2. Towards a United Europe?
A Legal Perspective on European Institutionalization and Integration

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> The different international organizations within Europe form part of one comprehensive system, and become explicable only by reference to that system. (Bowett 1982: 167)

This chapter gives a short survey of European institution building in the current and past century, in the fields of security, human rights and economic cooperation, from a legal perspective. It is pointed out that institution building in the field of 'security' cannot be separated from the processes in the areas of 'solidarity' (human rights) and 'welfare' (economic cooperation). The developments in these three areas have mutually reinforced each other. The chapter deals especially with general themes taken from the study of international institutional law, such as the transfer of sovereignty, the powers of decisionmaking organs, and the powers of international organizations to control or enforce compliance with the rules agreed upon. Unlike the more common manner of dealing with these subjects in legal approaches, an effort will be made to use these themes to investigate whether and to what extent institutionalization in Europe has led to European integration. No attempt is made to give an exhaustive analysis. This chapter provides an introduction to the approach by touching upon key elements and relevant characteristics.

The focus is on the process of institutionalization as it took place in Western Europe. Institution building in Central and Eastern Europe (CEE) has not been part of the mutually reinforcing processes in Europe, despite the fact that the setting up of some institutions in Western Europe triggered the creation of new institutions in the East (EC triggered CMEA; NATO triggered WTO). The Helsinki process,

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with its pan-European mandate, is somewhat different: it was an attempt to overcome the very divide which excluded CEE states from European integration. Already in 1948, at the 'Congress of Europe' in The Hague, the division between East and West had been obvious. Sixteen Western states participated with official delegations (Austria, Belgium, Great Britain, Denmark, Ireland, France, Germany, Greece, Italy, Liechtenstein, Luxembourg, the Netherlands, Norway, Saarland, Sweden and Switzerland), while ten others, from Eastern Europe and North America, attended as observers only (Bulgaria, Canada, Czechoslovakia, Finland, Hungary, Poland, Romania, Spain, the USA and Yugoslavia). The Soviet Union was not even present.

International institutional law versus international relations

The study of international institutional law differs in many respects from most other approaches dealing with international institutions. First of all, it is mainly interested in certain actors only: states (as represented by governments) and groups of states (as represented by IGOs). Following the division into 'realism', 'pluralism/liberalism' and 'structuralism/radicalism', common in International Relations theory (see e.g. Banks 1985), the international legal approach can be regarded as fitting into the realist school of thought. Note, however, that this is not at all a perfect fit. Law does not always coincide with a state's power interest (Scott 1994). There is no universally accepted definition of an international organization. But international organizations in the definition used here, include only intergovernmental organizations (IGOs). They should meet the following criteria (Bowett 1982: 6, n2; Brownlie 1990: 681): only states (or other international organizations) are members; the basis of the international organization is a treaty; the organization has been created in order to deal with the common interests of the participating states; it makes use of more or less permanent organs; the tasks and powers of these organs have been formally decided upon; the organization possesses some degree of international legal personality.

Secondly, the focus is on the powers and functions of international organizations that are formally agreed upon by the member states, rather than on the political aspects of international collaboration. This does not mean that the study of international law denies the importance of political processes. It is, however, above all the result of these processes (preferably in written legal form) that interests the international lawyer.

Although the process of European integration has been mainly based on political motives, the tools for constructing a larger cooperation or even a 'greater unity', as it is called in Article 1 of the Stat-

ute of the Council of Europe (1949), were mainly legal.[2] It is the concluding of an official legal document that ultimately satisfies even the politician. Despite the large number of forms of cooperation not based on legally binding obligations, 'political agreements' still offer less security than legally binding documents (treaties). This explains why almost all the major forms of cooperation within Europe are based on legal agreements (the Organization for Security and Cooperation in Europe, OSCE, is the most important exception), and why the main frameworks for international cooperation in Europe meet the above criteria of an 'international organization'.

With regard to the decisions made by international organizations, in the legal approach the focus is on legally binding decisions, rather than on the vast range of non-legal recommendations and resolutions commonly referred to as 'soft law' (e.g. Chinkin 1989). The distinction between decisions that are legally binding and those that are 'only' politically or morally binding is not always easy to make (see Bothe 1980; van Dijk 1987; Schachter 1977, 1981). Both forms contribute to the regulation of cooperation between states and one cannot say in general that one is more effective than the other. To say that the possibility of sanctions, in the case of non-compliance with the rules, points to the legal nature of those rules is too easy. Here again, the OSCE offers an example of commitments that are not legally binding, linked to an extensive system of compliance control.

With the increase in the number of international organizations, the study of international institutional law has developed into a separate discipline within the study of international law. Many international lawyers have concentrated their studies on the institutional aspects of international law, giving new insights into the functioning of international organizations, the relationship between international and national law, and the role international institutions can play in international cooperation and integration. Of these writers two especially deserve to be mentioned: D.W. Bowett, whose *The Law of International Institutions* has been the textbook for many students and practitioners since 1964; and H.G. Schermers (1980), who offers one of the most complete surveys in this field (a new edition is to appear in 1995).

The legal concept of institutionalization

International collaboration can take place on a scale that varies from

2. Many legal documents referred to in this chapter can be found in e.g. *International Organization and Integration: Annotated Basic Documents and Descriptive Directory of International Organizations and Arrangements*, The Hague, etc.: Martinus Nijhoff, 1981. For EC documents, see Rudden and Wyatt, 1994.

pure intergovernmental cooperation, through integration, to complete unification — in which case one can no longer exclusively speak of *inter*national cooperation, but of a *supra*national organization or even a federation. The distinctions between these forms are somewhat theoretical; states can make use of various forms in one issue area, or even within one organization. Thus 'intergovernmental cooperation', 'supranationalism' and 'unification' should be regarded as points on one scale. (Compare Weiler 1986: 344, who defines supranationalism as 'a processual rather than a fixed relationship or structure'.)

Intergovernmental cooperation, in its most classic form, can be understood as collaboration between governments of independent, sovereign states. Even if the character of this form of collaboration is *ad hoc*, there can be some institutionalization in the sense that agreements can be made to hold meetings on a regular basis, possibly even in the framework of an international organization. The intergovernmental cooperation on political issues that took place between the governments of the members of the EC during the period of the European Political Cooperation (EPC) is an example in this respect.[3]

Integration implies a certain degree of transfer of sovereignty from the state to the international organization. Cooperation has become more structural in the sense that international organizations are created with special tasks and powers in a specific field. With regard to some issues, these organizations have *supranational* features. On the global level, one may take the United Nations as an example; while most decisions are taken through intergovernmental cooperation, the Security Council is (or, legally speaking, at least should be) in complete control of a specific area (the use of force) and has been equipped with certain supranational powers to be able to enforce compliance. In Western Europe the European Union shows similar issue specific integration.

Unification requires a fusion of the national sovereign powers of different states. Unification does not necessarily mean that all the sovereign powers of a state are given up. A union can for instance be a federation, or may be created for certain fields or issues only. It goes beyond integration in the sense that the transfer of sovereignty in a specific field is complete. The organizations involved have strong

3. Before the Maastricht Treaty (1993), political cooperation took place in the framework of the EPC. Before the Single European Act (SEA) of 1987, political cooperation between the 'Twelve' took place without any written legal basis. The SEA (Article 30) has 'institutionalized' the meetings on political issues, while in the Maastricht Treaty the Common Foreign and Security Policy (CFSP) has obtained an even more structural position (see also Chapter 13 of this volume).

supranational powers, or, in the ultimate case, have replaced the national governments. The Economic and Monetary Union (EMU), which is to be finalized in Europe at the end of this century, is a clear example.

This division into different forms of collaboration (based on Robertson 1973) can best be made at an abstract theoretical level. Actual international collaboration cannot always be moulded into one of these concepts. One reason is that the process of increasing European cooperation has not taken place in a linear way. On the one hand, there has been the willingness on the part of states to increase international cooperation. At the same time this willingness has been hindered by the 'natural' tendency of states to preserve their own identity and to hold on to their sovereign powers as much as possible. These two processes can be regarded as complete opposites and often block each other. It is this everlasting battle between unification and diversification that has resulted in a European integration process comparable to driving a car as fast as possible, while keeping one's foot on the brake.

In a legal sense the various forms of collaboration are particularly interesting when their institutionalization reaches the point that an international legal agreement has been concluded, involving an international organization. Institutionalization thus defined, is the process of increasing cooperation, leading to the creation of an international organization.

Europe as a pioneer in institutionalization

In Europe, institutionalization as expressed in 'institution building' took on various forms. The first and most common form was to create an international organization to solve problems that went beyond the national level. Secondly, new organizations split off from existing ones, or were created by the same members. The latter has been quite common. The creation of the European Economic Community (EEC), following the success of the European Coal and Steel Community (ECSC), is an example. A third form may be called the 'example method': noticing the success of an organization, non-member states may decide to follow the example. Joining the already existing organization is either impossible (the states do not meet the criteria for accession) or not desirable (the existing organization has certain features or powers they do not feel comfortable with). This is why the European Free Trade Association (EFTA) was set up. The last form mentioned here relates to the real meaning of the term 'institution building': an institution is built on the foundations of a previous one in the same field, taking over the functions of the older organization and adding new ones. The creation of the Organization

for Economic Cooperation and Development (OECD) on the basis of the Organization for European Economic Cooperation (OEEC) is an example in this respect.

It is both interesting and logical to look at Europe when studying institutionalization. Interesting, because in Europe experiments in cooperation have taken place — and are still taking place — which involve unique restrictions on national sovereignty. Logical, because of the pioneering role Europe has played in this respect. Especially in the economic field, European cooperation is unique in the world. It is in Europe that the roots of international institutionalization can be found. In the study of international institutions, many reasons have been suggested to explain Europe's pioneering role (Robertson 1973: 1-4; Bowett 1982: 168).

First of all, increased interaction created a need for more institutionalization in almost all fields. Secondly, the growth of the world economy demanded closer institutionalization in order to make the European economy viable and competitive. Thirdly, the existence of the ideology of a united Europe provided an extra incentive. A fourth reason is the increased importance of regional institutions (Taylor 1993). The universal global system that was set up after the Second World War looked very promising at first, but proved to be disappointing in the sense that many states — due to the Cold War — were simply not able to work together. Finally, in the military field, the fear of Soviet aggression and the influence of a clear hegemonic power (the United States) should be mentioned. These reasons help to explain why institutionalization took place in the 'security' and 'welfare' fields, but not in the 'solidarity' field. It will be pointed out that the intrinsic dynamics of European institutionalization played an important role in this field.

Isolated examples of institution building in Europe can be found from before the beginning of its era. In the fourth and fifth centuries BC the Greek city states formed the Delian League for security reasons. From the Middle Ages onwards institutionalization took on many forms, varying from city-state and territorial state building, to the expansion of church institutions or the formation of the Hanseatic League. But 1815 is the appropriate starting point for the contemporary process. The Central Commission for the Navigation of the Rhine, founded in 1815, is the first international organization that fully fits our definition. The Concert of Europe, the balance of power system based on international conferences following the Napoleonic era, was established the same year. It would turn out to be the last era of ad hoc international conferences in the political military realm, in the tradition of the seventeenth and eighteenth century conferences. These had resulted in e.g. the peace of Westphalia (1648) or the

Treaty of Utrecht (1714). In the twentieth century the European states also turned to institution building to manage difficult, conflict-ridden issues that touch upon the essence of their identity; those relating to national sovereignty. Bowett (1982: 3) mentions five reasons for this: 1 for each problem which arose a new conference had to be convened; 2 time did not permit a real debate on the issues; delegations just delivered their statements; 3 special invitations from the host state (the initiator of a conference) were needed, which meant that sometimes not all states were invited; 4 the dogma of state equality and unanimity could hamper decision making; 5 a conference, as a political body, was not ideally suited for the determination of legal questions.

These disadvantages of the conference system resulted in a tendency to create permanent international institutions to deal with the specific problems. After the Rhine Commission had been introduced in 1815, nineteenth-century politicians showed a willingness to establish more institutions. Especially the commissions created to control the trade (and security) regime of a specific river — such as the Danube Commission (1856) — proved to be very successful. Other organizations included the Superior Council of Health (1838) to prevent the spread of cholera from Asia to Europe, and the International Telegraph Union (1865) which had a constitution that did not exclude non-European states as potential members. Generally, this is referred to as a process of functional international organization — a quasi non-political form of international cooperation. A second line of development took place in the highly political realm of balance of power, but in Europe institutionalized military-political alliances did not occur until after the Second World War. A third development during the nineteenth century was the organization of regular international Peace Conferences. Apart from some important successes in the settlement of disputes and the formulation of 'ius in bello', these were rather idealistic, if not utopian given their main goal of 'disarmament'. A new aspect was, however, that people discussed conditions for peace unrelated to the outcome of a recent war. Elements of all these three developments can be found in the League of Nations.

In terms of the main formative period for European institutions, however, the postwar period should be highlighted. From 1947 until the end of the fifties the main international organizations were established. Most of the organizations still play an important role today, if not even more important than at the time of their conception. This means that almost all the organizations in Europe as we now know them were set up within approximately ten years (for recent and extensive surveys, see Arter 1993 and Urwin 1995).

European institutionalization as a comprehensive development

The year 1947 is taken as a starting point because the Treaty of Dunkirk was concluded between France and the United Kingdom, providing for a security alliance between the two countries and mutual assistance. Additionally, a conference involving fourteen European states was held in the same year. It resulted in the Committee on European Economic Cooperation. The Committee laid the foundation for the establishment of the Organization for European Economic Cooperation (OEEC) which became a reality in 1948. With the OEEC, European economic institutionalization started, not with the positive idea of working together towards a common goal, but rather to ensure that the Marshall Aid was distributed equally.

In 1948 the Brussels Treaty was concluded as well. This treaty provided for cooperation in many fields (economic, social and cultural), with the concept of collective security as its main underlying idea. European institutionalization seemed to be easy to achieve, and in the same year the enthusiasm of sixteen European states resulted in an ambitious statement at the Congress of Europe: 'We desire a united Europe ... a Charter of Human Rights ... a Court of Justice ... a European Assembly.' ('Message to Europeans', adopted at the Congress of Europe, May 1948; quoted in Robertson 1973: 10). Here we see a clear reference to cooperation in the human rights field, alongside cooperation in the two other areas.

The Brussels Treaty was, *inter alia*, concluded in order to make collective self defence against a potential renewal of German aggression possible. At the same time it became clear, however, that it was not the Germans but the developments in Eastern Europe that posed the main threat. After the Berlin blockade particularly, American interest increased and on 14 April 1949, the North Atlantic Treaty was signed, resulting in the participation of the United States and Canada as well. North Atlantic cooperation required a new treaty. The Brussels Treaty was concluded with different goals in mind and in this respect the North Atlantic Treaty and its organization, NATO, was a logical successor. It should be realized that 'Europe' from this time on, until 1990, actually meant Western Europe — and more particularly Germany and France, with Great Britain in the background. Eastern Europe embarked on its own course of institutionalization — a process which ended at the same time as the Soviet Union, thereby indicating that it has not developed any meaningful dynamics of its own. The politically neutral countries on the European continent also charted their own course, resulting, for instance, in the EFTA.

With institutionalization in the economic and security areas increasing, the need for general political cooperation became clearer. One

month after the North Atlantic Treaty was concluded, the Statute of the Council of Europe was signed 'to bring European states into closer association' and 'to achieve greater unity between its members' (Preamble and Article 1 of the Statute of the Council of Europe). One of the main priorities of the Council of Europe was the drafting of a human rights charter. Already on 4 November 1950, the ten member states of the Council of Europe signed the Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention entered into force on 3 September 1953.

But the 'European unionists' were still not satisfied. The fear of another war between France and Germany could only be diminished by effective control over their coal and steel industry, it was argued. One year after the conclusion of the Statute of the Council of Europe, the French Minister for Foreign Affairs, Robert Schuman, proposed a 'High Authority' to supervise French and German production of coal and steel. On 18 April 1951, the Benelux countries and Italy joined this undertaking, and a new organization, the ECSC, was born. Although a European economic institution, the main reason for the Schuman Plan was to increase European security. 'The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible', Schuman argued (quoted in Jacobson 1984: 46).

The aim of a 'united Europe', however, had still not been reached. In the security field it was felt that whatever NATO's advantages, it did not contribute to the notion of a greater European unity. As a follow-up to their economic cooperation, the six ECSC states in 1952 signed the Treaty instituting the European Defence Community (EDC), which aimed at a merger of the armed forces of the ECSC member states. The developments between 'the Six' seemed to progress successfully, and the opportunity was seized to try and increase integration, at least between these six states. By 1953 a draft treaty had been completed, covering foreign policy, defence, industry and trade in one European Political Community. Neither this draft nor the EDC survived long, which abruptly but clearly drew the curtain on the optimistic views about European integration at the time. The draft treaty to establish the European Political Community remained a draft forever, while in 1954 the French parliament decided not to ratify the EDC treaty. This was due to the *detente* in Europe, a diminishing interest in defence matters, and the wish to prevent the uncomfortable situation of having French soldiers under German command.

The demise of the EDC most certainly came as a shock to the 'European unionists'. It was, however, advantageous for an already familiar arrangement, the Brussels Treaty. In 1954 this treaty was revived: the Western European Union (WEU) was founded, and new

members joined in 'promoting the unity and encouraging the progressive integration of Europe' (Preamble to the Protocol Modifying and Completing the Brussels Treaty, signed in October 1954; published in Bloed and Wessel 1994). The accession of Germany to the WEU in particular made this 'progresive integration' possible.

In the meantime, negotiations in the economic field had continued between the six ECSC states. On 25 March 1957 this resulted in a treaty establishing the European Economic Community (EEC) and a treaty establishing the European Atomic Energy Community (EAEC or Euratom). From the beginning of the 1970s, the number of EEC members willing to share in the success increased. By the end of the 1950s, the tariff reductions within the EEC sparked a response by some non-EEC members (the United Kingdom, Denmark, Norway, Sweden, Austria, Switzerland and Portugal) in the form of the EFTA (established in 1959).[4] In 1960, also in a broader framework, changes took place. The OEEC was revised because of an increasing world trade, and because the United States was troubled by the division of Western Europe into the Six (EEC) and the Seven (EFTA), resulting in the Convention on the Organization for Economic Cooperation and Development (OECD).[5] The most important change was the new membership of non-European states: the United States and Canada.

CEE countries did not take part in this process, but responded to Western institutionalization. From 1949, economic cooperation took place within the framework of the Council for Mutual Economic Assistance (CMEA), and security policy, from 1955 onwards, was coordinated by the Warsaw Treaty Organization (WTO). Both organizations ceased to exist in 1991.

The revolutions in Central and Eastern Europe at the end of the

1980s provided new opportunities in the sphere of institutionalization. Western Europe, however, proved to be somewhat reluctant to extend all its forms of cooperation in an easterly direction. In the economic field emphasis was placed on intensifying cooperation between the existing members, supplemented by increasing cooperation with the EFTA member states. On 1 January 1994 the European Economic Area (EEA) came into force, covering the entire area of the European Union and the EFTA (except Switzerland). The EEA was seen as an important step towards full membership of the EC, instituting *inter alia* 'the four freedoms' covered by the internal market provisions of the EC (free movement of goods, persons, services and capital). With the accession of Sweden, Finland and Austria to the European Union the EEA is now relevant for Liechtenstein, Iceland, and Norway only. As for the EC itself, the Single European Act (SEA) of 1987 ('towards Europe '92 and an internal market') was followed by the Treaty on European Union (Treaty of Maastricht) in 1992, which entered into force on 1 November 1993. This treaty modified the existing EC treaties (e.g. concerning the conclusion of an Economic and Monetary Union at the end of this century) and introduced a Common Foreign and Security Policy (CFSP) and Cooperation in the fields of Justice and Home Affairs (CJHA). The newly established 'European Union' thus explicitly comprises political and security provisions as well. The WEU is to form 'an integral part of the development of the Union'.

Nevertheless, the European Union should not be regarded as a Union which replaces the other main institutions in Europe. Transatlantic security cooperation continues to take place in the NATO context, and in the area of human rights protection, the Council of Europe remains indispensable.

While all the organizations mentioned have increased cooperation with the former socialist countries (almost all of these countries signed the European Convention on Human Rights; NATO introduced the North Atlantic Cooperation Council (NACC) and the Partnership for Peace; and the European Union concluded association agreements), not many important *pan*-European arrangements have been established. In 1975 almost all European states, as well as the United States and Canada, signed the Helsinki Final Act, thus committing themselves to greater cooperation in the fields of security, economy and human rights. Although the OSCE does not meet our criteria of an international organization — there is no *legal* document establishing the OSCE — it has become one of the central arrangements in Europe in the field of security (especially due to Confidence and Security Building Measures, CSBMs) and human rights in the framework of the so-called Human Dimension (Bloed and van Dijk 1991).

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4. Today the EFTA has a different composition; some members have joined the European Communities (the United Kingdom and Denmark in 1972, and Portugal in 1985), new states have acceded to EFTA (Liechtenstein, Finland and Iceland). In 1995 the EFTA members Sweden, Finland and Austria joined the EU.

5. In 1995, the OECD is composed of Australia, Canada, the fifteen EU member states, Iceland, Japan, New Zealand, Norway, Switzerland, Turkey, and the United States of America. Former Yugoslavia was an associated member. Of the former CMEA countries, so far only the people of the former GDR managed to become part of the OECD (as well as of the rest of the Western IO networks), due to the unification with the FRG. New candidates to join the OECD are Mexico, probably in 1995, followed by South Korea, Hungary, Poland, the Czech and the Slovak Republics, possibly in 1996. In June 1994 a cooperation accord was signed with Russia.

This overview of European institutionalization suggests a somewhat chaotic process. The pragmatic, almost random, nature of institutionalization can be seen as a reason. Thirty five years after the main formative period of European institutionalization (1947-59) came to an end, one may ask whether the West European states have achieved their official aims of integration and unification.

The transfer of sovereignty

When discussing the 'diminishing powers of states' or the 'increasing power of international organizations', it should always be kept in mind that the basis of international law is the sovereignty and equality of states. The principle of sovereignty implies that the consent of a state is necessary for that state to be legally bound (Bothe 1980: 67 and Schachter 1977: 296). It also implies, however, that once states have decided to ratify a treaty or to join an international organization, they are obliged to abide by the rules and obligations agreed upon. Joining an international organization may thus imply a transfer of certain aspects of sovereignty from the national to the international level. This transfer, sometimes referred to as *pooling* to stress the non-permanent and limited nature, always takes place voluntarily and in most cases states are free to leave the organization according to specific treaty stipulations, thus regaining the transferred sovereignty. The discussion on the transfer of sovereignty is particularly lively in the study of the constitutional law of the European Communities (Obradovic 1993).

It is interesting to investigate whether the optimistic statements put forward at international conferences, and in the preambles of some important agreements shortly after the Second World War, are reflected in the provisions of the treaties and conventions concluded since. In many instances the actual provisions of a constitutional treaty do not enable the organization to meet the goals set forth in that same agreement. For instance, the Preamble of the Statute of the Council of Europe provides: '[T]here is need of closer unity between all like-minded countries of Europe [and] it is necessary forthwith to create an organization which will bring European States into closer association.' Article 1 of the Statute adds: 'The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles ...' How this greater unity is to be reached is stated in Article 1(b): 'by discussion of questions of common concern and by agreements and common action ...' This means that no innovative processes were introduced in order to be able to create greater unity. The Council of Europe was bound to stick to traditional intergovernmental cooperation. In other words, the actual degree of supranationality comes

close to zero.

Though there are no supranational organizations in a strict sense, the degree of supranationality of international organizations is reflected in a number of legal features (Weiler 1986; Hay 1966). The three most important ones are: the composition of the main organs of the organization and the decisionmaking process; the types of decisions (legally binding or not) or the 'legislative powers' of the organization; the supervision powers of the organization.

When supranationality is considered in terms of further integration, these points can be used as criteria for determining the degree of integration (or unification) in Western Europe. Integration is defined here as the extent of formal, juridical transfer of sovereignty to an international organization.

Composition of organs

In almost every international organization, the concept of state sovereignty is reflected in the type and composition of its organs. In most organizations the main decisionmaking organ consists of the representatives of the member states; in European organizations this is often a 'Council of Ministers'. Only a few organizations possess organs that operate outside (or 'above') intergovernmental cooperation.

In the field of defence cooperation, organizations follow the general rule. Article 9 of the North Atlantic Treaty demanded that the parties establish 'a Council, on which each of them shall be represented, to consider matters concerning the implementation of this Treaty'. The same system was introduced in the WEU (Article VIII, modified Brussels Treaty).

In the field of economic cooperation some other organs can be found, alongside the intergovernmental ones. The ECSC introduced a 'High Authority' with members that would be 'completely independent in the performance of their duties [and] shall neither seek nor take instructions from any Government or from any other body' (Article 9, ECSC Treaty). This example has been followed by the EEC, which also introduced a Commission with independent members (Article 157, EC). (The Merger Treaty of 1965 resulted in the merger of the organs of the three EC organizations. The High Authority and the Commissions of EEC and Euratom became the Commission of the European Communities.) In addition to the Commission, the Court of Justice of the EC should be mentioned as an organ operating independently from the member states.

European cooperation in the area of human rights mainly takes place in the framework of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which entered into force in 1953. Two organs consist of representatives not acting on

behalf of their governments: the European Commission for Human Rights and the European Court of Human Rights. On the other hand the Council of Ministers is composed of the representatives of the member states.

Decisionmaking powers

Even more important, however, are the powers of the organization to make (legally) binding decisions for the member states, and the ways these decisions can be taken. Again reflecting the starting point of state sovereignty, the voting procedures for binding decisions in most IGOs make use of the principle of unanimity. Only in a very limited number of organizations can states be bound 'against their will' by a majority voting procedure. Although the principle of majority voting is relatively new, it has occasionally been introduced in organizations in the past as well. The Danube Commission (1856) made use of majority voting for a limited number of subjects (Bowett 1982: 6).

The binding force of decisions is an indication of the level of integration in a specific field. Most organizations can only make *recommendations* to the member states. While recommendations and other resolutions that are not meant to be legally binding, can also contribute considerably to the development of international law — in particular in the process of creating customary law these rules can obtain a binding nature (e.g. Singh 1993 and Schachter 1994) — some organizations have the ability to make legally binding decisions, thus binding the member states, or even the citizens of a state (in Europe the EC is the best example).

Security, traditionally, is a field in which states are hesitant to give up even parts of their sovereignty. The North Atlantic Treaty, certainly, provides for no special voting procedures, and decisions have to be taken unanimously. With unanimous voting procedures, questions relating to the capacity of an organization to make legally binding decisions become less interesting. The WEU also uses the principle of unanimity (Article VIII, Brussels Treaty), but the Council can sometimes decide by a qualified or even a simple majority. Decisions that can be taken by majority vote are, however, not very far-reaching and include, for instance, decisions on breaches of agreements restricting the manufacture of certain armaments. Therefore, the decisionmaking procedures of the WEU do not seem sufficient to meet the goal set forth in Article II of the modified Brussels Treaty of 1954: 'to promote the unity and to encourage the progressive integration of Europe'.

The CFSP of the EU contains a slight improvement in this respect. The 'joint actions' taken in this framework 'shall commit the Member States ...' (Article J.3 and 4, EU Treaty). Common posi-tions and decisions on joint action are to be binding on the member states (Wessel 1995), but it should be noted that these decisions must be taken unanimously. The member states can, however, (unanimously) decide to make some decisions during the development of a joint action by a majority vote (see also Chapter 13 of this volume).

Economic cooperation in Europe started off with an organization that could make binding decisions. Article 13 of the OEEC Convention stated that the Council could 'take decisions for implementation by members'. It should be kept in mind, however, that these decisions required unanimity. The transformation of the OEEC into the OECD did not result in an improvement in this respect. The OECD Council can still take binding decisions by a unanimous vote, but these decisions become binding only when the national ratification procedures have been completed. Member states that have not voted in favour of the decision (abstention) are not bound at all (Article 5 and 6, OECD Convention, 14 December 1960).

The alleged 'supranational' character of the ECSC and EC has been discussed extensively since the establishment of these organizations (see e.g. Kapteyn and VerLoren van Themaat 1990: 36-51). Here, it suffices to state that the decisionmaking procedures and the decisions that can be taken by the ECSC and the EC are unique, not only in Europe, but in the world. The Commission under the ECSC treaty has even more far-reaching powers than under the EC treaty. Article 88 of the ECSC treaty states, for example, that the High Authority may impose sanctions where states have not lived up to their treaty obligations. However, the fact that the consent of the Council of Ministers is needed puts this 'supranational' element into perspective. Nevertheless, here it is of more interest to focus on the EC, because of the very limited scope of the ECSC.

Although in the Luxembourg Accord (1966) the EC members agreed to take decisions by consensus as often as possible, the subsequent changes to the treaty (the SEA of 1986, and the Maastricht Treaty of 1992) reflect a trend towards an increasing number of subjects that can be agreed upon by a qualified majority. As far as the types of decisions are concerned, Article 189 of the EC mentions, *inter alia*, regulations, decisions and directives. While directives are binding on the member states only, regulations and decisions can be binding even on individuals. The Court of Justice of the EC has continuously stressed the special character of Community Law, in the sense that it is directly applicable in the member states and should be given priority when conflicting with national provisions. (See in particular the rulings of the Court of Justice in the *Van Gend en Loos*, 1963, and *Costa-ENEL*, 1964, cases, and in general Kapteyn and VerLoren van Themaat 1990: 36-51.)

While EC decisions can be legally binding on member states and their citizens, it should also be stressed that these decisions can be made by an organ in which no national representatives have a seat. When measuring the level of integration, it is important to stress that not only the Council of Ministers (the intergovernmental organ) can take binding decisions, but the Commission (the 'supranational' organ) as well. The members of the Commission are completely independent from their own governments (Article 157, EC). It should be kept in mind, however, that the decisionmaking powers of the Commission are limited to certain issue areas (e.g. competition policy). Its main task is to draft a proposal to be decided upon by the Council of Ministers. It could be argued that the EU Treaty even reduced the role of the Commission (e.g. in the new co-decision procedure), or that the Commission powers at least did not keep pace with the extended functions of the Council in some new areas. In the CFSP and the CJHA, the Commission plays a minor role, indeed, in the sense that no proposals from the Commission are required before the Council can make decisions. On the other hand one should keep in mind that the alleged reduced powers of the Commission in the co-decision procedure were directed in favour of the European Parliament and that the powers of the Commission in CFSP and CJHA are at least clearer formulated than in the pre-Maastricht period.

Economic institutionalization may score relatively high on the scale of 'supranationality'; in the field of human rights protection institutionalization has resulted in a comprehensive system as well. The institutions under the European Convention do have more extensive powers than the Council of Europe itself. While under the Statute of the Council of Europe the Committee of Ministers can only make recommendations by a unanimous vote, the same organ is allowed to take binding decisions with a two-thirds majority on alleged breaches of the obligations under the European Convention. (The Council of Ministers takes this decision only if the case has not been brought before the Court of Human Rights within the period of three months, cf. Article 31(1), European Convention.) The (independent) Commission is competent to make binding decisions on the admissibility of complaints ('petitions') received and has thus been provided with a powerful tool, because in determining whether a complaint brought before the Commission is admissible, the Commission often goes into the substance of a case. Especially when determining whether a petition is manifestly ill-founded, the Commission makes decisions that would otherwise (e.g. in a national legal procedure) be taken by a Court. However, some changes are forthcoming. Protocol No 11 aims at a drastic reformation of the system of the European Convention. According to the provisions in this Protocol, the Commission will

disappear, and the Court will take over its tasks.[6]

Looking at the main organizations, the conclusion must be that, particularly in the social-economic area (and to a lesser extent in the human rights area), the general principle of unanimous decision-making by state representatives has been partly abandoned. This conclusion should not, however, be overestimated. According to one study (van Ooik 1994), even in the EC, thirty per cent of the issues require unanimity to be decided upon. Further, there is a trend in the EC to increasingly make use of 'soft law' regulations rather than legally binding decisions (Snyder 1993).

Supervision and enforcement
Many people do not consider international law to really be law, the main reason being that, in most cases, there are no internationally organized sanctions that can be imposed on those who break it. Leaving aside the question of whether international law should be viewed in this manner, one way of looking at the degree of integration in Europe is to look at the options European organizations have for supervising, or even enforcing, compliance with the rules. In general, states are, of course, obliged to live up to the legal agreements they have made. This principle of *pacta sunt servanda* is universally recognized and codified in the Vienna Convention on the Law of Treaties (Article 26). In this system, however, it is always a state that has to take the initiative to sue or complain about another state. Practice has shown that states are hesitant to use the option of turning to an international organization, let alone an independent court. Much more effective is the system in which the international organization has the ability to watch over and control compliance by the member states.

The European organizations operating in the security area are not equipped with any special powers in this respect. Apart from the option noted above, neither NATO nor the WEU have a special legal procedure in case a member state has 'second thoughts' and decides not to participate in a joint action. International organizations, however, do not usually sit back and relax in the event of non-compliance by a member state. NATO, for instance, has developed a procedure whereby the other members confront the recalcitrant member state, in cases of unsatisfactory defence contributions. This procedure is used

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6. Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery was thereby established. See for a description and the text of this protocol: *Human Rights Law Journal*, vol 15, 29 July 1994, no 3. It is highly uncertain whether this Protocol will ever enter into force.

to ultimately convince the state to live up to its agreements.

In the field of economic cooperation a similar 'confrontation technique' is used by the OECD. This procedure provides the organization with an effective tool for using pressure techniques to make countries change their national policies.

The system based upon the EC treaties, however, should be mentioned more extensively. The Court of Justice of the EC in Luxembourg has played a very impressive and indispensable role in European economic integration. The Court can rule on alleged breaches of the treaty, brought before it by the Commission, the Council, the European Parliament, another member state or even, under certain circumstances, an individual. In addition to these procedures, national courts are allowed (or even obliged if there is no judicial remedy under national law) to ask a preliminary question, if a question of EC law is raised during the proceedings of a national court. Both national governments and national courts must follow the rulings of the Court of Justice. Although the former EEC Treaty did not provide for real sanctions when a member state ignores the Court's rulings, the Maastricht Treaty introduced the possibility of demanding a 'lump sum or penalty payment' from the recalcitrant state (see Article 171, 173 and 177 of the new, post-Maastricht, EC Treaty).

The system of human rights protection, as it has been introduced by the European Convention on Human Rights, also provides for a relatively extensive control mechanism. Apart from a reporting procedure, parties to the Convention can receive complaints from other states, and from individuals. Complaints are dealt with by the three organs established under the Convention. Individual petitions will only be accepted if the state in question has previously agreed that individuals under its jurisdiction may lodge a complaint when an alleged breach of obligations under the Convention has occurred. To date, all parties to the Convention have made a declaration acknowledging this right.

Under the European Convention, the rulings of the European Court of Human Rights are to be executed by the governments. States are bound to implement these rulings in their national legal orders and they are responsible in a legal sense. A more negative point is that sanctions are lacking in cases of non-compliance. European integration, in terms of supervision and enforcement, is still very limited in a legal sense. Nevertheless, it should be kept in mind that an international court can have functions beside those of supervision and enforcement. By using teleological interpretation methods an international court may play a stimulating role, resulting in an *Eigendynamik* of the integration process within an organization or issue area. Of both European courts this function can never be overestimated.

The degree of European integration

Looking at the overview of institutions given in this chapter, one has to conclude that the European states have done an impressive job with regard to institutionalization. Bearing in mind the numerous organizations in more specific fields, not mentioned in this chapter, one may say that there are not many internationally related subjects that are still the exclusive realm of individual states.

However, institution building is not the same as integration, let alone unification. Pure intergovernmental cooperation does not lead to 'a greater unity'. In fact, intergovernmental cooperation underlines the principle of state sovereignty. The above analysis shows that collaboration between states via international organizations (with the latter gaining some 'sovereign' powers) has only replaced intergovernmental cooperation to a very limited extent.

Looking at the organizations, the composition of their organs, and the decisions they can take, it is quite clear that national governments have continued to play a decisive role. Only in the economic and human rights field, can supranational features be discovered, in the sense that decisions in these areas can be legally binding, taken with a majority of the states only and by organs that are not composed of national representatives. The EC, of course, has introduced a legal order that in many ways cannot even be compared with traditional international cooperation. A number of subjects fall within the exclusive competence of the EC, which implies that the member states are not even allowed to make decisions in those areas. Integration in the area of 'welfare' can be said to have been relatively successful so far, when compared to other issue areas or other regions. Two other features underline this. First of all, the EC is the only European organization that can rely on its own financial means. Most international organizations are often faced with member states unwilling to contribute to certain aspects of the organization. Secondly, despite the introduction of some parliamentary control over other organizations (e.g. Council of Europe, NATO), the European Parliament is the only organ with some real legal powers and at least some political influence — if not when compared to national parliaments. One should therefore not get the impression that parliamentary control of decisionmaking in the EU is perfect. On the contrary, the influence of the European Parliament on Community decisions is very marginal, while in the areas of foreign and security policy, and justice and home affairs (introduced by the Maastricht Treaty) parliamentary control will almost be non-existent (Curtin 1993). Nevertheless, it is clear that these two aspects — budget and parliament — can be used to stress the degree of 'supranationality' as well.

At first sight, the Treaty on EU seems to be a further, if not a

final, step towards a complete unification of the economies of the Fifteen. When taking a closer look at the treaty, however, one can see that the 'battle between unification and diversification' has still not come to an end. This is already reflected in the first article of the treaty:

> This Treaty marks a new stage in the process creating an ever closer Union among the peoples of Europe, where decisions are taken as closely as possible to the citizens.[7]

This provision leads to the conclusion that, despite the treaty, a 'real' Union has still not been established, and that national governments will continue to play a very important role. One of the core principles of the treaty is the principle of 'subsidiarity' (Article 3B, EC) which generally boils down to the rule that the Community, with respect to issues not falling within its exclusive competence, will only act in cases where the ends cannot be sufficiently attained by the actions of the member states.

The cooperation of European states in the security area has remained strictly intergovernmental. Initiatives for future cooperation do not seem to have the potential to change this in any way. Among the Fifteen, post-Maastricht cooperation in the fields of foreign and security policy does not form part of the Community Law of the Union. Like cooperation in the areas of justice and home affairs, an intergovernmental character dominates the cooperation, no powers are given to the Court of Justice (Article L) and legal protection is extremely limited (Curtin 1993: n32).

The relatively extensive control and enforcement mechanisms of the systems established by the EC Treaties and the European Convention for Human Rights, on the other hand, indicate the willingness of the national states to become, at least in these areas, subject to some degree of supranationalism. Through the treaties, the national states have agreed to abide by the rulings of the two Courts (and to obey the regulations, decisions and directives that come from the direction of Brussels) even when these rules or Court rulings go against the national interest at that particular moment in time.

A real unification would, of course, go beyond this. It requires an integration of national policies in the more general political field and in the field of foreign affairs. Although political cooperation certainly

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7. Due to a panic reaction by the British, the 'F-word' had to be deleted. One of the original proposals, drafted by the Netherlands, included a slightly different Art. A: 'This Treaty marks a new stage in the process leading gradually to a Union with a *federal* goal' (emphasis added).

existed in the period covered by this chapter (e.g. in the Council of Europe as a general political organization) political issues as such have not really been parted with other states or international organizations. Initiatives were mostly informal or *ad hoc*, although sometimes arranged in a more structural form or even on a written legal basis. The EPC between the twelve EC members before the Maastricht Treaty is an example of the latter, and the CFSP certainly means an improvement in this respect. Within NATO political consultations take place, too. Nevertheless, political cooperation has always occured on an intergovernmental basis. There are not many reasons to assume that this will change in the near future (see Chapter 13).

A complete European unification would, of course, include Central and Eastern Europe. The best way would be to include the CEE states in the Western European institutionalization process, instead of starting institution building in that area from scratch again, as if we are back in 1945. The Commonwealth of Independent States (CIS) is a kind of survivor, but its future looks dim. The CIS was founded on 8 December 1991 and consists of all former Soviet republics with the exception of Georgia and the three Baltic states. It is not the successor of the former Soviet Union, and is not a subject of international law. Generally, CIS agreements have the status of declarations of intent, but its coordinating bodies, seated in Minsk (Belarus), do not function very well (Zagorski 1993).

Specific pan-European cooperation still lacks a legal framework. Even though, especially after the Cold War, the CSCE/OSCE has been transformed into an explicit arrangement in many pan-European fields (security and human rights are particularly important) it is not an international institution based on international *legal* agreements. The political character of the OSCE has been emphasized from the outset. Nevertheless, it cannot be denied that, in recent years, the OSCE has been developing more and more towards a further institutionalized framework. Many (new) organs have been created, each of them having special functions. The establishment of a Council of Ministers, a Senior Council composed of senior officials, and a Permanent Council as a sort of Board, has resulted in a more structural forum for cooperation. The supervisory mechanisms of the OSCE have also been refined, and under certain circumstances OSCE missions can investigate a (human rights) situation in a participating state without obtaining the consent of that state. Furthermore, the golden rule of decisionmaking by consensus has become subject to some restrictions (Bloed 1993). In that context, changing the name from 'Conference on' to 'Organization for' security and cooperation makes sense, but so far its qualities relate more to other features than legal commitments that reflect actual pan-European integration.

Legal or political limits?

When focusing on European integration in a legal way, taking into account the institutions that have been set up, the powers these institutions have been granted, and the 'quantity' of sovereignty transferred from the national state to international organizations, one has to conclude that a 'European Union', as proclaimed after the Second World War, has not yet been established, and that European integration has only taken place in a limited area. A limited area, not only with regard to the issues (economy and human rights), but also in a geographical sense (in a part of Western Europe only).

Widely held views in International Relations theory concerning a unification or integration process resulting from 'functionalist dynamics' (e.g. Mitrany 1966 and 1975; Haas 1965) or 'increasing interdependence' (some interpretations of Keohane and Nye 1977), ultimately leading towards 'the end of the nation state', cannot be confirmed by looking at the legal agreements states have been willing to make. On the contrary, the process of European institutionalization does not seem to continue in a linear way. Since the end of the main formative period of the European institutions, no new initiatives leading to greater unity in a legal sense have been successful. Especially in the fields of security and foreign affairs, means of arriving at a form of collaboration that goes beyond (traditional) intergovernmental cooperation are limited. On the other hand, the end of the Cold War did not disturb the achieved levels of integration.

Taking into account the present tendency of many states to hold on to, or even strengthen, their national identity — despite the question of whether it hampers the necessity for or desirability of extended cooperation — one may have to conclude that this is probably as far as we can go with the (legal) institutionalization of Europe. Alternately, some recent developments, partly as a result of the end of the Cold War (and the signing of a Charter for a New Europe), could lead to a different conclusion: that a new phase has just emerged. In this phase, developments reflect a tendency towards a broadening of European cooperation, but this happens at the cost of a deepening. An important development concerns the enlargement of the geographical area of some important institutions. The improved relationship between the two formally separated parts of Europe led e.g. to the development of the Council of Europe into a pan-European organization. At the moment almost all European states are members of the Council of Europe and a party to the European Convention, which makes them subject to the rulings of the Court of Human Rights. This has led President Mitterrand to declare that the Council of Europe is the most important institution at the moment (Statement of President Mitterrand at the Summit of the Council at Vienna, 9 October 1993).

Pan-Europeanism has penetrated the security area as well. Apart from the OSCE, the NACC and Partnership for Peace, the initiative — confirmed by the EU — to create a Stability Pact, including all European states, can serve as an example.

Nor have matters come to an end in the EU. Requests for membership have been submitted by many states, while the EU including the remaining EEA states provides for a free trade zone larger, in terms of number of people and volume of trade, than that of the North American Free Trade Association (NAFTA). Alongside the EEA, the EU has concluded association agreements with a number of Central European states. The difficulties the EU faces with respect to a possible enlargement are well reflected in the words of former Commission Chairman, Jacques Delors:

> We have to multiply the links and work out a new political and institutional programme for a structure comprising twenty-four or even thirty countries. There can be no Greater Europe without the Community, but neither can there be a future for the Community without development. (*The Guardian*, 14 October 1991, quoted in Arter 1993: n13).

Regarding the EU, a meeting is scheduled for 1996, where the member states, *inter alia*, will investigate the possibilities of moving certain issues from the intergovernmental to the Community pillar of the Union (Article B and N, para. 2, Treaty on EU), and where new scenarios can be discussed to deal with the conflicting goals of integration and enlargement (multiple speed, concentric circles, hard-core group, variable geometry or 'Europe à la carte'; Curtin 1995).

It is clear that the ideology of a real 'European Union' has survived the setbacks it has had to suffer during the past decades. Whether the new plans and initiatives concerning institutionalization in Europe will lead to more European integration, will continue to depend on the will of the states to equip the institutions with real powers. On the other hand, as Dehausse and Weiler clearly indicated, 'there is no absolute correlation between institutional and substantive integration: a more supranational structure will not necessarily end up producing more integrated norms'. They emphasize, however, that 'legal and institutional factors largely condition the evaluation of the integration process' (Dehausse and Weiler 1990: 247, 252).

Security cooperation is severely hindered by two different, but interlinked, problems: states are not ready to give away parts of this sensitive feature of sovereignty (which will result in a continuation of *ad hoc* decisionmaking, depending on the political will of an increasing number of European states participating in the process); and the

chosen forms of cooperation with the CEE partners provide for a complex mixture of different institutions and arrangements, with no clear distinctions and obligations. All in all, the current state of affairs in Europe does not offer too many reasons for optimism if a united Europe is still what we are longing for in the end.

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