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How International Organizations Affect the Legal Position of Non-Members

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2.1 INTRODUCTION

International organizations are typically viewed as mechanisms for enhancing cooperation among states that share common goals, such as maintaining international peace and security, protecting and promoting human health or achieving greater prosperity by establishing closer economic ties. By resorting to institutional frameworks where collective decisions can be made and delegating some authority to independent secretariats and dispute settlement mechanisms, states can overcome some of the inefficiencies and costs of unilateral action in a decentralized political system.[1] It is, thus, no surprise that much scholarship focuses on what happens *within* international organizations.

At the same time, in pursuing their purposes and fulfilling their functions those organizations are often required to engage with the outside world by conducting 'external relations' with non-member states and non-member international organizations on the international plane.[2] Those external relations may be sporadic, arising in unexpected ways from the functioning of an organization over time, or they may constitute a core element of the

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[1] For an influential account, see K. Abbott and D. Snidal, 'Why Do States Act through Formal International Organizations' (1998) 42 *Journal of Conflict Resolution* 3.

[2] And, indeed, with other entities, both governmental and non-governmental. The relations with which this chapter is mainly concerned are those of international organizations with non-member states/international organizations or comparable entities. Relations with other entities are covered elsewhere in this volume.

organization's mandate. Either way, by interacting with the outside world, international organizations end up affecting it.

The myriad forms in which organizations relate with non-members on the international plane form a rich universe for sociological, political and legal study. Rather than attempting to provide a systematic account of those relations, let alone a comprehensive one, what I propose to do in this chapter is to offer some reflections on how international organizations may affect the legal position of non-members by either imposing rules on them or exporting rules to them. To borrow José Alvarez's phrase, the chapter considers the 'external ripples' of 'internal law' of international organizations.[3]

To that end, it is convenient to distinguish between universal international organizations (UIOs) and regional international organizations (RIOs), for the size of membership and the character of the goals pursued may determine how the organization engages with the outside world. UIOs may show a tendency to impose rules on non-members in ways that put into question and potentially reshape the structural principles that underpin the international legal system. In contrast, RIOs tend to persuade non-members to adopt rules by enlisting their consent and cooperation, though not without raising specific normative concerns in the process. To substantiate these broad insights, the chapter turns to practices stemming from the United Nations (UN) and the International Criminal Court (ICC) (Section 2.2) and from the Organization for Economic Co-operation and Development (OECD) and the European Union (EU) (Section 2.3).

It must be conceded from the outset that not all or even most UIOs or RIOs maintain significant external relations, let alone attempt to affect the legal position of non-members.[4] The analysis provided here does not seek, therefore, to offer an account of how the average international organization attempts to shape the outside world. Rather, by focusing on organizations that stand out for the ambition of their purposes, the extent of their powers or their capability to engage non-members, I offer some elements for appraising the potential legal and normative impacts of the use of a distinct legal construct, that of the international organization. The value of considering more 'extreme' examples, even when they may seem somewhat unique in the current institutional landscape, is that it allows us to assess the extent that

[3] I borrow this term from J. E. Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2005), 143–146.

[4] For a comparative analysis, see F. L. Bordin et al., *Final Report of the ILA Study Group on the International Law of Regional Organizations* (International Law Association, 2024).

collective action through international organizations changes not only international cooperation but also the international legal system itself.

2.2 UNIVERSAL INTERNATIONAL ORGANIZATIONS ENGAGING NON-MEMBERS

2.2.1 *Legal Effects of Decisions of UIOs Addressed at Non-Members*

International organizations of a universal character, when understood as institutions whose 'membership and responsibilities are on a worldwide scale',[5] may have little opportunity to maintain external relations. If they are successful in attracting large swathes of the international community, there are few non-members with whom they can interact on the international plane. Yet, the goal of universal membership is not always straightforward, and, on its way towards it, an organization may have to deal with a considerable number of non-members. In the case of the UN, 51 original members adopted the Charter, leaving several states to seek admission at a later stage.[6] Between 1950 and 1955, due to Cold War politics, no new members were allowed to join the organization, until the 'logjam' was broken with the admission of 16 states, paving the way for the UN to embrace universality of membership in its practice for the years ahead.[7] Moreover, full universality of membership may be impossible to achieve. Even when an organization becomes universal in the sense that it manages to attract (almost) all existing states, a small outside world will remain in the form of new states and other international organizations and entities that do not qualify for membership.

The external relations that UIOs maintain are marked by a particular challenge: how to perform 'responsibilities on a worldwide scale' without

[5] The 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character defines, in Article 2(1)(2), 'international organization of a universal character' as 'the United Nations, its specialized agencies, the International Atomic Energy Agency and any similar organization whose membership and responsibilities are on a worldwide scale'.

[6] It is easy to forget that the UN Charter does not require universality of membership, rather reserving admission to 'peace-loving states which accept the obligations contained in the … Charter and, in the judgment of the Organization', to be jointly exercised by the Security Council and the General Assembly, 'are able and willing to carry out these obligations': UN Charter, Art. 4.

[7] For a comprehensive study of the evolution of thinking and practice within the UN, see T. Grant, *Admission to the United Nations: Charter Article 4 and the Rise of Universal Organization* (Martinus Nijhoff, 2009).

having legal authority over the whole world? In other words, how can they coach non-members into supporting – or at least not impeding – the fulfilment of their universal goals and functions? Article 2(6) of the UN Charter provides a fascinating case study of an UIO identifying and raising this challenge. It prescribes that '[t]he Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security'. In the words of Hans Kelsen, an influential early commentator, '[t]his provision is a consequence of the fact that the purpose of the United Nations … is not only to maintain peace within the Organisation but within the whole international community, that is to say: to maintain world peace'.[8]

But what can a UIO like the UN legally do to ensure that non-members act in accordance with its principles? The legal effect of Article 2(6) has been the subject of academic debate. Does it impose obligations on non-members, or does it merely create an obligation for the organization itself to take action that ensures that non-members refrain from threatening or using force in international relations and settle disputes peacefully? In either case, does Article 2 (6) provide a legal basis for the organization to use military force against a non-member? Kelsen has provocatively suggested that, if one accepts that Chapter VII action against a non-member is possible, '[t]he Charter attaches a sanction to a certain behaviour of non-Members', thus constituting a 'true obligation of non-Members to observe the contrary behaviour'.[9] But the extrapolation that Article 2(6) creates legal obligations for non-members runs into a major obstacle of principle: it contravenes the *pacta tertiis nec nocent nec prosunt* rule, according to which a treaty does not impose rights or obligations on a third party absent its consent.[10] In a system based on sovereign equality, states cannot make an agreement for the purpose of imposing obligations on third parties.[11] That is why mainstream commentary tends to emphasize that the

[8] H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (Stevens and Sons, 1950), 106.

[9] Ibid., 107 (though, as will be seen, Kelsen's position is more nuanced).

[10] See Art. 34, 1969 Vienna Convention on the Law of Treaties.

[11] As stated in the *Friendly Relations Declaration*, sovereign equality entails that states 'have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political and cultural systems', and, in particular, that states are 'juridically equal', enjoy 'the rights inherent in full sovereignty', and have 'the duty to respect the personality of other States': UNGA Res 2625(XXV) (1970). From that it follows that, as a default proposition, the legal position of a state may not be affected by majoritarian decision-making.

only addressee of Article 2(6) is the UN itself.[12] A corollary of that proposition is that, in its relations with non-members, the UN is constrained by the rules of general international law.[13] It follows that enforcement action against non-members in cases of individual or collective self-defence would be lawful, but that the proactive use of military force to address threats to international peace and security more generally would be proscribed unless a rule of general international law could be invoked in its support.

This cautious interpretation of Article 2(6) is borne out by the International Court of Justice's advisory opinion in *Namibia*. In Resolution 276 (1970), the Security Council had called upon 'all States ... to refrain from any dealings with the Government of South Africa' that would be inconsistent with its finding that 'the continued presence of the South African authorities in Namibia [was] illegal'.[14] Considering the legal consequences of that resolution for non-member states, the Court found that 'the termination of the Mandate [by the UN General Assembly] and the declaration of the illegality of South Africa's presence in Namibia [were] opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law'.[15] That being the case, 'no State which [entered] into relations with South Africa concerning Namibia [could] expect the United Nations or its Members to recognize the validity or effects of such relationship, or of the consequences thereof'.[16] While the Court stated that it was for 'non-member States to act in accordance with those decisions',[17] that was not because the Charter imposed obligations on them. Indeed, the Court emphasized that non-members were 'not bound by Articles 24 and 25 of the Charter'.[18] The basis for the obligation lay instead in general international law. In the words of Judge Onyeama, '[t]he legal consequences for States [were] those which [flowed] automatically, under international law, from the unlawful continuation of South Africa's presence in Namibia'. They would

[12] See, e.g. J. Frowein, 'The United Nations and Non-Member States', (1970) 25 *International Journal* 333, 337–338; K. Widdows, 'Security Council Resolutions and Non-Members of the United Nations' (1978) 27 *International and Comparative Quarterly* 459, 460–461; and S. Talmon, 'Article 2(6)', in B. Simma et al. (eds.), *The Charter of the United Nations: A Commentary* (Oxford University Press, 2012), 252, at 260–262.

[13] Talmon, 'Article 2(6)', 262.

[14] UNSC Res 276 (1970), operative clauses 2 and 5.

[15] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, para. 126.

[16] Ibid.

[17] Ibid.

[18] Ibid.

not 'extend to enforcement measures which may or may not be adopted by States individually, or the United Nations collectively, to remove South Africa from the Territory or to assert the authority of the United Nations over the Territory, in the absence of treaty provisions or a customary rule of international law requiring such measures to be adopted'.[19]

That said, the practice of the UN Security Council reveals a more complex self-understanding of the legal effects of Article 2(6) than the *Namibia* opinion suggests. Two resolutions close in time to the issuing of the opinion provide an illustration. In Resolution 314 (1972), adopted under Chapter VII, the Council urged 'all States to implement fully all Security Council resolutions establishing sanctions against Southern Rhodesia, in accordance with their obligations under Article 25 and Article 2, paragraph 6, of the Charter of the United Nations'.[20] The Council did not explain what those obligations under Article 2(6) were, but it evidently assumed their existence. In Resolution 418 (1977), also adopted under Chapter VII, the Council went as far as *deciding* that all states were to join an arms embargo against South Africa. A contemporaneous commentator who was sceptical of the view that Article 2(6) imposed obligations on non-members, nevertheless conceded that the language employed in Resolution 418 evinced an intention to bind them.[21]

Also of interest is the UNSC practice in relation to other international organizations, which arguably provide the most important focal point for the application for Article 2(6) nowadays. That those organizations do not qualify for UN membership has not stopped the Council from addressing them. There are no legal difficulties in the Council calling upon 'all States and all international and regional organizations, including the United Nations and its specialized agencies, to act strictly in accordance with [provisions imposing an arms embargo against the Taliban]', or '[encouraging] Interpol to intensify its efforts with respect to the foreign terrorist fighter threat and to recommend or put in place additional resources to support and encourage national, regional and international measures to monitor and prevent the transit of foreign terrorist fighters'.[22]

[19] *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, Separate Opinion of Judge Onyeama, at 148. The Court's opinion in *Namibia* later became a key precedent for the International Law Commission's articulation, in Article 41 of the Articles on the Responsibility of States for Internationally Wrongful Acts, of the obligations of non-recognition and cooperation to put an end to serious breaches of *jus cogens* norms: ILC Yearbook 2001, vol II, Part Two, at 115.

[20] UNSC Res 314 (1972).

[21] Widdows, 'Security Council Resolutions', 462.

[22] UNSC Res 1333 (2000) and UNSC Res 2178 (2014).

But what if the Council were to 'decide' or 'demand' that an organization take a particular course of action?[23] Should that organization be viewed as bound by the UN Charter? In the *Kadi* case, the Court of First Instance of the European Community (now the EU) observed that:

> unlike its Member States, the Community as such is not directly bound by the Charter of the United Nations and that it is therefore not required, as an obligation of general public international law, to accept and carry out the decisions of the Security Council in accordance with Article 25 of that Charter. The reason is that the Community is not a member of the United Nations, or an addressee of the resolutions of the Security Council, or the successor to the rights and obligations of the Member States for the purposes of public international law.[24]

But this may not be the end of the matter, as suggested, for example, by the recent work of the International Law Commission on the law of international organizations. Article 67 of the 2011 Articles on the Responsibility of International Organizations (ARIO) is a saving clause providing that the Articles 'are without prejudice to the Charter of the United Nations'. In the commentary, the ILC observes that 'even if the prevailing effect of obligations under the Charter may have a legal basis for international organizations that differs from the legal basis applicable to States, one may reach the conclusion that the Charter of the United Nations also has a prevailing effect with regard to international organizations',[25] pointing to the Security Council's practice of not distinguishing between states and international organizations in ordering arms embargoes.

What then might be the differing legal basis for the Charter to have such a 'prevailing effect'? One possibility is for the UN to conclude treaties with the other organizations. For example, through Article VII of the Agreement

[23] In this connection, it is noteworthy that the Charter refers, in Chapter VII, to 'regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action'. In particular, Article 53 prescribes that '[t]he Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority', provided that 'no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council'. What the drafters of the Charter may not have foreseen, forever, is that such regional arrangements would take the form of entities with separate international legal personality which, by application of the normal rules of the law of treaties, could be regarded as third parties in relation to the Charter.

[24] Case T-315/01, *Kadi v. Council and Commission (Kadi I)*, ECLI:EU:T:2005:332, para. 192. On appeal, the European Court of Justice reversed the Court of First Instance's judgment, focusing solely on the question of the compatibility of sanctions with EU law, without pronouncing on the applicability of the Charter to the EU or on the possibility of reviewing UNSC resolutions under international law.

[25] (2011) *Yearbook of the International Law Commission*, vol. II, Part Two, at 104–105.

between the United Nations and the World Health Organization (WHO), the WHO 'agrees to co-operate with the [Security] Council in furnishing such information and rendering such assistance for the maintenance or restoration of international peace and security as the Security Council may request'.[26] But it could be argued more generally that other international organizations must comply with Chapter VII measures for the simple reason that they are entirely composed of UN member states that remain bound by the Charter when they act through those organizations. This view finds some support in the reasoning of the Court of First Instance in *Kadi*, according to which 'in so far as the powers necessary for the performance of the Member States' obligations under the Charter have been transferred to the [EU], the Member States have undertaken, pursuant to public international law, to ensure that the [EU] itself should exercise powers to that end'.[27] Or, as the Court said in another passage from the same judgment, perhaps '[by] conferring those powers on the [EU], the Member States demonstrated their will to bind it by the obligations entered into them under the Charter of the United Nations',[28] so that, even if the EU is not bound by the Charter as a party, it 'must be considered to be bound ... in the same way as its Member States, by virtue of the Treaty establishing it'.[29] The claim that the decision of the UN members to transfer to another organization powers in the field of international peace and security gives rise to an obligation to abide by the Charter under the internal law of that organization, if accepted, would no doubt contribute to ensuring that the organization act in accordance with UN principles in line with Article 2(6). In that scenario, however, the 'prevailing effect' of the Charter would be limited, as the UN has no standing under public international law to demand that other organizations comply with their own internal law. For the 'prevailing effect' to obtain under public international law, it is essential that those organizations owe the UN obligations on the international plane.

Pressure on Article 2(6) may likewise arise from the burgeoning practice of the Security Council to address its resolutions to non-state actors other than international organizations. In Resolution 1244 (1999), for example, the Council demanded that 'the [Kosovo Liberation Army] and other armed

[26] Article VII, Agreement between the United Nations and the World Health Organization (1948). Other relationship agreements are less committed. See, e.g., Article VI, Agreement between the United Nations and the International Monetary Fund (1947) (undertaking to 'have due regard for decisions of the Security Council under Article 41 and 42 of the United Nations Charter' and agreeing to 'assist the Security Council by furnishing to it information').

[27] *Kadi I*, para. 198.

[28] Ibid., para. 200.

[29] Ibid., paras. 192–193.

Kosovo Albanian groups end immediately all offensive actions and comply with the [applicable] requirements for demilitarization'. The International Court scrutinized that resolution in the *Kosovo* advisory opinion, where the question was posed whether the declaration of independence issued in 2008 was in accordance with the legal regime established for Kosovo by the Council. The Court recalled that 'it has not been uncommon for the Security Council to make demands on actors other than United Nations Member States and inter-governmental organizations'[30] but ultimately concluded that Resolution 1244 did not address a prohibition to declare independence to the authors of the declaration.[31] But a tricky question that the Court did not examine was whether the Security Council could have prohibited the authors of the declaration, whom it defined as 'persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration',[32] from attempting to secede from Serbia. In other words, may a UNSC Resolution as such create a prohibition on secession? The power of the Security Council to regulate the conduct of non-state actors can be justified as a transfer of jurisdiction from member states to the United Nations in cases where regulating the conduct of persons operating within a state may be required to maintain international peace and security. But what if said non-state actors have established – or are in the process of establishing – a new state? It follows from the reasoning of the Court in *Kosovo* itself that, under international law, the parent state may not make an attempt at secession invalid merely by opposing it.[33] If a member state cannot legally require 'representatives of the people' seeking to create a new state to stop, how can the Security Council presume to do so? Without engaging with those tricky questions, the Court seems to have assumed that the authors of the declaration of independence could have violated Resolution 1244 if only the resolution had been drafted differently.[34]

[30] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *Advisory Opinion*, ICJ Reports 2010, para. 116. For a helpful discussion of UNSC practice and the ability to bind non-state actors, see S. Murphy, 'Reflections on the ICJ Advisory Opinion on Kosovo: Interpreting Security Council Resolution 1244 (1999)', in M. Wood and M. Milanovic (eds.), *The Law and Politics of the Kosovo Advisory Opinion* (Oxford University Press, 2015), 134, 161–163.

[31] *Kadi I*, paras. 117–118.

[32] Ibid., para. 109.

[33] Ibid., paras. 79–91 (where the Court concludes that there is no specific prohibition on declarations of independence under customary international law, and that 'the scope of the principle of territorial integrity is confined to the sphere of relations between States').

[34] Indeed, the relevant section of the opinion is titled 'The question whether the authors of the declaration of independence acted in violation of Security Council resolution 1244 (1999) or the measures adopted thereunder'.

2.2.2 *Systemic Implications of UIOs' Aspiration to Regulate Non-Members*

The practice of the Security Council and the way it has been received suggest that there is more to the UN Charter and Article 2(6) than meets the eye. While Article 2(6) can be squared with the traditional law of treaties, there is a growing sense that the UN Charter enjoys some sort of special status allowing the Security Council to bind whomever it addresses in its Chapter VII decisions. That intuition shows in a fascinating yet somewhat overlooked decision of Trial Chamber III of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Milutinovic* case. The defence had sought to challenge the jurisdiction of the Tribunal by arguing that, when the alleged crimes were committed, the Federal Republic of Yugoslavia (FRY), today's Serbia, was not a UN member over which the UNSC could exercise authority.[35] The Trial Chamber concluded that, in the relevant period, the FRY could be regarded as a UN member for certain purposes, but also considered the alternative scenario where the FRY was viewed as a non-member. It started its analysis with the disclaimer that it was not 'necessary to pronounce on the general question of the application of the United Nations Charter to non-member States'.[36] The Chamber placed emphasis on the fact that the UNSC had the power to take action at the onset of the conflict in 1991, prior to the breakup of the former Yugoslavia. The main element of its reasoning was that it would be 'odd' if that power had been 'somehow lost in 1993 by the circumstance of the non-membership of the United Nations of any of the States that formerly constituted the SFRY'.[37] In a striking passage, the Chamber added that:

> The constitutional character of the Charter, its near universal membership, the critical importance to the international community of the goal of the maintenance of international peace and security, are all factors that combine to render the Chapter VII resolution establishing the Tribunal applicable to any country that was a part of the former SFRY, irrespective of its United Nations membership at the time of the adoption of that resolution, or at the time of the commission of the offences.[38]

That very much reads as a pronouncement on 'the general question of the application of the United Nations Charter to non-member States' – and one

[35] The ICTY was created by UNSC Res 827 (1993).
[36] *Prosecutor v Milutinović and others*, Decision on Motion Challenging Jurisdiction, Case No IT-99-37-PT, ICL 63 (ICTY 2003), para 55.
[37] Ibid., paras. 55–61.
[38] Ibid., para. 62.

which offers a very different account from that of the International Court in *Namibia*. The Charter, the Trial Chamber suggests, enjoys a special 'constitutional' status linked to the 'near universal membership' of the UN and the 'critical importance' of its mandate.

Commentators have tried to grapple with the potentially special status of the Charter in different ways. Bardo Fassbender attempts to explain it by appealing, as the Trial Chamber in *Milutinovic* did, to the Charter's constitutional character: 'the Charter, as the constitution of the international community, is binding on all subjects of international law'.[39] His way around the *pacta tertiis* objection is to propose a 'functional interpretation of the concept of sovereignty', according to which sovereign equality 'depends on a comprehensive prohibition of the use of force in international relations, and a working mechanism to implement and enforce this prohibition' such as that established by the Charter.[40] Another way of making sense of the Charter's special status is to argue, as Stefan Talmon does, that the system of collective security established by the UN Charter now forms part of customary international law. In his words:

> [t]he practice of UN organs . . ., the opinion expressed by member States, and the consistent and uniform practice of non-member states suggest that at least since the 1990s the provisions of the Charter dealing with international peace and security have acquired the status of rules of customary international law that are binding on non-members, both States and non-State actors alike, independently of the Charter.[41]

Neither of these approaches is entirely convincing. While the constitutionalist approach comes across as excessively deductive (Talmon criticises it as an instance of 'law-making by taxonomy'[42]), it is unclear whether treaty rules establishing an organ of an international organization possess the 'fundamentally norm-creating character' required for it to be 'regarded as forming the basis of a general rule of law'[43] or whether the practice of states since the 1990s would meet a rigorous application of the test of *opinio juris*. At the same time, dismissing Security Council practice and its progressive acceptance in the case law and academic commentary would be reductive. The difficulty to

[39] B. Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff, 2009), 150.
[40] Ibid., 111–113.
[41] Talmon, 'Article 2(6)', 279.
[42] Ibid.
[43] *North Sea Continental Shelf Cases (Germany/Denmark; Germany Netherlands)*, Judgment, [1969] ICJ Reports, para. 72.

come up with a clear legal account derives from the fact that, as Kelsen presciently observed in 1950, '[f]rom the point of view of existing international law, the attempt of the Charter to apply to states which are not contracting parties to it must be characterised as revolutionary', so that '[w]hether it will be considered as a violation of the old, or as the beginning of a new international law, remains to be seen'.[44] This appears to remain a situation of uncertainty in the law, even if practice around the Charter does confirm Kelsen's intuition that the Charter attempts to apply to non-members and if, at a time when almost all states are UN members, there seems to be little, if any, appetite to resist that attempt.

Whatever the most plausible legal position may be, Article 2(6) and UN practice vis-à-vis non-members provide a dramatic illustration of an aspiration that is latent in how UIOs engage the world. That is the aspiration to bend non-members to their will – or, in Kelsen's more decorous words, 'the tendency to be the law not only of the United Nations [or *a fortiori* of any other relevant organization] but also of the whole international community, that is to say, to be general, not only particular, international law'.[45] To some degree, every organization that seeks universality shows the potential to become a hegemonic project. The lengths to which they can or will go to impose their rules on the outside world will of course depend on the stakes involved – one does not find, for example, provisions analogous to Article 2 (6) in the constituent instruments of UN specialized agencies with technical mandates. There may also be organizations whose 'membership and responsibilities are on a worldwide scale' but which will neither need nor desire to impose their rules on non-parties, at least overtly. The World Trade Organization's avowed priority, for example, is to establish preferential relationships among 'members of the club' instead of enforcing a unitary trade regime on the whole world.[46] Be that as it may, when a majority of states seriously invested in pursuing a goal that demands universal adherence create an international organization, action geared towards making non-members comply may put pressure on the international legal system, raising the question of whether the rules of the organization apply only among members or whether they rather enjoy a special status, whether 'constitutional' or 'customary'.

[44] Kelsen, *Law of the United Nations*, 110.

[45] Ibid., 109.

[46] Which is not to say that the practice of those organizations may not affect customary international law in meaningful ways. On the impact on custom of *ad hoc* arrangements that are often mistakenly viewed as mere *lex specialis*, see J. E. Alvarez, 'A BIT on Custom' (2009) 42 *New York University Journal of International Law and Politics* 17.

Another interesting (if less straightforward) example of this aspiration is provided by some of the decisions of the International Criminal Court[47] on whether state official immunity posed a procedural obstacle for the parties to the Rome Statute surrendering to the Court Omar al-Bashir, then head of state of Sudan. The question arose because Sudan is not a party to the Rome Statute – the situation had been referred to the ICC by the UN Security Council.[48] Article 27(2) of the Statute prescribes that '[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'. But Article 98(1) provides that

> [t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

That means that, instead of ordering the parties to ensure that non-parties cooperate with the ICC, as Article 2(6) of the UN Charter does for the UN, the Statute directs the parties to respect the rights of third states.[49] That is nicely captured by the decision of Pre-Trial Chamber II in relation to South Africa, where it observed that the rule in Article 27(2) 'applies only to States that have consented to such a regime', whereas 'States that are not parties to the Statute in principle have no obligation to cooperate with the Court and the irrelevance of immunities based on official capacity as enshrined in

[47] Which is (and perceives itself) as an international organization: Decision on the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ICC-RoC46(3)-01/18, Pre-Trial Chamber I (2018), para. 48 (affirming the ICC's objective international legal personality in the light of case law and doctrine pertaining to IOs. The Court refers to itself as a 'legal-judicial-institutional entity').

[48] UNSC Res 1593 (2005).

[49] The ICC Statute contains only very modest provisions on external relations. Art. 54, for example, empowers the Prosecutor to '[s]eek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate'. Art. 87 allows the Court to 'invite any State not party to this Statute to provide assistance . . . on the basis of an *ad hoc* arrangement, an agreement with such State or any other appropriate basis'; directs the Court to 'inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council' if a non-party fails to cooperate; and enables the Court to 'ask any intergovernmental organization to provide information or documents' or 'for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate'.

article 27(2) of the Statute has no effect on their rights under international law, which Article 98(1) safeguards'.[50]

In a polemical decision, however, the Appeals Chamber disagreed with that reasoning on the dubious grounds that there is no rule of customary international law recognizing the immunity of heads of state vis-à-vis international courts. The analysis of state practice and *opinio juris* that the Appeals Chamber undertook is less relevant for the present purposes than the assumption that animated it, namely, that international courts and domestic courts have a different character. In the Appeals Chamber's words, '[w]hile the latter are essentially an expression of a State's sovereign power, which is necessarily limited by the sovereign power of the other States, the former, when adjudicating international crimes, do not act on behalf of a particular State or States'.[51] Instead, 'international courts act on behalf of the international community as a whole', which entails that 'the principle of *par in parem non habet imperium*, which is based on the sovereign equality of States, finds no application in relation to an international court such as the International Criminal Court'.[52] It stands to reason that the principle of *par in parem non habet imperium* has no place in the relations between the ICC and its member states, but why must the large section of the international community that did not ratify the Rome Statute accept the ICC as acting on behalf of the international community as a whole?[53] The suggestion that it must seems tied to an institutional self-understanding that the ICC's mission is to combat impunity whenever it has jurisdiction, whatever the rights of third states may be.

[50] *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09, Pre-Trial Chamber II (2017), para. 82

[51] *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09 OA2, Appeals Chamber (2019), para. 115.

[52] Ibid.

[53] The situation is different, of course, when the UNSC refers a situation to the Court under Article 13(b) of the ICC Statute, for, in that case, the obligation to subject to the Statute (including rules dispensing with immunity) comes from the UN Charter itself: see D. Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) *Journal of International Criminal Law and Justice* 333, 346–348. Indeed, the effects of UNSC Res 1593 (2005) referring the situation of Sudan to the ICC were part and parcel of the ICC's reasoning, so much so that Sarah Nouwen has persuasively argued that 'a close reading' of the Chamber's judgment 'reveals that the Chamber has in fact not gone the "full way" in supporting an "international-criminal-court-exception" because the judgment still depends on the Security-Council-analogous-to-a-state-party-route': S. Nouwen, 'Return to Sender: Let the International Court of Justice Justify or Qualify International-Criminal-Court Exceptionalism Regarding Personal Immunities' (2019) 78 *Cambridge Law Journal* 595, 607–610.

In this connection, the language employed by Pre-Trial Chamber I in the very first decision given on the issue of Al-Bashir's immunity, in relation to Malawi, is revealing: '[t]he Chamber considers that the international community's commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass'.[54] If this were read as a Freudian slip, it would betray the notion that once a 'critical mass' of states decides to take a morally valuable course of action other states need to bow down. That is why the ICC's current position on state immunity illustrates the aspiration of organizations that possess or aspire to universality to take over. Were the outside world to acquiesce to this – as it has arguably done in the case of the UN Charter – new structural changes to the international legal system would ensue.

2.3 REGIONAL INTERNATIONAL ORGANIZATIONS ENGAGING NON-MEMBERS

2.3.1 *From International Cooperation to Unilateral Regulation*

Unlike universal organizations, regional international organizations may not have the kind of mandate that fosters an aspiration or tendency to bend the outside world to their will. For one, not every RIO is designed or empowered to maintain external relations with non-members.[55] But the outside world may become crucial to the functioning of RIOs in at least a couple of scenarios.

The first is when the organization, despite being regional (or sectoral) in terms of membership, pursues goals that can only be realized with the cooperation of non-members, that is, goals that could have befitted a UIO. That is the case with the Organization for Economic Co-operation and Development (OECD)'s efforts to develop international tax rules. Alongside the G20, the OECD has been pursuing the ambitious Base Erosion and Profit Shifting (BEPS) project, with the main objective of preventing multinational corporations from taking advantage of 'double non-taxation', that is, from positioning themselves in between two or more jurisdictions in ways that enable them to pay no income tax. The BEPS project comprises 15 proposed actions, including compliance with minimum standards on harmful tax practices, prevention

[54] *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Pre-Trial Chamber I (2011), para 42.

[55] See Bordin et al., *Final Report of the ILA Study Group*.

of tax treaty abuse, and country-by-country reporting.[56] But the 38 current member states of the OECD cannot possibly combat harmful tax practices by creating rules that apply amongst themselves only. There are many non-member states where multinational corporations can seek to benefit from tax loopholes and other regulatory distortions. That is why the organization established the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting, which has managed to enlarge the group of states and other territories committed to implementing BEPS actions to 143.[57] A high point of the OECD's strategy to engage the wider world in the field of taxation was the adoption of the 2016 Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. The Convention modifies thousands of double-taxation bilateral treaties in line with the standards of the BEPS Project for the 81 states (out of 100 signatories) for which it has already entered into force.

A second scenario in which non-members become crucial to the functioning of RIOs is when states make use of those organizations to act on their behalf and pursue their collective interests in international relations. The prime example is provided by the European Union, which has been given wide-reaching competences to engage in external relations in the fields of trade, economic, financial, technical and development cooperation, humanitarian aid, security and defence, and any other subjects falling under its internal policies that have an external dimension. What distinguishes EU external action from the foreign relations of the average state is the organization's willingness and capability to exercise leadership, particularly taking a proactive role in exporting norms to non-members. This institutional self-understanding was captured in a European Commission staff working document from 2007, where it is noted that '[t]here is a window of opportunity to push global solutions forward' and that '[t]he EU is in a good position to take a lead, promoting its modern regulatory framework internationally'.[58]

The EU has thus become very active in global forums such as the World Trade Organization, the International Organization of Securities Commissions, and the Food and Agriculture Organization, where much international regulation is produced. It has also endeavoured to promote its preferred standards by concluding treaties with non-members. Those treaties

[56] www.oecd.org/tax/beps/beps-actions/, last accessed 7 August 2023.
[57] www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf, last accessed 7 August 2023.
[58] European Commission Staff Working Document, 'The External Dimension of the Single Market Review' (2007), at 8.

tend to fall in two main categories.[59] The first are the Partnership and Cooperation Agreements (PCA), which push for EU standards more aggressively. For example, the PCA that the EU concluded with Armenia in 2018 provides that Armenia 'shall take further steps to develop a well-functioning market economy and to gradually approximate its economic and financial regulations and policies to those of the European Union'.[60] The second are the Preferential Trade Agreements (PTAs), which advance EU standards in more subtle ways, nudging non-members in their direction without requiring that they be formally adopted. For example, the PTA concluded by the EU with Colombia and Peru in 2012 commits the parties to '[encourage] its standardisation bodies to cooperate with the relevant standardisation bodies of another Party in international standardisation activities' and makes reference to standards found in global instruments such as the UN Framework Convention on Climate Change and conventions adopted under the auspices of the International Labour Organization.

A more thought-provoking way in which the EU affects the legal position of non-members is by taking unilateral action that causes them to change their rules to adopt (or adapt to) standards favoured by the EU. Three forms of unilateral action are particularly interesting. The first is the adoption of rules that apply to the extra-territorial conduct of foreigners operating abroad. Exercises of extra-territorial jurisdiction not supported by any of the well-accepted jurisdictional bases from international law are rare, but EU practice provides a few significant examples. The so-called Derivatives Regulation, for instance, purports to 'apply to [over-the counter] derivative contracts entered into between third country entities … provided that those contracts have a direct, substantial and foreseeable effect within the Union or where such obligation is necessary or appropriate to prevent the evasion of any provision of [the] Regulation'.[61] This type of action not only affects foreigners operating abroad but also exemplifies how RIO unilateral action can affect the development of custom in core fields of international law.[62] The EU has traditionally

[59] For a helpful description of EU practice, see A. Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press, 2020), 69–75.

[60] Art. 22(2), Partnership and Cooperation Partnership Agreement between the EU and Armenia (2018).

[61] EU Regulation No 648/2012 on OTC derivatives, central counterparties and trade repositories, Article 11(12).

[62] The possibility of international organizations contributing to the formation of customary international law through their own practice is recognized in Conclusion 4(2) of the ILC's Conclusions on Identification of Customary International Law. For an insightful scholarly account, see K. Daugirdas, 'International Organizations and the Creation of Customary International Law' (2020) 31 *European Journal of International Law* 201.

taken an orthodox approach to the law of jurisdiction, maintaining that extra-territorial exercises of public authority require 'some nexus between the conduct to be regulated and the regulating State'.[63] Yet, the adoption of instruments such as the Derivatives Regulation could be viewed as supporting the so-called effects doctrine, articulated by the United States and traditionally opposed by the EU, according to which there is a nexus between extra-territorial conduct and a regulating entity whenever the effects of that conduct are felt in the territory where the regulating entity operates.[64] Depending on non-members' reactions to those aggressive exercises of extra-territorial jurisdiction, EU practice can have a marked influence on the evolution of the law of jurisdiction.

The second form of unilateral action is a technique Joanne Scott has labelled 'territorial extension'. It happens when '[t]he application of a measure is triggered by a territorial connection' between the entities concerned and the EU, 'but in applying the measure the regulator is required, as a matter of law, to take into account conduct or circumstances abroad'.[65] An example is provided by the General Data Protection Regulation (GDPR), which prescribes that '[a] transfer of personal data to a third country or an international organisation may [only] take place where the Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organisation in question ensures an adequate level of protection'.[66] An interesting feature of the GDPR is that it requires not only non-member states but also other international organizations to offer 'an

[63] Brief of the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum*, US Supreme Court (2012), at 10 (recognizing, however, the possibility of universal jurisdiction). Similarly, the CJEU has recognized the applicability of principles of customary international law on jurisdiction in EU law: Case C-366/10, *Air Transport Association of America v. Secretary of State*, ECLI:EU:C:2011:864, para. 5.

[64] The possibility that a 'qualified effects test' could ground the extra-territorial application of Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty was confirmed by the Court of Justice of *Intel v. Commission*, where the Court observed that such a test served the objective of 'preventing conduct which, while not adopted within the EU, has anticompetitive effects liable to have an impact on the EU market': Case C-413/14 P (2017), *Intel v. Commission*, ECLI:EU:C:2017:632, paras. 45–46. For a discussion of the 'effects doctrine' and (early) EU opposition to it, see J. Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford University Press, 2019), 447–448.

[65] J. Scott, 'Extraterritoriality and Territorial Extension in EU Law', (2014) 62 *American Journal of Comparative Law* 87, 90.

[66] Regulation 2016/679 of the European Parliament and of the Council (General Data Protection Regulation) (2016), Art. 45(1).

adequate level of protection' if they require data from an operator placed under EU jurisdiction.[67] While that is probably permissible under international law because the GDPR applies to data operators over which the EU has jurisdiction, it puts pressure on non-members to regulate data transfers like the EU does (or to the satisfaction of EU organs) and gives rise to concerns of undue intervention. The United Nations, for example, has complained that the GDPR has interfered with the functioning of UN-System organizations by, among other things, making it difficult for them to sign contracts with service providers who are apprehensive of being penalized by the EU.[68] It claims that the application of the GDPR is inconsistent with the privileges and immunities that EU member states – but, notably, not the EU itself – owe to UN-System organizations.[69]

The third form of unilateral action is the phenomenon that Anu Bradford has termed 'the Brussels effect', consisting in the 'EU's unilateral ability to regulate the global marketplace',[70] even when the regulation does not explicitly purport to cover foreign conduct. Whenever the EU is strict in how it, for example, regulates the health and safety of a product, market forces create an incentive for private business to follow the EU regulation wherever it operates because of the cost of having different production lines with different specifications. The unilateral ability to regulate the global marketplace arises when the regulating entity has jurisdiction over a sizeable consumer market and enjoys considerable regulatory capacity that it is willing to deploy to impose stringent rules over producers and products that are inelastic (in that they cannot be easily moved to other jurisdictions) and where production is non-divisible (in that it is not feasible or advantageous to manufacture products with different specifications for each market).[71] This form of external influence through the rippling effects of unilateral regulation may be unwitting in the first instance, but it can be deployed strategically once a regulating entity becomes aware of it.[72]

[67] Ibid., Art. 45(5).

[68] Comments of the United Nations Secretariat on behalf of the United Nations System Organizations on the 'Guidelines 2/2020 on articles 46 (2) (a) and 46 (3) (b) of Regulation 2016/679 for transfers of personal data between EEA and non-EEA public authorities and bodies' adopted by the European Data Protection Board on 18 January 2020.

[69] For a discussion of this controversy, see F. L. Bordin, 'Is the EU Engaging in Impermissible Indirect Regulation of UN Action? Controversies over the General Data Protection Regulation', *EJILTalk!* (2020).

[70] Bradford, *Brussels Effect*, 1.

[71] See the detailed discussion in Bradford, *Brussels Effect*, 25–65.

[72] Ibid., 22–23.

2.3.2 *Concerns over Norm Imperialism by RIOs*

The external relations of international organizations and their impact on the wider world raise a bunch of normative concerns. For one, they challenge the perception that international organizations are institutions that serve the common good. There has been a progressive realization that international organizations are not always 'harbingers of international happiness', but real-life institutions that can be co-opted by special interests and fall prey to inefficiencies and malfeasance.[73] This invites us to rethink – or at least question – the relative unaccountability that results from the legal autonomy international organizations possess (in particular the assumption that members are not liable for their action[74]); from the difficulty to bring claims against them both on the international and institutional planes; and from the generous immunities that shield them from domestic courts.[75] The core normative tenet of functionalist theories, that international law's priority must be to enable organizations to perform their functions,[76] needs be weighed against other values.

But an aspect of this reckoning, which is of special concern when it comes to RIOs,[77] must be that functionalism can only provide a reason *for members* to enable international organizations to perform their functions and not for the outside world which those organizations engage. While this point may come across as trite, it has sometimes been neglected.[78] Consider Article 51(4) of the ARIO, according to which countermeasures against an international organization are to be taken 'in such a way as to limit their effects on the

[73] J. Klabbers, 'The Life and Times of the Law of International Organizations' (2001) 70 *Nordic Journal of International Law* 287, 288.

[74] Cf Articles on the Responsibility of International Organizations for Internationally Wrongful Acts (2011), Art. 62.

[75] See, e.g. E. Benvenisti, 'Upholding Democracy amid the Challenges of New Technology: What Role for the Law of Global Governance?' (2018) 29 *European Journal of International Law* 9, 16–26.

[76] J. Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 *European Journal of International Law* 9, 11 (describing as 'basic insight' shared by functionalists that 'international organizations are functional entities, set up to perform specific tasks for the greater good of mankind and, as such, in need of legal protection').

[77] Which means the reckoning also applies to UIOs in their relations with non-members. What makes RIOs stand out, however, is that their membership is by definition closed, which in itself affects their ability to make a plausible case to be pursuing the global common good (or at least to do so to the detriment of the interests of their members).

[78] J. Klabbers, 'Sui Generis? The European Union as an International Organization', in D. Patterson and A. Södersten (eds.), *A Companion to European Union Law and International Law* (Wiley, 2016), 3, 5.

exercise by the responsible international organization of its functions'. That provision makes sense in a scenario where it is a member that takes the countermeasure, but why should a non-member be required to take the functioning of the wrongdoing organization into account in its response? By turning our attention to RIOs and how they affect non-members, we can train ourselves to ask *whose* interests the organization is pursuing and how its actions affect stakeholders that are not at all represented in its decision-making.[79] Constituent instruments themselves provide a starting point. The Treaty on European Union, for instance, prescribes that '[i]n its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens', and that external action shall be taken in accordance with 'strategic interests and objectives of the Union' to be determined by the European Council.[80] For its part, the Constitutive Act of the African Union includes among the objectives of the organization to 'promote and defend African common positions on issues of interest to the continent and its peoples' and 'establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations'.[81]

That RIOs pursue the interests of their members according to regional (or sectoral) sensibilities does not mean that they may not have functions and goals of a universal (or at least more generalizable) character. For example, the constituent instrument of the OECD includes among the aims of the organization 'to promote policies designed … to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development'.[82] Likewise, the Treaty on European Union commits the EU to contributing to 'peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights …, as well as to

[79] The issue of democratic legitimacy in international organizations is very complex, not least because states serve as proxy representatives for individuals and groups who rarely get to exercise political rights at the international organization level. Moreover, international organizations may pose democratic legitimacy issues even at the level of state representation, as seen in the composition of the UNSC and the special status afforded to the five permanent members. See, for example, Alvarez, *International Organizations as Law-Makers*, and S. Besson, 'Democratic Representation within International Organizations: From International Good Governance to International Good Government' (2022) 19 *International Organizations Law Review* 489.

[80] Compare Arts. 3(5), 21 and 22 of the Treaty on European Union (1992).

[81] Constitutive Act of the African Union (2000), Article 2(d) and (i).

[82] Convention on the Organisation for Economic Co-operation and Development (1960), Art. 1(b).

the strict observance and the development of international law . . .'.[83] It also specifies that the EU's

> action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.[84]

But the question arises of how cosmopolitan-minded RIOs are to reconcile, in practice, competing commitments to regional and global interests. Can it ever be expected that regional organizations will, without more, prioritize the outside world over their own members? As Jan Klabbers has noted in respect of the EU, 'one can hold that the European Union contributes to Europe's common good without necessarily also contributing to the global common good'.[85]

Even when regional and global interests align and a RIO can make a plausible case that it is contributing to the common good of the world at large, its action may raise questions of input legitimacy. To return to the example of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting, despite the efforts of the OECD to involve non-members, the reality remains that those non-members are being invited to implement standards in the elaboration of which they had little, if any, input. In the case of unilateral regulation with rippling effects such as that adopted by the EU, the concerns are even more serious insofar as rules are indirectly forced upon non-members. Even attempts that the EU makes to export norms by cooperation, especially with neighbouring countries, have led to accusations that the EU is engaging in 'normative imperialism'. In Raffaela Del Sarto's words:

> [T]he conceptualization of the European Union as a normative empire [explains] EU policies toward its borderlands. Thus, it takes issue with a resilient key assumption of 'normative power Europe' approaches: that is, the Union's presumed predisposition to act normatively in world politics because of its specific history and normative construction. Certainly, in essence the EU does not rely on the use of force in its external relations. However . . . the 'normative' action of transferring EU rules and practices beyond its borders

[83] Treaty on European Union, Art. 3(5).
[84] Ibid., Art. 21(1).
[85] Klabbers, '*Sui Generis*?', 10–11.

> primarily serves the economic and security interests of the European core vis-a-vis the periphery.[86]

Is the kind of 'normative imperialism' exercised by the OECD and the EU, whether through international cooperation or unilaterally, necessarily a bad thing? À propos the 'Brussels Effect', Anu Bradford ponders that, whether it 'is positive or negative depends on individual preferences that vary across policy areas, individuals' socioeconomic and cultural backgrounds, values and ideologies'.[87] Yet, she cautiously suggests that 'on balance, the Brussels Effect is more likely to generate net benefits that are valuable – even if not uniformly in all instances and for all the people'.[88] While these are difficult assessments to make in times of pluralism and contestation, it is not implausible to suggest that making multinational corporations pay taxes, requiring the private sector to cooperate in the fight against climate change or ensuring that people's data are duly handled potentially reflect global aspirations, even if their realization is promoted through regulation adopted through non-inclusive processes.

The external relations conducted by RIOs invite a comparison with the external relations conducted by states. Everything that has been said here about the ways in which the OECD and the EU have sought to export their rules and values, whether by resorting to international cooperation or by taking unilateral action, could equally apply to any state taking a position of leadership in international relations, such as the United States or China. Which raises an interesting question: does it make a difference that leadership is being exercised by a RIO instead of by individual states? In particular, does the use by states of the legal form of international organization to engage with – and shape – the outside world improve or impoverish the quality of international cooperation? On the one hand, the effort to coordinate the external action of states through institutions that remain creatures of the international legal system may contribute to the adoption of a more cosmopolitan outlook, making it easier for individual states to overcome some of the more parochial pulls of domestic politics that might otherwise stand in the way of desirable courses of action on the international plane. Joanne Scott has suggested that the EU regulates with an 'international orientation', unlike the United States, for example, which is more inward-looking and exceptionalist in its approach.[89] On the other hand,

[86] R. Del Sarto, 'Normative Empire Europe: The European Union, Its Borderlands, and the Arab Spring' (2015) 54 *Journal of Common Market Studies* 215, 227. For a thoughtful discussion of eurocentrism that looks specifically into how it colours EU mediation efforts, see S. Nouwen, 'Exporting Peace? The EU Mediator's Normative Backpack' (2022) 1 *European Law Open* 26.

[87] Bradford, *Brussels Effect*, 263.

[88] Ibid.

[89] Scott, 'Extraterritoriality', 114–116.

RIOs provide an instrument for states to pool their resources in ways that may increase the problem of substantive inequality that already prevails among the sovereign equals of today's world. No European state alone would be able to pull its weight as the EU does.[90] Thus far, the practice of using RIOs to engage the outside world has been somewhat timid, with the EU remaining in a league of its own.[91] But if that practice picks up, the significance and implications of groups of states utilizing the legal form of international organization to engage the wider world will become clearer.

2.4 CONCLUDING REMARKS

The external relations of international organizations impact on the legal position of non-members – and the international legal system more generally – in different ways. UIOs such as the United Nations act with a latent aspiration to bend the outside world to their will. That is well exemplified by the Security Council purporting to bind non-members and getting away with it. The RIOs that are set up to pursue goals requiring international operation or to conduct external relations on behalf of their members can also influence the legal position of non-members, both through strategic cooperation or by engaging in unilateral regulation that creates powerful incentives for the outside world to follow suit. While that form of leadership can be (and is) also exercised by individual states, it is arguably amplified by using the legal form of international organization.

The practice of entities such as the UN, the ICC, the OECD and the EU thus speaks to the external ripples of the intensified forms of cooperation that international organizations institutionalize among their members. When states coalesce around UIOs, or empower RIOs to engage the outside world, they put pressure on a decentralized international legal system that remains based on the principle of sovereign equality. The resulting potential for legal innovation and change, which comes with normative implications that may be both desirable and undesirable, deserves close scrutiny.

[90] As Bradford puts it, '[i]n the world where the United States projects hard power through its military and engagement in trade wars, and China economic power through its loans and investments, the EU exerts power thorough the most potent tool for global influence it has – regulation': Bradford, *Brussels Effect*, 24.

[91] See, e.g., Bordin et al., *Final Report of the ILA Study Group*.