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Introduction

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Whatever activity one wishes to engage in, be it the sending of a postcard to a friend abroad or the purchase of a television set produced in a foreign country, it is more than likely that the activity is in one way or another regulated by the activities of an international organization. Indeed, there are few, if any, activities these days which have an international element but which are not the subject of activities of at least one, and quite often more than one, international organization.¹ International organizations have developed into a pervasive phenomenon, and, according to most calculations, even outnumber states.²

Wherever human activity is organized, there will be rules of law, as expressed in the ancient adage, *ubi societas, ibi jus*. Social organization without rules is, quite literally, unthinkable. Hence, the activities of international organizations are also subject to law, and give rise to law. Each and every international organization has a set of rules relating to its own functioning, however rudimentary such a set of rules may be. Moreover, as international organizations do not exist in a vacuum, their activities are also bound to exercise some influence on other legal systems, and absorb the influence of such systems. While it is by no means impossible for international organizations to be influenced by, and exert influence on, the law of individual nation-states (the law of the European Union is an excellent example), the more direct and influential links usually exist with public international law. Not surprisingly, therefore, international lawyers have attempted to describe and analyse these links and the resulting rules and legal concepts which make them possible to begin with.

This book will try to provide a comprehensive introduction to the law of international organizations, and aims to do so by concentrating on general legal issues. Thus, there will be little discussion of individual organizations,

¹ See Matthias Ruffert and Christian Walter, *Institutionalisiertes Völkerrecht* (Munich, 2009).

² Estimates vary from some 240 to 350. See, respectively, James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford, 2012), pp. 166–7, and Pieter Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Dordrecht, 1994), p. 4.

and fairly little presentation of decontextualized facts. Instead, the aim is to discuss legal problems relating to the creation, the functioning and the termination of international organizations.

The very fact that this textbook is intended to be introductory has several implications. The most obvious one will be a lack of detail, but existing works, such as the encyclopaedic volume by Schermers and Blokker, offer more than adequate compensation.³ In addition, there are numerous specialized works on various individual international organizations. The United Nations, for example, has been the subject of various rich and detailed studies,⁴ as have numerous other organizations.

Being a textbook about the law of international organizations, its focus will rest upon institutional law rather than on substantive law. After all, the most likely area for general rules and principles to develop is where international organizations have things in common. Generally speaking, they will have things in common when it comes to the way they are organized, rather than with respect to their substantive rules.

Although meant as a textbook for university students, practitioners too may find this work of value, predominantly perhaps as a guide to understanding the often ambiguous legal precepts and in helping them to find further references. For, a proper introduction not only familiarizes the reader with the more important legal principles at stake, but also makes clear that few, if any, legal rules and principles are carved in stone. They are derived from precedent and research, so it stands to reason that precedent and research are referred to. Indeed, especially where a more or less critical mode of analysis is thought to be of great educational value, as in this book, any slackening of the requirements of reference would expose intellectual dishonesty.

Three types of legal dynamics

As far as matters of theory go, the law of international organizations is still somewhat immature. We lack a convincing theory on the international legal personality of international organizations, to name just one thing. Moreover, if an international organization fails to meet its legal obligations, we are not at all sure as to whether and in what circumstances it can be held responsible, let alone whether its member states incur some responsibility as well. Furthermore, we are quick to point to the possibility that legal powers, while not explicitly granted to a given organization, may nonetheless be implied, but we are less certain as to the basis of such implied powers. In short, on numerous points, the law lacks certainty, and to the extent that certainty is apparent, it is

³ H. G. Schermers and Niels Blokker, *International Institutional Law* (5th edn, Leiden, 2011).

⁴ A recent example is Robert Kolb, *An Introduction to the Law of the United Nations* (Oxford, 2010).

usually the relatively indeterminate sort of certainty that ‘problems are best solved by negotiations’, or that ‘an equitable solution is called for’.

Such problems stem, ultimately, from the lack of a convincing theoretical framework regarding international organizations,⁵ and it is surprising to note that, while international organizations have been around for roughly a century-and-a-half, few attempts have been made at theorizing.⁶

What makes the law of international organizations complicated is the fact that it involves three rather different legal relationships, and thus three different dynamics.⁷ The first of these concerns the relationship between the organization and its member states. This involves such issues as the powers of organizations, their financing, or their privileges and immunities. Second, there is what one might refer to as the ‘internal’ relations: relations between organization and staff, or relations between the various organs of the organization. Here, institutional checks and balances assume importance, as does the law relating to the employment of the international civil service. The third legal relationship consists of relations between the organization and the outside world, i.e. neither member states nor staff. This relationship involves such things as treaty-making by organizations, but also issues of accountability and responsibility.

The first dynamic, between organizations and their member states, is often seen as central, and has given rise to the theory of functionalism: international organizations, so the theory posits, exist so as to exercise functions delegated by their member states. Functionalism has assumed huge importance, so much so that few international institutional lawyers would call themselves anything other than ‘functionalist’.⁸ More importantly for present purposes, the law has largely developed within a functionalist framework. Put differently, much of international institutional law focuses on the relationship between the organization and its member states, and addresses aspects of that relationship. While this has hardly resulted in a stable and secure legal system (it is constantly subject to a tug of war between the organization and its member states), at least it can be said that there is some law, and some recognizably legal thought.

By contrast, the second and third relationships are far less well developed. There is, admittedly, an impressive body of case law on the law relating to

⁵ See generally also Jan Klabbers, ‘The Changing Image of International Organizations’, in Jean-Marc Coicaud and Veijo Heiskanen (eds.), *The Legitimacy of International Organizations* (Tokyo, 2001), pp. 221–55.

⁶ An early example is A. Rapisardi-Mirabelli, ‘Théorie générale des unions internationales’ (1925/II) 7 RdC, 345–93. Among more recent attempts, see in particular David Kennedy, ‘The Move to Institutions’ (1987) 8 *Cardozo Law Review*, 841–988.

⁷ See Jan Klabbers, ‘Theorising International Organisations’, in Anne Orford and Florian Hoffmann (eds.), *Oxford Handbook of International Legal Theory* (Oxford, forthcoming).

⁸ A rare exception was Seyersted, much of whose work has been posthumously published as Finn Seyersted, *Common Law of International Organizations* (Leiden, 2008).

the employment of the international civil service, but as we will see there is fairly little in terms of institutional checks and balances, and the law on the responsibility of international organizations is, likewise, still in process of development. The reason for this is that both the internal and external relations defy the functionalist logic: it does little good to develop rules on the relations between, for example, plenary and executive bodies by pointing to functionalist logic. The Security Council and General Assembly of the UN may both work towards the same goal or function, but that insight is of little immediate relevance when trying to understand whether the Assembly should listen to the Council (or *vice versa*) or in trying to figure out when they ought to cooperate. Likewise, there is little point in discussing the relationship between the organization and its members when trying to come to terms with the accountability of peacekeepers towards third parties, or the administration of territory by organizations. The functionalist logic, to put it starkly, has blinded the discipline for all issues that cannot be captured in terms of the relations between organization and member states.⁹

And even within functionalist thought, as we will see, the law remains uncertain on many points, due to the centrality of the relationship between organizations and their members. For here too, instability is structural. One of the core propositions of the critical legal studies movement is that law is doomed to go back and forth between two extremes. On the one hand (if we limit ourselves to international law), the law is supposed to respect the interests of individual states. As any introductory textbook on international law will make clear, international law is largely based on the consent of states; and they have given this consent as free and individual sovereign entities.¹⁰ Thus, the law must cater to their demands, or it will run the risk of losing the respect of precisely those whose behaviour it is supposed to regulate.

Yet, at the same time, the law must also take the interests of the international community into account, if only because some interests override those of individual states. Some interests represent those of mankind at large or the international community as a whole. While these interests are difficult to give concrete meaning to, often international organizations are held to be the representatives of the common interest.¹¹

The two extremes sketched above have been the two poles that have dominated theories about (and of) international law as they have developed,

⁹ See further Jan Klabbers, 'Contending Approaches to International Organizations: Between Functionalism and Constitutionalism', in Jan Klabbers and Åsa Wallendahl (eds.), *Research Handbook on the Law of International Organisations* (Cheltenham, 2011), pp. 3–30.

¹⁰ See, for example, Jan Klabbers, *International Law* (Cambridge, 2013), pp. 21–40.

¹¹ See generally Jan Klabbers, 'Unity, Diversity, Accountability: The Ambivalent Concept of International Organization' (2013) 14 *Melbourne JIL*, 149–70.

and it has long been a frustration that if a theory managed to explain a lot about sovereignty, it could not cope with considerations of community; and where it could cope with community, it was invariably at the expense of considerations of sovereignty.¹²

It is the great merit of critical legal studies to have demonstrated that this tension between those two poles is, really, unsolvable, at least given our normative apparatus which does not allow us to make normative choices.¹³ Under liberalism, it is impossible to give priority to some values over other values. Indeed, the 'liberal' value *par excellence*, tolerance, is itself eminently empty. She who is tolerant of others is she who refuses to make normative choices.

Unavoidably, this affects international law. Following the critical legal tradition, international law is bound to swerve back and forth between the two poles of sovereignty and community, and never the twain shall meet. It is this tension which makes international legal rules often (if not always) ultimately uncertain, and it is this tension that will function as one of the red threads running through much of this book.

For, if the critical problem affects international law, and indeed affects other legal systems as well (the notion was first developed by American lawyers, with reference to US law¹⁴), it will also affect the law of international organizations. Indeed, above, I already mentioned, among other things, the tension between the implied powers doctrine on the one hand, and the principle that organizations and their organs can only act on the basis of powers conferred upon them (the so-called principle of attribution of powers, or principle of speciality) on the other hand. This tension can be seen as the tension between sovereignty and community in a different guise. Strict adherents to the notion of state sovereignty will not easily admit the existence of an implied power,¹⁵ yet for the protection of community interests, an implied power may well be deemed desirable. Thus, the tension between the two strands of thinking is visible in some of the more general and central notions of the law of international organizations.

While critical legal studies have illuminated the unsolvable nature of the tension between thinking in terms of state sovereignty and thinking in terms

¹² The very existence of such tension was explicitly noted in one of the seminal texts on the law of international organizations, Michel Virally's 'La notion de fonction dans la théorie de l'organisation internationale', in Suzanne Bastid *et al.*, *Mélanges offerts à Charles Rousseau: La communauté internationale* (Paris, 1974), pp. 277–300, esp. p. 296.

¹³ Classic works are David Kennedy, *International Legal Structures* (Baden-Baden, 1987) and Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki, 1989).

¹⁴ See, for example, Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge, MA, 1986).

¹⁵ In a telling choice of words, implied powers have even been regarded as fundamental violations of national sovereignty. See Moshe Kaniel, *The Exclusive Treaty-Making Power of the European Community up to the Period of the Single European Act* (The Hague, 1996), p. 101.

of the community interest, this does not mean that the effects of the tension cannot be mitigated: they often can.¹⁶ Put differently, there is sufficient reason to believe that, while critical theory may be right in the abstract, in everyday life the fact that no right answer is available does not immediately make legal analysis meaningless. Often, there is room for some form of compromise; often, there is room to discover some principle of more or less general application. Still, that takes nothing away from the usefulness of the critical method. Indeed, in contrast to more traditional approaches, it does not lure the reader into thinking that the law has any certainties to offer.¹⁷

Thus, the red thread running through much of this book – in particular its first part – will be a critical analysis of the law of international organizations, in order to show the problems involved in that area of international law. Nonetheless, that is where the theoretical focus will stop. My aim is not to provide a critical deconstruction of the law of international organizations;¹⁸ rather, it is to provide an introductory look at international organizations from a critical perspective. Precisely because the main benefit of critical legal theory is its capacity to make visible the inherent tensions and contradictions which help shape the law, it can provide great services to an introductory textbook.

Trying to define international organizations

Perhaps the most difficult question to answer is the one which is, in some ways, a preliminary question: what exactly is an international organization? What is that creature which will be central to this book? The short answer is, quite simply, that we do not know. We may, in most cases,¹⁹ be able to recognize an international organization when we see one, but it has so far proved impossible to actually define such organizations in a comprehensive way.²⁰

What is only rarely realized is that it is indeed structurally impossible to define, in a comprehensive manner, something which is a social creation to begin with. International organizations are not creatures of nature, which lead

¹⁶ Compare also Jan Klabbbers, *The Concept of Treaty in International Law* (The Hague, 1996).

¹⁷ Incidentally, this type of analysis is not limited to critical lawyers only. See, for example, the way in which Franck uses the notion of fairness as a means to reconcile the tensions noted above: Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford, 1995), esp. Chapter 1.

¹⁸ With respect to EU law, such an exercise has been undertaken by Ian Ward, *The Margins of European Law* (London, 1996).

¹⁹ There have been some doubts recently about, for example, the European Union and the OSCE; more traditionally, GATT's status as an international organization has been debated, which has led some scholars to the question-begging conclusion that if it was not a *de jure* organization, it was at least a *de facto* organization.

²⁰ Compare generally also Abdullah El-Erian, 'Preliminary Report on the Second Part of the Topic of Relations between States and International Organizations' (1977/II, Part 1), *YbILC*, 139–55.

a relatively intransmutable existence, so that all possible variations can be captured within a single definition. Instead, they are social constructs,²¹ created by people in order, presumably, to help them achieve some purpose, whatever that purpose may be.

It is important to realize, indeed, that international actors do not purposely set out to create an international organization following some eternally valid blueprint. Instead, their aim will be to create an entity that allows them to meet their ends, endow those entities with some of the characteristics they think those entities might need (certain organs, certain powers), and then hope that their creation can do what they set it up to do. They do not meet and decide to create, say, a 'functional open organization'. That may well be what their creation will eventually look like, but it will normally not be their intention. Labels such as 'functional open organization' are labels conceived by scholars, for the sole purpose of classifying organizations, in the hope that classification will contribute to our understanding.

That said, it is common in the literature to delimit international organizations in at least some ways. One delimitation often made depends on the nature of the body of law governing the activities of the organization. If those activities are governed by (public) international law, we speak of an international organization proper, or at least of an intergovernmental organization. If those activities are, however, governed by some domestic law, we usually say that the organization in question is a non-governmental organization; examples include such entities as Greenpeace or Amnesty International. While the activities of such entities may be international in character, and they may even have been given some tasks under international law,²² they do not meet the usual understanding of what constitutes an international organization.

For the international lawyer, it goes without saying that the activities of organizations that are subject to international law will be of most interest. Usually, those organizations will have a number of characteristics in common although, in conformity with the fact that their founding fathers are relatively free to establish whatever they wish, those characteristics are, indeed, merely characteristics. The fact that they do not always hold true does not, as such, deny their value in general.

Indeed, quite a few entities will not meet with all characteristics and, what is more, are sometimes designed so as not to meet with all characteristics. There is a perception that the idea of international organization involves formalism and rigidity, and forms an obstacle against flexibility. To some extent this is no

²¹ In much the same way as notions such as state sovereignty are socially constructed. Compare, for example, Thomas J. Biersteker and Cynthia Weber (eds.), *State Sovereignty as Social Construct* (Cambridge, 1996). For a very lucid philosophical account, see John R. Searle, *The Construction of Social Reality* (London, 1995).

²² Compare, for example, the role of the Red Cross under the 1949 Geneva Conventions.

doubt true: formal organizations represent the rule of law in one way or another and this entails, for example, that their constituent instruments might be difficult to amend, or that the making of new rules has to follow prescribed procedures – this sometimes means that international organizations become ‘all talk and no action’. On the other hand, often enough rigidity or the lack of flexibility is the result not so much of existing procedures, but of the absence of political agreement. Usually, if all member states of an organization want to do the same thing, they can do so without a problem.²³ Yet, the absence of political agreement cannot be compensated for by flexible institutional design without this creating an opportunity for powerful member states to dominate the less powerful ones.

Still, many entities aspire to attain an image of flexibility by styling themselves as something other than an organization. Thus, the bamboo and rattan sector is united in a self-styled network, the International Network for Bamboo and Rattan (INBAR). The jute sector is united in the International Jute Study Group, while piracy in Somalia’s waters is being combatted under the auspices of the Contact Group on Piracy off the Coast of Somalia. The labels chosen (network, study group, contact group) suggest a desire to escape from the formalism sometimes associated with international organization, but quite a few of these entities nonetheless display most or all of the characteristics of international organizations.

One of the interesting aspects of the Contact Group on Piracy off the Coast of Somalia is that it consists not only of states, but also of other ‘stakeholders’ (to resort to ugly but effective jargon). It does not have members properly speaking, but instead has ‘participants’, and these include not just states but also several international organizations with an interest in the matter (the IMO is an obvious one, but NATO and the EU also participate) as well as private sector entities, ranging from insurance companies to organizations of seafarers.²⁴ Similar constructions can be found in other walks of life, most notably perhaps in the health sector, where the WHO often cooperates in joint ventures with others, including private actors and foundations such as the Bill and Melinda Gates Foundation.²⁵

Still, while acknowledging that the concept of international organizations is a highly fluid concept, difficult to capture in a single definition, the following four characteristics are often singled out as being of some relevance, and together they provide a useful point of departure for any conversation about international organizations.

²³ See Jan Klabbers, ‘Constitutionalism Lite’ (2004) 1 *IOLR*, 31–58.

²⁴ For a brief overview, see Jan Klabbers, ‘Piracy in Global Law and Global Governance’, in Panos Koutrakos and Achilles Skordas (eds.), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Oxford, 2014), pp. 329–42, at pp. 338–9.

²⁵ See Gian Luca Burci, ‘Public/Private Partnerships in the Public Health Sector’ (2009) 6 *IOLR*, 359–82.

... created between states ...

International organizations are usually created between states, or rather, as states themselves are abstractions, by duly authorized representatives of states.²⁶ There is not, generally speaking, a maximum number of states involved, although sometimes organizations will limit membership to states from a particular region or with a particular ideology. There is, however, a minimum: to speak of an international organization presupposes the involvement of at least two member states.²⁷ On this basis, the ICJ had no problem designating the institutionalized cooperation established in 1975 by Argentina and Uruguay to manage the river Uruguay (known as CARU) as an international organization,²⁸ and neither did a French court in regard to the Office Franco-Allemand pour la Jeunesse.²⁹

Still, international organizations sometimes involve actors other than states. For one thing, there are international organizations which are themselves members of other international organizations – sometimes even founding members. For example, the EU is a member of the FAO, and a founding member of the WTO. Still, we do not exclude the WTO and the FAO from the scope of international organizations simply because they count another organization among their members. Generally, then, it is not a hard and fast rule that international organizations can only be created by states.³⁰

²⁶ As the Permanent Court of International Justice already held in 1923, states can only act by and through their agents: *Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland*, advisory opinion, [1923] Publ. PCIJ, Series B, no. 6, p. 22. Which agents (of which agencies) are concerned is a different matter altogether. In 1962, Lord Strang could observe, somewhat awestruck, that, within the British government, some twenty departments bore responsibility for maintaining relations with international organizations. See Lord Strang, *The Diplomatic Career* (London, 1962), p. 107.

²⁷ Some posit three members as a minimum: see, for example, Konstantinos Magliveras, 'Membership in International Organizations', in Jan Klabbbers and Åsa Wallendahl (eds.), *Research Handbook on the Law of International Organisations* (Aldershot, 2011), pp. 84–107.

²⁸ See *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, [2010] ICJ Reports 14, para. 89.

²⁹ See *Klarsfeld v. Office Franco-Allemand pour la Jeunesse*, Paris Court of Appeal, 18 June 1968, 72 ILR 191. The Inter-American Tropical Tuna Commission, currently counting twenty-one members, started with two (the United States and Costa Rica) in 1950. Still, the EU withdrew from the Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and Belts after most other parties had denounced it following their accession to the EU. This would have left the organization based on the Convention with only Russia and the EU as members, something the EU held to be 'disproportionate and inefficient'. See Council Decision 2004/890/EC.

³⁰ There is at least one international organization which was created exclusively by other organizations: the Joint Vienna Institute (essentially established in 1994 to help Eastern European states in their transition to market-based economies, text in (1994) 33 ILM 1505). This was the creation of the BIS, EBRD, IBRD, IMF and OECD. A curious example of a different nature (an organization created not so much by, as in order to aid, a different organization) is the Advisory Centre on WTO Law, which aims to assist developing nations in their dealings with the WTO. For a brief overview, see Claudia Orozco, 'The WTO Solution: The Advisory Centre on WTO Law' (2001) 4 *Journal of World Intellectual Property*, 245–9.

Second, not all creatures created by states are generally considered to be international organizations.³¹ For example, states may establish a legal person under some domestic legal systems. Perhaps an example is the Basle–Mulhouse airport authority set up between France and Switzerland and governed by French law.³² On the other hand, an arbitral tribunal found in 2002 that the Basle-based Bank for International Settlements (BIS), established by states but partly governed by Swiss law and having private shareholders, qualified as an international organization.³³

Moreover, sometimes treaties are to be implemented with the help of one or more organs. For example, the European Court of Human Rights is entrusted with supervising the implementation of the European Convention on Human Rights. Yet, the Court is not considered to be an international organization in its own right; it is, instead, often referred to as a treaty organ.

In what exactly the distinction between an organization and a treaty organ resides is unclear, and perhaps it may be argued that its importance is diminishing anyway. In particular perhaps in international environmental law, new entities have been created under generic labels such as ‘meeting of the parties’ or ‘conference of the parties’. These meet all formal requirements for ‘organization-hood’, and yet may not always be thought of as international organizations.³⁴ It has also been suggested that treaty organs endowed with decision-making powers may well be international organizations in disguise.³⁵ In political science literature, reference is often made to ‘international regimes’³⁶ or, again, ‘institutions’.³⁷

... on the basis of a treaty ...

A second characteristic that many (but again, not all) organizations have in common is that they are established by means of a treaty. Their creation was

³¹ Conversely, sometimes non-governmental organizations may be regarded as intergovernmental for some purposes. See, with respect to IATA, the Swiss Federal Tribunal’s decision in *Jenni and others v. Conseil d’Etat of the Canton of Geneva*, 4 October 1978, 75 ILR 99.

³² On such creatures generally, see the multi-volume work by H. T. Adam, *Les organismes internationaux spécialisés* (Paris). See also Ignaz Seidl-Hohenveldern, *Corporations in and under International Law* (Cambridge, 1987).

³³ See *Reineccius and others v. Bank for International Settlements*, Permanent Court of Arbitration, partial award of 22 November 2002, Permanent Court of Arbitration, paras. 104–18. For discussion, see David J. Bederman, ‘The Unique Legal Status of the Bank for International Settlements Comes into Focus’ (2003) 16 *Leiden JIL*, 787–94.

³⁴ The seminal article is Robin R. Churchill and Geir Ulfstein, ‘Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law’ (2000) 94 *AJIL*, 623–59.

³⁵ See, for example, Deirdre Curtin, ‘EU Police Cooperation and Human Rights Protection: Building the Trellis and Training the Vine’, in Ami Barav *et al.*, *Scritti in onore di Giuseppe Federico Mancini, Volume II* (Milan, 1998), pp. 227–56. Curtin refers to such bodies as ‘unidentified international organizations’.

³⁶ See, for example, Stephen D. Krasner (ed.), *International Regimes* (Ithaca, NY, 1983).

³⁷ See Daniel Wincott, ‘Political Theory, Law and European Union’, in Jo Shaw and Gillian More (eds.), *New Legal Dynamics of European Union* (Oxford, 1995), pp. 293–311.