

UNITY, DIVERSITY, ACCOUNTABILITY: THE AMBIVALENT CONCEPT OF INTERNATIONAL ORGANISATION

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This article explores the concept of international organisation, starting from the observation that many of these entities seem to exist and that few seem to be alike. This raises issues of cognition: how to establish whether an entity is indeed an international organisation? The question is all the more relevant in light of the suggestion, sometimes heard, that international law ought to treat different (groups of) organisations in different ways. Having first established the enormous variety of international organisations in existence, the article presents an overview of attempts by international institutional lawyers to differentiate between organisations, followed by an excursion into the relevant judicial decisions. Whereas the literature remains content with discussing formal characteristics, the courts suggest that a public task is one of the core elements of international organisation. This discrepancy is further discussed and it is concluded that the law of international organisations cannot include a public task as an essential element of the concept of international organisation, as this criterion is too fluid and too general to be of much use. In the end, the discipline cannot but uphold a single formalistic conceptualisation of international organisation.

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I INTRODUCTION

When, in the mid-1990s, international organisations started to administer territory on a more or less regular basis, discussions quickly ensued in relation to their possible privileges and immunities. After all, international organisations and their staff are typically immune from prosecution; yet, to the extent that administering territory includes the performance of law enforcement tasks, granting immunity from prosecution to individuals engaged in law enforcement would be difficult to reconcile with the rule of law, whatever the precise conception of the rule of law.¹ Surely, so the argument went, police officials should not be above the law, nor should they be seen to be above the law. Hence, in the end, this discussion involved a plea for recognition of differences — legally relevant differences — among international organisations:

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¹ The rule of law is about as contested a notion as it gets. For a fine overview, see Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004).

with some, immunity from suit ought not to apply or ought to apply in ways that are different from other organisations.²

This particular discussion has died down to some extent, but there have been other occasions where it has been argued that international organisations are too varied to be given the same treatment. The financial institutions sometimes make a profit out of their activities, typically benefiting their shareholders, who are usually industrialised Western states.³ Some organisations engage in military or paramilitary activities — for instance in the fight against piracy — and may even end up killing people, as the North Atlantic Treaty Organization demonstrated in the late 1990s in its humanitarian intervention on behalf of Kosovo. All this has led to a flurry of activities relating to the possible responsibility or accountability of international organisations under international law, but here too some organisations aim to escape the standard format, suggesting that they are in a different position from most other organisations and therefore that different rules should apply to them. The European Union repeatedly made such a claim during discussions on the International Law Commission's *Draft Articles on the Responsibility of International Organizations*,⁴ and similar claims were made by some of the financial institutions.⁵

In short, there seems to be a constant tension in international institutional law between two approaches. The first and dominant approach holds that even though there is great variety among international organisations in terms of their tasks and structures, nonetheless the law treats them (and should treat them) all alike. Yet there is also the recurring thought that this wide variety among organisations should somehow be reflected in their legal position and the extent of their rights and obligations under international law. This essay aims to explore this tension between unity and diversity, with a view to finding out whether it is possible or plausible to subject organisations to different legal regimes under international law.

² See generally Ombudsperson Institution in Kosovo, 'Special Report No 1 on the Compatibility with Recognized International Standards of UNMIK Regulation No 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo and on the Implementation of the above Regulation' (Special Report to the Special Representative of the Secretary-General of the United Nations, Ombudsperson Institution in Kosovo, 26 April 2001). See also United Nations Interim Administration Mission in Kosovo, *Regulation No 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo*, Doc No UNMIK/REG/2000/47 (18 August 2000). Earlier, similar discussions had been conducted with respect to Interpol (the organisation devoted to international policing cooperation) and its European Union-related counterpart, Europol: see, eg, Ulrich Daum, 'INTERPOL — öffentliche Gewalt ohne Kontrolle' [INTERPOL — Public Power without Control] (1980) 35 *JuristenZeitung* 798; Burkhard Hirsch, 'Immunität für Europol — eine Polizei über dem Gesetz?' [Immunity for Europol — a Police above the Law?] (1998) 31 *Zeitschrift für Rechtspolitik* 10.

³ See generally Ngaire Woods, *The Globalizers: The IMF, the World Bank, and their Borrowers* (Cornell University Press, 2006).

⁴ International Law Commission, *Responsibility of Organizations: Titles and Texts of the Draft Articles 1–67 Adopted by the Drafting Committee on Second Reading in 2011*, UN Doc A/CN.4/L.778 (30 May 2011) 54–69 ('Draft Articles').

⁵ See generally Pieter Jan Kuijper and Esa Paasivirta, 'Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations' (2004) 1 *International Organizations Law Review* 111.

The essay is structured as follows. In Part II, I will sketch the wide variety currently existing among international organisations — a variety so wide that it suggests that the single cookie-cutter conception of international organisation is untenable. In Part III, I will discuss earlier scholarly attempts to define the concept of international organisation, concluding that the literature conceptualises international organisations predominantly with the help of formal characteristics. By contrast, the scarce case law of judicial bodies on the concept of international organisations, reviewed in Part IV, suggests the relevance of a substantive criterion: whether or not the entity in question exercises public tasks. Part V aims to further explore the applicability of this idea of entities working in the public interest, whereas Part VI concludes.

In a nutshell, I will argue that the law of international institutions⁶ is incapable of making legally relevant distinctions between various classes of organisations. This is of some relevance in light of the discussions on responsibility or accountability of organisations; the strong current emphasis on the accountability (*vel non*) of international organisations is partly a result of the incapacity of international institutional law to distinguish between entities with the aid of a substantive requirement.⁷

II INTERNATIONAL ORGANISATIONS IN THEIR INFINITE VARIETY

International organisations (ie, intergovernmental entities) come in all forms and shapes. There are, by some counts, roughly 300 or so of these creatures in existence and the international lawyer's wisdom is that no two are alike. While it is no doubt the case that when states create an organisation they use existing ones as models, the variety amongst and between international organisations is nonetheless immense.⁸

This variation is visible when it comes to membership: organisations range from truly global (the United Nations) to almost global (eg, the World Trade Organization) to regional (eg, the EU, African Union, Organization of American States) and, indeed, even to bilateral entities (eg, the *Office franco-allemand pour la Jeunesse*). In addition, some organisations have select membership along ideological lines (NATO, the Organisation for Economic Co-Operation and Development ('OECD'), Organisation of Islamic Cooperation ('OIC')). Variation is also visible with regards to their fields of activity: some are military alliances (eg, NATO); some deal with finance (eg, International Monetary Fund ('IMF')) or are in effect investment banks (eg, World Bank, Nordic Investment Bank); some address issues of trade or other aspects of the economy (eg, WTO, International Labour Organization ('ILO')); some are essentially research entities

⁶ I use the terms 'international institutional law' and 'law of international organisations' interchangeably.

⁷ The more salient contributions to this discussion include the global administrative law approach and the public institutions approach. On the former, see Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68(2) *Law and Contemporary Problems* 15. The flagship of the latter is: Armin von Bogdandy et al (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer, 2010).

⁸ For a fine discussion of this variety and the problems of arriving at an authoritative definition, see José E Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2006) 4–17.

(eg, European Forest Institute); some address issues of general human welfare (eg, World Health Organization ('WHO'), the United Nations Children's Fund ('UNICEF'), United Nations Educational, Scientific and Cultural Organization); and some are of more or less general jurisdiction (eg, UN, Council of Europe).

Regardless of the variety amongst entities that are formally presented as international organisations, there also exist entities that may not be so presented but are, in effect, well-nigh indistinguishable; think of the various conferences of the parties ('COPs') and meetings of the parties ('MOPs') set up under multilateral environmental agreements; think of the Organization for Security and Co-operation in Europe or, on a smaller scale, of an entity such as the Council of the Baltic Sea States ('CBSS'). In addition, a recent trend is the creation of international hybrids made up of a variety of other actors, sometimes encompassing both the public and the private sectors. Examples include the GAVI Alliance (once known as the Global Alliance for Vaccines and Immunisation) and the Global Water Partnership, while the Contact Group on Piracy off the Coast of Somalia more closely resembles a network, with ever-changing participants, than a formal entity.

The law of international organisations (and, in its wake, domestic law generally) applies by and large the same principles to all international organisations, regardless of their composition, their set-up or their tasks. Thus, all international organisations are thought to work on the basis of powers conferred upon them, either expressly or impliedly, by their member states. All organisations (or parts of organisations) are granted privileges and immunities from the jurisdiction of their member states, even if the precise scope of privileges and immunities may differ from organisation to organisation. All organisations are deemed subjected to the same international responsibility regime, authoritatively formulated by the International Law Commission under guidance of Special Rapporteur, now Judge, Giorgio Gaja.⁹ Paradoxically, this results in the situation that there is no proper law of international organisations: there are notions that apply to most or all international organisations, such as the implied powers doctrine, but no rules that are valid for all organisations. Indeed, it is no coincidence that no one speaks of a 'rule of implied powers' — the term 'rule' would suggest universal applicability.¹⁰ If variety is the spice of life, nonetheless the law tends to treat most of these entities as if no variation exists.

In the mainstream literature (and well-nigh all legal literature on international organisations is mainstream), international organisations are typically seen as entities set up between states to perform a given task or function, based on a treaty and endowed with at least one organ and some independent powers which enable it to formulate and exercise a will that is independent, to a greater or lesser extent, from the will of the aggregate of its member states. These elements, strictly speaking, do not form legal requirements; it is generally recognised and acknowledged that the law of international organisations lacks a robust legal

⁹ The International Law Commission adopted the *Draft Articles* in 2011. The Sixth Committee of the General Assembly adopted a draft resolution endorsing the *Draft Articles: Responsibility of International Organizations*, UN GAOR, 66th Comm, 66th sess, Agenda Item 81, UN Doc A/C.6/66/L.22 (4 November 2011).

¹⁰ Jan Klabbers, 'The Paradox of International Institutional Law' (2008) 5 *International Organizations Law Review* 151, 163.

definition. Instead, they are best regarded as regularly recurring elements, without prejudice to possible exceptions. Thus, there are also entities widely recognised as international organisations which are not exclusively set up between states — the WTO, for example, counts the EU among its founding members. Likewise, there are international organisations that have their legal basis not in a treaty but in, for instance, a resolution adopted by another organisation — an example is the UN Industrial Development Organization, set up by a General Assembly resolution in 1966.¹¹

An important point to note is that these elements are all formal in nature or, more to the point perhaps, they are not substantive: international institutional law does not look at what entities do or mean to accomplish as a serious element. This is no coincidence; the prevailing concept of international organisation, with its insistence on formal characteristics, needs to come to terms with the ambivalences undergirding the existence of international organisations. Or, in other words, the only safeguard the law offers against possibly malicious or nefarious international organisations is that, for all practical purposes, organisations need to meet with some form of acquiescence or recognition before they can function in a meaningful way in contact with the outside world. The general presumption then is that all international organisations are by definition, and inherently, ‘good’: they embody international cooperation (also seen as inherently ‘good’) and are seen to perform a task that is somehow in the public interest. Otherwise, after all, others would refuse to do business with them: the invisible hand on the marketplace of ideologies — or the invisible college of international lawyers, perhaps — is relied upon to guarantee that no bad apples ever land in the basket.

The net result is that organisations are pictured as innately good, socially beneficial creatures, which should be given the room and facilities to perform and perhaps even expand. Many have held that organisations can remedy the defects of the global legal order¹² and Nagendra Singh — who would later become President of the International Court of Justice (‘ICJ’) — even went so far, in the late 1950s, as to hold that organisations contribute to the ‘salvation of mankind’.¹³ Historically speaking, this makes some sense: international organisations, based in law if not always in fact on the sovereign equality of their member states, came to replace the naked exercise of power by important states and thus carried an implicit promise of a better world. At the very least, small powers could avoid being ‘bossed around’ by major powers by entering into formal organisations with them.¹⁴ While there is room for the argument that the major powers are still capable of carving out special positions and privileges for

¹¹ See *United Nations Industrial Development Organization*, GA Res 2152 (XXI), UN GAOR, 2nd Comm, 1468th plen mtg, Agenda Item 41b, UN Doc A/RES/2152 (XXI) (17 November 1966). To be sure, in 1979 a constitution was adopted and now ranks as the basic instrument of the United Nations Industrial Development Organization: *Constitution of the United Nations Industrial Development Organization*, opened for signature 8 April 1979, 1401 UNTS 3 (entered into force 21 June 1985).

¹² See, eg, Henry G Schermers and Niels M Blokker, *International Institutional Law: Unity within Diversity* (Martinus Nijhoff, 5th ed, 2011) 6–7.

¹³ Nagendra Singh, *Termination of Membership of International Organisations* (Stevens and Sons, 1958) vii.

¹⁴ See Bengt Broms, *The Doctrine of Equality of States as Applied in International Organizations* (University of Helsinki, 1959).

themselves within international organisations, the same argument recognises that within formal organisations they need to take the interests of smaller powers into account.¹⁵

Either way, the promise of international organisations contributing to the salvation of mankind depends to some extent on luck (moral luck, as it were) and rhetorical strategies. The moral luck resides in the circumstance that truly malicious international organisations are unknown. A high-profile attempt to establish a nefarious directorate in the form of an international organisation was proposed, but was eventually aborted. In the 1920s, Italy's fascist dictator Benito Mussolini proposed an international organisation, comprised of Germany (about to become Nazified), the UK and France, in order to dominate Europe's smaller powers. Reportedly, the scheme failed because France — much to its credit — refused to participate.¹⁶ But had Mussolini's initiative been successful, it would have presented international institutional law with a serious dilemma: how to treat an international organisation whose purpose would be considered by many as malicious.¹⁷

In the rare instances where this has come to be seen as problematic, the chosen strategy was invariably to somehow deny that the entity in question qualified as an international organisation. Thus, Western observers sometimes dismissed the *Warsaw Pact* and the Council for Mutual Economic Assistance ('CMEA'). These would, so the argument went, not really be international organisations but vehicles for domination by a single and hugely powerful member state: the Soviet Union.¹⁸

After the end of the Cold War and the demise of both the *Warsaw Pact* and CMEA, perhaps something similar might apply to the Organization of the Islamic Conference (re-named in 2011 as the Organisation of Islamic Cooperation). While its quality as an international organisation is not directly contested, nonetheless it seems to be all but ignored. It is rarely given more than a passing mention in textbooks and rarely subjected to serious analysis,¹⁹ despite having been in existence for some four decades, comprising close to 60 member states and having considerable influence within the UN system as currently representing the largest bloc of like-minded states.

Be that as it may, the law of international organisations faces a challenge whenever confronted with an entity actively endorsing agendas that are not universally shared or where it is doubtful that the entity works for the global common good. One iteration thereof concerns military alliances, which have

¹⁵ See Randall W Stone, *Controlling Institutions: International Organizations in the Global Economy* (Cambridge University Press, 2011).

¹⁶ The story is recounted in Remco van Diepen, *Voor Volkenbond en vrede: Nederland en het streven naar een nieuwe wereldorde 1919–1946* [For League of Nations and Peace: The Netherlands and the Pursuit of a New World Order 1919–1946] (Bert Bakker, 1999) 134.

¹⁷ At least with the benefit of hindsight. It is possible to conceive of some 1920s audiences as having been enthusiastic about strong leadership in the face of political and economic crises; some historians conceptualise twentieth-century Europe as the arena in which liberalism, fascism and communism struggled for prominence: see especially Mark Mazower, *Dark Continent: Europe's Twentieth Century* (Penguin, 1999).

¹⁸ See Bryan Schwartz and Elliott Leven 'International Organizations: What Makes Them Work?' (1992) 30 *Canadian Yearbook of International Law* 165, 178.

¹⁹ But see Katja Samuel, *The OIC, the UN and Counter-Terrorism Law-Making: Conflicting or Cooperative Legal Orders?* (Hart, forthcoming).

typically met with some ambivalence in the literature, perhaps mostly caused by uncertainty regarding the extent to which these actually represent international cooperation.²⁰ Thus, the problematic military alliance based on the *Security Treaty between Australia, New Zealand and the United States of America* ('ANZUS')²¹ is usually presented as a platform for consultations rather than as an institution²² and, likewise, the erstwhile Central Treaty Organization ('CENTO') involving Iran, Pakistan, Turkey and the UK was described as acting 'more as a security alliance than an organisation also aiming to promote cooperation in economic and other fields'.²³

Among lawyers, there has been less debate about other military alliances, such as NATO or the now defunct Southeast Asia Treaty Organization. Many lawyers accept these as organisations, partly because they actually look like organisations, having several organs and being engaged in more than the provision of basic military security. In other words, these represent cooperation between states to a greater degree than ANZUS or CENTO and have a more robust institutional framework as well. As Hans Morgenthau put it with respect to NATO, its military tasks do not distinguish it from a traditional alliance. Yet Morgenthau, often seen as the father of realism in the study of international relations, underlined that NATO has other objectives as well and suggested that it is this characteristic, in combination with an institutional structure, that allows it to be seen as an international organisation.²⁴ In brief conclusion, it seems that the decisive criteria for military alliances to be seen as international organisations include the existence of organs and the ambition to further cooperation between the participating states.

The notion of international organisation is also probed from other directions. There are many entities whose institutional structure is so loose as to create doubts about their quality as international organisations.²⁵ In the field of international environmental law, a central overarching organisation is lacking, but many agreements create a secretariat and institutionalise regular MOPs or

²⁰ Here it should perhaps be noted that many military alliances are not even discussed in these terms to begin with, as they are limited to offering mutual military guarantees.

²¹ *Security Treaty between Australia, New Zealand and the United States of America*, opened for signature 1 September 1951, 131 UNTS 83 (entered into force 29 April 1952) ('ANZUS').

²² The story of ANZUS is rendered more complicated still by the circumstance that the US and New Zealand have deep-rooted differences concerning the propriety of the use of nuclear power and nuclear weapons, resulting in a suspension of relations between the two, leaving Australia and the US to consult bilaterally. This alone renders any institution-building difficult and makes it problematic to think of ANZUS as an organisation. While formally ANZUS continues to exist, it is by and large inoperative.

²³ Bob Reinalda, *Routledge History of International Organizations: From 1815 to the Present Day* (Routledge, 2009) 372. The Central Treaty Organization was disbanded after the Iranian Revolution in 1979.

²⁴ See Hans Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (Alfred A Knopf, 2nd ed, 1955) 495–7.

²⁵ See generally Jan Klabbers 'Institutional Ambivalence by Design: Soft Organizations in International Law' (2001) 70 *Nordic Journal of International Law* 403; Alison Duxbury, 'Moving Towards or Turning Away from Institutions? The Future of International Organizations in Asia and the Pacific' (2007) 11 *Singapore Yearbook of International Law* 177.

COPs.²⁶ These may function like international organisations in all but name. Likewise, in many different fields regular working groups representing states and having a more or less regularised structure may be active. One of the more well-known examples, established by the European Council, was the so-called TREVI group, set up in order to informally discuss issues related to terrorism;²⁷ it was disbanded when integrated into the formal EU structure by means of the *Treaty of European Union*.²⁸

Other fairly informal groupings include the Group of Seven ('G7'), Group of Eight ('G8') and Group of 20 ('G20'), operating over the years in different constellations and configurations. The regularity of their meetings suggests something of an institutional structure, yet they lack the embodiments of such a structure, such as a secretariat. The meetings are prepared by the host country and, therewith, oddly perhaps, the G8 (and now G20) form a throwback to the late 19th century, when international organisations were yet to gain their full independence. That said, the G7 inaugurated the creation of the Financial Action Task Force ('FATF') so as to combat money laundering and also, later, the financing of terrorist activities. The FATF is itself considered an international organisation in that it has member states, a lead administrator and a Secretariat, although the latter is housed within the OECD headquarters. This dependence on others for premises is also a throwback of sorts: the Universal Postal Union was first based, in the late 19th century, on the premises of the Swiss postal department.

By the same token, less high-profile entities such as the CBSS or the Black Sea Economic Cooperation ('BSEC') started life as regular gatherings for political leaders with a minimal institutional infrastructure, although both have institutionalised to some extent over the years. BSEC (note the absence of any institutional reference in its designation) has created a Secretariat and so has the CBSS. Curiously perhaps, with the latter it is the Secretariat which is deemed to have international legal personality and which has concluded a headquarters agreement with the state where it is located (ie, Sweden). The CBSS itself is still depicted as a loose and informal framework for inter-state cooperation.²⁹

Also noteworthy are the various partnerships engaged in by international organisations and other entities, including the private sector. The resulting creations defy easy categorisation. Take, for instance, the GAVI Alliance, which

²⁶ The seminal analysis is Robin R Churchill and Geir Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 *American Journal of International Law* 623.

²⁷ See, eg, Deirdre Curtin, 'EU Police Cooperation and Human Rights Protection: Building the Trellis and Training the Vine' in Ami Barav et al (eds), *Scritti in onore di Giuseppe Federico Mancini, Volume II* [Essays in Honour of Giuseppe Federico Mancini] (Giuffrè, 1998) 227.

²⁸ *Treaty on European Union*, opened for signature 7 February 1992, [2010] OJ C 83/13 (entered into force 1 November 1993) Title VI ('*Treaty on European Union*'). Police cooperation generally takes place in a myriad of cooperative entities: see generally Peter Andreas and Ethan Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations* (Oxford University Press, 2006). Even the leading organisation, Interpol, hardly conforms to the standard definition, having been set up by law enforcement authorities rather than states: see generally Rutsel Silvestre J Martha, *The Legal Foundations of INTERPOL* (Hart, 2010).

²⁹ See Jan Klabbers, 'Ostseerat' [Council of the Baltic Sea States] in Peter-Christian Müller-Graff and Armin Hatje (eds), *Enzyklopedie des Europarechts* (Nomos, forthcoming).

is a joint enterprise involving the WHO, a number of states, private companies, civil society organisations and the Bill and Melinda Gates Foundation. Is this an international organisation or is it something else? Much the same applies to other partnerships of this kind, ranging from the Global Water Partnership to the Global Environment Facility.

Also complicating matters may be the situation where an entity is institutionally linked to a different one, leading to all sorts of questions relating to accountability. This came to the fore rather prominently in 2012, when the ICJ rendered an advisory opinion concerning a judgment of the ILO Administrative Tribunal relating to the plight of an employee of the Global Mechanism of the *United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*,³⁰ an entity housed in and administered by the International Fund for Agricultural Development ('IFAD'). The ICJ held, in a nutshell, that in the circumstances of the case, IFAD could not escape responsibility by pointing to the separate existence of the Global Mechanism.³¹

Relatedly, the discipline of international institutional law may have a hard time distinguishing between organisations and their programs, as such programs can take on highly institutionalised characteristics of their own. The World Food Programme ('WFP'), for example, is a joint program established by the UN and the Food and Agriculture Organization, with approximately 12 000 employees and its own, albeit relatively modest, set of organs.³² Likewise, the Office of the UN High Commissioner for Refugees ('UNHCR') is a creation of the UN General Assembly and still governed by the General Assembly and the UN's Economic and Social Council. It has been pointed out that such programmes may in practice operate largely independently, raising questions about the degree to which their parent organisations retain control and can, eventually, be held accountable. This is all the more relevant as entities such as WFP and UNHCR operate in the field and directly affect the lives of millions of people.³³

Some doctrinal confusion exists with respect to the position of international courts and tribunals. These are, for some purposes, treated as international organisations. It is not uncommon, for example, for an international tribunal to conclude a headquarters agreement with the host state and to be the recipient of privileges and immunities. Yet for other purposes, treating judicial bodies as international organisations is awkward; it can, for example, not plausibly be maintained that they have member states or exercise delegated powers (unless one treats the judicial task in general as such). On both points, after all, there

³⁰ *United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, opened for signature 14 October 1994, 1954 UNTS 3 (entered into force 26 December 1996).

³¹ *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed Against the International Fund for Agricultural Development (Advisory Opinion)* (International Court of Justice, General List No 146, 1 February 2012) 28–30.

³² World Food Programme, *About: Corporate Information* (2013) <<http://www.wfp.org/about/corporate-information>>.

³³ For an excellent study, see Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (Cambridge University Press, 2011).

would be problems in respect of the traditional and revered idea of judicial independence: a court with member states and delegated tasks may have to listen to instructions emanating from those member states and perform those delegated tasks. Yet it would be difficult to imagine an international court set up on any other basis: the International Criminal Court is perhaps an overt example, governed as it is (in a way) by an Assembly of States Parties, but much the same applies to other international courts and tribunals. Even the ICJ is, formally if not in practice, subject to control and steering by the parties to its *Statute*.³⁴

Also curious is that some academic entities are set up as international organisations. This applies most prominently perhaps to the European University Institute, based in Florence, set up on the basis of an agreement between the member states of the European Union, complete with a headquarters agreement with the host state of Italy. Other examples may include the International Council for the Exploration of the Sea, set up by the intrepid Fridtjof Nansen; the European Forest Institute; the Nairobi-based International Centre of Insect Physiology and Ecology; or the various European schools littered across Europe.

Some international organisations are seen primarily as interest groups. While this can hardly be said to apply to the various commodity organisations in existence, such as those aiming to regulate the market in coffee, cocoa or olive oil with their emphasis on fair trading and market stabilisation, it is an allegation sometimes directed at the Organization of Petroleum Exporting Countries ('OPEC'), which has been on the receiving end of antitrust investigations.³⁵ Some other organisations might be seen to straddle the dividing line between interest group and public entity. This applies, perhaps, to an entity such as the International Organisation of Vine and Wine, created in 2001 to replace the International Wine Office (in existence since 1924) and having among its tasks 'the preparation of new international standards in order to improve the conditions for producing and marketing vine and wine products'.³⁶

Other entities seem to exist primarily as vehicles for the spread and maintenance of pre-existing cultural ties: this might apply to the Commonwealth of Nations (formerly the British Commonwealth),³⁷ as well as to the Organisation internationale de la Francophonie or its Portuguese counterpart, the Comunidade dos Países de Língua Portuguesa.

Moreover, there are some entities, usually considered international organisations, that claim something of a special position for themselves, as

³⁴ *Statute of the International Court of Justice*. The problem was noted with respect to the UN Administrative Tribunal — and rapidly glossed over under reference to domestic analogies — by the ICJ in *Effect of Awards of Compensation Made by the UN Administrative Tribunal (Advisory Opinion)* [1954] ICJ Rep 47, 61.

³⁵ See Cedric Ryngaert, 'Domestic Legal Remedies against OPEC', in August Reinisch (ed), *Challenging Acts of International Organizations before National Courts* (Oxford University Press, 2010) 239, 239–40.

³⁶ *Agreement Establishing the International Organisation of Vine and Wine*, opened for signature 3 April 2001 [2004] ATS 3 (entered into force 1 January 2004) art 2(c).

³⁷ To be sure, its status as an international organisation is debated, with the faint suggestion that since it was not based on a treaty, it may not be an organisation: see Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2nd ed, 2007) 38. That said, it has all the hallmarks associated with organisations, ranging from organs to membership criteria and suspension procedures. The Commonwealth itself deftly circumvents the discussion by describing itself as a 'voluntary association': Commonwealth, *Who We Are* (2011) <<http://www.thecommonwealth.org/subhomepage/191086/>>.

mentioned above. In some respects, this is done most vocally by the EU, which consistently answered the attempts to develop a regime on the responsibility of international organisations under international law by proclaiming that for all its merits, such a regime could not apply to the EU, as the EU is, somehow, different.³⁸

Something similar applies to the financial institutions, who sometimes also claim that general rules should not apply to them, at least not in full. On at least one topic of salience the financial institutions have departed from general practice: when it comes to successions of member states (eg, after a state has dissolved), the new states have typically been treated by financial institutions as the successors in law of the predecessor state — and understandably so. There is, after all, a lot of money at stake when states have borrowed from the financial institutions and a loss of membership would entail the creation of a clean slate with respect to debts. Hence, while the general practice ('rule' being perhaps too strong a term) suggests that membership is personal and lost upon dissolution, the practice with respect to financial institutions has been the reverse: membership has been presumed to continue.³⁹

As this survey suggests, organisations come in all kinds, shapes and forms. Some are military alliances; some are profit-making; some engage in law enforcement activities; some aim to advocate a particular political or economic agenda on behalf of a limited group of states; some are devoted to education or academic research; some are highly formal creatures; some are highly informal creatures; some unequivocally work for the global common good, however defined; others perform technical tasks; and some aim to spread ideologies or maintain cultural ties. All this suggests the contours of the problem: is it feasible to subject all entities to the same sets of rules and doctrines? This has both a normative and an academic side. On the normative side, it may be wondered how fair it is to grant privileges and immunities (from suit, from taxation) to organisations that are little more than economic interest groups, to educational facilities or to entities and their staff exercising law enforcement tasks. On the academic side, it may be wondered whether it is feasible to discuss profitable money-making entities such as the financial institutions or entities pushing particular regional or ideological agendas, such as the EU or the OIC, in the same vein as entities devoted to the global good, for example by providing food to famine-stricken areas or eradicating deadly diseases.

III CLASSIFYING INTERNATIONAL ORGANISATIONS: THE LITERATURE

In essence, the above suggests that there might be a need to classify international organisations with a view to increasing fairness and transparency. Attempts to classify international organisations are nothing new: this has been done before and is a regular staple of the leading textbooks on international institutions. What is novel, however, is the suggestion that such classifications may serve more than heuristic purposes. As the following will suggest,

³⁸ See Jan Klabbbers, 'Sui Generis? The EU as an International Organization' in Dennis Patterson (ed), *The Wiley-Blackwell Companion to EU Law and International Law* (Wiley Blackwell, forthcoming).

³⁹ See generally Jan Klabbbers, *An Introduction to International Institutional Law* (Cambridge University Press, 2nd ed, 2009).

classifications are invariably provided with a view to organising the material, but not (sometimes emphatically not)⁴⁰ with a view to attaching different legal consequences to the different categories of international organisation as identified. For it is reasonably clear that the law of international institutions, such as it currently is, does not honour any distinction as being of legal relevance.

In 1972, Henry Schermers published the first edition of his classic work of reference-cum-textbook on international organisations: *International Institutional Law*,⁴¹ then still published in two relatively slender volumes (later accompanied by a volume containing legal materials).⁴² The first chapter of the first volume pays homage to the wide variety among international institutions by proposing a number of different classifications. Thus, Schermers devotes some attention to the distinction between public and private international organisations and then rapidly announces that he will not discuss private organisations in the remainder of his study since these ‘are so varied that they are hardly suitable for comparative study’.⁴³ He notes that organisations can be classified as either universal or regional; they can be set up either as supranational or as intergovernmental entities; and these can be classified as either general or functional organisations.⁴⁴ This discussion is prefaced by the claim that further distinguishing criteria could have been made but did not seem all that relevant. One of these would have been to classify organisations according to task (agriculture, nuclear energy, health); another would have been to distinguish between permanent and temporary organisations.⁴⁵

Schermers’s classifications already suggest some conceptual issues at the heart of international institutional law, all the more so as he seemed to disagree with Abdullah El-Erian, Special Rapporteur of the International Law Commission, on various topics relating to international institutional law. For El-Erian, Schermers’s putative distinction between temporary and permanent organisations did not seem to be warranted: a temporary conference by definition lacks the institutional element which is a hallmark of any international organisation. More pointedly, he also dismissed the idea of private bodies as international organisations; to his mind, they fell outside any relevant definition.⁴⁶ Instead, El-Erian presented two basic categories: coverage (universal or regional) and function; the latter he subdivided into further categories. Organisations could be classified in accordance with the scope of their functions (general or specialised), in accordance with division of competences (legislative, administrative or judicial) or according to their position relative to their member states (supranational, policy-making or operative).⁴⁷ The important point to note is that his classification differed in some respects from Schermers’s classification. More importantly still, El-Erian warned — in

⁴⁰ Ibid.

⁴¹ Henry G Schermers, *International Institutional Law Volume I: Structure* (Sijthoff, 1972).

⁴² Henry G Schermers, *International Institutional Law Volume III: Teaching and Materials* (Sijthoff, 1974).

⁴³ Schermers, *International Institutional Law*, above n 41, 12.

⁴⁴ Ibid 5.

⁴⁵ Ibid 4.

⁴⁶ See Abdullah El-Erian, ‘Relations between States and Inter-Governmental Organizations: First Report’ [1963] (2) *Yearbook of the International Law Commission* 159.

⁴⁷ Ibid 167–9.

somewhat opaque language and without providing possible examples — that different classifications may lead to different legal consequences. He concluded his discussion of classifications with the admonition that while not exhaustive, his classifications were illustrative of ‘the intricacies of the subject, especially if certain legal consequences are attached to them’.⁴⁸

El-Erian’s warning shot was not heeded. Schermers, for all his work on classifying international organisations, never suggested that these may lead to different legal consequences and there is still no hint to this effect in the latest edition of his work.⁴⁹ Instead, the classification serves above all a heuristic purpose: to bring ‘some order to our vast field of study’.⁵⁰ Much the same applies to the authors of other textbooks. D W Bowett, for example, distinguishes between organisations on the basis of function (political or administrative) and geographical coverage (global or regional), but ends his brief section on classifications by stating that ‘its purpose is to simplify presentation’.⁵¹

C F Amerasinghe too lists various possible classifications but does so without suggesting that these may come with different legal consequences. The one element he adds (compared to Schermers at least, but to some extent following both El-Erian and Bowett) is a distinction between judicial and non-judicial institutions, noting that some international courts — such as the ICJ or the various administrative tribunals — form part of other organisations, but that some can be regarded as organisations in their own right. He then, however, quickly announces that these do not come within the scope of his study because they do not form a ‘suitable subject for a general work on international institutions which are largely of a political or technical nature’.⁵²

Finn Seyersted, in many respects something of a maverick amongst international institutional lawyers, nonetheless presented a similar categorisation, discussing four broad categories of classification — according to size or membership; according to purpose (general or specific); according to powers (consultative, operational or supranational); and according to duration⁵³ — noting that while most organisations are intended to be permanent, some are created for a limited period of time only. One example of the latter was the European Coal and Steel Community, created for a period of 50 years (and now disbanded, with any remaining relevant parts incorporated into the EU).⁵⁴ Seyersted agreed with Amerasinghe that some international courts and tribunals can be seen as international organisations in their own right and usefully draws

⁴⁸ Ibid 169.

⁴⁹ See Schermers and Blokker, above n 12, 50–9.

⁵⁰ Ibid 59.

⁵¹ D W Bowett, *The Law of International Institutions* (Stevens and Sons, 4th ed, 1982) 12. The sentence has survived the transition of authors and can also be found in the fifth edition: Phillippe Sands and Pierre Klein, *Bowett’s Law of International Institutions* (Sweet and Maxwell, 5th ed, 2001) 19.

⁵² C F Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press, 2nd ed, 2005) 12.

⁵³ See Finn Seyersted, *Common Law of International Organizations* (Martinus Nijhoff, 2008) 9–21.

⁵⁴ Karen J Alter and David Steinberg, ‘The Theory and Reality of the European Coal and Steel Community’ (Working Paper No 07-001, Roberta Buffett Center for International and Comparative Studies, Northwestern University, January 2007) 12.

attention to the existence of treaty organs and how difficult it may sometimes be to distinguish these from international organisations.⁵⁵ Such organs may include monitoring bodies or even courts. While he does not mention it, a possible example might be the European Court of Human Rights: is this best seen as an international organisation in its own right or, rather, as a treaty organ created by the *European Convention on Human Rights*⁵⁶ and embedded within the framework of the Council of Europe?

While it would go too far to discuss the practice of international organisations in any detail, perhaps one point is worth noting. Organisations do not only each have their own constitution (and an attempt by the ICJ to link the constitutions of various organisations together into an organic whole proved less than persuasive),⁵⁷ they also typically have their own regimes relating to privileges and immunities. A 1970s attempt to conclude a global convention on the representation of states in their relations with international organisations came to naught. Its scope, originally thought to be general so as to potentially cover all organisations, quickly became limited to universal organisations only and, even then, while the *Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character* was concluded in 1975, it has never entered into force.⁵⁸

The above discussion, however brief, once again suggests that there are different kinds of international organisations and that there is an innate tendency amongst academic observers at least to make distinctions, if only for heuristic purposes. It would seem, however, that this tendency taps into a deeper underlying sentiment: the currently accepted concept of international organisation may be too broad a church. Not only is it too broad for purposes of description and discussion, it may also be too broad for purposes of legal treatment. El-Erian's warning points in this direction without doing much with it, suggesting the possibility of different legal consequences attaching to different classes of organisations. In the following Part, it will be argued that instead of focusing merely on formal criteria, the scarce relevant case law adds a substantive element: that of serving a public purpose.

IV INTERNATIONAL ORGANISATIONS BEFORE COURTS AND TRIBUNALS

There are surprisingly few court decisions — or so it seems — presenting a definition or concept of international organisation. Often, whenever an international entity appears before a court, its status as an international organisation is taken for granted or simply not considered relevant. Many cases

⁵⁵ Ibid 14.

⁵⁶ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) art 19.

⁵⁷ See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* [1996] ICJ Rep 226. For critical analysis of the advisory opinion, see Jan Klabbers, 'Global Governance before the ICJ: Re-Reading the WHA Opinion' (2009) 13 *Max Planck Yearbook of United Nations Law* 1.

⁵⁸ *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character*, opened for signature 14 March 1975, UN Doc A/CONF.67/16 (not yet in force). For useful discussion of the *Convention*, see J G Fennessy 'The 1975 *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character*' (1976) 70 *American Journal of International Law* 62.

arriving before domestic courts, for example, concern the possible privileges and immunities of such entities. Since the matter is usually governed by an agreement on privileges or immunities or a headquarters agreement, normally courts will not look further than those agreements and, to be sure, do not need to look further. The agreement will govern the legal relations between the entity concerned and the state in question and will give rise to an unquestioned presumption that the entity concerned will be an international organisation.⁵⁹

Hence, case law concerning the concept of international organisation is rare and, what is more, to the extent that relevant judicial decisions exist, they tend to be 'in the negative'. In other words, courts sometimes say what an international organisation is not, but rather less often specify what makes an international organisation. This applies most famously perhaps to the classic *Reparation for Injuries* advisory opinion, where the ICJ held that the UN was not a state, let alone a 'super-state'.⁶⁰ The one 'positive' thing the Court was willing to say was too general to be considered as very informative regarding the nature of international organisations: the UN was described as a subject of international law 'and capable of possessing international rights and duties'.⁶¹

Still, some of the work of the Permanent Court of International Justice, addressing the legal status of the ILO in one of its very first advisory opinions, already provides a glimpse into the concept of international organisation, albeit not very explicitly. Confronted with the question of whether the ILO was empowered to regulate the agricultural sector (in addition to industry), the Court first made it clear that it was temperamentally disinclined to engage in any 'theoretical' reflection on the nature of the ILO or of organisations generally.⁶² Nonetheless, when discussing the ILO's aims and purposes, it felt that the ILO's universal mission was not entirely without significance: the Court discussed the ILO's Preamble,⁶³ and highlighted that in order to prevent nations from competing with each other, one of the points of the ILO was to create equal labour conditions.⁶⁴ The Court held that these, in turn, were inspired 'by sentiments of justice and humanity' as well as by the wish to 'secure the permanent peace of the world'.⁶⁵ An equally fleeting hint at the UN's universal mission can be found in the *Effect of Awards* opinion of the ICJ, holding that the

⁵⁹ See, eg, *European Molecular Biology Laboratory (EMBL) v Federal Republic of Germany* (Arbitration Tribunal, 1990) 105 ILR 1.

⁶⁰ *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174, 179.

⁶¹ *Ibid.*

⁶² The Permanent Court of International Justice famously stated:

It was much urged in argument that the establishment of the International Labour Organisation involved an abandonment of rights derived from national sovereignty, and that the competence of the Organisation therefore should not be extended by interpretation. There may be some force in this argument, but the question in every case must resolve itself into what the terms of the Treaty actually mean.

Competence of the ILO in Regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture (Advisory Opinion) [1922] PCIJ (ser B) No 2, 23 ('Competence of the ILO').

⁶³ *Treaty of Peace between the Allied and Associated Powers and Germany*, signed 28 June 1919, 225 ConTS 188 (entered into force 10 January 1920) pt XIII ('Treaty of Versailles').

⁶⁴ *Competence of the ILO* 25.

⁶⁵ *Ibid.* 27.

non-existence of a judicial avenue for UN staff members would ‘hardly be consistent with the expressed aim of the *Charter [of the United Nations]* to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim’.⁶⁶

Still, there are some court decisions which are a little more instructive and all of them seem to have one thing in common: they all stress that one of the hallmarks of the international organisation is that it is engaged in public tasks or works for the public good. An example of a domestic court decision along these lines is the decision by the Court of Appeal of Paris in 1966, in *Dumont v Association de la Muette*.⁶⁷ After the French Ministry of Cultural Affairs negotiated an extension to the OECD headquarters, neighbours brought together in the *Association de la Muette* (the Parisian neighbourhood in question was called La Muette) complained about the disturbance and went to court to seek an order for an investigation. The lower court agreed, upon which the contractors appealed, suggesting that public entities under French law were outside the jurisdiction of the French courts.

The Appeals Court noted, perhaps not surprisingly, that the OECD was to be considered as an international organisation, though not as a public entity under French law.⁶⁸ Intriguingly though, the Court did say a few words in passing about international organisations, when it suggested that the OECD ‘has the fundamental aim of realizing in the Member States the greatest possible expansion of their economies and improving the well-being of their peoples’ and that it was clear and, moreover, uncontested that the OECD’s aim was ‘of general and indeed universal interest’.⁶⁹

The Court of Justice of the European Communities (now the EU) (‘CJEU’) has on several occasions addressed the question as to what makes an international organisation. The leading decision is *SAT Fluggesellschaft*, in which the Court was asked about the status of Eurocontrol.⁷⁰ The case arose before a Belgian court when a German airline company (SAT) complained about the charges it was due to pay to Eurocontrol, an international entity engaged with aviation safety. SAT suggested that Eurocontrol was guilty of abusing a dominant position, giving rise to the question of whether Eurocontrol should be seen as an ‘undertaking’ within the meaning of EU competition law.⁷¹

The CJEU answered in the negative and argued that Eurocontrol had as one of its tasks the collection of route charges levied on users of air space, but was not in a position to itself decide on these charges. Eurocontrol’s power was delegated and limited, with the member states deciding individually on the appropriate charges. In addition, Eurocontrol played a limited role in the operational exercise of air navigation control, but only at the request of some of its member states. Finally, the Court observed that Eurocontrol’s expenses are borne by its member

⁶⁶ *Effect of Awards of Compensation Made by the UN Administrative Tribunal (Advisory Opinion)* [1954] ICJ Rep 47, 57.

⁶⁷ *Dumont & Besson and Dumez v Association de la Muette* (1966) 47 ILR 345 (Court of Appeal of Paris) (‘*Dumont*’).

⁶⁸ *Ibid* [347].

⁶⁹ *Ibid*.

⁷⁰ *SAT Fluggesellschaft mbH v European Organization for the Safety of Air Navigation (Eurocontrol)* (C-364/92) [1994] ECR I-55.

⁷¹ *Ibid* I-58.

states; it does not make a profit. This allowed the CJEU to hold that ‘Eurocontrol thus carries out, on behalf of the Contracting States, tasks in the public interest aimed at contributing to the maintenance and improvement of air navigation safety’.⁷² These charges, moreover, ‘are merely the consideration, payable by users, for the obligatory and exclusive use of air navigation control facilities and services’.⁷³ In the end, the CJEU concluded that

[t]aken as a whole, Eurocontrol’s activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space which are typically those of a public authority.⁷⁴

The picture emerging from *SAT Fluggesellschaft* is, at a minimum, that an entity that exercises delegated powers without much discretion and in the public interest is classified in the eyes of the CJEU as an international organisation.⁷⁵ Earlier, the European Community’s Court of First Instance had reached a similar conclusion in *Evangelos Vardakas v Commission of European Communities*,⁷⁶ where it held that the European Committee for Standardization (‘ECS’) qualified as an international organisation, despite having been set up by national standardisation bodies instead of member states. What mattered, as the Court of First Instance noted, was that ECS ‘has been recognized by States and by international organizations created by States, such as the European Communities, and has been entrusted with tasks in the public interest by those States and international organizations’.⁷⁷

Perhaps the most relevant decision is the partial arbitral award in *Reineccius v Bank for International Settlements*, rendered in 2002.⁷⁸ The Bank for International Settlements (‘BIS’) was set up in 1930 by international agreement between states as a company limited by shares and, while the idea was that the central banks of the participant states would be the shareholders, initially that proved not quite possible. Hence, the constituent documents authorised the central banks to issue shares to the public. In other words, to some extent the BIS turned out to have private shareholders. When (around the turn of the century) this was no longer deemed desirable, the BIS decided to buy out the private shareholders, against compensation. Reineccius and others claimed that the compensation offered was insufficient and started arbitration proceedings against the BIS. In the course of these proceedings, the question arose as to whether the BIS was an international organisation and, therewith, bound, so the implication

⁷² Ibid I-63 [27].

⁷³ Ibid [28].

⁷⁴ Ibid I-63–64 [30].

⁷⁵ The Court of Justice of the European Union essentially confirmed its position, also addressing the position of Eurocontrol in light of EU competition law, in *SELEX Sistemi Integrati SpA v Commission of the European Communities* (C-113/07P) [2009] ECR I-2207.

⁷⁶ See *Evangelos Vardakas v Commission of the European Communities* (T-4/92) [1993] ECR-SC II-359 (‘Vardakas’).

⁷⁷ Ibid II-371 [47]. Note however that the European Community’s Court of First Instance felt compelled to present a broad interpretation of the staff regulations on which Mr Vardakas relied: at II-368–70 — so it remains uncertain whether the concept of international organisation in *Vardakas* must be seen as the Court of First Instance’s general concept or as a special concept for purposes of the staff regulations.

⁷⁸ *Reineccius v Bank for International Settlements (Partial Award)* (2002) 23 RIAA 183 (‘Reineccius’).

went, to respect human rights standards but not necessarily market-based commercial standards.

The Permanent Court of Arbitration ('PCA') held that the BIS 'is a sui generis creation which is an international organization'.⁷⁹ One of the arguments for reaching this conclusion resides in the legal origin of the BIS: it was set up on the basis of an agreement between states, even though the agreement instructed one of these states (Switzerland — the BIS is based in Basel) to accept the BIS as a company limited by shares under Swiss law.⁸⁰ The other main argument, though, stressed the public nature of the BIS's tasks. These included the enhancement of international cooperation in financial matters, cooperation between central banks and the management, initially, of the Young Plan for the settlement of German reparations following World War I.⁸¹ The mere circumstance that the BIS might make use of private instruments — and might even make a profit⁸² — took nothing away from it being 'charged with the performance of a particularly urgent international task'.⁸³ The BIS's functions, so the PCA held, were 'quintessentially public international in their character'.⁸⁴

In other words, the CJEU and the French Court of First Instance, as well as the Court of Appeals of Paris and the PCA, placed a premium on the public interest involved. Eurocontrol, the ECS, the OECD and the BIS were considered to be international organisations not so much (or not only) because they met any formal definition, but because they work in the public interest and perform public tasks.

V WHAT PUBLIC INTEREST?

The curious situation thus arises that whereas the courts — to the extent that they address the legal character of international organisations — tend to emphasise the public nature of their tasks, this is missing from the general conceptualisations and classifications of international organisations. Organisations are deemed to be created between states and based in treaty — perhaps with an organ or two — and may be technical or political, regional or global, but there are few, if any, considerations relating to the nature of their tasks that are deemed to be of relevance.

It is not immediately self-evident what causes this discrepancy, in particular because judicial decisions and considerations often play an important role within legal academic work. In this light, it could have been expected that academic conceptualisations of international organisations take judicial decisions into account and thus, so the expectation might continue, would have included some kind of reference to the public tasks of international organisations as part of any conceptualisation. Yet this has not happened; part of the explanation may well reside in the circumstance that, whereas academics typically address

⁷⁹ Ibid 216 [118]. For commentary, see David J Bederman, 'The Unique Legal Status of the Bank for International Settlements Comes into Focus' (2003) 16 *Leiden Journal of International Law* 787.

⁸⁰ *Reineccius* 212–14.

⁸¹ Ibid 215.

⁸² Ibid 216.

⁸³ Ibid 215 [114].

⁸⁴ Ibid [113].

international organisations as a general category and are rarely forced to evaluate whether a specific entity qualifies as such, courts have to address singular instances and present justifications as to why entity X, Y or Z qualifies as an international organisation, often having to do so in the face of argument to the contrary.

That said, perhaps the more relevant explanation for the discrepancy between judicial decision and academic opinion resides in the circumstance that while an idea such as ‘public interest’ may be identified in any given set of circumstances, it defies any general, abstract definition or, at least, is impossible to render in an abstract manner. It is not only the case that the very category of ‘public’ is fluid, as John Dewey noted in the 1920s;⁸⁵ it is also the case that within international organisations, conceptions of the public interest and some other interest may come together in uncomfortable union.

Take, for example, the case of OPEC. In the popular imagination, it is probably no exaggeration to state that OPEC is considered first and foremost as an interest group for oil-producing countries. This would seem to suggest a predominantly private function: making sure that oil-producing countries maintain a strong market position and a guaranteed flow of income. Yet, even this is capable of different interpretation; after all, since the participants are states (ie, public entities), it is the position of public entities that is at stake. Moreover, OPEC itself claims to work not only for producing states, but also in the interest of consumers and investors. While its main task, according to art 2A of its *Statute*,⁸⁶ is the safeguarding of the interests of the member states, nonetheless the *Statute* also underlines the need to secure ‘an efficient, economic and regular supply of petroleum to consuming nations and a fair return on their capital to those investing in the petroleum industry’.⁸⁷

Something similar may apply to the EU. According to its main constituent document, the *Treaty on European Union*, the EU has several objectives. One of these relates to its position in the world. As art 3(5) puts it, ‘the Union shall uphold and promote its values and interests and contribute to the protection of its citizens’. This is language reminiscent of the statutes of interest groups: the EU is charged with the task of upholding the values and interests of the European Union and to contribute to the protection of EU citizens. Indeed, the same transpires from its main objective, listed in art 3(1): the EU’s ‘aim is to promote peace, its values and the wellbeing of its peoples’.

The constitutions of OPEC and the EU therefore both manifest a significant ambivalence. While the courts, as mentioned, tend to include a reference to some public interest or public task among the hallmarks of an international organisation, several constituent documents are more ambivalent. For some international organisations, the main set of tasks is a mixture of public tasks and, if you will, the tasks of an interest group. Few would dispute that the promotion of peace is a public task, regardless of considerations concerning the precise conception of peace to be pursued. The EU receiving the Nobel Peace Prize proves this point. Few would also dispute that promoting the wellbeing of

⁸⁵ See John Dewey, *The Public and its Problems* (Swallow Press, first published 1927, 1954 ed).

⁸⁶ *Statute of the Organization of the Petroleum Exporting Countries* (1965) 4 ILM 1175.

⁸⁷ *Ibid* art 2C.

Europeans is a public task, again regardless of political considerations as to what constitutes the wellbeing of Europeans. Yet, when doing so implies the prioritisation of the wellbeing of Europeans and their interests over those of others, the public nature of the task becomes less evident and gets mixed up with a more interest-based conception.

By the same token, fairness towards petroleum consuming nations and investors may well also be considered a public task, in addition to the interest group task of protecting the interests of oil-producing states in OPEC's *Statute*.⁸⁸ To be sure, if a sliding scale were to be construed, OPEC would find itself closer to being seen as an interest group than as a public body. OPEC's art 4 is telling (note also its prominent placement at the beginning of the *Statute*): member states shall not benefit from sanctions being imposed against one of them. The ranks must be kept closed.

Contrast this with art 1 of the *Constitution of the World Health Organization*: the 'objective of the World Health Organization ... shall be the attainment by all peoples of the highest possible level of health'.⁸⁹ Here the group of beneficiaries is clearly stated to be 'all peoples', regardless of membership or nationality. The WHO would be difficult to classify as an interest group, far more so than the EU, never mind OPEC. Much the same applies to the International Atomic Energy Agency ('IAEA'), whose objective, according to art II of its *Statute*,⁹⁰ is to 'seek to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world'. The 1946 General Assembly resolution setting up UNICEF likewise had the interests of all children in mind, even though it prioritised children living in countries that were victims of aggression.⁹¹ Within the WHO, UNICEF and the IAEA, the public task dominates and none can meaningfully be classified as interest groups striving to improve the position of their member states.

In this light, it would seem that the only entities capable of truly engaging in public tasks are those with a universal mission. Regional organisations or organisations comprising ideological communities by definition need to set themselves apart from universal ones. Their tasks inevitably demand patterns of inclusion and exclusion and, while their tasks can be called 'public' for those who are included, the public element is limited and will invariably involve a ranking of interests: their own member states and their citizens come first.

That is not to say that organisations with a public mission are 'above politics'. After all, politics is the hallmark of public affairs, as Aristotle already taught;⁹² reasonable people can have reasonable differences of opinion as to how to best provide emergency relief, eradicate disease or maintain atomic peace. What it does say is that non-universal entities are structurally incapable of devoting themselves solely to a public task: their public tasks, however respectable, are inevitably bound up with the protection of the interests of their citizens.

⁸⁸ Ibid art 2A.

⁸⁹ *Constitution of the World Health Organization*, opened for signature 22 July 1946, 14 UNTS 185 (entered into force 7 April 1948).

⁹⁰ *Statute of the International Atomic Energy Agency*, opened for signature 26 October 1956, 276 UNTS 3 (entered into force 29 July 1957).

⁹¹ *Establishment of an International Children's Emergency Fund*, GA Res 57(I), UN GAOR, 1st sess, 56th plen mtg, UN Doc A/RES/57(I) (11 December 1946).

⁹² See generally Aristotle, *The Politics* (T A Sinclair trans, revised ed, Penguin, 1981).

VI BY WAY OF CONCLUSION

It would seem then that international institutional law has no choice but to live with the circumstance that organisations, in all their variety, must be subject to the same legal regime. The law, it seems, is structurally incapable of making principled decisions relating to the different nature of different organisations. Partly this is because to insist on a public task is problematic: even those entities that come close to being interest groups, defending and promoting the interests of their member states, can nonetheless boast some reference to the public good — and can do so in a meaningful, non-trivial way. Obnoxious as some of the practices of entities such as OPEC or the EU may be, it cannot be denied that they do seem to serve some public interest, namely the public interest of the member states of these organisations and, one may hope, their citizens. The only possible way out of the dilemma would be to insist that organisations must serve a universal public interest, but even that would not work. While some organisations do serve a universal public interest (think of the WHO or UNICEF), even the more limited public interest served by the EU is not to be neglected and has global ramifications; surely the creation and maintenance of peace in Western Europe, the scene of two world wars, serves a public interest above and beyond that of the EU member states alone.

There may be merit in the suggestion that the public task as identified by courts serves a different purpose. Perhaps it is best seen as a political legitimacy criterion, in much the same way that entities applying for recognition of their possible statehood may be evaluated on the basis of their public activities: do they respect a minimum of human rights and the rule of law, for instance? Such determinations need not be decisive: the law on statehood, too, by and large lacks substantive criteria.⁹³ Yet, on the diplomatic level — and sometimes on the legal level, too — the way entities perform or undertake to perform their public tasks may constitute an element in decisions whether or not they should be recognised as states, as is suggested by, for example, the 1991 European Community *Guidelines on Recognition of New States in Eastern Europe and in the Soviet Union*.⁹⁴

In the end, the variety among international organisations is too great to do justice to their individual characteristics. Even if a distinction were possible on the basis of public tasks, the discipline would still encounter numerous other classification issues. The most salient of these remains the issue with which this essay started: few would dispute that law enforcement is a public task par excellence and yet, to grant law enforcement officials legal immunities simply because they are employed by international organisations would be awkward and, many would agree, undesirable. The circumstance that the law is incapable of distinguishing between international organisations helps explain the move towards accountability: instead of controlling the work of international organisations at the gate, so to speak, by insisting that some qualify as ‘proper’

⁹³ See generally Jan Klabbers, *International Law* (Cambridge University Press, 2013).

⁹⁴ Extraordinary European Community Ministerial Meeting, ‘European Community: Declaration on Yugoslavia and on the Guidelines on the Recognition of New States’ (1992) 31 ILM 1485, 1486. See also Roland Rich, ‘Recognition of States: The Collapse of Yugoslavia and the Soviet Union’ (1993) 4 *European Journal of International Law* 36.

organisations but others do not, the law can only focus on the concrete activities of organisations.

This is not necessarily a bad thing. While the ‘one size fits all’ approach to which international institutional law is condemned has its drawbacks, being forced to focus on accountability for specific acts instead of being able to control entrance into the ranks of international organisations serves as a reminder that international organisations are political creatures, set up by other political actors for political reasons and in order to carry out political tasks. In such circumstances, excluding entities in advance would be problematic. After all, the legitimacy of the tasks and purposes of specific international organisations is itself a matter of evaluation and political appraisal. Whether the focus on accountability will prove capable of successfully harnessing the activities of international organisations is, however, a different matter.⁹⁵

⁹⁵ The author is working on a monograph on the topic, under the working title *Controlling International Organizations: Between Function and Virtue*.