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International Organizations and the Disaggregation of Consent

CATHERINE BRÖLMANN

4.1 INTRODUCTION

This chapter examines how 'consent', traditionally taken as a foundational element in international law, fares in the institutionalized environment of contemporary international legal life. The central argument is that international organizations (hereafter IOs), both as actors consenting to international law and as institutional spaces[1] for other actors, have changed the operation or even the nature of consent in international law, as they have made the components of the act of consent come apart.

The notion of consent appears in more than a few ways. This is to say that the elements of definition (acceptance of a norm of international law),[2] and also the explanatory angle may vary. It is thus helpful to mention also some perspectives not taken in this chapter. Many studies proceed from consent as a prerequisite imbedded in some way in international law. This prerequisite may then be addressed with an analytical approach (e.g. identifying a trend of 'nonconsensualism' at work in public international law as a whole)[3] or a normative approach (e.g. '[consent] creates a cumbersome status quo bias').[4] In the latter category is also the proposition to understand (equal State) consent not as a right to repudiate a norm, but as a right to (equal State)

[1] 'Institutionalized' and 'institutional' in this chapter refer to the institutional character and structure of IOs in particular.

[2] This chapter's working definition is loosely adopted from Samantha Besson, 'State Consent and Disagreement in International Law-Making: Dissolving the Paradox' (2016) 29(2) *Leiden Journal of International Law* 289–316, at 295.

[3] Nico Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108(1) *American Journal of International Law* 1–40.

[4] Andrew T. Guzman, 'The Consent Problem in International Law' (2011) *UC Berkeley Working Paper Series* 1–63. Available at: https://escholarship.org/content/qt04x8x174/qt04x8x174.pdf?t=lnrx4u, last accessed 11 January 2023, at 2.

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participation in the formation of the norm.[5] Either way, important questions, for instance, regarding legitimacy, are raised.[6] This chapter, however, is not primarily concerned with the role of consent for the general sphere or – depending on the lens – system of international law.

Rather, the starting point of this chapter is consent as an act of the subject. When the notion is further unpacked, it shows at least four facets, which tend to be alternately emphasized in legal discourse but rarely articulated as such. These are consent as an intentional state; consent as an agreed (symbolic) expression of that intentional state; the object of consent; and the manifestation thereof as a concrete legal-normative situation binding the subject. In the archetypal image of consent, most likely because of its connection with situations involving the natural person, these facets are closely or even inextricably linked. The intentional state and the agreed symbol(s) for its expression are taken together – summarized here as 'giving consent' – while the object of consent is close to the normative outcome. This is the picture in which one person expresses consent to another and vice versa, in order to create mutual rights and obligations, on the precise substance of which clear agreement exists; as when X buys a good from Y. While all consent can be said to amount to acceptance of a rule as law, this scenario emphasizes the 'unanimous (intersubjective) acceptance for the same reasons'.[7] It may be summarized as 'consent as agreement'. There is also a picture in which X accepts a given rule as law without the intersubjective dimension, and this may be denoted by the general term of 'consent as acceptance'.[8] Both dynamics play a role in international law.

The argument made in this chapter is that in the context of IOs these different facets of consent have disaggregated. When the organization itself gives consent, the symbolic expression has come to be separated from the underlying intentional state. Where the organization appears as an institutional space for the consent of others, the object of consent can be far removed in time and especially in substance from the *Rechtsmoment* at which the consent bears normative effect for the consent-giver. In these instances the object of consent may not overlap with the eventual normative effect.

5 Besson, fn. 2.

6 Thomas Christiano, 'The Legitimacy of International Institutions', in Andrei Marmor, *The Routledge Companion to Philosophy of Law* (New York: Routledge, 2014), pp. 380–393; Besson, fn. 2.

7 Besson, fn. 2, at 295.

8 I use these expressions without engaging with the (convincing) argument about how consent is not an 'agreement' in the substantive sense, made by Samantha Besson: see ibid.

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Why is this relevant? After all, it is abstract and formal-doctrinal language, which over the years has lost considerable persuasive power. Indeed, it has been pointed out how in recent decades social change is often brought about not by adjusting the law, but by moving outside the sphere of formal international law altogether.[9] Unsurprisingly, 'informal law' (a notion that leaves us to explore whether it amounts to 'international law' or not)[10] and 'soft law' (a notion that predominantly is taken to refer to non-law) have been studied extensively in recent years. It is one reason for which this chapter chooses to focus precisely on consent as a formal-legal tool and, while 'consent' can be used to refer to a commitment to 'law' in the full variety of normative shades, to start squarely within the formal-legal realm with a concomitantly formal and binary notion of consent.

Disaggregation of consent in all cases can, arguably, be traced to the same origin – the mechanistic view of organizations as legal subjects ultimately in the service of States, mentioned in Section 4.2. It is not equally apparent in all cases however. The distinction and possibly separation between the intentional state and its expression is an elusive phenomenon and arguably under-theorized. In contrast, the separation between the object of consent, on the one hand, and the normative outcome for the consent-giver, on the other hand, is well documented – albeit as part of a different narrative. A prime example of such separation are the cases of delegated powers and ensuing possibilities for majority decision-making, often within a formal institutional structure.

In order to advance the claim of disaggregation, this chapter aims to capture particular features of the act of consent in the context of organizations. The disaggregation of consent performed by IOs themselves (Section 4.2) is determined largely *a contrario*, on the basis of what is not said, against the background of the way in which the 'juridical will' of organizations in general has been construed. The act of consent of States within the institutional space of organizations (Section 4.3) is addressed through a more straightforwardly descriptive approach. The chapter concludes with some remarks on the implications of the disaggregation of consent (Section 4.4).

4.2 CONSENT AS INTENTIONAL STATE AND AS EXPRESSION

Giving consent thus has two dimensions: one is the psychological condition or mental state, for which this chapter uses the term 'intentional state' because of

[9] Krisch, fn. 3, at 2: 'international law is often sidelined'.

[10] Joost Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Research Questions', in Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds.), *Informal International Lawmaking* (Oxford: Oxford University Press, 2012), pp. 13–34.

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its association with directedness.[11] It is a particular manifestation of the 'juridical will'[12] – the construct that serves to operationalize the legal agency of actors that are allowed participation in a legal system and thus become legal subjects or persons. The other is the conduct symbolizing or signifying that intentional state. Seen through a semiotic lens, to give consent comprises the *signifié* (the realm of content) and the *signifiant* (its expression). This duality is borne out by the classic reference in the Vienna Conventions on the Law of Treaties (hereafter VCLT) to 'expression of consent to be bound'.[13] The concept underscores that both facets of giving 'consent' (leaving aside the distinction between law and obligation) are present in international law. They are generally not separated, and an emphasis on one of them, depending on the context, is only implicit.

In one account '[b]y the end of the eighteenth century', for treaties, 'emphasis was placed upon the meeting of minds, or upon the expression of a "mutual will" through reciprocal consent to the terms of the agreement'.[14] Meanwhile the ability to perform consent, as a manifestation of will, had come to be firmly located in the State.[15] By the nineteenth century, the State's unique corporate and fictional nature had largely disappeared from view,[16] facilitating the incorporation of domestic law analogies in international law and the idea of the State as a 'natural person' amounting to a *personne morale*.

The anthropomorphic view of the State was to some extent dismantled by interbellum scholarship,[17] with States rediscovered as corporate entities alongside other international actors.[18] In truth, however, international law doctrine

[11] John R. Searle, 'What Is an Intentional State?' (1979) 88(349) *Mind* 74–92.

[12] Taken as a construct, in contrast to the notion of 'will' as a specific psychological state in, for example, the analysis of Alain Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making' (1992) 12(1) *Australian Yearbook of International Law* 22–54; Pellet, Chapter 1 in this volume.

[13] Arts. 11–17 of the Vienna Convention on the Law of Treaties (VCLT), 1155 UNTS 331 (adopted 23 May 1969, entered into force 27 January 1980).

[14] Matthew Craven, 'The Ends of Consent', in Michael J. Bowman and Dino Kritsiotis (eds.), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge: Cambridge University Press, 2018), pp. 103–135, p. 113.

[15] See different forms of consent identified by de Vattel: see Emer de Vattel, *Le droit des gens, ou Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, Vol. 1, translated by Charles G. Fenwich (Washington, DC: Carnegie institution of Washington, 1916), p. 9.

[16] Martti Koskenniemi, 'The Wonderful Artificiality of States' (1994) 88 *Proceedings of the Annual Meeting of the American Society of International Law* 22–29.

[17] Such as by Kelsen, Brierly and Nekam: see Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Oxford: Hart, 2007), pp. 70–71.

[18] Besson, fn. 2, at 295.

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and practice have always remained at ease with the attribution of legally relevant 'states of mind' to States. It has been pointed out how in the course of the twentieth century the ability to *think* became linked to the doctrine of 'fundamental' rights of States.[19] References to psychological agency and the attribution of will, such as consent, to legal actors are, as in domestic (private) law, common in international law. Witness classic references such as '[t]he signed text is ... the ... expression of the common will of the parties'.[20] As before, '[o]rthodox international law proceeds from the assumption that States have a legal conscience, [even if] it has no workable or operational way to explain how this is supposed to work',[21] and it operates 'as if governments, let alone States, had determinable states of mind'.[22]

This is decidedly different when it comes to IOs, as was brought to light by the codification process of the law of treaties once its scope was to be expanded to include IOs.[23] It is important to note that this is not about the actual possibility of corporate entities such as organizations forming a 'will'. Political theory and political philosophy have shown how group agents are distinct from the sum of their component parts because of a particular decision-making structure,[24] and how by the ability to formulate a separate, collective will, they would become susceptible to bearing responsibility.[25] Philosophy of language can explain how (groups of) human individuals may 'impose intentionality on governments or international organisations', and how *opinio juris* as part of the formation of custom may amount to

[19] Jean d'Aspremont, 'The Doctrine of Fundamental Rights of States and Anthropomorphic Thinking in International Law' (2015) 4(3) *Cambridge Journal of International and Comparative Law* 501–520, at 515.

[20] International Law Commission (hereafter ILC), 'Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur', *Yearbook of the International Law Commission* (1964) Vol. II, UN Doc. A/CN.4/167 and Add. 1–3, pp. 5–66, p. 56 (my translation); ILC, 'Reports of the International Law Commission on the Second Part of Its Seventeenth Session and on Its Eighteenth Session', *Yearbook of the International Law Commission* (1966) Vol. II, UN Doc. A/6306/Rev.1, pp. 169–364, p. 220 (my translation).

[21] Anthony Carty, 'Doctrine versus State Practice', in Bardo Fassbender and Anne Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012), pp. 972–996, p. 976.

[22] Philip Allott, 'The Concept of International Law' (1999) 10(1) *European Journal of International Law* 31–50, at 39.

[23] Brölmann, fn. 17.

[24] Philip Pettit, 'Collective Persons and Powers' (2002) 8(4) *Legal Theory* 443–470; Fleur Johns (ed.), *International Legal Personality* (Farnham: Ashgate, 2010), pp. xi–xxix, footnote 87.

[25] From the angle of the international relations scholarship: see, for example, Toni Erskine, 'Assigning Responsibilities to Institutional Moral Agents: The Case of States and "Quasi-States"', in Toni Erskine (ed.), *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations* (London: Palgrave Macmillan, 2003), pp. 19, 20.

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an 'institutional object', brought about by speech acts that express beliefs and intentions.[26]

Thus considered, the attribution of an intentional state to one composite actor (e.g. an IO) should not require more effort than the attribution to another composite actor (e.g. a State). However, legal doctrine seems unconnected to such philosophical and psychological considerations. As has been pointed out, 'the collective and institutional structure of states has not been discussed by international law scholars'.[27] From an immanent perspective we find that a legal actor's capability to have an intentional state depends foremost on the legal framework, and on the legal imaginary within which the actor is situated. The traditional hesitation to attribute full-fledged agency to IOs and the ensuing mechanistic image of organizations as international actors would naturally affect the subjective, psychological dimension of the organization's legal consent. This appears to be confirmed in doctrine and practice, but it leaves only subtle traces.

Now, the intentional state of a consent-giver may be disregarded when agreed symbolic conduct exists for the expression of such juridical will. We find this in the law of treaties, as in 'signature' for 'consent',[28] or the 'passing of twelve months' for 'acceptance'.[29] In these cases, a presumption of consent as an intentional state can exist without the need for its ascertainment.

On the other hand, where an agreed symbolic expression is lacking, the intentional state (the 'juridical will') as such must be established, which is a more intricate process. This process can, however, be fluid and flexible when an actor's capacity in this regard is uncontested, as in the case of States. The powerful image of States as legal actors capable of a psychological condition, summarized as 'will', is reflected, for example, in the weight traditionally given to the State's 'intention' to consent to a juridical agreement, or conversely to a

[26] Sufyan Droubi, '*Opinio Juris*: Between Mental States and Institutional Objects', in Sufyan Droubi and Jean d'Aspremont (eds.), *International Organisations, Non-State Actors, and the Formation of Customary International Law* (Manchester: Manchester University Press, 2020), pp. 62–101, p. 79.

[27] Specifically in relation to the tenability of 'any analogy between state and individual consent' and to the view of 'states as unitary subjects of international law', which 'reduces states to individuals in a domestic setting': see Besson, fn. 2, at 295. Somewhat different from the corporate dimension, see the collective dimension of the responsibility of both States and organizations treated in Samantha Besson (ed.), *Theories of International Responsibility Law* (Cambridge: Cambridge University Press, 2022); see, more specifically, Paolo Palchetti, 'Responsibility of Members of an International Organization: Collective and/or Individual?', in Besson, *Theories of International Responsibility Law*, ibid., pp. 143–164.

[28] Art. 12 VCLT.

[29] Art. 20(5) VCLT.

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non-legal arrangement.[30] In contrast, the restricted agency of IOs[31] is reflected, for instance, in the fact that so far no cases appear to exist in which the subjective intentional state of an IO has prevailed.

This again turns on the particular conceptualization of organizations in which they have been accommodated as legal persons but not wilful legal persons or *personnes morales*.[32] The codification process of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereafter the 1986 Convention), from 1971 to 1986, gives evidence of that. From the text, the commentaries and the *travaux* in general emerges, next to a States' concern about the possibility of independent action on the part of organizations, primarily a mechanistic view of IOs as legal actors.[33] To be sure, according to the regime of the 1986 Convention, IOs could engage in treaty-making, especially if they can produce an agreed sign of a legal will expressed to this effect, such as the formal 'expression of consent to be bound by a treaty'. At the same time, IOs as such are not ascribed the moral and political 'considerations', and 'intentions' that go with the legal *persona* projected upon States. Thus, the 1986 Convention envisages the possibility of error or fraud in the conclusion of a treaty on the part of an organization, but in order to ascertain that this is the case, the claimant must resort to the internal institutional order of the IO, or – in other words – to the Member States.[34] The Convention provides that States 'acquiesce in the validity of the treaty', while organizations must be seen to have 'renounced the right to invoke that ground [of invalidity]' based on the passing

[30] A novel focus on external conduct rather than the intentional state of the disputing parties is found in *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)* [1994] ICJ Rep. 112. A classic reliance on the state's intention is found in *Iron Rhine Arbitration (Belgium/Netherlands)*, PCA, Award (24 May 2005) 140 ILR 130, para. 142; *Dispute concerning Delimitation of the Maritime Boundary in the Bay of Bengal* (*Bangladesh/Myanmar*), Judgment of 14 March 2012, ITLOS Reports 2012, p. 4.

[31] Catherine Brölmann, 'Capturing the Juridical Will of International Organisations', in Droubi and d'Aspremont, fn. 26, pp. 42–61.

[32] On 'moral personality' in the civil law tradition see, for example, Frederic W. Maitland, 'Moral Personality and Legal Personality' (1905) 6(2) *Journal of the Society of Comparative Legislation* 192–200; Évelyne Pisier-Kouchner, 'La notion de personne morale dans l'oeuvre de Léon Duguit' (1974) 11/12(2) *Quaderni fiorentini per la storia del pensiero giuridico moderno* 667–684.

[33] This proposition is elaborated in Brölmann, fn. 17.

[34] Arts. 48, 49 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereafter 1986 Convention), UN Doc. A/Conf.129/15 (adopted 21 March 1986); ILC, 'Report of the International Law Commission on the Work of Its Thirty-Fourth Session', *Yearbook of the International Law Commission* (1982) Vol. II, Part Two, UN Doc. A/37/10, p. 53, para. 2 (regarding Art. 48(2)).

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of a certain stretch of time.[35] In a general sense, the position of IOs is clear from the fact that 'the [International Law] Commission thought it worthwhile to point out that, in the present state of international law, it is States that are called upon to establish or recognize peremptory norms'.[36] The reluctance to ascribe juridical will, or an intentional state, to IOs is also reflected in the long-time idea of the impossibility of an IO's wrongdoing: ('[i]s it really conceivable that … organisations may … employ, the threat or use of force …?'),[37] while in relation to an early version of the Draft Articles on State Responsibility the International Law Commission (hereafter ILC) had stated that 'it must not be forgotten that, by their very nature, international organizations normally behave in such a manner as not to commit internationally wrongful acts'.[38] Clearly the adoption of the 2011 ILC Draft articles on the responsibility of international organizations[39] has confirmed an extent of IOs' coming of age,[40] in the sense of their being capable of wrongful conduct; however, this has not altogether changed the underlying mechanistic view of the legal subjectivity of organizations.

Also illustrative is the doctrinal discourse of *opinio juris*, which in some accounts of sources theory is the embodiment of consent, and in some other accounts too, at least in part, as practice and *opinio juris* cannot be separated to begin with.[41] The ascertainment of *opinio juris*, in the absence of agreed symbolic behaviour, focuses on the intentional state of legal actors. The search for a subjective psychological condition can be gleaned from the range of expressions used by the International Court of Justice (hereafter ICJ) to render the notion of *opinio juris*, which include 'feeling', 'belief', 'deliberate intention', 'awareness', 'conviction', 'general feeling' and 'actual consciousness'.[42]

[35] Arts. 45(1)(b), 45(2)(b) of the 1986 Convention.

[36] ILC, fn. 34, p. 56, para. 3 (regarding Art. 53).

[37] Ibid., p. 55, para. 2.

[38] ILC, 'Report of the International Law Commission on the Work of Its Twenty-Seventh Session', *Yearbook of the International Law Commission* (1975) Vol. II, Part One, UN Doc. A/10010/Rev.1, p. 87, para. 3 (emphasis added); both the article and the commentary were adopted in an unaltered version in 1996.

[39] ILC, 'Draft Articles on the Responsibility of International Organizations', *Yearbook of the International Law Commission* (2011) Vol. II, Part Two, UN Doc. A/66/10, pp. 40–105, paras. 87–88.

[40] On this point and the 'coming of age' frame see Brölmann, fn. 31, p. 59.

[41] Besson, fn. 2, at 295: 'contexts, like customary international law-making … in which consent occurs not by expressing or stating, but by doing'. Proceeding from the view that both practice and *opinio juris* are a form of practice; John Tasioulas, 'Custom, *Jus Cogens*, and Human Rights', in Curtis A. Bradley, *Custom's Future: International Law in a Changing World* (Cambridge: Cambridge University Press, 2016), pp. 95–116, pp. 103–105.

[42] Collected in the context of the ILC project on the identification of custom; see ILC, 'Second Report on the Identification of Customary International Law, by Sir Michael Wood, Special

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Given the aforementioned mechanistic image of the IO as a legal subject, the fact that *opinio juris* is not communicated by an agreed expression coupled with the ensuing reliance on an underlying intentional state, would affect the position of organizations. This is confirmed by the modest role in the process of international custom formation accorded to IOs by the ILC in its 2018 Conclusions on identification of customary international law (hereafter 'the ILC Conclusions'),[43] with one reference to the practice of organizations[44] and no reference to their *opinio juris*.[45]

The minor role of IOs in the process of international custom formation[46] is consistent with the general reticence on the part of international lawyers and policy-makers in regard of organizations, and with the limits in international law's imagery when it comes to IOs as full-fledged legal subjects. These are factors that may explain how, for the establishment of customary international law, both the element of *opinio juris* and the element of (distinctly willed) practice can pose a challenge when these must be ascertained in an IO.

The language of consent, whether one takes it as alluding to 'self-limitation' or rather to 'authority assertion', has a strong connotation of legal agency. It 'invites us to think about the State, in organic terms, as a morally autonomous agent capable of pursuing "the dictates of its own will"'.[47] This goes to underline the relevance of studying consent in relation to IOs, precisely because it also points to the challenge of incorporating organizations in international law; the construction of organizations' legal agency is closely connected to the role that organizations are *allowed* to play in international life, perhaps more than to any particular formal institutional features. As has

Rapporteur', *Yearbook of the International Law Commission* (2014) Vol. II, Part One, UN Doc. A/CN.4/672, pp. 163–203, para. 67.

43 ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries', in *Yearbook of the International Law Commission* (2018) Vol. II, Part Two, UN Doc. A/73/10, pp. 119–200.

44 Ibid., p. 119, Conclusion 4(2): 'In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.' For commentaries, see ibid., p. 130, paras. 5–6; Bordin, Chapter 11 in this volume.

45 Implicitly in the commentary to Conclusion 4(2): see ILC, fn. 43, p. 130, paras. 5–6.

46 While organizations have a modest role in the text of the ILC Conclusions, it is true that the commentary to Conclusion 10 (2) states that it 'applies *mutatis mutandis* to forms of evidence of acceptance as law (*opinio juris*) of international organizations': see ibid., p. 141, para. 7. As emerges from the cited materials in the footnotes of the Third Report of the Special Rapporteur, this might be called groundbreaking in respect of previous times: see ILC, 'Third Report on Identification of Customary International Law, by Sir Michael Wood, Special Rapporteur', *Yearbook of the International Law Commission* (2015) Vol. II, Part One, UN Doc. A/CN.4/673, pp. 93–134, paras. 68–797; at the same time, in absolute terms the role of organizations is certainly modest when compared to that of States.

47 Craven, fn. 14, p. 112.

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been argued elsewhere, this may be related to the historical development of international law doctrine; to limitations to our legal imagination; or to philosophical considerations such as that the IO is not a 'natural' political community, and less suited for protecting all people's interests; or to legal considerations such as that an IO is ultimately too transparent as a legal structure, with the Member States all too present; or to political considerations such as a wish not to share power.[48]

4.3 THE OBJECT OF CONSENT AND ITS MANIFESTATION

Not only are IOs actors who give consent, they also exist as an institutional space for other actors, especially States, consenting to international law.[49] An 'institutional space' in this chapter is epitomized by the framework of a formal intergovernmental organization, but the vertical dynamic, captured early on by the notion of 'centralization' that Hans Kelsen used in relation to the United Nations (hereafter UN),[50] is present also in less formal intergovernmental arrangements, such as treaty regimes with a 'constitutional character', for instance, featuring a compliance mechanism or a mechanism for subsequent decisions by treaty parties. Here as well the focus is on the formal rule-making framework, while a variety of 'soft law' made by and in organizations[51] is left out of account.

Where the organization acts as an institutional space, the disaggregation of consent does not so much concern the intentional state of consent and its expression, but rather points to a distance between the object of consent (in treaty-making comprising *consensus ad idem*, as part of mutual consent), on the one hand, and its effect as a 'processual trigger providing for the imposition of certain obligations',[52] on the other hand. These facets, traditionally closely linked, can become separated in an institutional context – with the distance between them specifically relating to substance, rather than to time.

[48] Brölmann, fn. 31, pp. 59–60.

[49] Important actors such as individuals and non-governmental organizations (NGOs) are left out of account here because of the formal framework.

[50] Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (London: Stevens and Sons, 1950), p. 329. He saw centralization as a precondition for the differentiation between the 'duties, rights and competences' of the organization and those of the Member States.

[51] See the findings of José E. Alvarez who takes an effect-based approach rather than a pedigree-based approach: see José E. Alvarez, *International Organisations as Law-Makers* (Oxford: Oxford University Press, 2005).

[52] With regard to treaties specifically, see Craven, fn. 14.

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Of course, organizations are known also for providing the infrastructure for acts of consent where such a distance does not exist. This is the case of the law-making treaties concluded under the auspices of the UN,[53] or the Conventions prepared and 'sponsored' by the International Labour Organization (hereafter ILO).[54] Frequently then, the institutional structure facilitates stages in the process leading up to the act of formal consent, which as such is largely outside, or parallel to, the institutional framework of the organization. Still, it is noteworthy that also in the early stages of the treaty-making process leading up to final consent, in the institutional space results may be obtained that are unfeasible in a completely open, contractual space. Thus, when the Conference on Disarmament did not succeed in reaching consensus on the adoption of the text of the Comprehensive Nuclear Test-Ban Treaty, the text was famously submitted by Australia to the UN General Assembly[55] and could be adopted with support even exceeding the required two-thirds majority.[56]

The mixing of contractual and institutional elements in States' treaty-making in the context of IOs is a long-time phenomenon, with the ILO still as a striking example among contemporary IOs, some eighty years after France repudiated the ILO constitution for the organization's encroachment upon State sovereignty through the convention-making technique.[57] The object of consent, however, in these instances, remains close to the normative effect.

In contrast, it is with the various forms of organizations' legal acts that a separation between the object of consent and its manifestation or 'outcome' is at issue. In the context of decision-making by organizations, we see the enactment of decisions and standards that are typically based on a constitutive treaty and which doctrinally appear as a produced part of the law of treaties canon; at the same time the conceptual boundaries of the 'treaty' become

[53] Many of the multilateral treaties deposited with the Secretary-General: see United Nations, 'Multilateral Treaties Deposited with the Secretary-General'. Available at: https://treaties.un.org/Pages/ParticipationStatus.aspx?clang=_en, last accessed 12 January 2023.

[54] Art. 19 of the Constitution of the ILO (Part XIII of the Treaty of Versailles (adopted 28 June 2013, entered into force 10 January 1935)).

[55] UN Doc. A/50/L.78 (6 September 1996).

[56] Art. 18(2) Charter of the United Nations and Statute of the International Court of Justice (adopted 24 June 1945, entered into force 24 October 1945); United Nations General Assembly, 'Adoption of the Agenda and Organization of Work: Comprehensive Test-Ban Treaty: Letter dated 22 August 1996 from the Permanent Representative of Australia to the United Nations addressed to the Secretary-General', 26 August 1996, UN Doc. A/50/1027.

[57] Charles Rousseau, *Droit international public* (Paris: Recueil Sirey, 1953), p. 39; Catherine Brölmann, 'ILO Convention Practice Mixed Methods in Norm-Setting for Social Justice', in George Politakis, Tomi Kohiyama and Thomas Lieby (eds.), *ILO100: Law for Social Justice* (Geneva: International Labour Office, 2019), pp. 137–149.

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apparent. The phenomenon is most stark in cases of majority rule-making, which as yet seem to be concentrated in IOs with a predominantly technical field of operation.[58] In an IO with near-universal membership, this can in certain areas move written legal rules from a context of freedom of treaty to one of institutional obligation. But outside an institutional context, 'there is no evidence that . . . members of the international community endorse *legislative* techniques based on majority law-making'.[59]

For instance, in the International Civil Aviation Organization (hereafter ICAO), 'standards' are adopted or amended by the Council by a two-thirds majority, which become effective unless the majority of the members register an objection within three months.[60] In the ICAO, where the opting-out system originates, the element of centralization is particularly apparent, as the Council is not a plenary organ. Comparable procedures for the enactment of 'regulatory acts' exist, for instance, in the World Health Organization (hereafter WHO) (where, however, the law-making function resides in the plenary organ)[61] and in several other Specialized Agencies.[62] In the category of – less formal-institutional – Multilateral Environmental Arrangements, the procedure laid down in the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer for the enactment of 'adjustments' to the original standards with regard to controlled substances, goes further than the ICAO regime on 'standards' in that such adjustments – failing consensus adopted by a two-thirds majority – are explicitly said to be binding on all parties to the Protocol.[63] It is arguable that instances such as these, in which the object of consent is detached from its manifestation (in effect because the object was

[58] Leaving aside the general difficulty of making a distinction between political and technical organizations, or between organizations that mainly act as a forum for inter-State negotiation, on the one hand, and organizations that act primarily as a machinery for technical rule-making activities, on the other hand: see, for example, Anne Peters and Simone Peter, 'International Organizations: Between Technocracy and Democracy', in Fassbender and Peters, fn. 21, pp. 170–197.

[59] A – still tenable – statement by Gennady Danilenko: see Gennady Danilenko, *Law-Making in the International Community*, 3rd ed. (Leiden: Martinus Nijhoff, 1993). He refers to comments of States participating in the third United Nations Conference on the Law of the Sea (1973–1982): see ibid., pp. 67–68 (emphasis added).

[60] Arts. 37, 54 (l) and (m) of the Convention on International Civil Aviation (Chicago Convention), 15 UNTS 295 (adopted 7 December 1944, entered into force 4 April 1947).

[61] Arts. 21, 22 of the Constitution of the WHO, 14 UNTS 185 (adopted 22 July 1946, entered into force 7 April 1948).

[62] Jan Klabbers, *An Introduction to International Organizations Law* (Cambridge: Cambridge University Press, 2022), pp. 164–165.

[63] Arts. 2(9), 11 (b) of the Montreal Protocol on Substances that Deplete the Ozone Layer, 1522 UNTS 3 (adopted 16 September 1987, entered into force 1 January 1989).

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not clearly defined to begin with), are only possible in a, to some degree, centralized, 'constitutionalized' environment – whether this environment be a formal institutional space, as in an organization, or a specific field of law such as environmental law or human rights law, with self-reflective mechanisms (e.g. the 'living instrument' doctrine in treaty interpretation).

The disaggregation of consent within an institutional space is relatively well documented, for one because the decision-making powers of IOs have been an element in debates, for instance, concerning the legitimacy of IOs,[64] the publicness of public international law[65] or the protection, and production, of global public goods.[66]

There has been considerable debate as to whether the aforementioned regulatory acts of IOs and regimes should be considered as 'treaty practice', that is, whether they are to be considered as 'treaty obligations' for the organization's Member States deriving from the constituent treaty, or on the contrary as 'legislative acts' issued by an organization simply binding its Member States. One important factor in the classification of these standard-setting acts is the legal image of IOs: as relatively open 'treaty regimes' that maintain a clear connection with their constituent treaties, or as independent 'legal orders' with a relatively closed structure.

The doctrinal stance of grounding IOs' decisions in the consent to the constitutive treaty, in accordance with a somewhat old-fashioned 'treaty analogy', points to the first choice. It was the approach of the ICJ, when it treated the conflict between the 1971 Montreal Convention and SC Resolution 748 – originating in the UN Charter – as a traditional case of conflicting treaties.[67] It was also the perspective of the Court of First Instance of the European Communities in the 2005 *Kadi Case*,[68] before the Grand Chamber of the

[64] See, for example, Jochen von Bernstorff, 'Procedures of Decision-Making and the Role of Law in International Organizations', in Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstoff, Philipp Dann and Matthias Goldmann (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Berlin: Springer, 2010), pp. 777–806.

[65] See, for example, an early enquiry, including into the place of the UN, in Bruno Simma, 'From Bilateralism to Community Interest in International Law' (Volume 250) *Collected Courses of the Hague Academy of International Law*, 1994, pp. 217–384.

[66] Krisch, fn. 3.

[67] *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America)* (Provisional Measures) [1992] ICJ Rep. 114, p. 126.

[68] Court of First Instance, *Yassin Abdullah Kadi* v. *Council of the European Union and Commission of the European Communities* (*Kadi I CFI*) (Case T-315/01) EU:T:2005:332 [2005] ECR II-3649, 21 September 2005.

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European Court of Justice (hereafter ECJ) in 2008[69] resorted to an unprecedented 'constitutional' approach.

At some point in the life of an organization, the latter perspective may come to prevail for reasons of practical and doctrinal necessity, as such perhaps part of a broader dynamic of 'sectoral constitutionalization',[70] and the organization itself may adopt a 'legislative' discourse. An example is the European Union legal order, where obligations stemming from 'community legislation' (Article 288 of the Treaty of the Functioning of the European Union) are clearly set apart from obligations stemming from treaty practice of the Member States, the 'primary' European Union law.

This aside, the opposition between the categories of 'treaty law' and 'international legislation' does not alter the fact that decisions by IOs, also where these in some accounts transcend the category 'treaty norms', are generally seen as grounded in the consent on the part of the States involved. Here the consent element is subsumed in the institutional space, engendering the construct of *consent ex ante*. The notion of consent as such then tends to 'acceptance', as mentioned in Section 4.1. Relatedly and at a more concrete, doctrinal level the delegation theory prevails over the treaty analogy theory.[71]

In short, this is not an argument about 'non-consensualism'.[72] Rather, the foregoing indicates how consent is remarkably resilient in international law.[73] That the classic image of consent appears stretched, is precisely because of the disaggregation of its components.

4.4 CONCLUSION

The global environment of today is marked by institutionalization, which in the context of this chapter refers first of all to IOs. Organizations can be seen both to give consent to international law and to act as institutional spaces for

[69] CJEU, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v. *Council of the European Union and Commission of the European Communities* (*Kadi I*) (Joined Cases C-402/05 P and C-415/05 P) EU:C:2008:461 [2008] ECR I-6351, 3 September 2008, GC.

[70] Anne Peters, 'Constitutionalisation', in Jean d'Aspremont and Sahib Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (Cheltenham: Edward Elgar, 2019), pp. 141–153, pp. 144–146.

[71] Klabbers, fn. 62, pp. 161–163; Pieter Jan Kuijper, 'Delegation and International Organizations' (Volume 426) *Collected Courses of the Hague Academy of International Law*, 2022, pp. 9–239.

[72] In a different vein, and on how majority decision-making in organizations (without a right to opt out) is compatible with the principle of 'equal state consent' once consent is taken in the sense of 'participation', see Besson and Martí, Chapter 14 in this volume.

[73] Krisch, fn. 3, at 39; Besson, fn. 2.

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the consent of others, notably States. The central argument of this chapter is that IOs have brought about a disaggregation of consent. This can be gleaned from the separation of the presumed intentional state and the expression thereof – two components that traditionally are taken together. It can also be observed in the distance brought between the object of consent, on the one hand, and its manifestation in an actual legal relation or obligation, on the other hand.

IOs are often presented as the essential non-State actors' success story, because, in the course of a century, they seemingly have come to act as legal actors on a par with States. But the legal agency of organizations has more to it. A look at the development of organizations as international legal actors since their entry on the international stage, including the facet of 'legal will' – as a shorthand for various intentional states, in addition makes clear that this development is closely connected to the role that organizations have been allowed to play in international law.

In the act of giving consent, both the psychological condition or 'intentional state' to commit to a particular obligation, arrangement or relation, and the expression thereof are traditionally presumed present in international law. Given the general reservations vis-à-vis full-fledged legal agency of organizations in the way of States, the underlying psychological dimension of consent has been inevitably underserved. It then logically follows that where IOs are involved, more reliance exists on the external, symbolic expression of consent.

Because of its disaggregation, the consent given by IOs constitutes a break with the traditional and persisting picture of a legal act by an anthropomorphic subject.[74] This can in turn be said to underline the 'mechanization' of the organization as a legal subject. In the long run, it might counterbalance threshold notions of 'natural' and 'original' legal persons, and may contribute to the opening up of international law in terms of legal personality and facilitate the inclusion of other actors. Or in a more general spirit, the disaggregation of consent brought about by organizations contributes to the awareness regarding the institutional nature of all consenting subjects in international law, including States.[75] The declining relevance of the intentional state fits a long-reported general trend of deformalization and objectivization in international law, which pertains first of all to States.

[74] See fn. 17, 18 and accompanying text.

[75] See Samantha Besson, *Reconstructing the International Institutional Order* (Paris: OpenEdition Books/Editions du Collège de France, 2021). Available at: https://books.openedition.org/cdf/12335, last accessed 12 January 2023.

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An example is the 'objectivization of intention' that was key to the landmark ICJ *Qatar* v. *Bahrain*.[76]

When States in an institutional space perform their act of consent, disaggregation occurs when the object of consent and the outcome become detached, notably when the object has not been clearly defined so as to leave room for further normative choices. This is the case of (majority) decision-making of organizations that at the doctrinal level tends to be explained on the basis of a theory of delegation.[77] A particular concern in this regard is that where flexibility increases, predictability and formality decrease. This is helpful for addressing problems, but not necessarily for levelling an uneven playing field among powerful and less powerful States. This argument runs along similar lines as the one on the (dis)advantages of informality in law-making, which have been mentioned frequently, and the continuous effort to strike a balance.[78] One author has pointed out that the structures created by 'non-consensualist' initiatives (which here refers to majority decision-making), 'in formal or informal guise', reduce the number of decision-makers, and they do so 'typically not in an egalitarian fashion but in a way that entails a loss of control for all but the most powerful players'.[79]

It is noteworthy that the term 'non-consensualism' is used frequently to refer to majority decision-making. Indeed, the flexibility of such mechanisms is considerable, up to a point that for some observers it would amount to 'non-consensual' law-making. This chapter is not as such focused on 'non-consensualism' as a general trend, but the question as to the scope of (the concept of) consent is a fair one. There may be a boundary to that scope (or to 'consensualism') – after which a legal relation or obligation would, in form and time, be so remote from an act of consent, that it would lapse into an instance of non-consensualism. How to locate that boundary, however, remains unclear. Such because of the inherent subjectivity, the link with certain doctrinal pre-assumptions (regarding, e.g., State sovereignty, or delegation of powers), and the concept of consent that is adopted (e.g. consent as 'acceptance' might tolerate more of a separation of components than consent as 'agreement'). Either way, it seems that in doctrine and in discursive practice, consent persists as a foundation for the creation of formal legal rules stemming from organizations' acts, irrespective of whether these acts are conceptualized

[76] *Qatar* v. *Bahrain*, fn. 30, para. 27.

[77] See fn. 71 and accompanying text. These references to 'delegation theory' as traditionally referred to in international law, especially in relation to a separate legal order, leave aside possible issues of unanimity of consent: Besson and Martí, Chapter 14 in this volume.

[78] Pauwelyn, fn. 10.

[79] Krisch, fn. 3, at 31.

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as treaty law or as legislation. This is confirmed by the fact that 'the pressure for change has mostly been absorbed not through new binding international rules and formal institutions, but through alternative means of regulation'. To this, the author adds that it is 'ones in which consensual elements are weak and hierarchies are often pronounced'.[80]

The different conceptualizations of consent – emphasizing agreement and acceptance, respectively, as proposed at the outset of this chapter – may tie in with the private and public law procedural characteristics that international law combines. At first blush, it would seem that when consent is given in an institutional context, disaggregation of the object of consent and its manifestation occur in a 'public law dynamic', such as with decisions and 'acts', accompanied by an understanding of consent as 'acceptance'. On the other hand, less disaggregation appears to occur when consent is given through a legal act with a contractual flavour in a 'private law dynamic', such as treaty-making in the institutional space of the organization. The understanding of consent then tends towards that of 'agreement'.

Finally, from the chapter it appears that the act of consent in international law responds to all things institutional. What common meaning can be found in the two very different institutional scenarios – the IO giving consent and the IO acting as an institutional space for the consent of others? Perhaps the most prominent aspect is a break – sadly and wisely – with the anthropomorphic picture in law that of old has had a strong hold, also in international law: 'consent [as] an expression of the individual's desires and commitments'.[81]

[80] Krisch, fn. 3, at 34.
[81] George P. Fletcher, *Basic Concepts of Legal Thought* (Oxford: Oxford University Press, 1996), p. 118.

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