Capturing the Juridical Will

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Chapter 2

Capturing the juridical will

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The *Conclusions on Identification of Customary International Law* (hereafter 'the Conclusions') as adopted by the International Law Commission on second reading[1] are an important resource in a thorny area of international law. A stated primary aim is to offer guidance to practitioners,[2] which accounts for the focus on systematisation of positive international law and practice.

The Conclusions are brief on the position of international organisations as *independent* actors in the formation of customary international law. This modest role could seem remarkable, given that international organisations participate ever more fully in international-legal affairs. The present chapter argues that one – generally under-studied – factor in explaining the apparently modest role of international organisations as independent actors in the formation of custom is the hesitation of international law to attribute a 'juridical will' to international organisations.

The construct of the juridical will plays a key role in legal actors' creation of law and legal relations in any legal system. This also holds for international law, and includes the process of the formation of custom. The ascription of a juridical will to States has been – especially since the nineteenth century – generally unproblematic. For international organisations, however, this is different. It seems international law has not been at ease with the construal of a 'mental state' for organisations, even when and where their status as independent legal actors was uncontested. Still, this tension is inconspicuous where a sign is agreed to communicate a legally relevant mental state, such as 'signature' for 'approval' or 'assent'.[3] The same holds for cases

1 International Law Commission Report 2018, Ch V, Draft Conclusions on Identification of Customary International Law, with commentaries (UN Doc A/73/10).

2 ibid 122 para 2.

3 In reality this does not quite capture the different layers at stake. E.g. (leaving aside the signified and the signifier of the legal terms) in treaty-making at least three levels exist (the physical act of signing, which signifies the legal act of signing, which in turn signifies consent to be bound (or any other intention).

in which international law accepts a fact in social reality – for example the sending of a military mission or the issuance of a Resolution – as a result of, in a legal sense, *willed* conduct and thus an expression of juridical will.

There are on the other hand situations in which juridical will must be ascertained without the help of agreed signs, as with the determination of *opinio juris*. To discern 'intention' or 'opinion' in States for the purpose of establishing customary international law is a nebulous process,[4] but when it comes to international organisations it is more problematic still, as in general the international organisation is not recognised as a sentient legal person in the way of states. A detailed tracing of the position of international organisations as independent actors in the Conclusions is carried out in another chapter of this volume.[5] The point which the present chapter aims to make is that the work of the International Law Commission confirms a general hesitation on the part of international law in attributing to international organisations a juridical will. This in turn can be linked to the mechanistic, functionalist view of international organisations that has persisted even when international organisations came to be recognised as independent actors.

This chapter is structured as follows. It briefly addresses the place of international organisations in the *Conclusions on the Identification of Customary International Law* (1), and recalls the role of the juridical will in the formation of customary international law on the part of legal actors in general (2). It then turns to the development of international organisations as legal actors (3), after which it zooms in on two facets of the concommitant feature of juridical will that are relevant to the formation and identification of custom (4): the *opinion* of organisations and the proverbial *volonté distincte* (that is, distinct from the will of the member States). The chapter addresses one implication, which is the asymmetry of international organisations not contributing to the formation of the customary law by which they are bound (5), followed by some concluding remarks (6).

1 International organisations in the Conclusions

In the Conclusions international organisations appear in two ways: as a platform for the (legal) acts of States, and as an independent international-legal actor. As to the latter, Conclusion 4 (*Requirement of practice*) para 2, refers to the practice of international organisations in their own right, as a possible contribution to 'the

4 The endeavour of the Conclusions to establish signs for *opinio juris* – for States – bears this out; Conclusion 10 and commentary (UN Doc A/73/10) 140–42.

5 *See* Chapter 1, this volume.

formation, or expression, of rules of customary international law'. This is most likely to occur, according to the commentary, when States have transferred exclusive competences to an international organisation, or 'conferred powers upon the international organization that are functionally equivalent to the powers exercised by States'.[6] More generally the commentary points to a key role for states: '[a]s a general rule, the more directly a practice of an international organisation is carried out on behalf of its member States or endorsed by them, and the larger the number of such member States, the greater weight it may have in relation to the formation, or expression, of rules of customary international law'.[7] Otherwise, Conclusion 6 (*Forms of practice*) para 2; Conclusion 10 (*Forms of evidence of acceptance as law* (*opinio juris*)) para 2; and Conclusion 12 (*Resolutions of international organisations and intergovernmental conferences*) are explicitly concerned with the practice and *opinio juris* of States in the context of international organisations.[8]

In short, the Conclusions give a relatively prominent part to organisations as a framework for customary international law formation by States, but they are brief about an independent role of international organisations in the identification and by implication formation of customary international law. While the *practice* of international organisations as such comes up in aforementioned Conclusion 4(2) ('in certain cases …'), Conclusion 10 makes no mention of the *opinio juris* of international organisations, and also its commentary speaks only of States.[9] International organisations thus figure predominantly as vehicles for State action, which in turn may bespeak *opinio juris* or relevant practice on the part of the State. In terminology introduced elsewhere: organisations are presented with a *transparent* institutional veil.[10] The emphasis on States is borne out by the Commentary to Conclusion 12: 'Although resolutions of organs of international organizations […] emanate, strictly speaking, not from the States members but from the organization, […] they may reflect the collective expression of the views of such States'.[11]

6 UN Doc A/73/10, 131 paras 5–6; *see* also Chapter 12 in this volume regarding the discussions leading up to Conclusion 4(2).

7 UN Doc A/73/10, 132, para 8.

8 cf R Deplano, 'Assessing the Role of Resolutions in the ILC Draft Conclusions on Identification of Customary International Law' (2017) 14 International Organizations Law Review 227, 229. This is set out in more detail in Chapter 1 of this volume.

9 UN Doc A/73/10, 138–42, Conclusions 9 and 10 and commentaries; *see* also Michael Wood, 'International Organizations and Customary International Law (2014 Jonathan J Charney Distinguished Lecture in Public International Law)' (2015) 48 Vanderbilt Journal of Transnational Law 609.

10 C Brölmann, *The Institutional Veil in Public International Law* (Hart 2007).

11 UN Doc A/71/10, 147 para 3.

That said, the Commentary to Conclusion 4 indicates that in principle international organisations *can* display their own relevant practice and *opinio juris*.[12] This idea gains additional weight as international organisations are set apart from 'other actors' by paragraph 3 of Conclusion 4, which articulates that the practice of other non-State actors does not have that potential. In this the Conclusions follow the reports by the Special Rapporteur, which – generally – give evidence of a more open approach to international organisations' independent role in customary international law formation.[13]

The 2018 Conclusions then recognise the possibility of an independent role for international organisations, but they do not elaborate; and some key questions are left pending. One is how the *opinio juris* of an organisation is to be established. Another is how to determine *when* we are dealing with practice (or *opinio juris*) of the organisation as such, and when with the practice of member States. It is worth noting the layered and more elaborate conceptualisation of '[subsequent] practice of the organisation' found in the International Law Commission's *Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties*, also adopted in 2018.[14] In the context of interpretation of constitutive treaties these envisage 'subsequent practice of the parties [… that …] *may arise from, or be expressed in*, the practice of an international organization' (Conclusion 12 (2) – emphasis added), as well as independent '[p]ractice of an international organization in the application of its constituent instrument' (Conclusion 12 (3)), both with abundant examples from practice.[15] The commentary also points out how the

12 cf the Commentary to Conclusion 4 (UN Doc A/73/10, 131 para 5): 'The practice of international organizations in international relations (when accompanied by *opinio juris*) may count as practice that gives rise or attests to rules of customary international law'.

13 International Law Commission, First report on formation and evidence of customary international law (Sir Michael Wood, Special Rapporteur) (2013) UN Doc A/CN.4/663; International Law Commission, Second report on identification of customary international law (2014) UN Doc A/CN.4/672; International Law Commission, Third report on identification of customary international law (2015) UN Doc A/CN.4/682; International Law Commission, Fourth report on identification of customary international law (2016) UN Doc A/CN.4/695. cf especially the Third Report, UN Doc A/CN.4/682, paras 68–79; *see* also Michael Wood, 'International Organizations and Customary International Law (2014 Jonathan J Charney Distinguished Lecture in Public International Law)' (2015) 48 Vanderbilt Journal of Transnational Law 609, 616–20.

14 Conclusions on *Subsequent agreements and subsequent practice in relation to the interpretation of treaties* (International Law Commission Report 2018 (UN Doc A/73/10), Chapter IV).

15 ibid 93–106.

authorship of legally relevant 'practice' might be even shared by the organisation and the (member) states, as was suggested by the International Court of Justice in the *Wall Case* when it subtly referred to 'the *accepted* practice of the General Assembly'.[16] This said, it is fair to assume that the disconnect between the two descriptions of 'practice' in relation to international organisations is more contextual than conceptual;[17] that issue, however, lies outside the scope of the present chapter.

2 The juridical will in public international law

The juridical will, that elusive legal attribute, has a key role in the creation of law and legal relations in any legal order. The concept of 'juridical will' is taken here to denote a broad category of mental states on the part of a legal actor that have an effect in law (and may thus translate into both legal acts and legal facts). We may think for example of assent, acquiescence, intention, opinion, aim, and good or bad faith. These are states of mind or, to borrow a helpful term from theory of agency, 'intentional states',[18] ascribed to recognised participants in any legal order. As a construct the juridical will operationalises legal agency, which is why it is also a key component of 'legal personality'.

Leaving aside the development in natural persons of the link between the psychological (theological) will on the one hand and the juridical will on the other, it is fair to say that by the eighteenth century in international law the idea of a juridical will had been successfully transposed to the State[19] as a component in the creation of law and – especially, in the contractual vision of that time – legal obligations. In the nineteenth century then, the 'natural' view of actorhood, or 'personality' in

16 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004 136, 150 (emphasis added).

17 As constitutive treaty interpretation is a more diffuse and 'inward-turned' exercise than the identification of a rule of customary international law, it may require less stringent parameters for the determination of practice; this is not unlike the way attribution of conduct with the consequence of rendering applicable a particular field of law seemed to allow for a lower threshold than attribution of conduct with the consequence of making a State legally responsible – something which famously led to divergent concepts of 'control' in the ICTY and the ICJ.

18 P Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (Polity Press 2001) 104, 115.

19 cf the different forms of consent identified by Emmerich De Vattel (*Le Droit des gens* (1758), *The Law of Nations* (from the Classics of International Law series by J Brown Scott (ed), the Carnegie Institute of Washington 1916) 9. This time also saw a move away from natural law, to some extent, and towards *voluntarism* in international relations.

doctrinal terms, in international law gained prominence. The only candidate for that role on the international plane was the State, described by Hegel as 'completely autonomous totalities in themselves' and as 'the absolute power on earth … in which the world spirit unfolds itself'.[20] By then the State's corporate and fictional nature had largely disappeared from view,[21] which in turn facilitated the incorporation in international law of domestic law analogies and the accommodation of a 'natural person', to whom a particular intentional state could be attributed.

The anthropomorphic view of the State, and of its international-legal 'personality', was to some extent dismantled by interbellum scholars such as Kelsen, Brierly, and Nekam,[22] and has been the object of contestation ever since. It has been pointed out that '[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',[23] 'as if governments, let alone states, had determinable states of mind'.[24] At the same time, the fiction of the intentional state is locked in in systems of law; it is needed to operationalise legal agency on the part of recognised actors.[25] And in truth international law has remained discretely at ease with ascribing a legally relevant 'state of mind' to States. One example is the weight traditionally given to the State's 'intention' in the interpretation of treaties or in the determination of the *juridical* character of an agreement. Another example is precisely the doctrine of States' *opinio juris* as a component of customary international law.

References to psychological agency and the attribution of will to legal actors are, in the same way as in domestic (private) law, common in international law, witness classic references such as '[t]he signed text is … the most recent expression of the common will of the parties'.[26] For the twentieth century the ability to *think* has

20 GF Hegel, *Grundlinien der Philosophie des Rechts* (Knox translation of 1821) (Suhrkamp 1986) paras 330 and 331.

21 cf M Koskenniemi, 'The Wonderful Artificiality of States' (1995) 89 Proceedings of the Annual Meeting of the American Society of International Law 22.

22 Brölmann (n 10) ch 4.

23 A Carty, 'Doctrine versus State Practice' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 972, 976.

24 P Allott, 'The Concept of International Law' (1999) 10 European Journal of International Law 31, 39.

25 *See* also Chapter 5 in this volume (while I disagree with the construal of *opinio juris* as 'unintentional … acceptance', I concur with the author's observation that the intentional state of 'will' is especially relevant in the 'positivist theory of lawmaking').

26 International Law Commission Special Rapporteur Sir Humphrey Waldock, ILC Ybk 1964 II 56; ILC Ybk 1966 II 220.

been linked to the doctrine of 'fundamental' rights of States, which is taken as an anthropomorphic construction.[27] Generally however, the subjective, mental dimension of the juridical will, and especially its construction for non-human legal actors, seems under-theorised.

At this point it must be recalled that this chapter is concerned with the ascription of a juridical will *within* the law. Seen from an immanent perspective this depends not only on particular features which may turn an entity into a legal actor, but foremost on the legal framework, and the legal imagery, within which the legal actor finds itself. It is true that political theory and political philosophy have brought to light how group agents are distinct from the sum of their component parts because of a particular decision-making structure,[28] and how by the ability to formulate a separate, collective will, they would become susceptible to bearing responsibility.[29] Philosophy of language can explicate how (groups of) human individuals may impose intentionality on governments and international organisations, and how *opinio juris* in fact may amount to an institutional object, brought about by speech acts that express beliefs and intentions.[30] From these perspectives the construction of a 'willful state of mind' for one composite (i.e. non-individual human) actor does not require more effort than for another.

However *within* the law intentional states are projections used by the system, necessary for it to function. The prime question is therefore whether a legal environment ascribes legally relevant intentional states to an actor. This mostly coincides with the recognition by the system of (a degree of) legal personhood – but not always, as in the case of international organisations, which, as set out below, in the imagery of international law have a seemingly subservient role.

The process is easiest when an agreed sign in external reality exists for a legally relevant state of mind on the part of a legal actor, such as 'signature' for 'assent', or the 'passing of 30 days' for 'acquiescence'. In these cases there is a presumption of juridical will, without the need for its ascertainment. When no agreed sign exists, it is a more intricate process to establish juridical will and its orientation. Yet, this

27 J d'Aspremont, 'The Doctrine of Fundamental Rights of States and Anthropomorphic Thinking in International Law' (2015) 4 Cambridge Journal of International and Comparative Law 501, esp 515ff.

28 P Pettit, 'Collective Persons and Powers' (2002) 8 Legal Theory 443; also F Johns (ed) *International Legal Personality* (Ashgate 2010) xi–xxix, and fn 87.

29 From the angle of international relations scholarschip *see* e.g. T Erskine, 'Assigning Responsibilities to Institutional Moral Agents: The Case of States and 'Quasi-States' in T Erskine (ed), *Can Institutions Have Responsibilities?* (Palgrave Macmillan 2003) 19, 20.

30 *See* Chapter 3 in this volume.

process can be fluid and flexible when an actor's capacity to have an intentional state as such is uncontested, as with States. The search for a subjective, mental state is typically at issue in the ascertainment of *opinio juris*, as can be seen from the range of expressions used by the International Court of Justice to render the notion, collected in the Second Report, which include 'feeling', 'belief', 'deliberate intention', 'awareness', 'conviction', 'general feeling', and 'actual consciousness'.[31] The next sections consider the 'legal will' of organisations, first as part of the image of organisations as legal persons (4) and then with a focus on two aspects that are specifically important for the formation of custom (5).

3 The thin legal personality of international organisations

This section aims to trace the development of organizations as international legal actors, which includes the facet of juridical will, since their entry on the scene. As argued above, this development is closely connected to the role that organisations are allowed to play in international law, more than to their particular institutional features in social reality. International organisations often are taken to represent the essential non-State actors' success story. The received narrative is that international organisations in the course of more than a century have come to act on a par with States as actors in international law. But the newfound legal agency of organisations can be unpacked further.

The development of international organisations as legal actors has been steep. As I have argued elsewhere,[32] after a 'functional' phase in which organisations acted as mere platforms for State action, international organisations have come to participate in international life also as independent legal actors, an independence that became prominent in the United Nations era. Organisations came to conclude treaties and send envoys, and to participate in international political and legal relations at an unprecedented scale. The conceptualisation of international organisations' legal independence (that is, the external aspect of their institutional autonomy) was couched first of all in the doctrinal terms of 'legal personality'. Here it is important to recall that international organisations, unlike states, in their history of conceptual and doctrinal development, never passed a stage in which they counted as a

31 Second Report of the Special Rapporteur, 66th session of the International Law Commission (2014) (UN Doc A/CN.4/672) para 67.

32 C Brölmann, 'Het constitutionele perspectief en de coming of age van internationale organisaties' [The constitutional perspective and the coming of age of international organisations], in JH Reestman et al (eds) *De Regels en het Spel: Opstellen over Recht, Filosofie, Literatuur en Geschiedenis* (TMC Asser Press 2011) 73.

'natural' form of political organisation with ensuing 'natural' international legal personality. If this had been the case, the image of the international organisation would arguably have been a different one today.

The possibility of international legal personality for international organisations had been a topic of debate among scholars in the interbellum, and had been left unresolved. Still, in practice the question whether organisations could, and did, have international legal personality was brought to a head immediately after the creation of the United Nations and was decided essentially for all international organisations with the 1949 International Court of Justice *Reparation* Opinion.[33] Later on, international legal personality would be boldly mentioned in the constitutive treaties of some new organisations (even if technically speaking the enjoyment of legal personality would not depend on a decision of the constituting states), such as the Rome Statute (Article 4(1)) and the Treaty on the European Union (Article 47). With the independent activity of organisations rapidly increasing, one response of the system was the codification of applicable rules of international law in specific substantive areas, such as privileges and immunities,[34] the law of treaties,[35] and the law of international responsibility.[36] At the same time, the mechanistic and partly transparent image of the international organisation remained.[37]

States kept a close and critical eye on the rapidly expanding independent activity of international organisations, but many scholars and commentators applauded the rise of international organisations.[38] Undoubtedly this enthusiasm was tied to an image of the autonomous international organisation as an a-political and spiritless mechanism.[39] In that vision international organisations embodied neutrality and were not susceptible to the political snares and conflicts of interest that so often were seen to hamper the effectiveness of international law when States were involved. For its part this view fitted in the post-war progress narrative on international law: the more international power and authority would be organised along

33 Brölmann (n 10) 65–96.

34 1946 Convention on the Privileges and Immunities of the United Nations, 1 UNTS 15.

35 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (UN Doc A/CONF.129/15).

36 UN Doc. A/66/10, 9 December 2011.

37 Brölmann (n 10) 245–47.

38 J Klabbers, 'The Changing Image of International Organisations' in JM Coicaud and V Heiskanen (eds), *The Legitimacy of International Organisations* (United Nations University 2001) 221, 226–27.

39 *See* also Chapter 1 in this volume.

functional lines rather than on the basis of State sovereignty,[40] the more compliance and *rule of law* – and hence safety and wellbeing of people – would improve. Another dimension of this was of course a confirmation of the State as the dominant form of political organisation and power. The functionalist, a-moral vision of international organisations was not about an 'unmoral organisation' in the way of Allott's 'unmoral state'[41] – which posits that only human individuals can be responsible behind the screen of corporate legal persons. Rather, it was about (member) States as the ultimate political, moral, and juridical agents.

This vision in turn strengthened a particular conceptualisation of organisations in which they were independent legal persons, but in a 'thin version'. One could say that organisations were accommodated as legal persons but not *willful* legal persons or *personnes morales*.[42] The codification process of the 1986 *Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations* ('1986 Convention'), which lasted from 1971 until 1986, gives evidence of that. From the text, the commentaries and the *travaux* in general emerges, next to a State's concern about the possibility of independent action of organisations, primarily a 'technical', a-political view of the autonomy of international organisations. To be sure, according to the regime of the 1986 Convention, international organisations can 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 international organisations as such are not ascribed the moral and political 'considerations' and 'intentions' that are part of the legal persona ascribed to States. Thus, the 1986 Convention envisages the possibility of error or fraud in the conclusion of a treaty on the part of an organisation, but in order to ascertain that this is the case, the claimant must resort to the internal institutional order of the international organisation, or – in other words – to the member States (Articles 48 and 49 of the 1986 Convention).[43] The Convention provides that states 'acquiesce in the validity of the treaty', while

40 The work of eminent institutional law scholars such as Schermers and Seidl-Hohenveldern provides a clear example of this optimism in relation to international organisations.

41 P Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29 Harvard Journal of International Law 1.

42 On 'moral personality' in the civil law tradition *see* e.g. FW Maitland, 'Moral Personality and Legal Personality' (1905) 6 Journal of Comparative Legislation and International Law 192; E Pisier-Kouchner, 'La notion de personne morale dans l'oeuvre de Léon Duguit' (1974) 11/12 Quaderni fiorentini per la storia del pensiero giuridico moderno 667.

43 Yearbook Of The International Law Commission 1982 Vol II (Part Two) 5 para 2 (re Art 48(2)).

organisations must be seen to have '*renounced* the right to invoke that ground' based on the passing of a certain stretch of time.[44] The reluctance to ascribe juridical will, or a specific intentional state, to international organisations is also reflected in the longtime idea of impossibility of an international organisation's 'wrongdoing' ('[i]s it really conceivable that … organisations may … employ, the threat or use of force …?').[45] In relation to an early version of the Draft Articles on State Responsibility the International Law Commission 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'.[46]

In the past two decades the neutral, mechanistic view of organisations has lost much of its appeal, arguably due to a disenchantment and sobering of expectations regarding international organisations, triggered for example by information about misconduct of United Nations military missions[47] and self-enrichment of United Nations staff members.[48] Already there were longtime misgivings about the manifestation of, especially universal, international organisations as a Western-hegemonic project.[49] Meanwhile circles of legal theory and sociology critiqued the presumed move from a territorial to a functional basis for power and authority[50] in international affairs, because of the risks that come with *single issue* agenda. It is safe to say that in our time the independent actorship of international organisations no longer raises only institutional and formal-juridical questions, or concerns on the role of member States as *Herren der Verträge* (Masters of the Treaties). Issues of legitimacy and ethics arise, both inside the organisation and in the context of general international law. A cynical thought experiment has described how in a traditional institutional law context an imaginary 'International Torture Organisation' operates entirely in accordance with the 'law of international organisations' (which

44 Articles 45(1)(b) and 45(2)(b) respectively.

45 Yearbook Of The International Law Commission 1982 Vol II (Part Two) 55 para 2.

46 Yearbook Of The International Law Commission 1975 Vol II para 3 87 (emphasis added); both the article and the commentary were adopted in an unaltered version in 1996.

47 C Lutz, M Gutmann and K Brown, 'Conduct and Discipline in UN Peacekeeping Operations: Culture, Political Economy and Gender' 2009 Watson Institute for International Studies Research Paper, http://dx.doi.org/10.2139/ssrn.2323758.

48 SA Notar, 'The Oil-for-Food Program and the Need for Oversight Entities to Monitor UN Sanctions Regimes' (2007) 101 Proceedings of the Annual Meeting of the American Society of International Law 163.

49 B Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 European Journal of International Law 1, 23–24.

50 G Teubner, 'Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie' (2003) 63 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1.

after all leaves quite some room for individual institutional arrangements) and practices its monopolistic right to torture (since torture is prohibited for States) without the possibility of calling the 'International Torture Organisation' to account.[51] An expression of the changing perspective on international organisations is that the notorious gap in individual legal protection vis-à-vis international organisations (if perhaps not in case of torture) that is created by a coinciding of attribution of conduct on the one hand and immunity on the other, or attribution of conduct on the one hand and a (lack of) *locus standi* on the other, increasingly has come to be considered unacceptable. With the increased activity of international organisations on the international scene, also in fields of *high politics* such as peace operations and other engagements which touch upon the internal affairs of States, the call for accountability of international organisations has grown accordingly. This has sparked interest in formal responsibility mechanisms[52] as well as non-legal accountability processes of international organisations;[53] it has created space for a concern about the compatibility of international organisation international conduct with human rights,[54] and ultimately questions as to whether international organisations are and should be bound by general international law.[55]

4 International organisations' juridical will and the formation of custom

As with States, the notion of a juridical will is key to the independent contribution of organisations to the formation ofcustomary international law.

Two facets of the juridical will of international organisations then are especially relevant for the formation of customary international law: the subjective and psychological dimension of the international organisation's juridical will, to

51 M Parish, 'An Essay on the Accountability of International Organisations' (2010) 7 International Organisations Law Review 277.

52 C Ahlborn, 'The Rules of International Organisations and the Law of International Responsibility' (2011) 8 International Organisations Law Review 397.

53 ILA Committee on *Accountability of International Organisations* (final report of 2002 New Delhi (70th) Conference).

54 cf J Wouters et al (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010) – who incidentally also refer to the mechanistic view of organisations in the book's introduction: 'Some may consider the theme … far-fetched. How could one imagine international organisations violating human rights?' (at 2).

55 K Daugirdas, 'How and Why International Law Binds International Organizations' (2016) 57 Harvard International Law Journal 325.

be identified as a 'pure' intentional state, and second, the *distinctness* of the international organisation's juridical will.

4.1 Opinion

It appears that international law can handle the juridical will on the part of an organisation when this turns on agreed signs, both internally ('majority decision-making') and internationally ('signature' as expression of the 'intention to be legally bound'). When no such signs are available (while also no concrete action can be determined from which to infer juridical will), it is necessary to ascertain a 'pure' intentional state with.

Whether international organisations can 'have an opinion' in a legally relevant sense appears to be a pending question in the 2018 Conclusions. The attention for international organisations as independent actors is geared to *practice* (albeit there is rarely agreement on its status)[56] rather than *opinio juris*. It is fair to say that this silence is an adequate reflection of the law and doctrine as it currently stands, and fitting the general context as set out above.

An earlier reflection of this position vis-à-vis international organisations, with an openly political dimension, is in the 1986 Convention the direct denial to organisations of the possibility to contribute to the formation of (customary) *jus cogens*. Articles 53 and 64 envision States but not international organisations to be part of the proverbial 'international community' that is empowered to establish which norms are part of *jus cogens*.[57] This case of direct political exclusion reflected in law may be compared to the doctrinal barrier to participation of non-governmental organisations in international legal relations.

4.2 Volonté distincte

The *volonté distincte* of international organisations is another facet of what has been described as the juridical will. The term specifically points to the *separateness* of the will of the organisation from that of the member States, and has come to be a term of art used only in that context. The *distinctness* of the international organisation's

56 *See* J Odermatt, 'The Development of Customary International Law by International Organizations' (2017) 66 International and Comparative Law Quarterly 491; *see* also Chapter 1 in this volume.

57 On the commentary by the International Law Commission on this point Brölmann (n 10) 241–43.

juridical will then can be at issue in concrete cases in which it is unclear to whom the relevant practice needs to be attributed; again this would require the ascertainment of a 'pure' intentional state, since practice does not per se convey *to whom* the objectivised intention should be attributed.

From the early days of international organisation doctrine the institutional feature of 'autonomy' has served as a foundation for the attribution of an *external* separate legal identity of sorts – formalised as 'legal personality' – to the extent that these have been, erroneously, assimilated (confusion may arise when some definitions of 'organisation' – with the aim to identify a category for the application of a particular regime, rather than to make a legal-ontological claim about international organisations – include 'legal personality' as a definitional element).[58]

The *volonté distincte* is admittedly of a fictional character, and how it should be identified is not generally elaborated upon by authors,[59] although it is of old the key element in the factual definition of 'international organisation'.[60] The *volonté distincte* is construed from, and translated into, objective institutional traits, and inferred from a particular institutional architecture in which ('at least one permanent organ' of) the organisation displays a degree of autonomy vis-à-vis the member states, as shown mainly in decision-making.[61] In technical terms the autonomy or *volonté distincte* of the organisation takes precedence – if only to a minimal extent – over the sovereignty of the individual states. This is part also of more sophisticated analyses of international organisations' 'autonomy'.[62]

58 As for example in the Conclusions (UN Doc A/73/10 131 para 5).

59 Schermers and Blokker do not elaborate. cf Jan Klabbers, 'The Changing Image of International Organisations' in Jean Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organisations* (United Nations University 2001) 221, 226ff; *see* Brölmann (n 10) 35–55 on the concept of the 'will' of international organisations in nineteenth- and early twentieth-century legal writing.

60 cf P Reuter, *Institutions internationales* (Presses Universitaires de France 1954), 195: 'En tant qu'*organisation* il ne peut que s'agir d'un groupe susceptible de manifester d'une manière permanente une volonté juridiquement distincte de celle de ces membres.'

61 HG Schermers and NM Blokker, *International Institutional Law: Unity Within Diversity* (Martinus Nijhoff 2011), paras 44 and 44A; N White, *The Law of International Organisations* (Manchester University Press 2017) at 9; R Collins and N White (eds), *International Organisations and the Idea of Autonomy* (Routledge 2011).

62 J d'Aspremont, 'The Multifaceted Concept of the Autonomy of International Organisations and International Legal Discourse' in R Collins and N White (eds), *International Organisations and the Idea of Autonomy* (Routledge 2011) 63 – identifies four types of 'autonomy'.

But *volonté distincte* is not just another word for institutional autonomy (although the latter is used as an indicator for the former) – as a concept it has a subjective, intentional aspect, which is left consistently undiscussed. It does explain why the *volonté distincte* has always remained a vague notion. The difficulty in discerning the international organisation's independent will, other than by looking at institutional voting rules, bears this out.[63]

Objectively verifiable conduct or 'practice' then may raise an additional question when it comes to international organisations: *willed* by whom – by the member States or the organisation? In concrete cases in which particular 'practice' for the formation of customary international law would need to be attributed to an organisation, the *distinctness* of the underlying will, ascribable to the organisation rather than to its member States, may be contested. The Commentary mentions the independent relevance of the practice of the EU and also of the UN, as an organisation without exclusive competences.[64] Still, indeterminacy remains and leaves space, for example, for the as yet unresolved discrepancy between the rule in Article 7 of the Articles on the Responsibility of International Organisations (which uses 'effective control' for attribution of conduct to the international organisation) and the United Nations internal rule and practice (which uses 'command and control' for attribution of conduct to the international organisation).[65]

5 The coming of age of international organisations: creating the law that binds you

A cursory view of signs from positive law and practice specifically in the law of treaties and the law of international responsibility, indeed suggest that notwithstanding organisations' independent participation in international legal affairs on

63 One of the few authors to have addressed this systematically is N White ('Discerning Separate Will', in W Heere (ed), *From Government to Governance: The Growing Impact of Non-State Actors on the International and European Legal System* (Proceedings of the 2004 ASIL/NVIR Conference), 2004, 31–38), who distinguishes the extent of such autonomy, which will, for example, be dependent on whether the organisation has contractual or constitutional foundations.

64 International Law Commission Report 2018 (UN Doc A/73/10) Ch V, 131 para 6; cf Odermatt (n 56) 491, who illustrates the relevance for customary international law of practice by international organisations as such by EU external acts.

65 Comments and Observations [to the Articles on the Responsibility of International Organisations] received from the United Nations (17 Feb 2011, UN Doc A/CN.4/637/Add.1 10).

the point of creation of obligations, accountability, and, in more recent times, expectations to international organisations of 'moral behaviour', international law seems is reluctant to project onto international organisations a fully fledged juridical will. This is one factor in explaining how for the establishment of customary international law, as set out in the previous section, both the element of practice and the element of *opinio juris* can pose a challenge when these are to be ascertained in an international organisation – precisely because the conceptual components of *opinio juris* and *distinctly willed* practice are not communicated by agreed signs.

With the technical, mechanistic vision of international organisations losing appeal, and with the growing attention to international organisations' accountability and responsibility, and to their being bound by international law, the image of an actor with thin legal personality, unsusceptible to the intentional states that are a habitual construct in the operationalisation of legal agency, also becomes less easy to accommodate. This is brought to the fore by the work on the formation of customary international law.

What then is the origin of this hesitation on the part of international law? It is likely to be a mixture of factors: (historical development of) international law doctrine; limitations to our legal imagination; the idea that a subjective, intentional state *should* not be ascribed to international organisations for philosophical reasons (e.g. an international organisation is not a 'natural' political community; or an international organisation is less suited for protecting everyone's interests); or for *legal* reasons (e.g. an international organisation is ultimately too transparent as a legal structure, and the member States are too independently present); or for *political* reasons (e.g. States do not wish to share their power). When the possibility of international organisations' independent legal agency is addressed, this is generally done – as may be gleaned from earlier International Law Commission materials – in terms of *political viability*. To be sure, the degree to which the States in this world *want* international organisations to have an independent role in lawmaking, is a major determining factor for any legal construction in regard of organisations. That account however excludes the conceptual aspect and the constraints both consciously and unconsciously posed upon the notion of 'juridical will' of international organisations in the imagery of international law.

The result may be problematic on different counts. This chapter mentions one, which as a topic has garnered renewed attention – possibly in the wake of the International Law Commission's engagement with custom. The debate spurred by developments in the field of human rights law, the proposition of international organisations being fully bound by relevant customary law in the field of human rights

is arguably since at least a decade no longer controversial.[66] Likewise it seems to be generally accepted that multilateral development banks, as international organisations with international legal personality, are bound by customary rules developed in international environmental law or international humanitarian law where these are practically relevant.[67] This raises the recurring question of symmetry: when international organisations are taken to be bound to customary international law, the setup of the system would suggest that international organisations are also able to create customary international law.[68] However, as to an overall symmetry scholars and commentators seem undecided.[69]

The view that international organisations are in many cases unable to generate legally relevant practice is connected at a deep level with the hesitation to project the intentional state associated with *opinio juris* onto an organisation. The implication is that organisations cannot fully contribute to international lawmaking, which means that customary rules *binding upon* organisations would be incidental and unaccounted for by the voluntarist systématique of international law. Even if we accept a 'constitutional turn' in international (institutional) law and the concomitant idea of an independent communal acquis to which legal participants unwittingly become privy, in this case the fact that international organisations may not contribute to the law that binds them may well be difficult in the long run, as it does not sit well with the idea of full-fledged actorship. It is true that 'international legal personality' has become an ex post predicate, designating the apparent ability to perform *some* juridical act, but it is undeniable that the international legal personality of organisations – with their broad spectrum of activity and their use of

66 cf O De Schutter, 'Human Rights and the Rise of International Organisations: the Logic of Sliding Scales in the Law of International Responsibility', in Jan Wouters et al (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010) 51, 56.

67 LB de Chazournes, 'The Bretton Woods Institutions and Human Rights: Converging Tendencies', in Wolfgang Benedek et al (eds), *Economic Globalization and Human Rights* (Cambridge University Press 2007) 210–42.

68 J Von Bernstorff, 'Procedures of Decision Making and the Role of Law in International Organizations' in A von Bogdandy et al (eds), *The Exercise of Public Authority by International Institutions* (Springer 2010) 777.

69 J Klabbers, 'Sources of International Organizations' Law: Reflections on Accountability' in J d'Aspremont and Samantha Besson (eds), *The Oxford Handbook of the Sources of International Law* (Oxford University Press 2017) 987; and A Reinisch, 'Sources of International Organizations' Law: Why Custom and General Principles are Crucial' in J d'Aspremont and S Besson (eds), *The Oxford Handbook of the Sources of International Law* (Oxford University Press 2017) 1007.

the *Kompetenz Kompetenz* – captures a kind of actorhood different from that of individuals in international law. Neither is the analogy proposed for example by Reinisch,[70] between international organisations and the Newly Independent States emerging from colonial structures and becoming bound by custom to which they never agreed, quite convincing. At stake are not organisations that have newly come into being. Most of them have been in existence for a long time and have long entered the international system. Learned comments[71] and the current scantiness of signs in legal practice (no International Court of Justice Advisory Opinions come to mind in which the *intention* of an organisation is at issue, as opposed to decisions in which the *intention* of a State plays a role) notwithstanding: if organisations remain the active participants in international affairs that they are, in the long run the State-centric perspective on the formation of customary international law could be untenable.

On customary lawmaking, the position of international organisations is arguably somewhat 'under-analysed',[72] and notably the 'principle of speciality'[73] is underexplored. No theoretical reason or systemic obstacle exists that would preclude the principle of speciality from serving as a foundational tenet more broadly than with regard to the traditional question of an international organisation's 'powers'. It makes good sense that within the parameters of its competences, which set the 'constitutional limitation' of the organisation, the organisation would be able to contribute to customary international law also by holding *opinio juris*. The Commentary to the Conclusions cautions that '[i]nternational organisations vary greatly, not just in their powers, but also in their membership and functions',[74] but – taken from the one-dimensional perspective of general international law – the variety among organisations does not exceed the variety among States. The speciality principle does figure in the Commentary to the Conclusions, but primarily in support of the

70 Reinisch (n 69) 1007, 1017.

71 cf in the Second Report of the Special Rapporteur (UN Doc A/CN.4/672) fn 121, examples of authors predominantly seeing the international organisation – in Higgins' words – as 'a very clear, very concentrated, focal point for state practice'.

72 But see Third report on identification of customary international law (2015) UN Doc A/CN.4/682.

73 International Court of Justice, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996, para 25.

74 *See* also Third Report, on identification of customary international law (2015) UN Doc A/CN.4/682, 50 para 73: 'The fact that there is a great variety of international organizations calls for particular caution in assessing their practice and the weight to be attributed to it.'

comment that 'international organisations are not States',[75] and of a reiteration of the functional character of organisations as legal creatures.

Still, arguably clear cases exist of emerging customary law – in any case *opinio juris* – generated by an organisation (*in casu* the United Nations), rather than by its member States. Here 'Responsibility to Protect' (R2P) and 'The Rule of Law at the National and International Levels' are prime examples. We can leave aside here whether utterances on these themes would count as expressions of *opinio juris*, or as practice. Also the latter reading – as indicator of a to-be-determined *distinct* will on the part of the international organisation – serves to support the point which this chapter aims to make.

6 Concluding remarks

The Conclusions bring to light that contemporary international law offers little ground for elaborating on the contribution to customary international law by international organisations as independent actors. This is a noteworthy fact, as international organisations tend to be taken as full-fledged participants in international law and international life, such moreover within the parameters of classic public international law. In nearly all fields of human collaboration one or more international organisations exist, in total approx. 275 international organisations[76] versus approximately 194 States. Major procedural areas of international law – not least the law of treaties and the law of international responsibility – have been the subject of codification projects aimed at specifically including international organisations in the pertinent legal regimes.

This chapter explains the modest role of international organisations in the practice of international custom formation, and in the Conclusions, by a hesitation on the part of international lawyers and policy-makers and thus a limitation of the imagery of international law, when it comes to the attribution to international organisations of an independent 'juridical will'. The term is used as a shorthand for various 'states of mind' or 'intentional states', such as intention, opinion, acquiescence. Systems of law project onto participants such 'states of mind' in order to operationalise legal agency. International law seems to have had no problem

75 International Law Commission Report 2018 (UN Doc A/73/10) Ch V 131 para 5 and fn 693.

76 Based on a conservative calculation. *See* Union of International Associations, 'The Yearbook of International Organizations' (20th Online Edition Brill 2020) www.uia.org/yearbook, accessed 30 November 2019.

accommodating States in this respect, but shows signs of hesitation in ascribing legally relevant 'states of mind' to international organisations. This can be linked to organisations' functional, mechanistic identity in international law – in all its political and theoretical facets – which has persisted even after organisations came to appear as increasingly prominent independent legal actors. The 'thin legal personality' of international organisations comes to the fore especially where agreed signs in social reality for intentional states (such as 'signature' for 'consent to be bound') are absent. It is one reason why the ascertainment of *opinio juris* or of an international organisation's *distinct* will to steer the attribution of a particular practice, may pose a challenge. The chapter finally proposes that in light of their current role in global affairs, international organisations would need to assume a role in the formation of custom insofar as relevant for their work. More generally, organisations must come of age as actors in international law and assume full legal personality, which includes the full susceptibility to projection of intentional states for the purpose of legal agency. This in turn will facilitate international organisations' participation, among other things, in the formation of customary international law.