CHAPTER EIGHT

GOVERNANCE BY INTERNATIONAL ORGANIZATIONS: RETHINKING THE NORMATIVE FORCE OF INTERNATIONAL DECISIONS

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> Legislation is often only part of a broader solution combining formal rules with other non-binding tools such as recommendations, guidelines, or even self-regulation within a commonly agreed framework.
>
> *European Commission's White Paper on European Governance, 2001*

1. *Introduction*

The proliferation of international organizations of states and of norm-setting organs within these organizations has resulted in a large variety of types of decisions on the international level of administration.[1] International organizations have shown a need for varying types of decisions to be able to respond to the need of establishing integration in different areas in a balanced manner (sometimes compelling, other times more directing). Reasons can be found in the necessity to find a balance between the process of integration and the degree of freedom of member states to continue setting their own policies, and the fact that citizens are often directly affected by decisions of these organizations. Each organization knows its own specific decision-

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1. On the proliferation of international organizations, *see* N. Blokker, "Proliferation of International Organizations: An Exploratory Introduction", in N.M. Blokker and H.G. Schermers (eds.), *Proliferation of International Organizations. Legal Issues* (the Hague, Kluwer, 2001), pp. 1–50.

types, but some well-known decision-types of the European Union can also be discovered in other international organizations.[2]

The proliferation of decision-types, in particular, seems to hold true for so-called "international integration-organizations".[3] This label is used for organizations that do not merely purport to establish a cooperation between their member states, but aim to go beyond this cooperation by establishing an integration in one or more policy areas. An essential feature of these organizations is that competences are being transferred from the member states to the organizations or that new competences for the organizations are created, through which it has become competent (often competing with the member states, but sometimes exclusively) to set rules to "harmonize" the legal systems of the member states in certain sectors. The main example, of course, is the European Union, but a number of other international organizations of a universal or regional character fall within this category as well.

In international legal literature the importance of decisions of international organizations is increasingly recognized. However, the main schools of international legal doctrine prove to offer an insufficient basis for an analysis of modern international administrative law, and in particular for a meaningful classification of the various forms in which international organizations mould their legal acts. According to the traditional positivist legal approach the legal validity of decisions of international organizations is regarded as identical to their legally binding force. As Kelsen stated: "to say that a norm is valid, is to say that we assume its existence or – what amounts to the same thing – we assume that it has "binding force" for those whose behaviour it regulates".[4] This approach conceives of the international legal system as a set of basically mandatory rules of conduct and competences to set those rules. Applied to decisions of international organizations: either decisions are legally binding, in which case they exist as legal rules, or decisions are not legally binding and do not exist as elements of the legal system. Thus this school of thought (strongly) rejects notions of "normative relativity" and "soft law" as

2. *See also* N. Blokker, "Decisions of International Organizations: The Case of the European Union", 30 *NYIL*, 1999, pp. 3–44 at 35–42.

3. *See*, in particular, M. Virally, "Definition and classification of international organizations: a legal approach", in G. Abi-Saab (ed.), *The Concept of international organization* (UNESCO, Paris, 1981), pp. 50–66.

4. H. Kelsen, *General Theory of Law and State* (Harvard University Press, 1961), p. 30.

relevant concepts of international (institutional) law.[5] It is not surprising that in this particular approach of international law, international organizations play only a modest role in the development of the international legal order. After all, only in exceptional instances do international organization have the competence to impose rules of conduct on their member states.[6]

Mainly under the influence of the so-called policy oriented approach of international law, this restricted view on the law-creating role of international organizations was opposed, first of all, by those who drew attention to the *effect* of non-binding decisions of international organizations – in particular declarations of the General Assembly of the United Nations – on the development of international law.[7] These play, as it was held, in particular an indirect role in the creation of customary law, as they function both as the formulation of the *praxis* and as the reflection of the *opinio iuris sive necessitatis*.[8] This approach became increasingly popular, not only in doctrine but also in international case law. Thus, the International Court of Justice based the customary legal status and substance of the ban on the use of force to a large extent on the formulation in the 1970 Declaration on Principles of International Law and the 1974 Resolution on the Definition of Aggression[9] and, in 1996 the Court stated in general:

5. *See*, in particular, P. Weil, "Towards Normative Relativity in International Law?", 77 *AJIL* 1983, pp. 413–442; J. Klabbers, *The Concept of Treaty in International Law* (Kluwer, The Hague, 1996), pp. 157–159.

6. The most well-known examples of organs having this competence include the Security Council of the United Nations and the Council of the European Union (the latter increasingly together with the European Parliament, as far as Community matters are concerned). *See* P. Szasz, "General law-making processes", in O. Schachter, Chr. C. Joyner (eds.), *United Nations Legal Order* Cambridge University Press, Cambridge, 1995), pp. 35–108; F.L. Kirgis, Jr., "Specialized law-making processes", in *idem*, pp. 109–168.

7. Classics in this respect include: R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, London, 1963); O.Y. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (The Hague, Martinus Nijhoff, 1966); R.A. Falk, "On the Quasi-Legislative Competence of the General Assembly", 60 American Journal of International Law 1966, p. 782; B.V.A. Röling, *Volkenrecht en Vrede (International Law and Peace)*, (Deventer, Kluwer, 3rd ed., 1973).

8. Some took the radical view point that resolutions of the General Assembly would as such to be seen mandatory decisions for the member states. This opinion, endowing the General Assembly with an international law-making competence, is, also today, not dominant. It is, however, strongly inspired by the traditional perception of international law as a system of mandatory rules of conduct and competences to enact those rules. *See* J. Castaneda, *Legal Effects of United Nations Resolutions* (New York, Columbia University Press, 1969).

9. International Court of Justice, *Military and Paramilitary Activities in and against*

> . . . that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio iuris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio iuris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio iuris* required for the establishment of a new rule.[10]

The acknowledgement of the legal importance of non-binding rules is an expression of the increasingly autonomous position of international organizations *vis-à-vis* their member states. However, according to this approach the legal significance of such rules – the normative effect of the results of the decisions-making processes – still lays (primarily) in the function they have in relation to mandatory rules of international law. Thus, in effect, this view is not that different from the traditional positivist analysis of international law.

These approaches to the law of international organizations prove to be unsatisfactory, in that they fail to explain and account for the existence and effect of a number of "acts" of international organizations as a consequence of their *a priori* exclusion from the legal system. Should we really conclude that the first article in the 1992 Treaty on European Union concerning the establishment of the Union, should be disregarded as a legal norm because it neither imposes a duty nor confers a power? Or that a norm such as "The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof" is an extra-legal norm because it seems to do both?

According to the "institutional" approach to law, the confinement of norms to the guidance of human behaviour does not present the whole picture, since significant parts of the administrative legislation and regulation of the modern welfare state, as well as of international organizations, no longer consists of rules of conduct or even of classical power-conferring rules, but of rules constituting legal institutions or powers to create rules constituting legal institutions. In Ruiter's words,

Nicaragua, Judgment of 27 June 1986, *ICJ Reports* 1986, pp. 99–100. *See* for the text of the resolutions resp. UNGA Res. 2625(XXV), 24 October 1970, GA Res. 3314(XXIX), 14 December 1974.

10. International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ Reports* 1996, pp. 254–255.

this means that "the issue is no longer how the concept of legal system can help us to legitimize legal norms of conduct. It must be replaced with the question what kind of results stemming from human activity, can obtain legal validity as elements of a legal system".[11] The legal system is conceived of as an "extra-linguistic institution", which confers legal validity to certain qualified linguistic utterances. This means that "words" uttered in the specific context of a legal system have different consequences than when they would be used in regular social day-to-day communication. Within the legal institutional framework "speech acts" bring about valid presentations of orders, inducements, purposes; but they may also bring about legally valid (re)presentations of a state of affairs, or (just) of an attitude about a state of affairs. This approach – based on the separation between legal validity and legal effects of acts – makes it possible to account for the legal significance of rules of international organizations that cannot always be placed under one of the two traditional headings of mandatory rules of conduct and competence-conferring rules.

In this chapter we examine the "institutional legal reality" of decisions of international organizations in two respects. Section 2 will try to explain the institutional legal approach to the normative force of decisions of international organizations by analyzing an institutional legal concept of international organizations, their legal regimes and a classification of their legal acts. In section 3 we will make an attempt to shed a light on the acts of international organizations in relation to the legal systems of the member states. In exploring these points we do not purport to present final answers, but merely whish to reflect on the line of research followed by both authors in addressing issues of international institutional law. It is only the beginning of a more extensive research project, which aims to shed more light on the normative force of decisions of international organizations, in particular the European Union.

11. D.W.P. Ruiter, *Institutional Legal Facts* (Deventer, Kluwer, 1993), pp. 32–33. The idea of the "extra-linguistic institution" is derived from the speech act theory of Searle. *See*, J.R. Searle, *Speech Acts. Expressions and Meaning* (Cambridge, Cambridge University Press, 1969).

2. *The normative force of decisions of international organizations*

2.1 *Legal institutions*

In earlier publications the present authors have analyzed the legal system of international organizations, in particular the legal system of the European Union, on the basis of the conceptual apparatus of the "institutional legal theory".[12] According to this theory, the main building blocks of legal systems are "legal institutions".[13] "Legal institutions" in this sense are not to be seen as synonymous with organizations or organs thereof but can be characterized as distinct legal systems governing specific forms of social conduct within an overall legal system of which they derive their validity. Ruiter defines a legal institution as ". . . a regime of legal norms purporting to effectuate a legal practice that can be interpreted as resulting from a common belief that the regime is an existent unity".[14] In other words, a legal institution does not refer to an existent entity, but to a presentation of a phenomenon that ought to be made true in the form of social practices. Thus, legal institutions have their counterparts in social reality, often referred to as "real" institutions. As Ruiter puts it: ". . . a legal institution is in the first instance a fiction that is subsequently realized by people believing in it and acting upon this belief. It follows i) that human beings must be able to visualize legal insti-

12. I.F. Dekker, R.A. Wessel, "The European Union and the Concept of Flexibility: Proliferation of Legal Systems Within International Organizations", in N.M. Blokker and H.G. Schermers (eds.), *Proliferation of International Organizations* (The Hague, Kluwer, 2001), pp. 381–414. *See also* R.A. Wessel, *The European Union's Foreign and Security Policy. A Legal Institutional Perspective* (The Hague, Kluwer, 1999); D.M. Curtin and I.F. Dekker, "The EU as a 'Layered' International Organization: Institutional Unity in Disguise", in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford, Oxford University Press, 1999) pp. 83–136; R.A. Wessel, "Revisiting the International Legal Status of the EU", 5 *European Foreign Affairs Review* 2000, 507–537; D.M. Curtin and I.F. Dekker, "The Constitutional Structure of the European Union: Some Reflections on Vertical Unity-in-Diversity", in P. Baumont, C. Lyons, N. Walker (eds.), *Convergence and Divergence in European Public Law* (Oxford, Hart, 2002), pp. 59–78.

13. *See* N. MacCormick, O. Weinberger, *An Institutional Theory of Law, New Approaches to Legal Positivism* (Dordrecht, Kluwer, 1986); O. Weinberger, *Law, Institution and Legal Practice. Fundamental Problems of Legal Theory and Social Philosophy* (Dordrecht, Kluwer,1991); D.W.P. Ruiter, *Institutional Legal Facts, Legal Powers and Their Effects* (Deventer, Kluwer, 1993); D.W.P. Ruiter, *Legal Institutions* (Deventer, Kluwer, 2002).

14. D.W.P. Ruiter, "A Basic Classification of Legal Institutions", 10 *Ratio Iuris*, 1997, 358.

tutions and ii) that the existence of legal institutions must be conceivable as inherent in human behaviour".[15]

The *existence* of a legal institution is determined by a set of different so-called "institutional rules".[16] These rules relate to the creation and termination of a specific legal institution as well as to the legal consequences the encompassing legal systems attach to such a legal institution. The latter rules regulate which legal norms can or cannot be part of a valid legal institution. A distinction is thus made between the legal institution as a *type* – also referred to as the "institutional legal concept" – and the *instance* or *token* of the concept.[17] Legal institutions in the sense of institutional legal concepts – such as the concepts "treaty" and "international organization" – are pre-requisites to the specific operationalization thereof – such as, respectively, for example, the 1969 Vienna Convention on the Law of Treaties and the United Nations Organization. The rules with regard to the establishment, termination and legal consequences of a specific treaty or international organization are part, respectively, of the international law of treaties and the international law of organizations.

Legal institutions refer to entities – subjects and objects – to properties of these entities – qualities and status – and to connections between entities. On the basis of these distinctions, Ruiter developed a classification of seven legal institutions.[18] Only two of these seem to be *prima facie* relevant to the concept of international organizations: "personal legal connections" and "legal persons". The first category is defined as "a valid legal régime with the form of a connection between subjects".[19] The bottom line is that this legal institution brings forward a set of legitimate expectations between legal persons – for instance, states – about their reciprocal behaviour. With regard to the law of international organizations, the most relevant legal institution of this kind is the institutional concept of "treaty", the relevant

15. D.W.P. Ruiter (note 14), p. 363.

16. *See* N. MacCormick, O. Weinberger, *An Institutional Theory of Law* (Dordrecht, Kluwer, 1986), p. 53.

17. *Ibid.*, p. 54.

18. *Legal persons* (subjects), *legal objects* ("goods"), *legal qualities* (property of subjects), *legal status* (property of objects), *personal legal relationships* (connection between subjects), *legal configurations* (connection between objects), and *objective legal relationships* (connection between subjects and objects). *See* D.W.P. Ruiter, *Legal Institutions* (The Hague, Kluwer, 2002), pp. 102–115.

19. Ruiter (note 18), p. 99.

institutional rules having been codified in the 1969 Vienna Convention on the Law of Treaties.

The second appropriate category of legal institutions for analyzing international organizations, the "legal person", is defined as "a valid legal regime with the form of an entity that can act".[20] In this case it is not so much the relation between legal persons that counts, but rather the establishment of a new legal entity. A legal institution in this sense is not only a set of mutual expectations of behaviour, but at the same time an entity which in legal terms and in reality – to a certain extent – occupies an independent position *vis-à-vis* its members and the outside world. The central element of the legal regime of a legal person is its capacity to pursue collective decision-making: a legal person makes it possible "to ascribe aggregate outcomes of collective decision-making processes to the collectivity of the participants".[21] In order to do that a legal person needs normally at least one organ (which is in fact a legal person too). Through this decision-making organ, the legal person will have the possibility, on the basis of power-conferring rules, to develop a relatively independent institutional legal system by issuing legal norms and rules, including other power-conferring rules.

Thus international organizations can be seen as contractual relationships between member states (legal persons) or as a legal entity with an autonomous status in the international legal system. According to the first view, decisions of international organizations are agreements between the member states, whereas in the latter view decisions are unilateral legal acts. In the following pages our analysis is based on the conception that international organizations are (international) legal persons in the institutional legal sense.

2.2 *The legal competence of international organizations*

Apart from the institutional rules, legal institutions – such as legal persons – have their own legal system, sometimes also called its "legal regime". The legal regime functions as the specific legal framework of a legal institution and is in itself in most cases a complex system of different legal rules (norms and principles). The concept "legal rules" is used in the institutional legal theory in a wide sense, encom-

20. *Ibid.*, p. 98.
21. *Ibid.*, p. 105.

passing all normative acts which can obtain legal validity in a legal system.[22] Besides these legal rules, the legal regime of an institution can include legal competences conferring legal powers on an organ of the institution to create legal rules. Through legal competences, a specific legal institution can develop its *own* institutional legal system with the purpose to regulate further its own practice. In other words: "An institutional legal regime that comprises power-conferring norms is no longer a mere concretization of consequential rules . . ., but actually becomes a relatively *independent institutional legal system* within a comprehensive legal system. By virtue of their self-regulatory powers, participants are to a certain extent able to design the institutional legal systems in accordance with their own wishes".[23]

Legal competences make an institutional legal system complex. By using the legal powers that have been conferred, "organs" of a legal institution have the capacity to create within the legal institution other legal institutions with their own legal regimes. With regard to such complex, "layered", legal institutions the concept of legal *unity*, as used in the definition of a legal institution, becomes important. It has, in the first place, the purpose of indicating that the institution can be dealt with as a more or less autonomous element within the over-all legal system and that it can be distinguished from other legal institutions within that system. Secondly, the unitary character of a legal institution implies that its institutional legal system has to be "coherent". In relation to law, "coherence" not only means the absence of contradictions – often referred to as "consistency" – but also the presence of positive connections between different parts of a legal system. However, it is important to stress that – contrary to consistency, which is an absolute concept – coherence of a legal system is always to be regarded as a matter of degree. The test of the unity of the legal regime of a legal institution thus depends on the question whether and in what manner the legal regime binds together its different sub legal systems by (fundamental) legal rules and competences.

Insofar as an international organization is conceived of as a legal person, the consequence is not only that an international organization is an autonomous subject of international law, but also that its

22. D.W.P. Ruiter, *Institutional Legal Facts, Legal Powers and Their Effects* (Deventer, Kluwer, 1993), p. 52–79, 90.
23. D.W.P. Ruiter, "A Basic Classification of Legal Institutions", 10 *Ratio Iuris*, 1997, 357, at 370.

capacities (in the sense of *potential* competences) are based on the legal system of the organization itself. In that line of thought, an international organization has all the competences needed to fulfil its purposes as far as they are not excluded by international law or by its own constitutive treaty. This is what in the literature on international organization is often referred to as *inherent powers*. The validity criterion of a competence is whether the competence fits in the legal system of the organization, taking into account the constitutive treaty and the purposes of the organization. In that sense this approach relates to the "institutional" notion of legal personality on the basis of which international organizations, like states, are "complete" international legal persons, and thus free "to perform any sovereign act, or any act under international law, which they are in a factual position to perform to attain their aims, provided that their constitutions do not preclude such acts".[24]

According to the institutional approach followed in this chapter competences of international organizations can also legally be founded on customary law. Besides the fact that contracts are almost by definition "incomplete", allowing for contractors to approach their relationship in a dynamic fashion, the constituting treaties of international organizations create a legal order with an "Eigendynamik". The legal orders of international organizations in general, but of integration-organizations in particular, often know a rule of recognition on the basis of which the organization is allowed to issue norms that cannot explicitly be traced back to the treaty. Sometimes these norms are said to be based on implied powers (in which case they are believed to attributed after all), but in other cases the existence (and subsequent acceptance) of rules can better be explained on the basis of customary powers, attaching validity to norms on the basis of a praxis and an acceptance of an articulated norm.

2.3 *Classifying the normative force of decisions*

What institutional legal theory basically does is combine legal positivism with the institutionalism that can be found in the linguistic philoso-

24. F. Seyersted, *United Nations Forces in the Law of Peace and War* (Leyden, Sijthoff, 1966), p. 133. Zie ook F. Seyersted, "International Personality of International Organizations. Do their capacities really depend upon their constitutions?", 4 *Indian Journal of International Law*, 1964, 1.

phy of John Searle.[25] According to Searle speaking is more than just uttering sounds; it is both a regulated and a regulating activity. This is reflected in the possible relations between, what he calls, "word" and "world". Depending on the type of "speech act" the "world" adapts itself to the words that are uttered in its context, or *vice versa*. But, it is equally possible that there is no relation between word and world or even that there exists a mutual adaptation. According to Searle, these adaptation relations, or "directions of fit", result in five conceivable speech acts: assertives (word to world direction of fit), directives and commissives (world to word direction of fit), expressives (null direction of fit) and declaratives (double direction of fit). This way language does not merely convey content (as a locutionary act), but the speaker also performs an action in saying something (an illocutionary act). Translated to legal theory this means that this illocutionary act consists in *the creation of* legal rights and duties, once it is performed by a competent actor.[26]

By taking the speech act theory as a starting point, Ruiter came up with a list of conceivable "results stemming from human activity" that qualify as legal acts.[27] The reason to present this classification in the present chapter is that it offers a far more shaded differentiation in rules than the classical distinctions between duty-imposing and power-conferring rules, or between legal and political rules. The following seven legal acts form part of Ruiter's classification:[28]

1 A *declarative* legal act is a legally valid presentation of a *state of affairs*. For instance an act through which an international organization is established.

2 A *hortatory* legal act is a legally valid presentation of an *inducement*

25. J.R. Searle (note 11). *See* for a Dutch analysis of institutional legal positivism: W.G. Werner, *Het recht geworden woord* (Enschede, 1995), Chapter 5.

26. *See also* S.N. Onuf, "Do Rules Say What They Do? From Ordinary Language to International Law", *Harvard International Law Journal*, 1985, 385.

27. It would seem that this notion covers both "rules" (which in Ruiter's terminology present a particular state of affairs that ought to be realized by way of a social practice based on a general belief in the existence of that state of affairs) and "norms" (that prescribe that, whenever a fact of a certain category occurs, a certain rule comes to apply). *See* D.W.P. Ruiter, "Institutions from the perspective of Institutional Theory", *NIG working papers*, no. 95–15, Enschede, University of Twente, 1995, p. 16.

28. Ruiter (note 22), Chapter 3. When the "negative acts-in-the-law" are taken into account, as acts-in-the-law whose successful performances have "negative" legal effects ("illocutionary denegations of acts-in-the-law"), Ruiter comes to a total of fourteen conceivable types. *Id.*, Chapter 4.

to get the *hearer* to carry out some future course of action. For instance a call of an international organization to its member states to spend a certain percentage of its GNP to development aid.

3 An *imperative* legal act is a legally valid presentation of an *order* to the *hearer* to carry out some future course of action. For instance the imposition of an organization to its member states to impose sanctions on another state.

4 A *purposive* legal act is a legally valid presentation of the *speaker's purpose* to carry out some future course of action. For instance the aim of an international organization that all states in a certain region within a set time limit require and acquire the membership of the organization.

5 A *commissive* legal act is a legally valid presentation of an *order* to the *speaker* to carry out some future course of action. For instance the promise of an international organization to send emergency funds to a disaster area.

6 An *assertive* legal act is a legally valid *re*presentation of a *state of affairs*. For instance the claim of an organ of an international organization that despite the silence of the constituting treaty on that point, the organization has the obligation to live up to human rights standards in its activities.

7 An *expressive* legal act is a legally valid presentation of an *attitude* about a state of affairs. For instance the statement by an organ of an international organization condemning the gross and massive violations of the rule of law in a certain country.

With the presentation of this classification, Ruiter makes clear that, regardless of the fact that the limits of the legal system are still defined by the criterion of validity, a larger number of rules in a variety of shades conceivably form part of that legal system. Looking at the above list, the question emerges of where competence-conferring norms fit in. After all, as we have seen, norms obtain a legal character only when uttered by certain specified subjects in a specified procedure. It is the norm of competence (or "rule of recognition') which determines that, if certain subjects utter certain presentations in a certain procedure, these presentations are legally valid.[29] According to Ruiter, competence-conferring acts are a special case of declarative speech acts: "Norms of competence convey legal validity to pre-

29. Ruiter (note 22), pp. 91–92.

sentations resulting from successful performances of the acts-in-the-law they specify. At the same time, they themselves are legally valid presentations pressing on the legal community to accept the legal validity of the former presentations".[30]

Organs such as the UN Security Council may, within their inherent competence, take decisions covering – in principle – all mentioned types of legal acts, including imperative ones. In addition, the Council of the European Union may make use of a large number of different decisions. Apart from Regulations, Directives and Decisions of the European Community, the European Union knows Joint Actions, Common Positions, Framework Decisions, and also Declarations of the Presidency or Conclusions of the European Council, Reports of the Council or Communications of other organs. All these acts purport to have an effect in the legal system in which they are uttered. This holds true as well for acts that *prima facie* may be seen as "non-binding". Even a statement of the Presidency of the European Union gives, or aims to give, an interpretation, fix an objective, or maybe make a promise. When these legal acts are ignored in the analyzes of the legal systems of international organizations, a large number of acts are kept outside the (legal) game, which in the case of integration-organizations – in practice – often subtly defines the policy to be pursued. But also within the category of so-called "binding" decisions – like Regulations or Framework Decisions of the EU Council – one may discover norm-types with a variable normative force. Apart from norms of conduct, these decisions may establish new organs and new competences. Some of these decisions only have effect within the organization itself, others also have effects within other legal systems, including the national legal systems of the member states.[31]

3. *Relations between legal systems of international organizations and legal systems of member states*

3.1 *Validity relations between legal systems*

So far we have concentrated on the internal systematics of a legal system, on the validity and normative force of rules within the legal

30. *Id.*, pp. 96 and 156.

31. *See* Art. 249 EC Treaty. The other EU decision types can be found in Arts. 12 and 34 of the EU Treaty.

system of an international organization. However, since it was established in the introduction of this chapter that the proliferation of different forms of decisions takes place in so-called integration-organizations in particular, the legal systems of international organizations are not to be approached in isolation and attention needs to be devoted to the relation between these systems and the legal systems of the member states.

Regarding this question, Kelsen pointed to the existence of different "basic norms" as the ultimate "source" of distinct legal systems, but he also argued that the source of two distinct legal systems can be the same when one order is based on the other.[32] Kelsen argued that there are four conceivable validity relations between two distinct legal systems:[33] a) both systems are completely divided ("*unabhängig*"), that is: they have distinct sources of validity; b) system A derives its validity from system B; c) system B derives its validity from system A ("*über- und unterordnung*"); and d) both systems are of equal value, they are (relatively) independent sub-systems, coordinated by an overarching superior system ("*Koordination*").[34]

In the *first* perspective, the classic *dualist* approach, the legal systems of international organizations and the member states are completely independent, separate of each other, in the sense that they have different legal sources and different legal subjects. In this approach the legal system of the international organization provides rules for the member states, for the functioning of the organization itself, whereas the legal system of the member states regulates the activities of *its* citizens and other private persons and the functioning of the state itself. In other words, legally valid rights and duties of individuals can only be created under the national legal system of the member states. This *dualist* construction is questioned in general with regard to the

32. H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrage zur einer reinen Rechtslehre* (Scientia Aalen, 1928, 1960), pp. 104–105: "In der Einheit und Besonderheit dieses Ursprungs, dieser Grundnorm, liegt das principium individuatis, liegt die Besonderheit einer Ordning als eines Systems von Normen". Despite its age, this book still serves as one of the clearest interpretations of the concept of sovereignty and the relation between the international legal order and national legal orders (or "states" in Kelsen's line of reasoning).

33. *Id.*, p. 104. *see also* Werner (note 25), p. 158.

34. *See also* D.M. Curtin, I.F. Dekker, "The Constitutional Structure of the European Union: Some Reflections on Vertical Unity-In-Diversity", in P. Baumont, C. Lyons, N. Walker (eds.), *Convergence and Divergence in European Public Law* (Oxford, Hart, 2002), pp. 59–78.

relation of international and national legal systems, both on theoretical and empirical grounds.[35] Theoretically, the approach in particular falls short in explaining the position of the state in relation to the national legal system, because that state, as the central subject of the international legal system, cannot be a part of the national legal order at the same time. However, this last consequence is difficult to reconcile with modern concepts of the rule of law, in which the state is (also) a legal subject of national law. Empirically, one can point to rules of positive international law purporting to bind private persons directly, without interference from national law. Under general international law, obvious examples of such rules relate to the international criminal responsibility of individuals for international crimes. Other examples may be found in the legal system of the European Union – and in particular that of the European Community – providing a range of treaty-based rules, regulations and decisions directly creating rights and duties for individuals and other legal persons. Taking the case law of the European Court of Justice as well as legal doctrine into account, it is difficult to maintain that the validity of these legal acts is based on the national legal systems of the member states, because the legal system itself provides for (secondary) rules on the formation, interpretation and implementation of EU law.

The dualist approach to the validity relation between the legal system of international integration-organizations and those of the member states thus raises serious objections. This leaves us with the three *monist* options distinguished above. According to the first option, the legal system of an international organizations is – qua legal validity – the highest legal order, implying that the national legal systems derive their validity from that legal system. Of course, already on historical grounds this explanation leads to the rather absurd conclusion that the legal systems of the member states are based on the treaty by which those same states created an international organization.

35. *See also* I. Weyland, "The Application of Kelsen's Theory of the Legal System to European Community Law – The Supremacy Puzzle Resolved", *Law and Philosophy*, 2002, 1–37. Although dealing with Community Law, Weyland argues: "[. . .] and analysis based on Kelsen's theory must reject a dualist conception and will lead to the assumption of only one basic norm of a unified set of norms, where the basic norm, either of the Community or of each Member State, validates both Community and national constitutional norms. The principle of the supremacy of Community over national constitutional norms may be fitted into either model". Weyland thus does not see a basic norms in an "overarching" legal order, but rather in either the national legal order or the legal order of the international organization.

In the second monist option the national legal systems of the member states are the highest legal orders, of which the legal system of the international organization is an offspring. This option is, at least implicitly, probably the most common assumption about the source of the validity of the legal system of an international organization. The validity of the system is derived from the competence of the member states – or, more correctly: the High Contracting Parties – to establish this legal system by concluding a constitutive treaty. This option seems to be the common explanation with regard to the European Communities, and is also used by the European Court of Justice.[36] However, this construction of the validity relation between the two legal systems poses new problems. When the validity of the legal system of an international organization would only be based on the distinctive legal orders of the various member states, the consequence would be that the constitutive treaty has not created *mutual* obligations between the member states.[37] A national legal system as such cannot be a sufficient legal basis for the establishment of a valid *international* agreement between sovereign states. One would at least need an "independent" rule (not based in the national legal systems) according to which the expressed will by a sovereign state counts as a valid way to be bound by an international agreement. It follows that this option, presenting the national legal system as the supreme system, cannot sufficiently explain the validity of the legal system of international organizations.

This leads us to the third monist approach to the validity relations between legal systems. In this construction both legal systems are to be considered as equal and (relatively) independent legal subsystems of the overarching international legal system. Both are based on international law and the validity of the legal system of the international organization in particular finds its basis in the international

36. *See*, for instance, Case 6/64, *Costa ENEL*, [1964] *ECR* 585, in which the Court, *inter alia*, stated that ". . . the EEC Treaty . . . became an integral part of the legal system of the Member States . . ". and that the Member States have limited their sovereign rights by creating a Community having "real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community . . .".

37. The other possibility to base the primacy of the national legal order over de European Union legal system is that the highest rule is laid down in *one* of the national legal orders of the member states. However, this option leads to rather absurd consequences because not only the European legal system but also all the other national legal orders are in this case subordinated to the "highest" national legal order (for instance, the Irish or Dutch legal order).

customary rule of *pacta sunt servanda*.[38] Thus, the treaties establishing the European Union created – in the words of the European Court of Justice with regard to the European Community – "a new legal order in international law",[39] and this order indeed has an "autonomous" nature.[40] However, this autonomy concerns the relationship with the legal systems of the member states and not with the international legal system. On the contrary, the international legal system not only provides the validity of the legal sub-systems, it also co-ordinates the relations between them. For instance, international treaty law provides that a state may not invoke its internal law as a justification for its failure to perform a treaty obligation, which, in principle, also applies to national constitutional law.[41] It is important to realize that this principle of (external) supremacy of the law of an international organization over national law cannot follow as such from the validity relationship between the two systems, since after all the systems are equal in that respect. The supremacy must therefore be based on a priority rule laid down in the overarching international legal system.

3.2 *Applicability, effect, and supremacy*

The consequence of the view that the legal systems of international organizations and those of their member states are both part of one, overarching legal system, is that *valid* legal rules of international organizations have to be accepted as legal *facts* by the member states. In other words, states are not free to grant or to deny a valid legal rule of an organization of which they are a member its *validity* in its own national legal system. The validity of the law of an international organization can only be judged on the basis of the conditions set out in that same legal system (including the relevant rules of international law) and is not dependent on the (constitutional) law of the member states, even where it concerns its status in the national legal system.

However, at the same time it is important to underline that no other consequences can be attached, on logical grounds, to the unity of the legal systems of international organizations and the member states

38. *See*, Article 26 of the Vienna Convention on the Law of Treaties, 1969.
39. Case 26/62, *Van Gend & Loos*, [1963] *ECR* 1, 12.
40. Case 6/64, *Costa ENEL*, [1964] *ECR* 585.
41. *See* Articles 27 and 46 of the Vienna Convention on the Law of Treaties, 1969.

as far as this unity is shaped by their validity relations. As mentioned before, the legal systems of the organization and its member states are, qua legal validity, in an hierarchically equal position and are relatively independent of each other. In particular the validity relationship does not say anything about the following issues:[42] a) whether the law created by the international organization is directly applicable in the national legal system or not, meaning whether besides the national legislature other national authorities – such as regional or local administrations, and national courts – are competent to apply that law as such; b) whether the legal rules of international organizations are directly effective or not, meaning whether individuals can rely on provisions of that law before their national courts; and c) whether the law of the international organization has supremacy over national law in the event of conflict between both kinds of rules. The answers to these questions do not follow from the validity of the specific legal rules of international organizations in the national legal systems of the member states, but depend on the relevant rules of international and national law.

It is well known that according to international law, states are, in principle, free in the way they apply and give effect to international law in their national legal systems. The consequence of this freedom is that, in practice, there are as many different ways in which the aforementioned issues are regulated as there are states.[43] For instance, with regard to the issue of applicability of international law in the national legal system, the national "solutions" vary between the situation in which international legal rules have to be transformed by the national legislature into national law before it can be applied by other national authorities,[44] or the situation in which, in principle, international legal rules are as such directly applicable by every national

42. *See*, A. Verdross and B. Simma, *Universelles Völkerrecht, Theorie und Praxis* (Berlin, Duncker & Humblot, 3rd ed., 1984), pp. 550–554. For the application of these issues in the European law context, *see*, A. Koller, *Die unmittelbare Anwendbarkeit völkerrechtlicher Verträge und des EWG-Vertrages im innerstaatlichen Bereich* (Bern, 1971); J. Winter, "Direct Applicability and Direct Effect, Two Distinct Concepts in Community Law", 9 *Common Market Law Review*, 1972, 425; P. Eleftheriadis, "The Direct Effect of Community Law: Conceptual Issues", 16 *Yearbook of European Law*, 1996, 205; J. Shaw, *Law of the European Union* (Basingstoke, Palgrave, 3rd ed., 2000), Chapter 12.

43. *See*, with further references, P. Malanczuk, *Akehurst's Modern Introduction to International Law* (London, Routledge, 7th ed., 1997), pp. 63–71.

44. Sometimes, such a system is also referred to as "dualist", however this is confusing because it can be applied within a monist relationship between distinct legal systems.

authority. This relatively anarchic situation is one of the reasons why the international legal system is often characterized as horizontal or decentralized. One can also say that institutional vertical unity between international law in general and the 200 or so national legal systems is – apart from their validity relation – presumptively absent and, as far as it is present in practice, that it solely rests on the limited practical options available.

The way to realize institutional vertical unity between the international and national legal systems is to regulate the issues of applicability, effect and supremacy in the international legal system. Such a regulation takes priority over national (constitutional) rules on the basis of the aforementioned customary rule that states may not invoke internal rules to justify breaches of international obligations.[45] The most well known example in this respect is, of course, the European Community legal system. Although an explicit regulation of the issues of applicability, effect and supremacy of Community law in the national legal systems of the member states was almost absent in the treaties establishing the European Communities, the Court of Justice assumed that the founding fathers of the Communities had the clear intention that these issues in the end had to be settled by the Community institutions, and in particular, the Court of Justice, on the basis of some fundamental unwritten Community principles. There is no need to go into the farreaching significance of the *assertion* that the applicability, effect and supremacy of Community law in the national legal systems are at least also questions of Community law.[46] It suffices to say, on the basis of European and national case law, that Community law is in principle directly applicable and directly effective on a priority basis in the national legal orders of the member states, although not all consequences of these structural principles are as yet fully developed or indeed fully accepted by the member states, in particular by some national courts.[47]

The question is whether this institutional vertical unity also exists between legal systems of other international organizations and those

45. *See*, *supra* note 41.

46. *See*, literature mentioned *supra* note 42. For an excellent and recent overview of the development of some of the core concepts, *see* B. de Witte, "Direct Effect, Supremacy, and the Nature of the Legal Order", in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford, Oxford University Press, 1999), pp. 177–214.

47. *See*, also P. Craig and G. de Búrca, *EU Law, Text, Cases and Materials* (Oxford, Oxford University Press, 3rd ed., 2002), Chapters 5, 6 and 7.

of their member states. This seems in particular relevant with regard to the aforementioned integration-organizations because they have the legal powers to take decisions about matters which can affect the legal position of individuals and other private parties. Insofar as the literature deals with this question, the answer is quite simply negative. It is assumed that the issues of applicability, effect, and supremacy have to be dealt with under the traditional rules of international law meaning that these issues are solely regulated by the internal (constitutional) law of the member states.

However, this conclusion seems premature and needs further research. At least two considerations seems to be important in this respect. In the first place, the absence of an explicit regulation of the relationship between the legal system of an international organization and those of the member states in the founding treaties is, in itself, not decisive with regard to the question whether rules of an international organization can be considered directly applicable and directly effective on a priority basis in the legal systems of the member states. It is generally recognized that the judgments of the European Court of Justice on the legal nature of the Community legal system were mainly based on "legal policy" considerations, in particular the objectives the effectiveness and uniformity of the application of Community law and the legal protection of individuals and other private parties. It is not clear why such objectives would have, beforehand, less relevance for other integration-organizations.

In the second place, a provision in a treaty establishing an international organization which *excludes* for instance the direct effect of certain types of legal act of the organization nevertheless shapes to some extent the vertical unity of the legal systems of the organization and those of the member states. By inserting such a clause – as happened in the PJCC chapter of the European Union with regard to "framework decisions" and "decisions"[48] – the member states accept in principle that the regulation of the relation between the legal system of the organization and their own legal systems has become a matter of the law of the organizations itself and that they are not free anymore to control this matter solely under their internal law. Moreover, the exclusion of the direct effect of certain legal acts implies that they are in principle directly applicable in the national

48. *See* Article 34(2)(a)(b) TEU.

legal systems, otherwise the exclusion makes no sense at all. At least within the Community legal system, the direct application of legal acts is the legal basis for the principle of "indirect effect", meaning that national authorities have the obligation to interpret national legislation and other national measures as much as possible in the light of the wording and purpose of Community law.[49]

4. *Conclusion*

With the increasing "institutionalization" of the international system, international organizations have evolved into autonomous legal entities with competences to govern the behaviour of their members. To make a comparison to national legal systems: where classic international law can be seen as "private law" between states, the choice for international organizations as a governance structure of the international system caused for the development of what one may call "international administrative law".

In this development some organizations play an important role, as they have been given the competence to operate not only on the level of the international (inter-state) legal order, but also within the national legal orders of their member states. The present contribution first of all made an attempt to reconsider the validity sources of decisions of international organizations, in particular when these decision not only affect the member states, but also natural and legal persons within those states. With the help of institutional legal theory we have presented a model of the international legal order in which states and international organizations are not hierarchically subordinate to one another, but in which both international legal persons rather stand on an equal footing. The validity of norms of international organizations within the national legal orders of the member states (as well as in the international legal order) is thus explained on the basis of a common basic norm. This does not mean that norms of international organizations by definition have direct effect or that they have supremacy over national norms. The "rules of recognition" by which these issues are settled are traditionally found in the national legal order, but may also be made on the international level; the European Community being the prime example in this respect.

49. *See* European Court of Justice, Case C-106/89, *Marleasing*, [1990] *ECR* I 3061.

It is in particular these “integration-organizations” that are in need of a whole toolbox of governance instruments to steer, stimulate or enforce the cooperation between member states and to get a grip on the actions of their citizens. However, classic classifications of legal norms usually do not allow for many of these norms to be regarded as legal, which causes problems related to the validity of these decisions, their normative force and accountability in case of non-compliance. This is for instance illustrated by the quote from the European Commission in the beginning of this chapter, in which “legislation” is opposed to “non-binding tools”, implying that the latter fall outside the legal scope.

The approach used in the present contribution departs from the notion that international organizations – as “legal institutions” – are also competent to create legal facts that cannot be qualified as either mandatory or competence-conferring norms (the classic dicho-tomy). This means that a larger number of legal acts in a variety of shades conceivably form part of the legal system of international organizations, and, thus – qua validity – of the national legal systems. The value of this approach can be found in the fact that is allows us to explain the validity and normative force of norms that are not mandatory, but nevertheless explicitly form part of the governance system of international organizations. A next step would be to apply the presented classification to the norms in decisions of – for instance – the European Union, in order to establish their normative force and meaning, as the proliferation of types of decisions in modern forms of international governance only makes sense when the legal status and meaning of the norms is comprehensible for the addressees.