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Identities of States in International Organizations

Ramses A. Wessel
Professor of International and European Law and Governance,
University of Twente, the Netherlands
ramses.wessel@utwente.nl

Ige F. Dekker
Professor of International Institutional Law, Utrecht University,
the Netherlands
i.f.dekker@uu.nl

Abstract

In academic debates on the responsibility of international organizations and their member States the different identities of States play a crucial role. However, apart from the difficulty to clearly separate 'State' and 'member State' identities, it is even more complex to distinguish between the different roles 'member States' may have in the framework of international organizations. As a general introduction to this special forum, this essay aims to clarify the different identities and roles States may have in relation to international organizations, especially in the context of the responsibility of international organizations. As the subsequent contributions reveal, the law on the international responsibility of international organizations takes account of the possible responsibility of their members. By mapping the different identities States may have in different settings, this contribution argues that such differentiations may be crucial for the further development of adequate international rules on the responsibility of international organizations and their members.

Keywords

international organizations – relations with States – relations with member States – different identities of (member) States – law of international responsibility

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1 Introduction

One of the key questions flowing from the recent debates on the responsibility of international organizations and their member States is how to distinguish States from member States. In relation to the allocation of responsibilities, and recent case law on the responsibility of States for acts performed in the framework of or by international organizations, this question, in particular, is gaining importance. This essay aims to clarify the different identities States can have in relation to international organizations. It thus serves as a general introduction – or *amuse* perhaps – to the theme of this special forum: the responsibilities of member States of international organizations.

The distinction between an international organization and its member States is a classic and recurring theme in the law of international organizations. Recently, the *2011 Articles on the Responsibilities of International Organizations* ('ARIO')[1] in particular triggered renewed debates on the different legal position of international organizations and their member States under international law.[2] The identity of 'member State', however, is just one of the possible positions States can have in relation to international organizations. And even the qualification as 'member State' hides several different identities. This contribution aims to map these different positions/roles and the connected identities States may have as creators of international organizations, members of international organizations, former members of international organizations, legal partners of international organizations or possible accountable back-ups for international organizations. In addition, it will address the tension States may experience between being a State and a member State at the same time. This tension is particularly visible in the European Union — where member States' obligations under EU law increasingly collide with general obligations those States may have under international law — but also become apparent in other international 'integration' organizations as well. In short, the aim of this contribution is to shed light on the distinction between States and member States in their relations with international organizations. We realize that much more can be said about any of the identities we include in our mapping exercise. In that sense, this article should be seen as a preliminary overview.

1 *Report on the Work of its Sixty-Third Session*, UN Doc. A/66/10 (2011). The set of 67 draft articles were adopted by the ILC on 3 June 2011, and the commentaries were adopted on 5 August 2011 ('ARIO and Commentaries').

2 *See especially* (2012) 9(1) *International Organizations Law Journal*, containing various contributions analysing the ARIO.

Nevertheless, the various contributions to this special forum highlight the importance of the distinction between the international organization and (member) States. Thus, d'Aspremont points to the notion that "the ARIO make international organizations powerful entities", in that they "construct the possibility of international organizations aiding, coercing, or directing (member) States".[3] At the same time States, acting in the capacity as members, are also empowered by the rule on international responsibility. In fact, as argued by d'Aspremont, "[i]n recognizing that States can exercise power within the framework of international organizations, the ARIO make it possible for power to fluctuate between organizations and their member States"; and, as we will argue in the present contribution, the different identities States may have in relation to the organization will affect the powers they can exercise in certain situations. These identities are perhaps most visible in relation to military operations conducted within the framework of an international organization. As shown by Dannenbaum, *cooperative military enterprises* ('CMES') reveal that "[t]roop contributing States and one or more organizations or lead States each take on some fraction of the functions that would ordinarily be held by a single authority".[4] As we will see below, the fact that troop contributing countries retain for instance disciplinary authority, criminal jurisdiction, troop appointment and promotion authority, and training responsibilities highlights their status as 'States', arguably leading to a different assessment of their responsibilities. The terms used in Article 7 of the ARIO — troops 'at the disposal' of an international organization, and 'effective control' exercised by either the organization or the State — again underline that it may be difficult to distinguish between the different identities of States in all circumstances.

More generally, "the identification of the 'proper respondent'" is a crucial element in the law of international responsibility.[5] The question is often whether (member) State conduct can be assessed independently of the decision taken by an international organization empowering the State to act. Palchetti points to the necessary distinction that must be drawn between different situations in this respect:

3 *See* Jean d'Aspremont's contribution to this special forum, 'International Responsibility and the Constitution of Power: International Organizations Bolstered'.

4 *See* Tom Dannenbaum's contribution to this special forum, 'Dual Attribution in the Context of Military Operations'.

5 *See* Paolo Palchetti's contribution to this special forum, 'Litigating Member State Responsibility: the Monetary Gold Principle and the Protection of Absent Organizations'.

> First, the position of the member State may be strictly intertwined with that of the organization because the conduct complained of can be simultaneously attributed to both subjects .... Secondly, an organization may contribute to the wrongful conduct of a member State, for instance by aiding and assisting, or directing and controlling, the member in the commission of the wrongful conduct, or by adopting a decision binding a member State to pursue such conduct. Finally, there are situations in which a member State incurs responsibility for conduct which is to be attributed to the organization.[6]

These situations again trigger the need to be able to establish the capacity in which a State acted and, in a way, reveal different identities of States, or, to be more precise, of 'member States'. Indeed, as underlined by Blokker: "The issue is the responsibility of States in their capacity as *member State*s of international organizations. In this sentence, the word *member* is fundamental."[7] It is exactly this point that the present contribution aims to develop further. While the distinction between 'State' and 'member State' identities is crucial in establishing international responsibilities, the same may hold true for the distinction between the different dimensions of 'membership'.

2 Perspectives on the Position of (Member) States in Relation to (Their) International Organizations

The role of many international institutions has developed well beyond a 'facilitation forum' and underlines their autonomous position in the global legal order.[8] In those cases, decision-making takes place not only on the basis of well-defined procedures with an involvement of institutional actors other than States, but also on the basis of a sometimes dynamic interpretation of the original mandate of the organization.[9] Indeed, the outcome comes closer to a

6 *Ibid*, p. 471.

7 *See* Niels Blokker's contribution to this special forum, 'Member State Responsibility for Wrongdoings of International Organizations: Beacon of Hope or Delusion?', p. 321.

8 *See generally* Richard Collins and Nigel D. White (eds.), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge, London, New York, 2011). *See also* Ramses A. Wessel, 'International Governmental Organizations as Non-State Actors', in M. Noortmann, A. Reinisch and C. Ryngaert (eds.), *Non-State Actors in International Law* (Hart Publishing, Oxford, 2015) pp. 185–203.

9 Jan Wouters and Philip De Man, 'International Organizations as Law-Makers', in J. Klabbers and Å. Wallendahl (eds.), *Research Handbook on the Law of International Organizations*

decision of an international organization than to an international *agreement* concluded between States. In fact, it could be argued that this is what 'institutional law-making' is all about: it is law-making *by* international institutions (be it formal international organizations or other international bodies) and less about law-making *through* international institutions.[10] Yet, the distinction is not always easy to make. In some cases, the degree of institutionalization of the organization is 'light', and it serves as an *ad hoc* vehicle for a multilateral diplomatic process. Thus, the 3rd UN Conference of the Law of the Sea led to *UNCLOS III*, and, at the 1998 Rome Conference, States adopted the *Statute of the International Criminal Court*. In these cases, the conferences were indeed not much more than meeting points which facilitated the conclusion of treaties by States.[11] Similar processes also take place within more permanent structures, including formal international organizations. Obvious examples include the UN General Assembly[12] and the UN specialized agencies.[13] In these cases an important function of international organizations is to reveal State practice (and *opinio juris*[14]) and to allow for the speedy creation of customary law,

(Edward Elgar Publishing, Cheltenham, 2011) p. 192: "It is possible … that the treaty provisions pertaining to the law-making powers of the organization will be construed in a different way than was originally intended by the drafting nations, as it proves very difficult to draft an instrument in such a manner as to effectively preclude any other possible interpretation".

10 Ramses A. Wessel, 'Institutional Law-Making: The Emergence of a Global Normative Web', in C. Bröllman and Y. Radi (eds.), *Handbook on the Theory and Practice of International Law-Making* (Edward Elgar Publishing, Cheltenham, 2016) (forthcoming). *See* on these two dimensions of international organizations J. Klabbers, 'Two Concepts of International Organization', (2005) 2 *International Organizations Law Review* pp. 277–293; as well as his 'Contending Approaches to International Organizations: Between Functionalism and Constitutionalism', in J. Klabbers and Å. Wallendahl, *supra* note 8, pp. 3–30.

11 Wouters and De Man, *supra* note 8, at p. 205, have argued that in these cases international organizations "merely act as agents, since they only propose draft conventions through gathering information and offering their expertise, which then may or may not be entered into by the member States".

12 Following Art. 13 of the UN Charter which refers to its responsibility for "encouraging the progressive development of international law and its codification".

13 *See e.g.* Alan Boyle and Chirstine Chinkin, *The Making of International Law* (Oxford University Press, Oxford, 2007), pp. 124–141.

14 Cf. *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, International Court of Justice, Advisory Opinion, [1996] ICJ Reports p. 226, at p. 240, para. 70: "General Assembly resolutions […] can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the

although one needs to remain aware of the distinction between State practice and the practice of an international organization.[15]

However, this contribution aims to shed more light on the issue of 'where the State ends and the member State of an organization begins' and thus aims to serve as a foundation for the other contributions to this special forum, which focus on the responsibilities of States as members of international organizations. While textbooks present the distinction between the organization and its member States as the basis of international institutional law, specific literature mapping the different identities of States in relation to international organizations is hard to find. Some distinction between the organization and its members is often part of textbook definitions of international organizations. Thus, the well-known description given by Schermers and Blokker of an international organization being a forms of cooperation "(1) founded on an international agreement; (2) having at least one organ with a will of its own; and (3) established under international law",[16] contains the criterion that the organization should have 'a will of its own'.

To what extent is this criterion helpful in identifying the different positions States may have in relation to the 'autonomous' international organizations?[17] Usually the *'volonté distincte'*, is reflected in the fact that organizations have organs (or indeed 'at least one organ') with a limited composition and procedures that allow for decisions to be taken in ways other than by consensus. In the variety of organs making up international organizations, the so-called 'Boards' or 'Councils' perhaps best represent the distinctive position of the organization *vis-à-vis* its member States.[18] Alongside a central congress (in the form of an 'Assembly') and a Secretariat, the Board completes the 'elementary triad'[19] forming the basis of the institutional structure of most international organizations. Whereas the plenary general congress is usually the reflection

conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule".

15 Wouters and De Man, *supra* note 9, pp. 207–208. Once consensus has been reached within an international organization, it will be difficult for States to deny their acceptance of a norm and to be recognised as a 'persistent objector'.

16 Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity* (Martinus Nijhoff Publishers, Leiden-Boston, 2011), p. 37.

17 Collins and White, *supra* note 8.

18 *See* more extensively on the function of Boards Ramses A. Wessel, 'Executive Boards and Councils', in J. Cogan, I. Hurd and I. Johnston (eds.), *Oxford Handbook of International Organizations* (Oxford University Press, Oxford, 2015) (forthcoming).

19 Schermers and Blokker, *supra* note 16, p. 293.

of the 'agora' function[20] of an international organization, and the Secretariat has mainly administrative functions, Boards were created to allow organizations to act more effectively through a non-plenary organ that would meet more frequently than the general congress or which would even be in session on a 'permanent' basis. The fact that not all members of the organization are represented in the Board, and that members may be selected on the basis of the knowledge of the field, turns this organ into the part of the institutional structure of the organization that perhaps best represents the latter's distinctive position. While there are good reasons also to view general congresses as also being 'true' organs of the organization (in which the participating States obtain a new identity as 'member State', following the rules and procedures of the organization and taking decisions that can be accredited to the organization), the fact that Boards are non-plenary organs strengthens the autonomy international organizations may enjoy from their member States (see further below).[21]

Yet, the idea of the '*volonté distincte*' of international organizations has also been criticized. Klabbers, in his textbook, pointed to the fact that it is perhaps too easy to be used in distinguishing international organizations from their members.[22] Their relationship is far more complex (as we will also see below) and the popular view that there is a constant struggle between the organization and its members (or *vice versa*) — resulting in the so-called *Frankenstein* problem[23] — does not do justice to the legal-political reality. At the same time, the relationship between international organizations and their members should not be seen as a zero-sum game. As argued by Klabbers:

> I do not think that the law of international organizations should only be analyzed in terms of a zero-sum game between the organizations and its members, where powers exercised by the members on Monday may be transferred to the organization on Tuesday only to flow back again to the

20 Jan Klabbers, 'Two Concepts of International Organization', and 'Contending Approaches to International Organizations', *supra* note 10.

21 *See* in general also Collins and White, *supra* note 8.

22 Jan Klabbers, *An Introduction to International Institutional Law* (2nd ed.) (Cambridge University Press, Cambridge, 2009) pp. 308–311. Occasionally we refer to this 2nd edition, as some of its parts did not recur in the 3rd edition.

23 Obviously, this problem relates to the idea that the entity created by the States may have a tendency to develop its own competences and may even turn against its creators. *See* Andrew Guzman, 'International Organizations and the Frankenstein Problem' (2013) 24(4) *European Journal of International Law* p. 999; cf. also the leading quote from Mary Shelly in Jan Klabbers, *An Introduction to International Institutional Law* (3rd ed,) (Cambridge University Press, Cambridge, 2015), p. v: "You are my creator, but I am your master; obey!"

> members on Wednesday, and so on and so forth. Neither is it a zero-sum game in the more fluid sense of saying that whenever an organization loses power, it can only be to the benefit of States, whereas when States lose power it only benefits organizations.[24]

Despite the fact that we are not aware of too many publications that present the relationship between the organization and its members as a zero-sum game, the point made here is clear. As we will see in the subsequent section, it is not so much the *powers* but rather the *identities* of States that are shifting; and they are not shifting from day to day but on a constant basis, and they may even overlap.

Apart from the composition and functions of the organs, academic literature pointed to the fact that by becoming a 'member State', States do not lose their identity as a 'State'. This dual identity perhaps becomes most visible in the context of an international organization that is of the opinion that its members are first and foremost 'member States' and that their 'State' identity has become more or less supplementary: the European Union. Indeed, recent case law underlines that the principle of sincere cooperation is believed to influence international law obligations in the sense that member States may be forced to renegotiate or withdraw from existing international agreements.[25] While for EU member States (and most EU legal scholars) these may be logical consequences of a dynamic division of competences, third States (and most

24 Jan Klabbers, *An Introduction to International Institutional Law* (2nd ed.), *supra note* 22, p. 309.

25 Examples include the *Open Skies* cases (e.g. *Commission* v. *Finland,* 5 November 2002, European Court of Justice, Case C-469/98, [2002] I-09627), *BITs* cases (*Commission* v. *Austria,* 3 March 2009, European Court of Justice, Case C-205/06, [2009] ECR I-1301; *Commission* v. *Sweden,* 3 March 2009, European Court of Justice, Case C-249/06, [2009] ECR I-1335; *Commission* v. *Finland,* 19 November 2009, European Court of Justice, Case C-118/07, [2009] ECR I-10889), or the *PFOS* case (*Commission* v. *Sweden,* 20 April 2010, European Court of Justice, Case 246/07, [2010] ECR I–3317). From a more constitutional point of view, similar arguments that international law should be applied in a way that would not harm the constitutional principles of the EU legal order were made in the *Kadi* case (*Yassin Abdullah Kadi and Al Barakaat International Foundation* v. *Council and Commission,* 3 September 2008, European Court of Justice, Joined cases C-402/05 P and C-415/05, [2008] ECR I-6351). While cases on the duty of cooperation in relation to existing international obligations (Art. 351 Treaty on the Functioning of the EU) typically point to a need to reconcile EU and international obligations, it may be argued that the *Kadi* cases go beyond that and may ultimately lead member States to violate international law obligations.

public international law scholars) would remind us of the rule of *pacta tertiis nec nocent nec prosunt*: third States are in principle not bound by the EU Treaty as to them it is an agreement between others.[26] From a legal perspective they should not be concerned with a complex division of competences that is part of a deal between the EU and its own member States.[27] This implies that EU member States will have to square their EU obligations with the occasionally conflicting obligations they have under international law (or, in the terminology of the current paper, square their identities of 'State' and 'member State'). A recent example is provided by the shift of the competence to conclude international investment treaties from the member States to the Union, causing the member States to try and get rid of the over 1000 Bilateral Investment Treaties ('BITs') they had concluded with third States.[28] Other examples of combinations of identities can be found in the position EU member States have in other international organizations, where they often have to combine their political preferences as a State with being loyal to an EU common position, or where they may even have to act on behalf of the EU once the latter is (exclusively) competent in a particular area but does not have a standing in the related international organization (e.g. the ILO).

3 Qualities of States in Relation to International Organizations

3.1 *States as Creators of International Organizations*

The situation in which there can be no confusion about the State/member State dichotomy is when the international organization does not yet exist. International organizations are based on international agreements between States (or other international organizations)[29] and obviously States can only become a member of the new entity once that agreement has entered into force and the organization starts functioning. This implies that, during all preparatory work, States

26 This rule is laid down in Art. 34 of the *1969 Vienna Convention on the Law of Treaties* ('VCLT'): "A treaty does not create either obligations or rights for a third State without its consent".

27 *See*, more extensively, Christina Eckes and Ramses A. Wessel, 'The European Union: An International Perspective', in T. Tridimas and R. Schütze (eds.), *The Oxford Principles of European Union Law – Volume 1: The European Union Legal Order* (Oxford University Press, Oxford, 2016) (forthcoming).

28 Angelos Dimopoulos, *EU Foreign Investment Law* (Oxford University Press, Oxford, 2011); Thomas Eilmansberger, 'Bilateral Investment Treaties and EU Law' (2009) 2 *Common Market Law Review* pp. 383–429.

29 Cf. Schermers and Blokker, *supra* note 16, p. 37.

remain having the single status as 'State', irrespective of procedures that may have been agreed upon during the negotiation process. Also, in terms of responsibility, it is clear that, in this situation, States are the relevant actors.

The negotiations about the establishment of an international organization are regularly concluded with the determination of the text of the treaty by the signing of the constitutive document by the participants. As signatories, States become, in principle, 'future' member States; and, as such, have a distinct legal status. As signatories of a constitutive treaty, they are bound by the minimum obligation to refrain from any acts or behaviour that may jeopardize the realization of the object and purpose of the organization.[30] Normally, States will only bear this quality temporarily because they will become full members after they have ratified the treaty and the treaty has entered into force. However, there is nothing automatic about becoming a member simply through becoming a signatory, nor is there any obligation to become a member. States can even free themselves from this minimum obligation by making their intention clear that they will not ratify the treaty and thus will not become a member of the organization.[31]

States that participated in the negotiations leading to the conclusion of the constitutive treaty of an organization become the 'original' or 'founding' members of the organization. However, such a qualification, if it is part of the constitutive treaty,[32] does not normally entail a privileged position as to the position of States who, after the start of the functioning of the organization, are admitted as members, although sometimes the founding members are given a certain distinct legal status. The quite recently concluded treaty on the establishment of the Asian Infrastructure Investment Bank ('AIIB') does give founding members a basic amount of votes and a privileged position as to the designation of the Directors of the Bank and the members of its Board.[33]

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30 Compare VCLT, Art. 8. Although treaties establishing international organizations form a special category, also in the light of the VCLT, this provision seems also applicable to such treaties. One could say that this is a requirement of 'good faith'. *See* Klabbers, *supra* note 20, pp. 90–91.

31 Also, to prevent legal consequences from such a minimum obligation, the United States and Israel informed the UN in 2002 that they no longer intended to become a party to the International Criminal Court and Stated explicitly that they have no legal obligations arising from their signature of the Rome Statute two years earlier. *See Digest of US Practice in International Law* (2002), p. 148.

32 *See, e.g.,* Art. 3 of the UN Charter.

33 *See* Articles of Agreement of the Asian Infrastructure Investment Bank, 2015, Articles 3(1b), 28, and 25(1), Schedule B. The Agreement was opened for signature on 29 June 2015. For the text of the Agreement, see: <www.aiibank.org>. *See*, for other examples, Schermers and Blokker, *supra* note 16, pp. 67–68.

A State with a special position in relation to an international organization is the host State of the organization. Usually, the host State is one of the founding member States, although there are some remarkable exceptions, such as Austria becoming the host State of the Organization of Petroleum Exporting Countries ('OPEC') and of Switzerland hosting the United Nations since its establishment (only joining the organization in 2002). The rules governing the relationship between the host State and the organization are laid down in headquarters or seat agreements between both parties, often complemented by other special agreements.[34] Host States bear special responsibilities for the proper functioning of the international organization, concerning, for instance, the admittance of representatives of member States and the protection of the (functional) immunity of the organization from domestic legal processes. At the same time, the organization and its staff are required to respect the law of the host State. In practice, the implementation of rights and duties of the actors involved often leads to diplomatic and judicial conflicts raising a wide range of questions about the responsibility of the host State *vis-à-vis* the organization and its staff, as well as of other member States.[35]

Finally, some treaties do not entail the establishment of an international organization, but rather a cooperation framework. Nevertheless, there still seems to be some distinction between the States and the framework they established. A clear example is formed by agreements including a Conference of Parties ('COPs') or Meeting of Parties ('MOPs'). However, while these conferences may perhaps not qualify as international organizations, "the fact remains that at the same time COPs/MOPs have been endowed with the competence to adopt binding decisions".[36] Or, as another observer held:

> Like treaties, they comprise a specific normative framework of prescriptions that are particularly suitable to organizing internationally coordinated behaviour within a limited issue-area. Like international organizations, they provide a permanent mechanism for changing these normative prescriptions.[37]

34 *See* Sam Muller, *International Organizations and Their Host States, Aspects of Their Legal Relationship* (Brill; Nijhoff, The Hague, 1995); Schermers and Blokker, *supra* note 16, pp. 1072–1075.

35 *See*, generally, Phillipe Sands and Pierre Klein, *Bowett's Law of International Institutions* (5th ed.) (Sweet & Maxwell, London, 2001) pp. 486–512.

36 Nikolaos Lavranos, *Legal Interaction between Decisions of International Organizations and European Law* (Europa Law Publishing, Groningen, 2004) p. 81.

37 Thomas Gehring, 'International Environmental Regimes: Dynamic Sectoral Legal Systems', (1990) 1 *Yearbook of International Environmental Law* pp. 54–55.

In other words, in some cases 'decisions' can be taken (rather than 'agreements' being concluded), which may hint at a distinctive position of the COPs/MOPs in relation to the participating States.

3.2 *States as Members of International Organizations*

Overall, States will obtain the status of 'member State' of an international organization once they have expressed their consent to be bound by the constitutive treaty (or treaties) and when all other conditions for the entry into force of the treaty (or treaties) are fulfilled. One of those conditions usually is a minimum number of State ratifications.

As members of an international organization, States' legal responsibilities are substantially expanded. Basically, members "have to behave as good members, a duty which can be seen as part of a modern general principle of law: the duty to cooperate".[38] At the same time, member States have rights. In particular, they have the right to be represented in at least one decision-making organ of the organization — for example, the UN General Assembly — and, to some extent, in other organs. Not surprisingly, the 'member' element is particularly clear in relation to the decision-making procedures in international organizations. Decision-making procedures need to be followed and, upon taking their seat, member States are part of the international organization. Often, a distinction is made between different voting procedures. Thus, in situations of unanimous voting, member States would have retained their 'State' identity more than when decisions are taken by majority voting. Yet, we would argue that this distinction is far less relevant than is often assumed. Decision-making takes place on the basis of the rules of the organization and the 'member State' identity reveals itself through the participation in that decision-making.

In the previous section we argued that Boards — as the non-plenary organs of an organization — particularly strengthen the autonomy international organizations may enjoy from their member States. Precisely because of their non-plenary nature, these Boards rely less on difficult compromises among a large number of member States, and are better able to focus on the institutional objectives rather than on individual national political preferences. Yet again, the situation is not black and white, and the autonomy of an organization may, for instance, be mitigated by the fact that national interests continue to play a (crucial) role even in non-plenary organs (the UN Security Council providing a prime example). Furthermore, it has been noted that, even with regard to non-plenary bodies deciding on behalf of the whole membership, the

38 Schermers and Blokker, *supra* note 16, p. 118. As these authors rightly mention, Art. 3 of the UN Charter makes this duty explicit.

issue of the dual identity of 'member States' is present. As held by some observers, on the Boards of international financial institutions for instance, the dichotomy inherent in the role of the Executive Directors — the members of these Boards — is clearly noticeable. In a 2008 report prepared by the Independent Evaluation Office of the IMF analyzing governance issues in that institution, the self-perception of Board members was described as follows:

> More than half of Board members reported that they occasionally face a conflict between their role as representatives of their authorities and their role in upholding the Fund's institutional interests … while in practice all Directors clearly understand their representational role, their status as officers of the Fund is less clear.[39]

In a similar vein, the famous independence of the members of the EU's Commission must be seen in relative terms. It has been argued that since members are "(c)hosen because of distinguished and well-connected prior careers, they have a list of professional and political contacts, with over two-thirds chosen from a party in government at the time of appointment".[40]

It is not uncommon for the plenary general congress or assembly to be viewed as representing the more 'intergovernmental' dimension of an international organization, with the non-plenary board reflecting a 'supranational' element. Political scientists in particular, would perhaps emphasise the 'conference' idea of a plenary organ, in which negotiations take place under the constant shadow of power play. Lawyers would generally have a tendency to point to the rules of the game that have to be followed and underline the fact that even plenary bodies are organs of an international organization in which States function as 'members' once they occupy a 'seat'. Indeed, the existence of elements such as 'organ', 'membership' or 'decision' all imply a distinction between the participating States and the international entity. In fact, there is a strong inter-linkage between these elements. Organs act on behalf of the international entity, and are not to be equated with the (collectivity of) States, in

39 Ana Sofia Barros and Cedric Ryngaert, 'The Position of Member States in (Autonomous) Institutional Decision-Making: Implications for the Establishment of Responsibility', (2014) 11(1) *International Organziations Law Review* pp. 53–82. *See also* Independent Evaluation Office of the IMF, *Report 'Governance of the IMF: An Evaluation'* (2008) p. 16, available at: <www.ieo-imf.org/ieo/pages/CompletedEvaluation110.aspx>.

40 Arndt Wonka, 'Technocratic and Independent? The Appointment of European Commissioners and its Policy Implications' (2007) 14(2) *Journal of European Public Policy* p. 169, at p. 178.

which case the term 'conference' would be more appropriate. The notion of 'membership' underlines a similar distinctiveness of the international entity (one can only be a member of something else). This seems to allow for the conclusion that for an international entity to be regarded as existing separately from its member States, the entity must have a decision-making organ that is able to produce a 'corporate' will, as opposed to a mere 'aggregate' of the wills of the member States. The outcomes of collective decision-making processes must allow for their ascription to an international organ rather than to the collectivity of the participants.[41]

Yet, it remains difficult to neglect the Janus-faced nature of international organizations, and it has been duly noted in doctrine that "[a]lthough the separate personality of an international organization 'establishes the will of the organization as a whole', this does not mean that the various 'member State wills' that led to it lose their relevance".[42] The relationship between States and international organizations certainly is complex. When using its veto right in the UN Security Council, the Russian representative clearly acts on behalf of its State; yet, in that particular setting, it is perhaps first and foremost a member State, who's veto right is based on the rules of the organization. It is, therefore, not so easy to distinguish the different identities of States; and they may even coincide in certain situations. Yet States are certainly aware of their different identities. The moment the member States of the EU realize that their organization is not competent to decide on a certain issue and they nevertheless feel the need for that discussion, the particular decision is not taken by the Council of the European Union, but they may adopt a "Decision of the Heads of State

41 Cf. Jan Klabbers, 'Presumptive Personality: The European Union in International Law', in M. Koskenniemi (ed.), *International Law Aspects of the European Union* (Kluwer Law International, The Hague, 1998), pp. 231–253, p. 243; Esa Paasivirta, 'The European Union: From an Aggregate of States to a Legal Person?' (1997) 2 *Hofstra Law & Policy Symposium*, pp. 37–59; and Manuel Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations', (1997) 44 *British Yearbook of International Law* p. 145: "It is the existence of organs which makes it possible to distinguish international organizations from other looser associations of States like, for example the British Commonwealth". On the distinction between States and member States and also the importance of 'legal personality' in that respect, *see* Ramses A. Wessel, 'Revisiting the International Legal Status of the EU' (2000) 5(4) *European Foreign Affairs Review* pp. 507–537.

42 Barros and Ryngaert, *supra* note 39; cf. also Jan Klabbers, 'Autonomy, Constitutionalism and Virtue in International Institutional Law', in R. Collins and N. White (eds.), *supra* note 8, p. 121: "there is always an element of artificiality in making a distinction between organizations and their members". *See also* Niels Blokker, 'International Organizations and their Members' (2004) 1 *International Organizations Law Review* pp. 139–161.

or Government, meeting within the European Council", as recently shown again in relation to the 'Brexit'-deal with the UK (discussed in Stefani Weiss and Steven Blockmans, 'The EU deal to avoid Brexit: Take it or leave', CEPS Special Report, No. 131 / February 2016). The member States' representatives do not leave the room, but for those particular items on the agenda one may argue that their identity changed.

3.3 *States as Former Members of International Organizations*

Just like with the creation of international organizations, the status of States is clear once they are no longer a member State. In the context of the EU this issue is particularly topical with the debates on a possible 'Grexit' or 'Brexit'. Yet, the question is whether former member States immediately lose their 'member' obligations and rights upon leaving the organization. This will certainly depend on the 'exit agreement' concluded between the organization and the member State, but in general one could foresee situations in which the State will be bound to some rules in the same way as its former fellow member States. This will particularly be the case during a transition phase in which third parties (including businesses, individuals) should be able to rely on previous arrangements.

At the same time, leaving an organization may not be that easy. One may not simply disregard its 'membership' and act like a sovereign State only. This again has to do with the fact that the constitutive agreements of international organizations are not merely to be seen as a contractual relationship between States, but as a 'treaty +': an agreement that at the same time created a new international legal entity. A prime example is given by the EU, which prior to the 2009 Lisbon Treaty, did not contain a provision dealing with members leaving the organization. Conceptually, the treaty modification is interesting. Before the Lisbon Treaty, the Treaty needed to be changed to allow a member State to leave (as member States are mentioned by name in the EU-Treaty). This could only be done by an Intergovernmental Conference of *States* (hence, by taking a step outside the organization). These days, Article 50 of the EU-Treaty provides for the possibility of an agreement, not between the States, but between the EU and the departing member State. [43] This underlines that the 'contract' these days is no longer (merely) with the fellow member State, but rather with the organization.

A similar situation may occur in the case of a dissolution of the international organization altogether. While this hardly happens, as in most cases functions of international organizations are simply transferred to another or

43 *See* more extensively Adam Łazowski, 'Withdrawal from the European Union and Alternatives to Membership', (2012) 37(5) *European Law Review* pp. 523–540.

new organization,[44] it is clear that, once an organization ceases to exist, there is no sense in speaking of 'membership'. Yet again, the situation may not be clear-cut: as we have seen, one of the traditional criteria to establish whether or not an international entity could be regarded an international organization is that it should be established by an international agreement. Hence, one could argue that the dissolution and succession of international agreements is a question to be settled by the general rules of treaty law with 'States' as the main actors. Indeed, the law of treaties may still play a role when conflicts between the contracting parties arise with regard to, for instance, the possibility of terminating or suspending a treaty.[45] In practice, however, in almost all cases of dissolution and succession, arguments are drawn from the constitutive document of the organization or from 'international institutional law', the body of rules and principles representing the 'unity in diversity'[46] of the law of international organizations. Thus, Amerasinghe, for instance, argues that "there is a general principle of international institutional law that an organization may be dissolved by the decision of its highest representative body (the general congress), when there are no provisions governing dissolution".[47]

4 Functions of (Member) States in Exercising the Tasks of International Organizations

4.1 *Law-Making*

The idea that there is a difference between law-making *through* international organizations and law-making *by* international organizations is far from new and reveals the identities member States may have in this respect as international co-legislator.[48] While we would maintain that States act as 'member

44 Ramses A. Wessel, 'Dissolution and Succession: The Transmigration of the Soul of International Organizations', in J. Klabbers and Å. Wallendahl (eds.), *supra* note 10, pp. 342–362.

45 Cf. e.g. Art. 59 (1) of the VCLT on the 'Termination and suspension of a treaty implied by conclusion of a later treaty'; or the possible application of the '*clausula rebus sic stantibus*' (Art. 62).

46 The subtitle of Schermers and Blokker, *supra* note 16.

47 Chittharanjan Felix Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press, Cambridge, 2005) p. 568.

48 *See* for a recent classification Roberto Virzo, 'The Proliferation of Institutional Acts of International Organizations: A Proposal for Their Classification', in R. Virzo and I. Ingravallo (eds.), *Evolutions in the Law of International Organizations* (Brill Nijhoff, Leiden-Boston, 2015), pp. 293–323.

States' in both situations, as far as the establishment and formulation of the principles and rules are concerned, conceptually, their roles are slightly different (1) when they allow the organization to take 'decisions', and (2) when using the international organization as a 'framework' to negotiate and establish new international norms, often in the form of 'agreements' or 'conventions'.

4.1.1 Allowing the Organization to Take Law-Making Decisions

While many international organizations were set-up as frameworks to allow States to institutionalize cooperation in a specific field, decisions of international organizations are increasingly considered a source of international law.[49] Indeed, this seems to lie behind the term institutional law-making.[50] Yet, traditionally, law-making is not seen as a key-function of international organizations.[51] The reason is that most international organizations have not been granted the power to issue binding decisions, as States were believed not to have transferred any sovereignty. Nevertheless, these days it is undisputed that many organizations do 'exercise sovereign powers' in the sense that they not only contribute to law-making by providing a framework for negotiation but also take decisions that legally bind — or otherwise exert legal force on — their member States.[52]

Organizations with some competence to take legally binding decisions which go beyond a mere application of the law include the EU, the UN, the World Health Assembly of the WHO, the Council of the ICAO, the OAS, the WEU, NATO, OECD, UPU, WMO and IMF.[53] In addition, as Alvarez's survey reveals,[54] it includes standard setting by the IMO, the FAO, the ICAO, the ILO,

49 For a theoretical perspective, *see also* Ige F. Dekker and Ramses A. Wessel, 'Governance by International Organizations: Rethinking the Source and Normative Force of International Decisions', in I. F. Dekker and W. G. Werner (eds.), *Governance and International Legal Theory* (Martinus Nijhoff Publishers, Leiden-Boston, 2004) pp. 215–236.

50 *See*, for a further development of this notion, R.A. Wessel, *supra* note 10.

51 Not even of the United Nations. *See* Oscar Schachter, 'The UN Legal Order: An Overview' in C. Joyner (ed.), *The United Nations and International Law* (Cambridge University Press, Cambridge, 1997) p. 3: "Neither the United Nations nor any of its specialised agencies was conceived as a legislative body".

52 Dan Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford University Press, Oxford, 2005).

53 Cf. Schermers and Blokker, *supra* note 16, pp. 822–832; Amerasinghe, *supra* note 47, pp. 172–175; Nigel D. White, *The Law of International Organizations* (2nd ed.) (Manchester UP, Manchester, 2005) pp. 161–168.

54 José E. Alvarez, *International Organizations as Law-Makers* (Oxford University Press, Oxford, 2006) p. 218.

the IAEA, UNEP, the World Bank, and the IMF. This reveals the complexity of institutional law-making; it is not just about clearly legally binding decisions of international organizations. Institutional law-making may be more subtle in the sense that States have no choice to accept (often technical) rules and standards to be able to play along. There are the well-known and still important resolutions of the UN General Assembly as the 1948 Universal Declaration of Human Rights and the 1970 Declaration on Principles of International Law, the OECD Guidelines for Multinational Enterprises,[55] and the — probably less well known, but also legally important — Core Principles for Effective Banking Supervision of the Basel Committee.[56]

4.1.2 Using the International Organization as a Framework for Law-Making

International organizations are used by their member States to develop international law through the more traditional forms, in particular conventions and agreements. As the first phase in the process of international law-making, the organization often adopts a resolution in which general norms are formulated with respect to a specific topic, which are subsequently elaborated upon in an international convention. The drafting of the convention can then be done by a standing or *ad hoc* commission of the organization, while the final negotiations and adoption of the text of the convention takes place at a conference, convened and organized by the international organization. Examples include the numerous UN declarations and conventions on human rights and the UN declaration and convention on the law of the sea or on outer space. Of course, a lot of conventions are established within international organizations without preceding resolutions: for example, the work of the International Law Commission of the UN on the law of treaties and international responsibility. Apart from the UN, other international organizations assist their member States in drafting conventions — with different success rates — such as the World Trade Organization or the Council of Europe.

For the most part, during these law-making processes, States act in their capacity as member States. Not only in drafting and adopting the resolutions — which are clearly legal acts adopted by the organization, on the basis of strictly defined procedures and often without the need for consensus — but also in

55 Originally the Guidelines were adopted in 1976, but were later revised and updated several times. *See* for the latest version, *OECD Guidelines for Multinational Enterprises*, OECD 2011, available at: mneguidelines.oecd.org/text.

56 *See* Joost Pauwelyn, Jan Wouters and Ramses A. Wessel (eds.), *Informal International Law-Making* (Oxford University Press, Oxford, 2012).

drafting and adopting the text of the convention. However, in the final phase of the process the agreements or conventions are often still in need of approval via national procedures and ratification, which in the end renders the 'State' identity decisive. In that respect, the situation differs from the one discussed in the previous sub-section, where decisions are adopted by an organ of an international organization (irrespective of the voting modalities) and States act as member States throughout the process of law-making. In a way, using the organization as a framework for law-making to some extent may come quite close to the COPs and MOPs we described above.

4.2 *Realization of Legal Acts*

Member States also play a crucial role in the process of the realization of the legal acts of international organizations. Again we can point to (at least two) different roles: (1) member States as 'implementers' of legal acts to effectuate them, and (2) member States as 'agents' of an organization.

4.2.1 Member States as 'Implementers'

In many cases, the realization of legal acts in social practice often depends primarily on the transfer of the act, one way or the other, into national legislative or administrative measures. Member States are in control of those transformation processes. It depends on the legal force of the legal act whether member States have an obligation or 'only' have to consider in good faith to implement the act in their national legal system; the legal consequences for States will differ if they refrain from implementing the decision of the organization. While in the implementation of the acts the 'State' identity is clear (as it will involve national legislative/constitutional procedures), the obligation as such flows from the fact that the particular State is a member of the international organization. Again, identities overlap, although one could distinguish the identities on the basis of different stages in the process of implementation.

Examples include the implementation of sanctions. Thus, the famous Security Council Resolution 1267 (1999) on the situation in Afghanistan provides that all the States must, in particular:

> freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons

> within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need (para. 4b).

Other organizations use similar ways of calling upon the members to implement a sanctions regime. Thus, in relation to the Russian invasion of Crimea, the EU ordered its member States to "prevent the entry into … their territories of the natural persons responsible for actions which undermine … the territorial integrity … of Ukraine, and of natural persons associated with them, as listed in the Annex".[57]

Yet examples go beyond sanctions and are in fact numerous. In many cases, international organizations 'call upon States to implement' a certain decision and adapt their domestic laws accordingly. A special situation is formed by EU Directives. The core of the legal character of this form of decisions of international organizations — which are binding as to the result to be achieved — is the transposition in national law, with, in most cases, the aim to largely harmonize the legal systems of the EU member States in a certain area.[58]

4.2.2 Member States as 'Agents' of the Organization

Member States may — and sometimes must — assist the organization in the realization of certain operational activities on which the organization has decided. The difference with the aforementioned identity is that, in this case, it is not primarily located in the legal world, but is directly connected to tasks in social reality. In other words: there is simply a defined result. Thus, the organization may call on member States because, for instance, it lacks the financial or substantial means to perform the activities itself. A prime example is formed by a UN authorization to employ a peacekeeping or peace-enforcement operation.[59] One could argue that in these situations member States (or even non-members or regional organizations or arrangements) act as 'agents' of the organizations. In a way, they adopt the identity of the organization which itself lacks the ability or the means to implement a decision. This role of a military

57 Council decision of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (2014/145/CFSP).

58 *See* Art. 288 of the Treaty on the Functioning of the EU.

59 Cf. Niels M. Blokker, 'Is Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by "Coalitions of the Able and Willing"' (2000) 11(3) *European Journal of International Law* pp. 541–568.

agent is one of the most important and controversial legal identities of member States in the framework of the responsibility of international organizations – extensive analyses of which are also in this special forum.[60] The above-mentioned example of EU member States stepping in at international organizations of which the EU itself cannot become a member despite the fact of its exclusive competences in that area also fits the notion of member States acting as 'agents' of the organization.

4.3 *The Settlement of Disputes*

The settlement of disputes is generally seen as a key function of international organizations.[61] In fact, one of the reasons for this is that, as 'member States', it is not very helpful when States have to settle their disputes related to the work or the objectives of the organization elsewhere. As phrased by Klabbers: "within an organization made up of a relatively small number of States, strict judicial settlement is somehow incongruous: if those States embark on a common project, it may not be a particularly good idea to have them meet in court on a regular basis".[62]

Again we can discover (at least) two identities of States: (1) member States as a party to a dispute with other member States or with (an organ of) the organization, and (2) member States as mediators for the resolution of disputes between other member States (or within another member State) upon a request of their international organization.

4.3.1 Member States as Parties to a Dispute

First of all, international organizations may have established mechanisms to settle disputes between their members. Prominent examples include the International Court of Justice ('ICJ') and the WTO Dispute Settlement Body. Although the parties in nearly all cases before the ICJ are members of the United Nations, they act, we would argue, only as members in disputes about the interpretation or application of the UN Charter or related instruments. So, for instance, in cases about the use of force or other military activities, the parties are primarily to be seen in their identity as UN members, even, we would say, in cases where the Court cannot apply the UN Charter as such but has to

60 *See* further the contributions to this special forum by Blokker, d'Aspremont, Dannenbaum and Tzanakopoulos.

61 *See* for a more extensive overview Elisa Tino, 'Settlement of Disputes by International Courts and Tribunals of Regional International Organizations', in R. Virzo and I. Ingravallo (eds.), *supra* note 49, pp. 468–508.

62 Klabbers, *supra* note 22, p. 229.

judge on the basis of international customary law on the use of force.[63] Other examples can be found with regard to the WTO Dispute Settlement Body and most other international judicial organs, including the European Court of Justice.[64] Their jurisdiction is primarily based on the constitutive treaty or related instruments of the organization, and often exclusively aims to give authoritative interpretations of the law of the organization concerned, or to decide on the application of those rules. Again, we would argue that the parties in these cases are first and foremost acting as 'member States'. After all, the only reason that the procedures apply to them is because they are a member of the organization. Yet again, identities may shift. In many cases, the dispute starts as one between 'States'. Think for instance about a trade dispute between China and the United States. In most cases, the dispute is triggered by measures that are unilaterally taken by a State which, in the trade partner's view, is violating certain trade rules. The idea that it all starts with States is underlined by the fact that these States sometimes engage in forum shopping to find the regime that fits their goals best. Thus, in the so-called 'swordfish dispute' between the EU and Chile, the dispute was brought before both a WTO panel and the International Tribunal for the Law of the Sea ('ITLOS'),[65] but in the end it was resolved on the basis of an amicable settlement between the two parties.[66]

Interestingly enough, related to the question of responsibilities is the fact that when EU member States violate WTO-rules they are usually 'substituted' by the EU in the settlement of a dispute. Indeed, in these cases the international organization takes over from its member States; or one may even argue from the member States of another organization, the WTO.

In the vast majority of cases, a dispute is not about the constitutive instrument of the organization (e.g. the UN Charter) but about the interpretation and application of other treaties and/or rules of international customary law, such as the law of the sea, the genocide convention, diplomatic and consular relations law, etc. In these cases the parties are primarily acting as 'States'.

63 *See Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States*), 27 June 1986, International Court of Justice, [1986] ICJ Reports p. 14.

64 But cases between EU member States before the ECJ on the basis of Art. 259 of the Treaty on the Functioning of the EU are rare. *See* Paul Craig, Garcia De Burca, *EU Law* (5th ed.) (Oxford University Press, Oxford, 2011) p. 432.

65 *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* (Chile/European Union), 2000–2009, International Tribunal for Law of the Sea, Case No. 7, available at: <www.itlos.org/cases/list-of-cases/case-no-7/>.

66 *See* EU Press Release: <http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc_114484.pdf>.

Sometimes the situation is mixed. The *Lockerbie case*, for instance, was brought before the ICJ by Libya as a dispute about the interpretation and application of the Montreal Convention on the suppression of unlawful acts against the safety of civil aviation, but, at least indirectly, the main underlying legal question concerned the competence of the Court to review the powers of the UN Security Council.[67]

Apart from disputes between States *inter se*, States may also end up in proceedings against the international organization. Within the legal system of the EU, member States are allowed to challenge the legal acts adopted by the Institutions of the Union before the European Court of Justice, and if the challenge is well founded, the Court can declare the act concerned void.[68] In other international organizations, member States do not have this far-reaching possibility. However, in the United Nations, and in most of the Specialized Agencies, member States can try to convince a majority in one of the organs of the organization to ask the ICJ for an advisory opinion on a disputed legal question.[69] In the consequent proceedings before the Court, member States then have the opportunity to present their views on the question, both in writing and orally. The Court has adopted a broad interpretation of its jurisdiction in such matters and has, on this basis, delivered quite a few important opinions including, for instance, the legal personality of the United Nations,[70] the legal basis for peace-keeping operations,[71] the illegality of racial discrimination and colonialism[72] and the legal consequences of the wall built by Israel in Palestine.[73] Although the advice of the Court is not always followed by the

67 *See Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (*Libyan Arab Jamahiriya* v. *United Kingdom/United States of America*), 27 February 1998, Preliminary Objections, International Court of Justice, [1998] ICJ Reports p. 9, at p. 115. *See further*, Nigel White, 'To Review or Not to Review: The Lockerbie Cases before the World Court' (1999) 12 *Leiden Journal of International Law* p. 401.

68 *See* Art. 263 and 264 of the Treaty on the Functioning of the EU.

69 *See* Art. 96 of the UN Charter.

70 *Reparation for Injuries Suffered in the Service of the United Nations*, 11 April 1949, International Court of Justice, Advisory Opinion, [1949] ICJ Reports p. 174.

71 *Certain Expenses of the United Nations* (*Article 17, paragraph 2, of the Charter*), 20 July 1962, International Court of Justice, Advisory Opinion, [1962] ICJ Reports p. 151.

72 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) *notwithstanding Security Council Resolution 276(1970)*, 21 June 1971, International Court of Justice, Advisory Opinion, [1971] ICJ Reports 1971 p. 16.

73 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, International Court of Justice, Advisory Opinion, [2004] ICJ Reports p. 136.

member States (or the organization for that matter), member States are reluctant to make use of the option to request for an opinion.[74]

We would argue that, in these proceedings, the primary identity of States is the one of 'member State'. The simple fact is that the procedures are usually open to organs of the organization and that States can only participate in their capacity as a 'member State'. In addition, the questions raised in most cases primarily relate to the functions of the organization in relation to its members. Yet again, there may be a situation in which the 'State' identity is more prominent. This would arguably be the case when the organization has (presumably) acted *ultra vires*. But, as Klabbers has noted, "there is fairly little legal protection against acts adopted *ultra vires*, precisely because many acts which might be, on the face of it, *ultra vires*, are nonetheless accepted by the organization's membership".[75]

4.3.2 Member States as Mediators for the Resolution of Disputes

The first step in the resolution of disputes between member States *inter se*, between member States and their international organization, or within a member State is via traditional means of negotiation. In general, these negotiations can take place at the premises of the organization, assisted by the organization's secretariat. But sometimes a member State, on the explicit or tacit request of the international organization, will host the parties to the dispute and/or make an offer to the parties to mediate in the conflict. This is a more or less constant factor in all attempts to solve the conflict in the Middle East but it has, for example, also occurred with regard to the peace negotiations between the Colombian government and the FARC, and the negotiations between Iran and the permanent members of the Security Council, Germany and the EU about an Iranian nuclear non-proliferation regime and the simultaneous lifting of the sanctions against Iran.

Another phenomenon is formed by the international tribunals, through which a member State facilitates an international organization in fulfilling one of its tasks. This will usually entail more than just providing for the premises and involves all kinds of jurisdictional facilities. The Netherlands has extensive experience in this area, not only with the permanent judicial bodies as the ICJ and the International Criminal Court, but also with several *ad hoc* tribunals, including the International Criminal Tribunal for the former Yugoslavia, the Iran-United States Claims Tribunal, and the Scottish court for

74 Since 1945, the Court has delivered a total of 26 advisory opinions, of which 11 were delivered in the first 15 years.

75 Klabbers, *supra* note 20, p. 186.

the Lockerbie trial. In particular in relation to those issues, the 'State' identity becomes more visible as jurisdictional questions often directly relate to Statehood.

4.4 *Member States as 'Law Enforcers'*

International organizations are often blamed for their weak enforcement measures. Indeed, in most cases, States have been willing to establish an international organization to facilitate their cooperation and yet have been reluctant to endow the organization with mechanisms to force them to live up to their obligations. Not only do (member) States play a central role in the realization of the decisions of international organizations but they also play an almost exclusive role in the enforcement of the law of the organization. Perhaps ironically, a prime example is formed by the most 'supranational' organization: the EU. Even for the enforcement of perhaps the most supranational part of European law, EU competition law, the European Commission has only a small office at its disposal and depends heavily on the efforts of its member States to enforce EU law.[76]

5 Conclusion

In the debates on the responsibility of member States of international organizations, the different identities of States play a crucial role. At the same time, it remains not only difficult to clearly separate the 'State' and 'member State' identities in all situations but also to distinguish between the different roles of member States. This is, of course, nothing new and flows from the famous Janus-faced nature of international organizations. It has been duly noted by Ryngaert and Barros, for instance, that "[a]lthough the separate personality of an international organization 'establishes the will of the organization as a whole', this does not mean that the various 'member State wills' that led to it lose their relevance.'[77] We should also keep in mind the warning by Condorelli and Cassese that:

> Although the limits to the sovereignty of States are increasingly growing in quantity and depth, partly in consequence of delegations of authority to supranational institutions and agencies, it remains true in substance

76 *See* Craig & De Burca, *EU Law*, *supra* note 65, pp. 1005–1010 (with further references).

77 Barros and Ryngaert, *supra* note 39. *Cf* also Jan Klabbers, 'Autonomy, Constitutionalism and Virtue in International Institutional Law', in R. Collins and N. White (eds.), *supra* note 8, p. 121: "there is always an element of artificiality in making a distinction between organizations and their members".

> that those growing limits still ultimately arise from the choice of the States: the choice to bind themselves, the sovereign choice to accept limits to their sovereignty.[78]

Thus, as Gazzini rightfully pointed out, "the question of international legal personality calls for a yes or no answer .... The question of the autonomy of international organizations from their membership, on the contrary, is a matter of degree".[79]

Yet, these observations — true as they may be — mainly relate to the distinction between States and member States. If there is one thing that is evidenced by our short analysis of the different identities, it is that, even in their identity of 'member State', States have different roles and functions. More importantly, in the context of this special forum, the relationship they have with the organization may differ. Indeed, this is not very helpful when it comes to establishing their possible responsibility. As the subsequent contributions will reveal, the rules on the international responsibility of international organizations take account of the possible responsibility of their members. We would argue, however, that it is important to clearly distinguish between the different identities States may have in different settings, and hope that the short identification presented in this contribution may be helpful in that respect.

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78 Luigi Condorelli and Antonio Cassese, 'Is Leviathan Still Holding Sway over International Dealings', in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press, Oxford, 2012) p. 14; in the same volume, José E. Alvarez, 'State Sovereignty is Not Withering Away: A Few Lessons for the Future', p. 26.

79 Tarcisio Gazzini, 'The Relationship between International Legal Personality and the Autonomy of International Organizations', in R. Collins and N. White (eds.), *supra* note 8, pp. 207–208.