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Introduction

1.1 Setting the Questions

A book about public procurement by international organizations is likely to evoke the odor of a dusty technical treatise destined for equally dusty and esoteric lawyers. It is anything but – you are in for a surprise. Here are but three of many more considerations which will help dispel this first impression.

A huge number of international organizations are there to foster social and economic objectives, oftentimes social and economic justice. It might be as simple as ensuring that a letter is delivered, it may be as critical as supplying emergency food aid. Procurement, whether of goods, services and works, is a key instrument in the realization, or impediment, of these goals. To understand the deep structure, rather than the surface language, of this dimension of international organizations, one must abandon the lofty language of preambles and declarations and dive into the messy reality of money and its expenditure.

Consider further. There is not a single international organization, big or small, that can avoid some degree of procurement, thus a critical common thread of international organization practice regardless of their identity or function. If your interest is in the internal and external processes of governance of such organizations, (and who cannot be interested seeing how huge tranches of public administration have moved from the national to the transnational), public procurement offers a veritable and generalizable laboratory for analyzing such.

And finally there is theory. Theory is ultimately tested in its ability to provide understanding and insight into the empirical phenomena to which it is applied. Procurement by international organizations provides, as will be seen, a fertile ground with which to test extant theories conceptualizing and explaining transnational and international governance – not least the

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théorie du jour, Global Administrative Law – and to generate new conceptualizations and theoretical insights into this phenomenon.

This book is both a law book and a book about the law. It is a law book in that it provides, for the first time I believe, a full account of both the positive law and the results of extensive empirical research of the actual practice of public procurement by international organizations. It is a book about the law in that it seeks to understand the significance, conceptual and theoretical of this law and practice well beyond the specific subject matter.

I will now explain in greater detail the premises, research questions, methodology and theoretical framework of the book.

In 2015, organizations belonging to the UN system spent more than $17.6 billion on the procurement of goods and services.[1] Since 2000, UN procurement volume has steadily increased, reaching $5 billion in 2003, $10 billion in 2007 and $15 billion in 2012. The overall increase from 2000 to 2015 is attributable to an overall increase in procurement activities of the UN system as a whole, but some organizations have increased more than others. For instance, the increase in volume since 2009 is mainly attributable to a rise in volume from three organizations: the United Nations Children's Fund (UNICEF) with $1,599 million, the United Nations Development Programme (UNDP) with $1,126 million and the World Health Organization (WHO) with $770 million. This significant growth trend has gone hand in hand with the growth of their functions and structure.

International organizations' procurement is made possible by member state contributions, which in many cases – like the United States, Japan, Germany, and Great Britain – amount to considerable sums. The United States, which in absolute terms is the largest funder of the UN system, contributed over $610 million (22 per cent of total contributions) to the regular budget of the United Nations in 2017.[2] By the end of 2016, the European Union Official Development Assistance (ODA) represented 0.51 per cent of EU gross national income (GNI), and development aid from European countries and contributions to development banks, which may or may not be managed by the European Commission, reached an average of 0.46 per cent of GDP per state. Thus, expenditure

[1] More precisely US$17,575,297.95. See UNOPS, *2015 Annual Statistical Report on United Nations Procurement* [ref. REP]. The report refers to UN organization(s) meaning by that the United Nations, its subsidiary bodies – including separately administered funds and programmes – specialized agencies, research and training institutes, and other subsidiary entities.

[2] More precisely US$610,836,578. See United Nations, *Assessment of Member States' Contributions to the United Nations Regular Budget* [ref. REP].

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for international organizations has a significant impact on government budgets and contributors and, at the same time, is a business opportunity for individuals and enterprises.[3]

To manage these resources and balance the interests connected to them, a body of hard and soft rules has been gradually developed which regulates the relationships between international organizations and private parties. Whereas private subjects are free to choose their contractual counterparts, international organizations – similarly to national administrations – are bound to a set of administrative rules which govern primarily the vendor selection phase and, for certain aspects, also the contract. In 1962 Jenks envisaged the development of an international administrative law that would go beyond governing relationships between the organization and its officials to apply to relationships between international administrations and third parties as well:

> [a]s international organization develops certain matters cease to be governed by the conflict of laws and become subject to international administrative law. Within a generation this process has been virtually completed in respect of the legal relations of international organizations with their officials and employees . . . At a later stage some of the legal relations and transactions of international organizations with third parties may become subject to international administrative law. At each successive stage of development difficulties may arise in determining whether the balance of advantage lies in applying the normal rules of conflict . . .[4]

Rules governing international organizations' procurement are the latest steps of an evolutionary process from non-proceduralized modalities of administrative action to a more proceduralized and accountable exercise of functions by international organizations which affect private subjects not only – and not much – through a unilateral exercise of authority but mainly through their contractual activity. This regulatory phenomenon includes three apparently conflicting elements. First, for their functioning international organizations mainly rely on forms of cooperation with private subjects: the procurement procedure usually ends in a bilateral or multilateral public-private agreement (the contract).

[3] European Union, *EU Official Development Assistance Reaches Highest Level Ever,* Brussels, *press release*, 11 April 2017, also available at https://ec.europa.eu/europeaid/news-and-events/eu-official-development-assistance-reaches-highest-level-ever_en; and also OECD, *Development Aid Rises Again in 2016*, 11 April 2017, also available at http://www.oecd.org/dac/development-aid-rises-again-in-2016-but-flows-to-poorest-countries-dip.htm.

[4] Jenks, *The Proper Law,* pp. xxxvii–xxxix.

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Second, in their contractual activity organizations become more and more bound by rules of action that confer administrative duties on the organizations and corresponding legal positions on private subjects. Third, despite the adoption of a cooperative paradigm, the proceduralization of contractual activity and the corresponding development of rights of private subjects, international organizations retain forms of administrative privilege over private subjects that the organizations claim to be justified by their international and public nature. Thus, this book aims to answer some questions arising from the observation of these trends. The first regards the features of the phenomenon: to what extent the procurement rules and practices of international organizations create rights for individuals[5] vis-à-vis international organizations? In carrying out procurement, do international organizations affect individuals through unilateral command mode patterns or, on the contrary, through a cooperative approach which provides for an even distribution of rights and duties among the parties of the process? More in general, in which direction the emergence of procurement rules of international organizations moves the balance point between international public authority and individual rights? Are these procurement procedures structured in such a way that they can function as legitimating devices for international organizations? These issues will be investigated in both direct and indirect procurement of international organizations. The former is the procurement directly carried out by international organizations. The latter is the procurement financed, regulated and supervised by international organizations, but implemented by recipient states. For this latter type of procurement, the questions set above have further implications. Regulation and supervision of international organizations over states, on one hand, entails the emergence, or strengthening, of private subjects' rights vis-à-vis states. On the other, it has a restrictive impact on the states' regulatory, administrative and contractual autonomy. Thus, the questions above also imply an analysis of the limits that international organizations put on such autonomy. The second set of questions relate to the causes of the phenomenon and draw a connection between the politics and the law of international organizations: how can the development of these rights, and the limits to it, be explained? Can they be understood in the light of the interplay of conflicting political and

[5] 'Contractual' is widely construed here to include the pre-contractual phase (selection of vendors), the contractual (negotiation and conclusion of the contract) and the post-contractual phase (contract execution).

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economic interests underlying the international organizations' institutional dynamics? Avoiding too simplistic analogies to domestic law, this second set of questions is important to assess whether a further step towards a more transparent, accountable and cooperative exercise of international public authority is desirable and possible, and if possible, under what conditions. As will be shown, states play a crucial role in shaping the international organizations' institutional dynamics, and in extending or shrinking the scope of individual rights vis-à-vis international organizations. When it comes to exploring the reasons for the development of procurement rules and practices of international organizations, states are the active subjects which carry strong or weak political and economic interests, and concur to determine the emergence of private subjects' rights, but also their limits and the shortcomings in their effectiveness.

The answers to the questions set above require an analysis of several aspects. These include: the identification of the principles that guide the procurement activity of international organizations when carrying out procurement, both in regulatory terms and in practice; an understanding and assessment of the accountability mechanisms in place; an analysis of the contractual equilibria, to check whether contract negotiation and the clauses governing its execution fulfil the interests of both parties, or rather crystallize the primacy of international public interests over private ones; the identification of the dynamics of interests that shape the relationship between international organizations and private subjects.

This book is the first academic contribution on the topic. Despite the economic importance of the issue, the emergence of this regulatory framework and its significant implications for the debate on global governance, the procurement activity of international organizations has never been subjected to a comprehensive and in-depth legal analysis. With the exception of certain studies which appeared in the 1960s and 1970s on some aspects of international organizations' contractual activity,[6] and a few works dealing with a specific sector or a specific organization,[7] there is virtually no scholarship in

[6] For bibliographical references see footnotes in Chapter 4 and 5.

[7] The few works focusing on a specific sector are: with reference to defence procurement, Heuninckx, *The Law of Collaborative Defence Procurement through International Organisations in the EU*; *id.*, 'Applicable Law to the Procurement of International Organisations in the European Union'; *id.*, *The Law of Collaborative Defence Procurement in the European Union*; with reference to humanitarian food

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this area. There are several reasons for this lack of attention to this emerging phenomenon. First, the phenomenon is relatively new. As the historical chapter of this volume shows, international organizations have undergone a lengthy process of reform that started to have concrete implementation only in the last decade through, for instance, the issuing of hard and soft rules and the pursuit of stricter observance of these rules. Second, the phenomenon is difficult to detect as it is not manifested at the macro level through traditional international public law tools such as international treaties or rulings by international courts. Instead, it emerges out of small incremental pieces of law, such as administrative regulations, circulars and procurement manuals, and is not shaped, with the exception of a few organizations, by judgments on this matter. Third, the practice of international organizations plays a fundamental role in the implementation of the rules, often *de facto* altering the letter of the norms. Moreover, on one hand it is extremely difficult, without working experience in international organizations, to acquire an in-depth knowledge of the implementing dynamics that follow the rules. On the other hand, although practitioners may have diverse and extensive work experience in the field, they have rarely chosen to investigate the implications that this body of rules and practices has on the paradigms that guide the exercise of public authority by international organizations and its possible reforms.

assistance, Sakane, 'Challenges for Humanitarian Food Assistance'; with reference to peacekeeping operations, *id.*, 'Public Procurement of UNPKO'. Works dealing with a specific organization or group of organizations are Reynaud, 'Le recours precontractuel au sein des marches publics des organisations internationales. Le cas de l'Agence Spatiale Europeenne'; and Neumann, *Procurement in the United Nations System* (mainly focused on UNIDO). Other works focus on procurement by financial institutions: Caroli Casavola, *La globalizzazione dei contratti delle pubbliche amministrazioni*, pp. 119–150; Williams-Elegbe, *Public Procurement and Multilateral Development Banks*; Lachimia, *Tied Aid and Development Aid Procurement in the Framework of EU and WTO Law*; de Castro Meireles, *The World Bank Procurement Regulations*; Verdeaux, 'The World Bank and Public Procurement'; and Morlino, 'Development Aid and the Europeanization of Public Procurement in Non-EU States'. Works taking a general approach are Killmann, 'Procurement Activities of International Organizations'; Renouf, 'When Legal Certainty Matters Less than a Deal' Carbonnier, 'Procurement of Goods and Services by International Organisations in Donor Countries'; and Morlino, 'Procurement Regimes of International Organizations'; *id.*, 'Cosmopolitan Democracy or Administrative Rights? International Organizations as Public Contractors'. More generally, on the relationships between international organizations and the private sector see Kell, 'Relations with the Private Sector'.

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1.2 Research Design

Although the analysis concerns international organizations, it does not cover *all* international organizations. In this regard, I wish to clarify three points. The first is how the organizations have been identified, i.e. the methodology I have used to select the empirical referent. The second is why I have chosen certain organizations in my examples, that is the relevance of some organizations for my research purposes. The third is which organizations I have considered in my analysis, that is the actual object of analysis.

At the outset of my research – even before the identification of the research questions that then guided my analysis – the preliminary problem was to understand whether or not international organizations (all, some, or just a few) had rules that governed their procurement, just as states do. Thus, I conducted an empirical investigation following three stages of progressively increasing depth and focus. In the first stage, I carried out a preliminary study of about eighty intergovernmental organizations selected *prima facie* and on the basis of elements such as the organization's size, functions, activities and the possible presence or absence of internal rules regulating their institutional activities. This initial analysis allowed me to make a shortlist of approximately forty organizations relevant for my purposes. The shortlist included organizations of the UN family as well as other organizations. In a second stage, I compared the shortlisted organizations specifically with regard to their procurement, attempting in particular to identify the differences among the organizations in terms of procurement spending and development of specific regulatory architectures for procurement. In a third stage, from a slightly smaller empirical basis (approximately thirty-five organizations), I identified, on the one hand, the more common procurement organization and regulation patterns with their main characteristics and, on the other, the more notable exceptions to these patterns. In a fourth and final phase, corresponding to Chapter 2, I traced the connections between the types of organizations as identified by the relevant literature, and the characteristics of procurement as resulting from the conceptualization of the phenomenon. Thus, of these four stages, only the last is presented explicitly as such to the reader, while the others are implicit and preliminary.

With regard to relevance, the idea underlying the research has been not so much to take into account all international organizations regardless of size, functions and importance in the international

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context, but to consider all organizations that manifested, to a greater or lesser extent, the phenomenon of procurement and its legal implications, i.e. procurement regulation. The aim of the book is not neutral and all-encompassing. Rather, it is to answer some research questions and to identify the causes and consequences of a phenomenon from that point of view. Thus, I have assessed the relevance of the organizations on the basis of three criteria. The first is the presence of established rules and related practices of procurement within an organization. The second is the guiding role that the regulatory patterns of some organizations seem to have and their capacity to influence the rule making of other organizations (these driving patterns are often found in organizations with greater procurement volumes). The third, exactly opposite to the second, is the criterion of 'deviation'. In other words, I deemed interesting those regulatory solutions (and, by extension, the organizations that adopted them) that deviated, even if only in specific aspects, from the common patterns.

These three criteria led me to choose as examples – and here I come to the point of identifying the object of the analysis – a transversal variety of organizations mainly, but not only, belonging to the UN system. Certainly, the United Nations and its agencies are the most frequently mentioned examples as they are among the largest organizations, with greater procurement volumes and often with a developed apparatus of rules, but they are not the only organizations that I choose to explicitly mention in the work and, above all, are not the only organizations that constituted the empirical basis of my research. The European Union, the European Space Agency (ESA), the North Atlantic Treaty Organization (NATO) – to mention but a few – are some of the institutions that are relevant examples of 'deviations' from the most common regulatory patterns of procurement and are important for understanding in a comparative perspective the differences in the dynamics and interests underlying the different types of procurement.

1.3 Theoretical Framework

As noted, the relationship between international organizations and private subjects as well as the exercise of authority by international organizations affecting private subjects and states within the procurement process are the core issues explored in the book. The choice of this particular viewpoint on the activity of international organizations was

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determined by an empirical observation of the historical evolution and recent developments in international organizations. At the same time, this choice had an influence on the theoretical tools that have been chosen for the analysis. In this regard, some preliminary considerations are useful to clarify the theoretical background of the research and understand how this work relates to the existing literature on international organizations.

First, the approach on which the analysis has been built is inductive. The observance of the increasing magnitude and functions of international organizations has led me to explore what actually made possible the exercise of these functions, i.e. procurement, and, in turn, to investigate how this procurement activity was exercised, according to which rules and affecting which subjects. This preliminary empirical investigation showed that, although the phenomenon has never received attention from scholars, international organizations function thanks to procurement; over the years they have slowly developed rules governing procurement; and, most importantly, their procurement activity and the connected rules affect private as well as public subjects.

Second, these empirical findings needed some tools to be read, analyzed and interpreted. The most straightforward way to do this was to turn to the categories developed by the literature on international institutional law, as it has been the stream of literature that most comprehensively explored the internal functioning of the international organizations and the rules governing them.[8] Although being of crucial importance to understand the statics and dynamics of international organizations, this literature proves, however, to be tailored to an idea of international organizations that does not include an analysis of their procurement activity, of the rules governing it or of the legal problems arising from its implementation. The lack of analysis on this aspect of international organizations can be explained by two reciprocally related factors.

The first regards the actors that are deemed to be involved in and affected by the law of international organizations. International institutional law is mainly concerned with relations between international

[8] Seminal works in this regard are Sands and Klein, *Bowett's Law of International Institutions*; Schermers and Blokker, *International Institutional Law*; Amerasinghe, *Principles of the Institutional Law of International Organizations*. The traditional model of international institutional law, based on functionalism, however, has been questioned by Klabbers, see *inter alia* Klabbers, *An Introduction to International Organizations Law*; *id.* 'The Emergence of Functionalism in International Institutional Law'; *id.*, 'The Transformation of International Organizations Law'.

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organizations and their member states. Thus, on one hand, it relates to intra-organizational relationships; while, on the other hand, as pointed out by some scholars, organizations' external relations are mainly conceptualized in terms of their treaty-making powers.[9]

The second factor is a consequence of the first. Based on the idea that there is a principal, i.e. the member states, assigning one or more functions to their agent, i.e. the international organizations,[10] international institutional law is built on the observation of a link between the functions exercised by the organizations and the rules governing them. The application of the principal–agent theory to organizations has been conceptualized in terms of functionalism.[11] International institutional law based on functionalism has had, on one side, the merit to describe and explain – when there were not yet descriptions and explanations – how international organizations are legally structured and carry out their activities. On the other side, the emphasis on functions, and their connection with the member states as subjects attributing them, implies also the tendency to view international organizations as subjects that are not accountable to any subjects other than states, but also that *should not* be accountable to any subjects other than states by virtue of the function exercised.[12] It is emblematic in this respect that, to the limited extent that relations with third parties are concerned, those are deemed to be governed by the doctrine of privileges and immunities of international organizations and responsibility comes into play, when it does, mainly as responsibility under international law. Moreover, emphasizing descriptive aspects without providing a critical analysis of these aspects gives the descriptive approach a normative value, because it is not questioned. But while this might have reflected and worked well with the traditional

9 Klabbers, 'The Transformation of International Organizations Law', p. 22.
10 On the control problems that the principal–agent relationship poses, see Vaubel, 'Principal-Agent Problems in International Organizations'.
11 Klabbers has provided a seminal definition of 'functionalism': '[i]n a nutshell, as I shall reconstruct it, [functionalism] is essentially a principal–agent theory, with a collective principal (the member states) assigning one or more specific tasks – functions – to their agent', see Klabbers, 'The Transformation of International Organizations Law', p. 10.
12 The normative component of international institutional law is explained by Klabbers in the following passage: '[a]dmittedly, functionalism in international organizations law has a descriptive component, but it is not a theory on how international organizations law works – in fact, it is far more normative than just this . . . [F]unctionalism at the core of international organizations law aims to tell us how organizations should and may behave, not how they actually behave. It is in essence a theory not about law (not even institutional law) but, rather, about international organizations and their relationship to their member states', *ibid.*, p. 20.

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