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Institutional Promiscuity

An Epilogue

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14.1 INTRODUCTION

The assumption that international organizations would only need to stand in any kind of legal relationship with their member states was always based more on fiction than on fact. On some points this is rather obvious: already the early nineteenth-century river commissions served to create winners and losers, not just among their member states but mostly within their member states. Cities that lost the right to collect tolls clearly also saw a source of income dry up; cities that lost disembarking privileges likewise saw a source of income dry up. Much the same applies more generally: the regulation of telegraphic and postal communication later in the nineteenth century smoothened the flows of information considerably, allowing an enterprising individual such as Julius Reuter to establish a press agency that still exists to this day. The international ization of intellectual property protection served not so much abstract entities such as France or Italy (although perhaps that too, in an abstract sort of manner) but served mostly individuals: Victor Hugo was one of the driving forces, and for good reason, while Giuseppe Verdi is sometimes mentioned as one of the first composers who, thanks to the international protection of copyright, could actually earn a nice living from composing alone.[1]

The above suggests that there have always been winners and losers associated with international organizations; it stands to reason therefore to suggest that the relationship between international organizations and those winners and losers (be it an individual or a company or still something else) be treated as one of some legal relevance – not just to think of international organizations

[1] O. Figes, *The Europeans* (Penguin, 2019).

as a distant source of costs and benefits, but as actually having something to do with the 'authoritative allocation of values', in much the same way as the state is seen as standing in such a relationship to its population. Not all economic effects of state decisions may subject to legal regulation and judicial review, not even in the most developed administrative states; but, that said, it is generally recognized that markets rely on states, and there is thus a legally relevant connection between state and market. And this relation works typically in both directions: individuals and companies incur wins and losses from state action, while the state itself derives some of its legitimacy from providing or guaranteeing prosperity. What applies to states applies just as well to international organizations, as these do some of the regulatory work typically associated with states.

In more straightforward legal practice too, the 'vacuum assumption' was never particularly realistic. International organizations may have lacked formal international legal personality until well after the end of World War II, but this rarely stopped them from doing things which would seem to presuppose such personality. The Cape Spartel Lighthouse reportedly entered into a multilateral agreement before many other international organizations had even been created; and the various sanitary bureaus set up during the nineteenth century at the edges of Europe must have been in touch with local authorities to combat the outbreak and spread of deadly diseases. The absence of international legal personality and of treaty-making powers indicate that no other relations were expected than those with member states, but practice usually finds a way. If a treaty cannot be concluded for lack of competence, then the 'memorandum of understanding' will be invented – this is explicitly not a treaty, and thus not reliant on treaty-making powers, or even on international legal personality. And perhaps the best example is offered by none other than the International Court of Justice in its classic *Reparation for Injuries* opinion. Here it derived the UN's international legal personality, in part, from the conclusion of the treaties by the same UN. The reasoning is circular, of course – performing such acts indicates the presence of precisely that quality which is required to perform such acts – but that is not quite the point for the present purposes. The point is, rather, that the Court did not hesitate to claim that one of the treaties the UN had taken part in was the 1946 General Convention on Privileges and Immunities of the UN. Yet, upon inspection, the UN was not, and still is not, a party to that Convention. It may well be considered a beneficiary, but such would only indicate that this treaty creates rights for third parties. But the UN never was a party, which means that the Court was either careless or, possibly more likely, finishing a thought: the thought that it is unlikely that an entity such as the UN, designed as the centre

of the legal and political universe after a devastating world war, would not be capable of participating in international relations.

To even state the possibility of a UN unable to act internationally is to state its absurdity, and yet a similar absurdity played out around the creation of the EU at Maastricht, in the early 1990s. Since the EU had not expressly been endowed with international legal personality, some felt that it could not be considered to be an international legal person (and some were delighted with this conclusion, mistakenly believing it seemed to safeguard national sovereignty).[2] Yet, such reasoning bordered on the nonsensical: surely, an entity with an official foreign policy and powers related to combating international crime and migration (in no particular order) could not be devoid of international legal personality – at least for those who feel that international legal personality is a threshold for acting on the international level. How else to implement a foreign policy? How else to give effect to migration decisions?

The vacuum assumption, in other words, has always been a myth. For many though, it appeared a useful myth. International organizations and their leadership and staff (if they would ever reflect on these things) were happy enough: the vacuum assumption entailed, amongst others, that they could only be held accountable by their member states, which in practice means they are rarely, if ever, held to account. Member states, likewise (if they would ever reflect on these things) were happy enough: they remained in full control of their creatures, without having to fear interference by victims, judges or other stakeholders – this makes life so much easier. And if neither organizations nor their member states ever question received wisdom (and academics feel they should not question what they think constitutes 'practice', however misguided), then a grand 'coalition of the unwilling' all but guarantees that the law remains stuck in a time-warp going back to the late nineteenth, early twentieth century.

14.2 SOME RAMIFICATIONS

This volume has demonstrated abundantly that the vacuum assumption no longer holds – if it ever did. International organizations, so the volume demonstrates, constantly interact with entities other than their member states. They interact with non-member states; with cities; with each other; with international sports associations; with large consultancy firms; with the private

[2] See, further, J. Klabbers, 'Presumptive Personality: The European Union in International Law', in M. Koskenniemi (ed.), *International Law Aspects of the European Union* (Martinus Nijhoff, 1998), 231.

sector, as well as with others. Gavi, the Vaccine Alliance, is an intriguing example, bringing together international organizations, states and private funders. An even more intriguing example perhaps is (was?) the Contact Group on Piracy off the Somali Coast, established to implement a Security Council mandate and involving not just states and international organizations, but also trade unions (of seafarers), church associations and the largest shipping insurer in the form of Lloyd's of London. Whatever the formal legal status of the Contact Group (whether an international organization or a mere 'governance mechanism' of uncertain provenance), it clearly brought international organizations such as the EU, NATO and the IMO together with a wide variety of other actors – other than (member or participating) states and other international organizations.

The volume further demonstrates how such interactions may take place, zooming in on the private sector. International organizations, so the volume makes clear, procure goods and services from the private sector; they do so in ways that are strictly legally regulated and in doing so they help shape the very markets in which they operate. They are funded by private actors, including philanthropic foundations. They not only procure goods and services, they also have their own services and goods to sell, and such relations may demand a further explanation in terms of contract law.

These are not novel observations per se. In 2013, a group of international relations scholars noted that international organizations were 'opening up' to the world by making provision for contacts with each other and what were referred to as 'transnational actors'.[3] International organizations had, in fact, already been doing this for quite some time, for instance in the form of accepting observers, in particular perhaps from civil society.[4] And many international organizations have developed rules or guidelines with respect to whose funding or donations they can accept or who they can do business with – clear signs of regulating engagement with the external world.[5]

The question remains though what this means for international organizations law. Clearly, the classic assumption according to which the only legal relationship of relevance was that between the organization and its member

[3] J. Tallberg et al. (eds.), *The Opening Up of International Organizations* (Cambridge University Press, 2013).

[4] See, e.g. N. Sybesma-Knol, *The Status of Observers in the United Nations* (Vrije Universiteit, 1981).

[5] The most well-known of these are the WHO's rules, known as the Framework of Engagement with Non-State Actors (FENSA). For discussion, see A. Berman, 'Between Participation and Capture in International Rule-Making: The WHO Framework of Engagement with Non-State Actors' (2021) 32 *European Journal of International Law* 227.

states has little traction, but then what? If we should not look at international organizations solely as agencies set up by member states to do things for those member states, then what should be put in its place?

What complicates the puzzle further is that, as a matter of fact, the classic assumption fails not because it is inaccurate, but because it is incomplete, meaning that some of it needs to be rescued: the baby should not be thrown out together with the bathwater. After all, international organizations are typically set up by member states to do things for member states – it is just that this is not even scratching the surface of what they do and, thus, cannot be the only legal relationship that matters.

Be that as it may, at a bare minimum the 'vacuum assumption' should be discarded, for lacking any correspondence with empirical reality. A properly grounded law of international organizations can no longer afford to think of only the 'organization–member' dynamic; it needs to 'open up', all the more so at a time when international organizations are often criticized for being untouchable and unaccountable.[6] The criticism, after all, stems directly from this untenable vacuum assumption.

It would be much better to accept that international organizations are characteristically set up by states, but rapidly (albeit to varying degrees) become political agents in their own right, in much the same way that domestic administrative agencies are usually not solely associated with central government. There is, after all, little qualitative difference – other than matters of scope – between a national radio frequencies board and an international frequencies board; between a national pandemic-declaring health agency and an international one; between a national river commission and an international river commission or even between a domestic development bank and an international development bank.

An international organizations law reflective of this state of affairs – the largely administrative task of many international organizations – will come to realize that international organizations are political operators in their own right. Their work needs funding; elementary fairness demands that they need to play by market rules in much the same way domestic agencies do; and their decisions and acts come with winners and losers – and not just among member-states.

And if that is realized, then it should no longer be near-automatic to just accept that international organizations can expand their competences and

[6] The literature is voluminous. See, e.g. C. Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (Oxford University Press, 2017); G. Hirschman, *Accountability in Global Governance* (Oxford University Press, 2020).

activities seemingly at will, without any form of scrutiny. It would entail that a decision to grant a particular international organization some privileges and immunities may well become a matter of calm contemplation, without anyone immediately proclaiming that the global common good is undermined. It may be a brilliant idea to protect health organizations and their staff against interference by domestic authorities but, surely, the same does not immediately apply to military or security officials.

Starting from the idea that international organizations do not only relate to their member states may also help to stimulate thinking about how they should be set up internally. As it is, the law of international organizations lacks the intellectual resources to address questions of relations between organs of the same organization, typically borrowing somewhat loosely from domestic 'separation of powers' arguments – if at all. And likewise, whatever international organizations may stand for, they are also employers, sometimes of fairly large numbers of people. While there is a lot of jurisprudence on specific legal questions, little principled thinking has gone into the role of international organizations as employers – likely because, under the vacuum assumption, such a role is hardly deemed to be of much relevance.

But most visibly, the putative accountability of international organizations towards third parties cannot be addressed in any meaningful way as long as the 'vacuum assumption' applies: in a conception where no third parties are considered relevant, no issues of accountability can possibly arise. *Quod erat demonstrandum*. There is merit in not succumbing to the knee-jerk reflex of blaming international organizations for all the perils one encounters;[7] but, by the same token, the total incapacity of the international legal order to devise a working accountability system (beyond accountability to the member states, that is) is not a very desirable situation either.

14.3 FINAL REMARKS

This volume has provided a first overview of how international organizations interact with the outside world – with a particular emphasis on relations with the private sector – and what this may entail for the governing legal framework. The volume hardly exhausts the matter. Not only are there at least 300 international organizations in existence at any given moment (empirically, therefore, this volume only scratches the surface), it is also plausible to

[7] J. Klabbers, 'Responsibility as Opportunism: The Responsibility of International Organizations', in S. Besson (ed.), *Theories of International Responsibility Law* (Cambridge University Press, 2022), 119.

suggest that different organizations may require different approaches. The work of the multilateral development banks, for instance, will affect local populations differently than those of, for example, humanitarian organizations. Military alliances such as NATO may kill people in ways that are unlikely to apply to organizations active in the field of communications, such as the Universal Postal Union. And academic institutions (whether the European University Institute or the European Molecular Biology Laboratory) will operate in ways different from food security organizations.

It is useful to recognize that international organizations are not just 'international', but that they are 'organizations' too, in much the same way as is the local fire department, municipal social security office or provincial board of education. Looked at from such an angle, it will become clear that international organizations, like all organizations, tend to do three things: they regulate; they monitor and manage what they regulate; and, in doing so, they allocate costs and benefits among stakeholders. It was long thought that only member states counted as stakeholders, but it is hoped that this volume has demonstrated that this assumption is no longer tenable, if it ever was.