multicoloured variations.

This contribution is devoted to a central theme of the law of international organizations: the relationship between an international organization and its members. Already in the early days of existence of international organizations, this topic has given rise to numerous questions. Many of these have now been answered, but sometimes resurface in contemporary variations. In addition there are new questions.

It is useful to first explore briefly the meaning of the word “members”. The English word “member” and the French “*membre*” are both derived from the Latin word “*membrum*”, which means “part of the body”. This meaning is important because it indicates clearly that members are part of a whole – a fact which takes us straight to one of the core questions addressed in this article. Members of an international organization are not just members, after

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all – like the members of a bridge club or a gardening club. In most cases, the members of international organizations are states. How then can members of an international organization be members of *a whole* when in most cases those members are sovereign states, even if the concept of sovereignty of states is no longer as absolute as it used to be? This is one of the major questions within the field of the law of international organizations. In order to examine this question, this contribution is divided into two parts. Section I will concentrate on the role of members *vis-à-vis* international organizations. In Section II the focus will shift to the whole of which the members are part; this Section will briefly look at some of the questions involved in giving a certain amount of autonomy to this whole.

I. WITHOUT MEMBERS, THERE WOULD BE NO INTERNATIONAL ORGANIZATIONS

I.1. The Role of Members in Founding the Organization

It is of course a truism to mention that there would be no international organizations without members. An international organization does not simply spring to life, spontaneously. It must be founded. Strictly speaking, it is not founded by its members. Those members only exist from the moment that the organization has been established. An organization is generally founded by states which draw up the founding treaty of the organization, sign it and subsequently ratify it.¹ These states are referred to as “*a priori* members”.² Because these “*a priori* members” realise the required number of ratifications, the organization comes into existence. Hence: without members, there would be no international organizations.

Sometimes the founding treaty acknowledges that “*a priori* members” hold a special position. This is reflected by giving them the title “original members”.

¹ In exceptional cases international organizations are not founded by treaty. Examples are the Organization of the Petroleum Exporting Countries (OPEC) and the Organization for Security and Cooperation in Europe (OSCE) In its work on the issue of responsibility of international organizations the International Law Commission has therefore rightly not limited its definition of international organizations to organizations established by treaty, but also included organizations established by another instrument governed by international law (see UN Doc. A/58/10, at 38-40).

² U. Fastenrath in B. Simma, *The Charter of the United Nations* (2nd ed. 2002), p. 173.

In legal terms these states are generally in the same position as non-original members. The title “original member” carries primarily a political meaning: the fact that a country is an original member reflects the fact that this country has been willing to give the organization support from the very beginning. The position of original members and the way in which international organizations come into being may be briefly illustrated by the following examples.

The UN Charter was signed on 26 June 1945 by representatives of all fifty countries which participated in the negotiations in San Francisco.³ The US was subsequently the first country to ratify it. On 24 October 1945, the required number of ratifications had been deposited, the Charter then came into force and the UN was born. Article 3 of the UN Charter deals with the original members of the UN – these are primarily the countries which participated in the San Francisco negotiations and which subsequently signed and ratified the Charter.⁴ The original members of the UN are therefore not only the countries which were members from the moment that the Charter came into force, but also countries which had taken part in the San Francisco negotiations and ratified after 24 October 1945. The Netherlands – which ratified on 10 December 1945 – is an example of such a country.

The Marrakesh Treaty, which founded the World Trade Organization (WTO), was signed on 15 April 1994. The final act embodying the results of the Uruguay Round (including the Marrakesh Treaty) makes explicit reference to the importance of membership by all the countries which participated in the negotiations: “[t]he representatives *agree* on the desirability of acceptance of the WTO Agreement by all participants in the Uruguay Round of Multilateral Trade Negotiations [...]”.⁵ Unlike in the case of the UN Charter, it was not provided that the treaty would come into force once a certain number of

³ See on the San Francisco Conference S.C. Schlesinger, *Act of Creation – The Founding of the United Nations* (2003).

⁴ In addition to the countries which participated in the San Francisco negotiations, Art. 3 of the UN Charter also acknowledges as original members the countries which signed the “Declaration by United Nations” on 1 January 1942 (and signed and ratified the Charter). This alternative possibility for belonging to the group of original members was in fact created especially for Poland. Poland had signed the “Declaration by United Nations”, but could not be invited to the San Francisco negotiations because no agreement could be reached about which government was authorised to represent Poland. See further U. Fastenrath and Chr. Vedder in Simma, *op. cit.* note 2, pp. 173-176 and pp. 1373-1378.

⁵ Final act embodying the results of the Uruguay Round of multilateral trade negotiations, para. 3.

ratifications had been reached. Instead, it was simply agreed in Marrakesh that the WTO Treaty would come into force on 1 January 1995 (or as early as possible thereafter). On 1 January 1995, the WTO saw the light of day, after a model pregnancy of just under 9 months. The original members are the old GATT contracting parties who had accepted the Treaty of Marrakesh before 1 January 1995. In contrast with the UN, it was determined that countries who had become members after the constitution of this organization had come into force could no longer be original members. In this case too, as in the case of the UN, “original membership” has political, no legal significance. China made a desperate attempt just before 1 January 1995 to ensure that it could belong to this category of members “of the first hour”, but did not succeed, and did not become a member till the end of 2001.

The Statute of the International Criminal Court (ICC) was adopted on 17 July 1998 in Rome. Less than four years later, faster than both opponents and advocates had expected, it came into force and the Court came into being. The Statute does not provide for a special position for original members. The US was the country that signed the Statute at the last possible moment, on 31 December 2000. On 6 May 2002, however, the Secretary-General of the UN received a message from the American government informing him that the US no longer intended to become a party to the Statute. This is popularly referred to as an “unsigning”, but legally this is not correct of course. Once a treaty has been signed, it has been signed forever; and the depositary is forbidden to erase or white out signatures. The legal situation was formulated precisely in the American message to the Secretary-General: “[a]ccordingly, the US has no legal obligation arising from its signature on December 31, 2000”.⁶ This American decision is highly regrettable, and we must wait to see how this first experiment in the international administration of criminal justice will fare without American involvement. In retrospect, in the light of American policy with respect to the ICC following May 6, 2002, the 6 May message also demonstrated that the US is taking its treaty law obligations seriously. The American government probably envisaged that this policy could come into conflict on a number of points with the *object and purpose* of the Statute, and these have to be respected, also by countries which have signed, but are not yet a party to it.⁷

⁶ The text of the message to the Secretary-General can be found in the “Ratification status of the Rome Statute”, see <www.un.org/law/ICC/index>.

⁷ *Vienna Convention on the Law of Treaties* (1969), art. 18.

A final example is the Treaty of Maastricht, whereby the European Union was founded. This treaty was signed on 7 February 1992. It came into force on 1 November 1993, after ratification by all 12 signatories. This was considerably later than expected. As in the case of the Treaty of Marrakesh, a target date had been agreed. Article R, second paragraph of the Treaty of Maastricht noted 1 January 1993 as the date. But the confidence with which the treaty-makers assumed that their plans for a Union would be welcomed enthusiastically by the peoples listed in the preamble was punished by, among others, the Danish and French referenda. The requirement that all founders ratify complicated the founding of the Union. This had, of course, proved the case in the distant past too when the French National Assembly blocked the founding of a European Defence Community. What is less well known, and less significant, is the fact that the European Foundation could not be founded because the Dutch Senate would not agree to it.⁸

In these four examples, states chose to do more than simply conclude a treaty in which mutual rights and obligations are determined. They opted also to found what has in the last sixty years usually been termed an “international organization”.⁹ In most cases it was acknowledged that it is important for those countries which participate in the founding negotiations to become members. Intensive negotiations between states concerned result in the joyful signing of a founding treaty. The subsequent period of pregnancy varies from a few months (UN) to a few years (the International Criminal Court), and is only rarely terminated by an *abortus provocatus* (the European Defence Community, the European Foundation). During the pregnancy nothing may be done that conflicts with the object and purpose of the unborn fetus, and, moreover, preparations have to be made for the arrival of the new world citizen. Nowadays, this work is sometimes carried out by Preparatory Commissions, PrepComs, which are somewhat akin to empty nurseries: a great deal of feverish decorating takes place there, so that the legal person in question will be delivered into comfortable surroundings. This is the way that international organisations are born. They would never have arisen without the efforts of the founding states, who usually

⁸ See Acts of the First Chamber, 12 November 1985, pp. 72-93, and 19 May 1987, pp. 30-1309/1310.

⁹ See re the origins of the terms “international organization” P.B. Potter, “Origin of the Term International Organization”, 39 *American Journal of International Law* (1945), pp. 803-806.

become original members of the organization. Hence the truism, which applies existentially: without members, international organizations would not exist.

1.2. The Role of Members after Foundation

There have from early on been authors who took the view that from the moment of its foundation international organizations have a will of their own, to be distinguished from that of the members. In the view of authors such as Romano, a legal order (*ordinamento giuridico*) is based on the supposition that there is an effective social group having its own process of formation of will. If we apply this to international organizations (as Romano himself did) this means that within their organs an autonomous process of formation of will takes place that is separate from the formation of will of the member states.¹⁰

Irrespective of what the theory may be, in practice it often becomes clear that both the original members and those who joined later are intensively involved in the decision-making and more in general in the overall functioning of international organizations. International organizations are as it were transparent. Their legal personality is often no more than a thin veil through which the member states are clearly visible. Often one or more of the organs of the organization are composed of representatives of the member states. The question then arises: can these representatives as constituents, or components, of these bodies act in complete freedom? Or are they subject to certain restrictions because the countries which are represented in these bodies are not only sovereign states, but also members of an organization founded by those same sovereign states?

Of course, all this seems to be highly theoretical. Yet this question already arose shortly after the founding of the United Nations in the early years of the Cold War. Various countries applied for membership. Membership of the UN cannot be acquired automatically, as it could in the case of some of the older international organizations.¹¹ This became apparent in practice when, among others, the United States and the Soviet Union insisted during the admission

¹⁰ See W. Meng, *Das Recht der Internationalen Organisationen – eine Entwicklungsstufe des Völkerrechts* (1979), pp. 152-157.

¹¹ See, for instance, art. 11 of the constitution of the Universal Postal Union. The current version of this article provides that only countries which are not members of the UN must be admitted by means of a separate decision (and cannot automatically become members by applying).

procedure on the condition that if a country from one side was admitted a country from the other side should be admitted at the same time. This resulted in great disagreement. Terms such as *horse trading* and *blackmail* were used in the Security Council.¹² A number of candidate members spent years in the UN's waiting-room, even though it is the organization's ambition to achieve universal membership.

The UN Charter lists five conditions for membership: the applicant must be a state, it must be peace-loving, it must accept the obligations contained in the Charter, and it must, in the judgment of the UN, be both able and willing to carry out these obligations.¹³ The "Cold War condition" for admission which was applied in practice, stipulating that a country from the one side be admitted together with a country from the other, does not occur on this list. The obvious question presented itself whether this additional condition could indeed be demanded. At the end of 1947, the General Assembly decided to submit this question to the International Court of Justice (ICJ). The advisory opinion which the Court issued six months later in the *Admission* case is of importance for the problem of the position of member states within an international organization.

This advisory opinion was supported by a majority of nine judges. The Court referred to the five conditions of membership. It indicated that judgment concerning whether these have been met must be made by the organization, more precisely the Security Council and the General Assembly, and finally: the members of these two bodies. The Court came to the conclusion that a member of the UN, when voting on an application for membership in the Security Council or in the General Assembly, is not juridically entitled to make its consent dependent on other conditions than those expressly provided for by Article 4, first paragraph of the Charter.

The position of the minority of six judges was articulated most clearly in the joint dissenting opinion of judges Basdevant, Winiarski, McNair and Read. They came to the conclusion that a member of the UN which votes on a request for membership does have the right to set different conditions than those listed in Article 4, first paragraph of the Charter. This nevertheless does not mean, in the view of the four dissenters, that UN members are not subject to any restriction whatsoever. They must respect the principle of good faith,

¹² *Security Council Official Records*, 2nd year No. 90 (204th meeting), p. 2418 and p. 2421.

¹³ Art. 4.1 of the UN Charter.

they must give effect to the purposes and principles of the UN and they must act in such a manner as not to involve any breach of the Charter.¹⁴

It is, in any case, clear that not only the majority, but also the four dissenters, agreed that states as members of an organization have certain membership obligations, and that therefore a completely “free vote” does not exist.¹⁵ The “joint dissent” clearly indicates what the capacity is of states which vote on membership requests: that of members of the body that must take a decision on this. Literally, the dissenters are saying: “the Member is envisaged in its capacity as a member of these organs, that is to say, in the discharge of its duty to contribute to the making of a recommendation by the Security Council or of a decision by the General Assembly on that recommendation. The freedom of that Member in this respect cannot be either more or less than that of the organ as a member of which he is called upon to give his vote”.¹⁶

This opinion is incidentally a variation on the theme of “politics and law in international organizations”. The four dissenters stress the extent to which the decisions concerning membership taken by the Security Council and the General Assembly are political decisions: “[t]he admission of a new Member is pre-eminently a political act, and a political act of the greatest importance. The main function of a political organ is to examine questions in their political aspect, which means examining them from every point of view”.¹⁷ But the opinion of the Court contains an important proviso to this: “[t]he political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment”.¹⁸ This latter statement was used later in discussions in other international organizations to indicate that there are also

¹⁴ *ICJ Reports 1947-1948*, p. 92 (para. 21).

¹⁵ This is also clear from a later advisory opinion of the Court, that from 1960 concerning the composition of the Maritime Safety Committee of the Inter-governmental Maritime Consultative Organization. The members of the Assembly of this organization were not free in their choice of members for this Committee, but were restricted by the relevant provisions of the constitution. See *ICJ Reports 1960*, p. 150 (in particular p. 159: “Whatever the margin of choice or individual appraisal which exists in the Assembly in relation to the election of any Member of the Council, that margin of choice or appraisal is one which is no greater than is permitted by the terms of those Articles read with Article 18”).

¹⁶ *ICJ Reports 1947-1948*, p. 83 (para. 4).

¹⁷ *Id.*, p. 85 (para. 9).

¹⁸ *Id.*, p. 64.

limitations to the authority of political organs.¹⁹ Neither these political organs, nor their members are entirely free.

The advice of the ICJ in the *Admission* case makes clear that states as members of organs of international organizations have obligations. How far these extend was a matter of debate within the Court, but not the fact that they exist. The dual role of states is a good example of what Georges Scelle once termed *dédoublement fonctionnel*.²⁰ (It is pure coincidence that the same Scelle represented France in 1947 during the oral pleadings of the *Admission* case.) Members are sovereign states, but their membership of international organizations gives them an additional role: that of a constituent part of organs of the organization. Within the organs of the organization in which they are represented, they must in good faith pursue the goals of the organization, and must fulfil any additionally formulated obligations.

A good example of the dual role of states (as state and member) can be found in COREPER, the Committee of Permanent Representatives of the European Union. This organ has a generally recognised pivotal function: on the one hand, the permanent representatives who serve here must represent the position of their country. On the other hand, it is the task of COREPER to prepare the work of the Council, and the ambassadors of the members are therefore embedded in the European decision-making process. A somewhat similar pivotal function is fulfilled by the permanent representatives of other international organizations, although there are no “COREPERS” there.²¹ These ambassadors too must keep their home front informed of developments, of the margins in the decision-making within the organization. They too experience at

¹⁹ The legal advisor of the International Telecommunications Union referred to this judgment of the ICJ when in 1982 the highest organ of the ITU was considering imposing sanctions against Israel which were not listed in the constitution. See H.G. Schermers & N.M. Blokker, *International Institutional Law* (4th ed. 2003), para. 1467.

²⁰ See G. Scelle, “Le phénomène juridique du dédoublement fonctionnel”, in W. Schätzel and J.-J. Schlochauer (eds.) *Rechtsfragen der Internationalen Organisation – Festschrift Hans Wehberg* (1956), pp. 324-342. See also M. Virally, *L’organisation mondiale* (1972), p. 56.

²¹ Compare art. 6 of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (1975). This treaty has not yet come into force. The description in art. 6 of the functions of the permanent representation makes the dual role of these representations very clear. The functions it lists are, among others, the protection of the interests of the sending state and the promotion of the aims and principles of the organization.

close hand the cooperation of the members within the organization. Of course they act according to instructions, but instructions often leave some room to manoeuvre and are, moreover, by no means always issued.

1.3. The Role of the Members with Respect to Different Types of Organs

Let us now delve more deeply into international organizations and look at the role of the members with respect to various types of organs. It is important to note in advance that a certain diversity exists: smaller organizations need non-plenary organs less than larger ones do, and most organizations do not have parliamentary or judicial organs. Nevertheless, there is a certain basic model which already existed in the case of a number of 19th century organizations. Firstly, there is an organ in which all the members are represented, which has the most extensive competence within the organization and that meets quite seldom. Then there is the secretariat, that in the past was run by the Ministry of Foreign Affairs of one of the members, but from the interbellum has increasingly become an independent organ. And finally there is the non-plenary organ, in which a section of the members is represented. This organ has roughly two kinds of tasks: dealing with current issues in the period between the meetings of the plenary organ, as well as supervising and supporting the independent secretariat.

This basic model proved to be reasonably popular and has also been adopted by a number of the international organizations which have been founded in the last few years. Whereas after the Second World War and decolonisation the number of members of global organizations has increased greatly, often triple or four times the original number, this basic structure has remained intact. The only substantial change which has taken place relates not to this structure as such, but to the size of the non-plenary organs of these international organizations. Despite the frequent calls for amendment of the UN Charter, this only occurred in the end in order to increase the number of members of ECOSOC and the Security Council. Similar alterations occurred within the specialised agencies.

What is the role of the members in relation to these three types of organs which we often find within international organizations?

a. In the plenary organ, usually the highest political organ of the organization, the members can defend their positions in the most undiluted manner. This general assembly of members resembles somewhat that from which it originated:

the diplomatic conference.²² But there are also differences, and these have consequences for the role of the members. General assemblies do not convene once, but regularly. Thus, decisions which were taken previously can be built on further and a kind of *corpus* of decisions develops which reflects a certain policy. In addition, these plenary organs function within a larger framework, the basis of which is the founding treaty of the organization. That treaty often imposes certain limits on what the organs and their members can do, as was stressed by the ICJ in the *Admission* case. Another aspect is that these organs are part of a larger whole, and have a certain relationship to other organs within the organization. Developments in practice can result in alterations being made to how these competences are used. Thus, in the history of the United Nations, the stalemate in the Security Council and the influx of developing countries sometimes resulted in the General Assembly taking action instead of the Security Council or the Economic and Social Council. The Charter allows this to a certain extent.

The above-mentioned differences make clear that there are differences between plenary organs and the *ad hoc* diplomatic conferences from which they originated, and that this has consequences for the role of the member states. Their representatives cannot advance exclusively and in an unadulterated manner the self-interest of states. This negative formulation prompts the question what else it is they should, to put it positively, advance. In answer to this Jenks already in 1945 suggested that these representatives should not only be regarded as representatives of the member states, but in addition also as members of an international organ with a collective international responsibility.²³ Sixty years

²² Sometimes the name of this plenary organ reminds of this origin. For example, in the case of the International Labour Organization or UNESCO the name of this organ is Conference.

²³ C. Wilfred Jenks, "Some Constitutional Problems of International Organizations", 22 *British Year Book of International Law* 1945, pp. 11-72, especially pp. 27-28 ("Such persons should, however, be encouraged, by the title given to them and the manner in which their duties are defined in the constitution of the organization concerned, to regard themselves as being simultaneously representatives of the nations appointing them and members of an international representative organ with a collective responsibility as such. [...] If a constitutional foundation can be laid for the gradual acceptance of the conception that the responsibility of persons discharging such duties to their constituencies – the individual nations – is paralleled by a responsibility as members of an international organ with a collective international responsibility, a sound basis will be available for long-term institutional development". Jenks' view was not new. See for instance F. von Liszt, *Das Völkerrecht – systematisch dargestellt* (5th edition 1907), p. 146: "Die Mitglieder dieser Organe haben

later this still appears somewhat idealistic. Nevertheless, it in general indicates well in what way the task of representatives of member states is broader than that of simply champions of pure self-interest.

b. The role of the members in relation to the Secretariat is completely different. Here considerable tension has regularly arisen between the rules and practice. Most organizations have regulations which are supposed to guarantee the independence of the Secretariat. The standard rule can be found for instance in the constitution of the Organization for the Prohibition of Chemical Weapons (OPCW), based in The Hague: “[e]ach State Party shall respect the exclusively international character of the responsibilities of the Director-General, the inspectors and the other members of the staff and not seek to influence them in the discharge of their responsibilities”.²⁴ This independence is in the collective interest of the members. Nevertheless, there have been some black pages in the history of international secretariats: the hunt for communists in the United States in the early years of the UN, which extended to the, for the US, forbidden hunting-ground of the UN Secretariat. The Soviet Union’s track record is no better, as we know from among other things the revelations of Shevchenko.²⁵ And even if the position of *experts on mission* is a bit different from that of Secretariat employees, the fates of UN Rapporteurs Mazilu and Cumaraswamy teach us that the independence of those who are in the service of the organization is still often not respected. In the *Cumaraswamy* case, Judge Rezek of the ICJ said: “[...] the fact of membership requires that every State, in its relations with the organization and its agents, display an attitude at least as constructive as that which characterizes diplomatic relations between States”.²⁶ But the difficulty is that all the above-mentioned cases involved own nationals of a member

daher auch nicht einseitig die Interessen ihres Heimatstaates nach den ihnen erteilten Instruktionen, sondern die gemeinsamen Interessen nach freier Überzeugung zu vertreten”, although Von Liszt feels obliged to add to this in a footnote: “[s]ehr bestritten”.

²⁴ Chemical Weapons Convention, Art. VIII.D.47.

²⁵ A.N. Shevchenko, *Breaking with Moscow* (1985).

²⁶ *ICJ Reports 1999*, p. 110. The complete text (on pp. 109-110) is: “There is no obligation on sovereign States to found international organizations, or to remain members of them against their will. However, the fact of membership – even in the case of an organization whose objectives are less essential than those of the United Nations, and in fields less salient than that of human rights – requires that every State, in its relations with the organization and its agents, display an attitude at least as constructive as that which characterizes diplomatic relations between States”.

state, and in diplomatic relations between states it is in principle forbidden for sending states to dispatch diplomats with the nationality of the receiving state.²⁷ History teaches us that it is precisely in the relationship to its own nationals that member states have difficulty in respecting the independent position of the Secretariat and of those who are in the organization's service.

c. The role of members of an international organization with respect to non-plenary organs is interesting from the point of view of representativity. How to ensure that membership of such organs properly reflects the membership of the entire organization? How to ensure that the members of these organs take the interests of the entire membership sufficiently into account? This can be achieved by, for instance, agreeing that these members do not act on instruction, but as experts. This is the case in the Postal Union: it is required of the 41 members of the Council of Administration that they "carry out their functions in the name and in the interests of the Union".²⁸ But in most of the other organizations this is not the case, and government representatives of the member states – not individual experts – sit on these organs. Another way to ensure that members of non-plenary organs take sufficient account of the interests of the entire membership can be found within financial organizations such as the IMF and the World Bank. Here, there are constituencies. Mr Melkert, the Dutch Executive Director of the World Bank, represents not only the interests of the Netherlands, but also those of the other countries within his constituency, such as Armenia and Israel. Consequently, his email address ends with *worldbank.org* and not *minbuza.nl* or *minfin.nl*. Because of these constituencies every member of the organization can feel represented. In the case of other organizations this is more difficult to realize, because the specific interests of each member in the work of the organization is less technical or is difficult to measure. Every member of the UN has an interest in the maintenance of international peace and security. It is difficult to determine in that case which member may sit in the Security Council, although the drafters of the UN Charter did give the General Assembly the task, in electing members of the Security Council, to pay due regard especially to the contribution of the candidates to the maintenance of international peace and security.²⁹ The Charter also indicates

²⁷ Vienna Convention on Diplomatic Relations, art. 8.2. An exception exists only in the case that the receiving state agrees to the dispatch of a diplomat with the nationality of that state.

²⁸ UPU Constitution, art. 17.2.

²⁹ UN Charter, art. 23.1.

that the Security Council – and therefore its members – acts on behalf of all members of the UN,³⁰ and must submit annual and, when necessary, special reports to the General Assembly, for its consideration.³¹

The role of the member states varies therefore in these three different kinds of organs. But this fact too indicates clearly that without members, there would be no international organizations. An international organization cannot do without its members who wish to make active use of it. Active members are a *conditio sine qua non* for a well-functioning international organization. At the same time, this does not mean that the organization should blindly do what its most powerful members want. At some point in time, the members chose to do more than simply conclude a treaty and to give the organization a face, an identity of its own, after all. This is the subject of the next section.

II. WITHOUT INTERNATIONAL ORGANIZATIONS, THERE WOULD BE NO MEMBERS

II.1. On the Need for a Volonté Distincte

States which have chosen to structure their cooperation, to institutionalise it, within the framework of an international organization, have chosen to be a *member* state, that is, to become a part of a larger whole because of a shared interest. They can only be a member and enjoy the fruits of this membership if they recognise that they are part of a larger whole that must have a certain amount of autonomy.³² Hence: without international organizations, there are no members. The question of the nature of that larger framework is a question which is one of the core questions of the law of international organizations, and which has occupied the minds of many, from the founding of the first organizations in the 19th century till now.

³⁰ UN Charter, art. 24.1.

³¹ UN Charter, art. 24.3. See also M.C. Wood, "Security Council Working Methods and Procedure: Recent Developments", 45 *International and Comparative Law Quarterly* (1996), pp. 150-161 (especially pp. 157-158).

³² As was indicated by the ICJ in the advisory opinion it gave to the World Health Organization in 1996. *ICJ Reports 1996*, p. 75: "But the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals".

In the past, questions arose above all because of unfamiliarity with this phenomenon of a larger framework. Were the newly-founded international organs to be seen as organs common to the members or as organs of the organization?³³ How should the secretariats of the League of Nations and the ILO be composed – should they consist of representatives of the members or of independent international civil servants?³⁴ Should international civil servants have the same privileges and immunities as diplomats?³⁵ Answers were given to these kinds of old questions, but old questions regularly arose whenever new organizations were established. In addition, relatively new questions arise, such as questions concerning the rules relating to responsibility of international organizations. And with the rise of all sorts of less formal, more short-lived forms of cooperation the question automatically arises: when to choose for a classic international organization, and when for a less formal connection? In short, there is still every reason to ask a classic question: what is the nature of the larger cooperation framework that we term an international organization?

If the choice is made to establish an international organization, how can such an organization be made capable of acting independently in international relations and in the exercise of its tasks? How can the organization be made to be more than an informal group of countries which act together on an *ad hoc* basis? This can be achieved by assuming that an international organization has a will of its own. In the literature, this is usually part of the definition of an international organization.³⁶ At first sight it may appear somewhat odd that something as abstract as an international organization should have a characteristic that would seem to be more appropriate to natural persons. But at the same time we have for centuries been familiar with the fact that states within international law have such a characteristic. There is, for instance, within treaty law the *consent to be bound*. And one of the two elements of international customary law is the *opinio iuris*. States can therefore have a will and an opinion. Nevertheless, it may be somewhat more difficult to accept that international organizations too

³³ See, with extensive references to further literature, J.L. Kunz, *Die Staatenverbindungen* (Handbuch des Völkerrechts, vierte Abteilung, 1929), especially pp. 393-404.

³⁴ See I.L. Claude, *Swords into Plowshares* (4th ed. 1971), pp. 191-212; J. Lemoine, *The International Civil Servant – An Endangered Species* (1995), especially pp. 15-41.

³⁵ C. van Vollenhoven, “Diplomatic Prerogatives of Non-Diplomats”, 19 *American Journal of International Law* (1925), pp. 469-474.

³⁶ See for instance P. Sands and P. Klein, *Bowett’s Law of International Institutions* (2001), p. 16; J. Klabbers, *An Introduction to International Institutional Law* (2002), pp. 12-13.

have these characteristics because they are somewhat further removed from social reality than states.

In, among others, the Anglo-Saxon and German literature the same terms are used for the “own will” of an organization: *a will of its own* and *der eigene Wille*. The French term is particularly apt: *volonté distincte*, because it expresses not only the independent will of the international organization, but also refers implicitly to that from which it should be distinguished: the *volonté* of the members.

It is difficult to find any examples of constitutions of international organizations which make explicit reference to such an “own will”. The latter is derived from the founding of organs which can take their own decisions. It is irrelevant for this purpose whether these decisions are taken unanimously, by majority vote, by consensus, or by any other means. What is relevant is that the decisions emanate not from any *ad hoc* grouping of states, but from a body upon which powers have been bestowed to adopt such decisions, a body that is therefore more than the sum of its members. For example, a decision authorizing the use of force in a particular situation by the UN Security Council is fundamentally different from a decision by 15 individual states by which these states support the use of force in a particular situation. There was political support by a substantial number of states – many more than 15 – for the military action by the US, the UK and Australia against Iraq in 2003, but there was no new Security Council resolution authorizing the use of force in this particular case and removing most if not all questions about the legality of Operation Iraqi Freedom.

While it is difficult to find examples of constitutional provisions explicitly referring to the “own will” of (organs of) the organizations, it is not true in general that no constitutional provisions exist about the own identity of the international organization. To the extent that such provisions exist, the term legal personality is used. Certainly in more recent times, it has become more common to include such provisions in constituent instruments of international organizations.

II.2. International Legal Personality: a Closed Chapter?

Why is it that theory and practice sometimes diverge so greatly in relation to the subject of the legal personality of international organizations? This would seem to be the case because of, among other things, the fact that this subject sometimes is politically exceptionally sensitive. This political sensitivity can be felt whenever the question arises whether a particular organization has, or should have, a legal personality of its own. Lawyers – and certainly the academics among them – have problems with the political preference or capriciousness

which can dominate under such circumstances. Certainly because this is at the same time also a core legal subject. As is the case with respect to other politically sensitive sections of international law, such as the recognition of states and the self-determination of peoples, the legal personality of international organizations is a subject with existential overtones. It raises the issue of the formal existence of the organization.

A long time ago this was one of the key subjects within the field of the law of international organizations. In the first half of the last century an intensive discussion on this subject took place in doctrine and practice. Many thought initially that acknowledging that international organizations had a legal personality was going too far. According to this view, sovereign states were the only ones who could lay claim to this. But gradually the view received more support that an own legal personality was not something that was sacrosanct, that should remain the exclusive right of states, but was more of a necessity in practice for international organizations.

The fact that this subject was still a sensitive one in 1945 is apparent from the negotiations concerning the UN Charter. During these the decision was taken not to explicitly accord international legal personality to the UN. The Committee which dealt with this regarded it as “superfluous to make this the subject of a text. In effect, it will be determined implicitly from the provisions of the Charter taken as a whole”.³⁷ What the American delegation report noted about this is telling: “[t]he Committee which discussed this matter was anxious to avoid any implication that the United Nations will be in any sense a ‘superstate’”.³⁸

A little under four years later the ICJ appeared to end the uncertainty on this subject in its *Reparations*-advisory opinion, by accepting that the UN had international legal personality. The Court, which of course wishes its opinions to be followed in political reality, tried to reassure the community of states in the following way, directly after it had been established that the UN had international legal personality: “[t]hat is not the same thing as saying that it is a

³⁷ Documents of the United Nations Conference on International Organization, San Francisco (1945), Vol. XIII (Commission IV, Judicial Organization), p. 710. See pp. 622-623 for a report of the short discussion on this subject. See p. 763 for the text proposed by Belgium in which “international status, together with the rights this involves” is explicitly attributed.

³⁸ Report of the San Francisco Conference to the American President, Department of State Publication 349, Conference Series 71, as cited in C.W. Jenks, “The Legal Personality of International Organizations”, 22 *British Year Book of International Law* 1945, on pp. 269-270.

State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is “a super-State”, whatever that expression may mean”.³⁹ The same need to make this advisory opinion acceptable also explains the somewhat unfortunate remark that the UN has “a large measure of international personality”. This means that the Court views legal personality as a relative concept: an international organization can have it to a greater or lesser degree.

After this 1949 advisory opinion it appeared for a long time as if the issue of the international legal personality of international organizations had been put to rest. International legal personality was usually not explicitly mentioned in constitutions, but accorded implicitly to international organizations along the lines of the *Reparations*-advisory opinion. But in the 1990s this rest was disturbed, and not in the most insignificant organizations: the European Union and the Organization for Security and Cooperation in Europe.

It has been curious to see how, during the last decade, the European Union struggled with what had for a long time been *acquis* in the law of international organizations.⁴⁰ The 1992 Maastricht Treaty establishing the EU did not explicitly grant international legal personality to the Union. Neither did the 1997 Amsterdam Treaty or the 2001 Nice Treaty. In some legal writings it was argued that the member states had implicitly given such personality to the EU.⁴¹ However until 2001 this was not accepted in practice. Only in April 2001 the EU became a party to a treaty in its own name, thereby assuming that it had the capacity to do so.⁴² The next step was taken in the Treaty establishing a Constitution for Europe (signed in Rome, 29 October 2004), which explicitly provides for legal personality for the Union.⁴³

³⁹ *ICJ Reports 1949*, p. 179.

⁴⁰ The next few sentences on the issue of international legal personality of the EU have largely been taken from Schermers & Blokker, *op. cit.* note 19, para. 1569.

⁴¹ See for example R.A. Wessel, “The International Legal Status of the European Union”, 2 *European Foreign Affairs Review* 109-129 (1997), and R.A. Wessel, “Revisiting the International Legal Status of the EU”, 5 *European Foreign Affairs Review* 507-537 (2000) (both with many references to further literature).

⁴² Agreement concluded between the EU and Yugoslavia concerning the activities of the EU Monitoring Mission in Yugoslavia, OJ 2001, L 125/1. This agreement was approved by the Council on behalf of the EU. Other examples are the agreements between the EU and the US on extradition and on mutual legal assistance, signed 25 June 2003 (see OJ 2003, L 181/25).

⁴³ Art. I.6: “The Union shall have legal personality”. Although this text leaves it open

The OSCE began in 1975 as a conference and developed in practice into an organization. It is one of the oddities of the OSCE that its members are not called members but “*participating states*”, even though the OSCE has in the meantime officially become an international organization. It is equally curious, but also a serious problem in practice, that the OSCE does not have international legal personality. Negotiations have taken place for a long time now on this subject, but the participating states have not come to an agreement about this. Especially the United States has been against giving international legal personality to the OSCE. In the meantime the organization must do its work, and it is regularly confronted in practice on all sorts of points with its imperfect status. OSCE personnel and OSCE missions do not enjoy the legal position with the necessary protection which is usual for international organizations. Third parties can sometimes begin proceedings against the OSCE and its staff in national courts without the former being able to enjoy immunity from jurisdiction under the same conditions which apply to other international organizations. In this way the OSCE has difficulty carrying out a number of its current tasks.

As in the case of the EU, scholars have adopted the view that the OSCE has in the meantime implicitly acquired international legal personality.⁴⁴ But unlike in the case of the EU, this view has barely been followed in practice. This is also apparent from the law that came into force in The Netherlands on 1 January 2003, which regulates the status, privileges and immunities of an OSCE institution, the High Commissioner on National Minorities.⁴⁵ Headquarters agreements are concluded for other international institutions which are based in The Netherlands. In the case of the OSCE this did not happen as the OSCE lacked the capacity to conclude treaties.

It is interesting that at the same time as legal personality problems became current within the EU and the OSCE, it became more common in the 1990s to include explicit provisions concerning the attribution of international legal personality to new organizations. That which used to be an exception seems now

whether it covers both national and international legal personality, the recent practice of the EU to conclude treaties supports the view that it also covers international legal personality.

⁴⁴ I. Seidl-Hohenveldern, “Internationale Organisationen aufgrund von Soft Law”, in U. Beyerlin et al. (eds.), *Recht zwischen Umbruch und Bewahrung – Festschrift für Rudolf Bernhardt* (1995), pp. 229-239.

⁴⁵ *Staatsblad* 2002, 580 (Official Gazette of the Kingdom of the Netherlands).

to have become the rule. Examples are Mercosur, the World Trade Organization and the Agency for International Trade Information and Cooperation.⁴⁶

Nevertheless, the developments within the EU and the OSCE have shown that the subject of the legal personality of international organizations is not a closed chapter. There is also something else that makes this clear. This is related to the implications of having an own legal personality.

II.3. *Volonté distincte, but also responsabilité distincte?*

If an organization has international legal personality, and acts independently within the international sphere, this also means that it must *itself* bear the consequences of any of its illegal actions which cause damage to others. A great deal has been said and written over the past years on the topic of the responsibility of international organizations, especially following the collapse of the Tin Council in 1985. The Institut de Droit International carried out a study on this topic,⁴⁷ the International Law Association adopted a substantial report on the larger topic of accountability of international organizations,⁴⁸ and the International Law Commission is now preparing articles dealing with responsibility of international organizations.

That so much attention is being devoted to this subject is not due to the fact that international organizations have suddenly begun in recent years to cause damage on a large scale. It is, however, the case that certain organizations have begun to perform more wide-ranging tasks, which inherently carries the risk that things can go wrong and that questions of responsibility could arise more often and more urgently. The attention to the subject has also arisen because this is a time in which questions of responsibility and accountability receive a great deal of attention *in general*: individual criminal responsibility within international law, even for heads of state; the founding of the *ad hoc* criminal tribunals and *internationalized courts* such as the Sierra Leone Tribunal; the creation of the International Criminal Court after decades of preliminary negotiations; the

⁴⁶ Mercosur, *Protocol of Ouro Preto* (1994), art. 34; Marrakesh Agreement establishing the World Trade Organization, art. VIII; Agreement establishing the Agency for International Trade Information and Cooperation as an Intergovernmental Organization, art. 13.

⁴⁷ R. Higgins, "The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations towards Third Parties", 66 *Annuaire de l'Institut de Droit International* (Session of Lisbonne, Vol. I, 1995).

⁴⁸ Reproduced in this issue.

articles concerning state responsibility which have been agreed in 2001 after years of preparations.

This general “accountability climate” has a direct impact on the functioning of international organizations. This is clear from, among other things, the increased vulnerability of the position of the highest functionary in international organizations. The US vetoed the decision to offer Boutros-Ghali another term of office. Nevertheless, Boutros-Ghali could at least conclude his term. This was not the case with the first Director-General of the OPCW, the Brazilian Bustani who was forced to leave mid-term, after especially the US had lost faith in him. In May 1997 Bustani was appointed as the OPCW’s first Director-General. In May 2000 he was re-appointed for a second term starting May 2001. However, on 22 April 2002 the Conference of the States Parties, the plenary organ of the OPCW, adopted a decision to terminate the appointment of the Director-General with immediate effect. This occurred despite the judgment of the legal advisor of this organization that this was illegal.⁴⁹ Bustani filed a complaint with the Administrative Tribunal of the International Labour Organization (ILOAT) and, to the surprise of many, won his case. ILOAT decided that “the independence of international civil servants is an essential guarantee, not only for the civil servants themselves, but also for the proper functioning of international organizations”.⁵⁰

This recent tendency of the increased vulnerability of the highest officials of international organizations is not difficult to understand. International organizations do not function in a vacuum. They are part of international society, and if questions of accountability become more prominent there, then international organizations will also be confronted with them. There are, however, limits. If because of this the necessary independence of the organization is eroded too greatly, this will in the end work against the interests of the member states.

It is not only interesting to look at the few cases in which the question of the responsibility of international organizations has had an impact in practice, such as the collapse of the Tin Council in 1985. It is also interesting to look at cases where this could have occurred in theory, but did not happen in practice. When NATO carried out operation *Allied Force* in 1999 in relation to the actions of Yugoslavia in Kosovo, this was generally regarded as a NATO operation.

⁴⁹ See 96 *American Journal of International Law* (2002), pp. 711-712.

⁵⁰ Judgment 2232, 16 July 2003 (see www.ilo.org/public/english/tribunal/fulltext/2232.htm).

The core decisions were taken by the North Atlantic Council.⁵¹ NATO was the spokesman. And it was NATO and not one of its member states which paid compensation to a Bulgarian family when a wide shot caused damage to their property.⁵² All of this was to be expected. In order for the operation to succeed it was crucial that the ranks remained closed and that the cooperating countries functioned as a unit, as a whole, not as incoherent parts. But it is interesting to see what happened when Yugoslavia initiated proceedings in the ICJ against ten NATO countries and when relatives of victims of the attack on the television tower lodged a complaint against NATO members at the European Court of Human Rights. It is noticeable that in these cases the defendant states barely made use of the defence that not they, but only NATO could be addressed and should be held responsible. Only Canada, France and Portugal (in the ICJ), and France (in the European Court), brought this argument forward to a certain extent.⁵³ Of course this defence would appear cowardly, certainly in a time in which questions of accountability are so in vogue. International organizations such as NATO cannot after all be a party to proceedings in these courts. But it is nevertheless remarkable, in view of the fact that a NATO operation was at issue, that this was so rarely mentioned.

It is understandable why member states opted in these cases not to seriously adopt the defence that they could not be held responsible for the actions of the organization. But this decision came at a cost. Such a 'piercing of the organizational veil', which occurs when the actions of the organization and the responsibility of the members diverge, entails the risk that either the organization starts to act too freely because it is the member states who are responsible

⁵¹ See further the so-called Kosovo evaluation which the government sent to Dutch House of Commons in March 2000, Parliamentary Document (Kamerstuk) 1999-2000, 22181, nr. 310, especially pp. 8-11 and 15-18.

⁵² See the Dutch newspaper *Trouw*, 3 August 2000.

⁵³ See, *inter alia*, Canada during the oral pleadings relating to the request by Yugoslavia for provisional measures (Public sitting 10 May 1999, Doc. CR 99/16 (p. 15), and Public sitting 12 May 1999, Doc. CR 99/27 (p. 10)); France (during the April 2004 hearings, Public sitting 20 April 2004, Doc. CR 2004/12, pp. 23-25); Portugal (during the April 2004 hearings, Public sitting 19 April 2004, Doc. CR 2004/9, pp. 21-24). France in *de Bancovic* cases: see ECHR, Grand Chamber Decision as to the admissibility of Application no. 52207/99, 12 December 2001 (especially paragraphs 31, 32 and 83). See also, briefly, R. Higgins, "The Responsibility of States Members for the Defaults of International Organizations: Continuing the Dialogue", in S. Schlemmer-Schulte & Ko-Yung Tung (eds.), *Liber Amicorum Ibrahim F.I. Shihata* 441-448 (2001), in particular at 446-448.

if things go wrong anyway, or the organization loses its independence and strength because the member states wish to become more intensively involved in the actions of the organization if they themselves can be held responsible in the event that things go wrong. In the end this could start to work against the member states who after all once chose, in their common interest, to found an organization which can operate independently. Denying or restricting *responsabilité distincte* can in the end sacrifice the *volonté distincte* which is sought. Or, as the saying goes: the danger exists that the baby will be thrown out with the bathwater.

CONCLUSION

Without members there are no international organizations, and without international organizations there are no members. It can be stated, using a small variation on what the Scottish legal scholar James Lorimer wrote in 1884, that 'international organizations belong to all members and to none'.⁵⁴ The law of international organizations is a field of study which is richly filled with paradoxes, and this is perhaps the most existential. Prospective members decide to create an international organization; it is the members who decide to end its life. But as long as the organization exists it can only do so if there is a certain amount of independence, of autonomy, in its relationship with its members. Each organization achieves that balance between dependence and independence in its own way. On this grand theme too many variations exist in practice.

⁵⁴ Lorimer designed a "Scheme for the Organization of an International Government". the original version of this was published in 1877 in his article "Le Problème final du Droit International", which appeared in the *Revue de Droit International* (Vol. ix, No. II, p. 161). The English text of this design is included in *The Institutes of the Law of Nations*, Vol. II (1884), p. 181 and further. On pp. 264-267 Lorimer discusses the "Want of an International Locality" which should serve as a "centre of international life". That is where a "government" should be located "which belonged to all nations and to none" (p. 266). As a synonym for the word "Government" Lorimer uses "international body", "institution" and "international organization". Lorimer regarded the Constantinople of his time to be the most suitable place for it to be located, and noted Geneva as an alternative.