

Concluding remarks: re-appraising international organizations

Introduction

It was stated in the beginning of this book that an important characteristic of the study of international organizations is the absence of a single perspective on them. Instead, as the previous chapters have sought to demonstrate, many of the ideas invoked in the law of international organizations can be traced back to different conceptions of what organizations are, and more specifically to different perspectives on the relationship between international organizations and their member-states.

What I hope to have indicated in the preceding chapters is that these contending perspectives are reflected in much of what we usually think of as the law of international organizations.¹ In many respects, this branch of the law is ambiguous, and cannot make up its mind whether to err on the side of the member-states, or whether to err on the side of international organizations (although it often ends up doing the latter). Thus, we find implied powers alongside attributed powers; we find residual liability side by side with limited or no liability, while member-states and organs are both interested in admitting new members.

That is, we may presume, a structural situation, which finds its origin in the fundamental tension lying at the heart of international law generally, and arguably of all law: the idea that law, in the absence of some form of agreement as to how best to organize our lives, in the absence of some concord on what constitutes the good life, has to cater to two fundamentally irreconcilable demands.

On the one hand, it should aspire to be in touch with the demands, desires and regular behaviour of its subjects, for a law that is out of touch

¹ This chapter draws on Jan Klabbers, 'The Changing Image of International Organizations', in Jean-Marc Coicaud & Veijo Heiskanen (eds.), *The Legitimacy of International Organizations* (Tokyo, 2001) 221–55.

with society will not prove to be a highly successful instrument for the regulation of that society. Yet, on the other hand, law must also distance itself from that society in order to be normative, for a law that only says what social actors already do anyway is, again, not very suitable as a regulatory instrument. Instead, it amounts (at best) to little more than descriptive sociology.²

In international law generally, this fundamental conflict finds itself translated into an everlasting tension between the exigencies of state sovereignty and the imperatives of international order and justice.³ With international organizations, it translates itself predominantly, but not exclusively, into a tension between the organization and its member-states. Additionally, when organizations look outside, third parties immediately enter the picture, and behind them stand, once again, such things as international order and justice, often portrayed as a personified international society (which in turn is sometimes held to be personified, confusingly, in the United Nations⁴).

The idea that much of the law of international organizations derives from the relationship between organizations and their members is far from novel, and goes back to at least the 1950s. Thus, Nagendra Singh, who would later serve as a judge with the International Court of Justice, could in 1958 boldly (and perhaps against his own sentiments) proclaim that 'anything which is not conceded in favour of the international organisation is retained by the member-State, which by virtue of its sovereignty must be vested with the residuary jurisdiction'.⁵

And part of the reason why Inis Claude's classic *Swords into Plowshares* still looks fresh, almost half a century after it was first published, is precisely his recognition of 'an ambiguity which is a persistent bane of the existence of international organization. Men and nations want the benefits

² It is perhaps no coincidence that outsiders tend to look at international law as either descriptive sociology (and thus of little practical effect in terms of constraining states' behaviour) or as a branch of ethics (and therewith equally of little practical effect). For a recent example, see Robert O. Keohane, 'International Relations and International Law: Two Optics' (1997) 38 *Harvard ILJ*, 487–502.

³ See generally Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki, 1989); see also his 'The Politics of International Law' (1990) 1 *EJIL*, 4–32.

⁴ For an example, see Jochen A. Frowein, 'Reactions by Not Directly Affected States to Breaches of Public International Law' (1994/IV) 248 *RdC*, 347–437.

⁵ See Nagendra Singh, *Termination of Membership of International Organisations* (London, 1958), pp. 80–1. His own sentiments, arguably, went more in the direction of viewing organizations as having 'a great role to play in the salvation of mankind' (*ibid.*, at vii).

of international organization, but they also want to retain the privileges of sovereignty, which are inseparable from international disorganization.⁶

Organizations v. members: a zero-sum game?

Much of the law of international organizations, then, derives from the relationship between the organization and its members, and, more importantly perhaps, is usually seen in terms of a clash between the organization and its members. Much writing in the field is based on the unspoken thought that whatever the law eventually says is the result of a tug of war between the organization and its member-states, and then miraculously ends up beyond politics.⁷ In short, much writing is based on the thought that this tug of war is a zero-sum game: either the organization wins, or the members win, and whatever the organization wins entails a corresponding loss for the members, and *vice versa*.

Indeed, much of this book is based on the same thought, precisely because it is the one thought that dominates the field.⁸ But (and this is perhaps where my argument becomes more novel), I do not think that the law of international organizations should only be analysed in terms of a zero-sum game between the organization and its members, where powers exercised by the members on Monday may be transferred to the organization on Tuesday only to flow back again to the members on Wednesday, and so on and so forth. Neither is it a zero-sum game in the more fluid sense of saying that whenever an organization loses power, it can only be to the benefit of states, whereas when states lose power it only benefits organizations. Instead, much as the organization and its members may be in competition when it comes to the exercise of power and powers, they ultimately also represent the same thing: the dream of instrumentality; the dream of regulation; the ideal that we can somehow make and shape society in accordance

⁶ Inis L. Claude, Jr, *Swords into Plowshares: The Problems and Progress of International Organization* (4th edn, New York, 1984), p. 39.

⁷ But see, for a classic statement by a self-confessed liberal that law is not beyond politics but is itself intensely political, Judith Shklar, *Legalism: Law, Morals and Political Trials* (2nd edn, Cambridge, MA, 1986).

⁸ As Schlag has observed, law is 'at once a concrete social form embedded in institutional practices and an abstract conceptual representation of those institutions and practices'. Legal analysis slips inevitably into an analysis of this representation rather than of the concrete social form, for constructing law is a matter of 'collective, projective objectification'. See Pierre Schlag, 'Law as the Continuation of God by Other Means' (1997) 85 *California Law Review*, 427–40, pp. 440 and 439, respectively.

with our favourite blueprints. States as well as organizations represent organized political life; both ultimately represent the idea that we can make and control our surroundings, and that we can conquer both nature and human nature.

This idea goes back to at least the Enlightenment, and found its culmination in eighteenth- and nineteenth-century pleas to advocate the abolition of such things as poverty by treaty,⁹ as well as in the 1950s battle cry of 'World peace through world law'. Law, it was thought (as an adjunct to politics, or perhaps taking the place of politics), could possibly cure all evils, as long as it was informed by science; novelist and would-be futurologist H. G. Wells (most famous for his futuristic *War of the Worlds*), in telling fashion, once sighed in desperation that many of the pitfalls of modern times could have been overcome if only the governance of society had been left to scientists.¹⁰

It is this Enlightenment ideal that has come increasingly under fire in recent decades; we are no longer convinced that we can shape society according to our wishes.¹¹ And more fundamentally perhaps, we cannot even agree on what society should look like. While the fall of communism has taught us the lesson that, broadly speaking, such things as liberty, democracy, respect for human rights, and the advantages of the market economy are preferable to their counterparts, the devil is, as they say, in the detail.¹² What exactly does liberty mean, and does it include the liberty to be abusive? What do we mean by democracy, and should not international society be democratic as much as we would like to see domestic societies democratically arranged? What, exactly, are human rights? Et cetera. While most of us – though probably not all of us – may agree on the broad outlines of the good life, there is sufficient ground to debate (and continue to debate) the more specific aspects thereof.¹³

⁹ As observed by Oakeshott, the nineteenth-century social reformer Robert Owen once suggested the project of a convention to end ignorance, poverty, sin and a few assorted other things as well. Oakeshott drily adds that even a rationalist might find this a bit eccentric. Compare Michael Oakeshott, 'Rationalism in Politics', in his *Rationalism in Politics and Other Essays* (London, 1962), 1–36, p. 6.

¹⁰ As referred to in Benedetto Croce, *History of Europe in the Nineteenth Century* (New York, 1933, trans. Furst), pp. 256–7.

¹¹ For an accessible formulation, see Claus Offe, *Modernity and the State* (Cambridge, 1996).

¹² For an illustration, see Kerry Rittich, 'Transformed Pursuits: The Quest for Equality in Globalized Markets' (2000) 13 *Harvard Human Rights Journal*, 231–61.

¹³ One of the more imaginative recent contributions to that debate is Andrew Linklater, *The Transformation of Political Community* (Cambridge, 1998).

To some extent, this has no doubt been a healthy development: such ideologies as fascism and communism presuppose a commitment to the modernist idea that society is malleable. As Zygmunt Bauman, a leading sociologist, has suggested, there is a direct connection between modernity's idea that society can be transformed at will, and the gas chambers of Auschwitz.¹⁴ Moreover, there is good reason to suppose that world government, once seen as the next phase of international organization, may itself be undesirable: perhaps mankind is better off with a world of smaller political communities instead of a single large polity.¹⁵

Where organized politics has lost some of its popularity, it should come as no surprise that the two main representatives thereof (states and international organizations) have also fallen from grace, although in the literature a trend towards re-appraising the state can be seen; the state, it would seem, has been rediscovered as a bounded political community, a form of living together of people allowing them to discuss freely the things they have in common and map out their desired future. Indeed, one could well argue that the recent victory tour of human rights and democracy has placed the state in a new, more favourable light, as the ideal guarantor of precisely human rights and democracy.

International organizations, however, are left behind, and have started to suffer from a bad reputation, especially compared with the optimism of yesteryear's 'international project'. They are deemed to be wasteful bureaucracies, feeding fat cats, without in any way contributing to the solution of global or regional problems. While it is reasonably obvious that some transboundary problems require international co-operation, it is no longer equally obvious that the formal international organization is the best-qualified vehicle for such co-operation. Indeed, one could argue that recent attempts to create entities which miss some of the characteristics of formal organizations (think of the OSCE, with its ostensible non-legal hallmarks, or the flexibility provided by G7 or G8) are attempts precisely to overcome the perceived obstacle of a formal style of politics.

A similar tendency is apparent from the names of some recently created organizations. Thus, co-operation in the bamboo and rattan sector takes place since 1998 through a network – the International Network for

¹⁴ See, e.g., Zygmunt Bauman, *Modernity and Ambivalence* (Cambridge, 1991), p. 50, arguing that modernity is a necessary (but not sufficient) condition for genocide.

¹⁵ So, e.g., Hannah Arendt, 'Karl Jaspers: Citizen of the World?', reprinted in her *Men in Dark Times* (San Diego, 1968), 81–94, pp. 83–4.

Bamboo and Rattan – and the International Jute Organization will be replaced by a toned-down International Jute Study Group once the Group's constituent document (tellingly referred to as an agreement establishing terms of reference rather than anything more ambitious) enters into force.

Transgovernmentalism, civil society and formalism

Taking the place of formal and organized international politics, we have started to idolize two new (relatively new, at any rate) styles of politics. One is the reification of transgovernmentalism¹⁶ or, as it has also been called in the slightly more concentrated context of the EC, infranationalism.¹⁷ We have come to be content with letting our lives be run by informal networks of decision-makers, and often consider this to be a welcome development: no more bureaucracy, but effective, goal-oriented management of international issues. Thus, judges are said to be engaged in international conversations with one another; civil servants serve their states by informally concluding informal arrangements with their colleagues elsewhere; bankers set standards at their meetings far from the spotlights.¹⁸ And to top things off, we often consider that these standards and arrangements are somehow beyond the realm of the law or, at best, make up that mushy institution known as soft law.¹⁹

There is, however, a price to be paid for all this effectiveness and efficiency: our lives are being run without any control whatsoever.²⁰ Parliaments cannot oversee the deals made by civil servants or bankers, and when they claim that they should have at least a look, they are told not to bother because those deals are not really law, after all. And the judges are too busy conducting their transnational conversations to mind much about the details

¹⁶ See in particular Anne-Marie Slaughter, 'The Real New World Order' (1997) 76 *Foreign Affairs*, 183–97.

¹⁷ Compare Joseph H. H. Weiler, *The Constitution of Europe* (Cambridge, 1999), esp. pp. 96–101.

¹⁸ See, e.g., Lawrence L. C. Lee, 'The Basle Accords as Soft Law: Strengthening International Banking Supervision' (1998) 39 *VaJIL*, 1–40.

¹⁹ For a critique, see Jan Klabbers, 'Institutional Ambivalence by Design: Soft Organizations in International Law' (2001) 70 *Nordic JIL*, 403–21.

²⁰ The same concern underlies, e.g., Deirdre Curtin, *Postnational Democracy: The European Union in Search of a Political Philosophy* (The Hague, 1997), as well as Larry Siedentop, *Democracy in Europe* (London, 2000). A first response, advocating in particular increased information flows as a means of increasing accountability in at least some circumstances is Anne-Marie Slaughter, 'The Accountability of Government Networks' (2001) 8 *Indiana Journal of Global Legal Studies*, 347–67.

of what others do, and they too start to believe that what those bankers or civil servants agree upon is not really law, and, should it be law after all, then perhaps it is not the type of law that would insist on rigid compliance.²¹

Still, we reify transgovernmentalism because, after all, it is somehow international, and we internationalists have a natural affection for what David Kennedy once fortuitously referred to as our 'international project': anything is good, as long as it is international.²² This, in turn, stems from our distrust of anything parochial: the state stands for nasty things such as sovereignty, human rights violations and warfare. After all, who has (or had, until Kosovo) ever seen an international organ or network go to war? Well then: for us internationalists, the state was, until recently, the root of all evil, so it follows that anything that attempts to reach beyond the state is laudable and praiseworthy, regardless of its precise contents. As Louis Henkin once put it with resonating force, sovereignty is a bad word;²³ state sovereignty needs to be overcome if life will ever get better.²⁴

The second form of politics we have come to appreciate is the politics of what is widely referred to as civil society. We have lost our faith in political parties, and have instead turned to what some call 'new social movements'. We may not turn out at election time, but we are busy raising funds for Greenpeace, writing postcards for Amnesty International, demonstrating in the streets of Seattle, Prague and Genoa, and discussing the pros and cons of prospective international agreements on the Internet.

However laudable such activities may be, once again democracy and accountability become problematic. Perhaps the *Werdegang* of the planned Multilateral Agreement on Investment, largely ascribed to amorphous and elusive Internet protests, illustrates best what is at stake: power exercised by faceless, nameless and uncontrolled individuals and groups, without any

²¹ Amazingly, recent scholarship in especially international trade law attempts to justify non-compliance on the rather curious ground that, after all, states do not always comply with rules, and such should be reflected in the law. A representative example is Joel Trachtman, 'Bananas, Direct Effect and Compliance' (1999) 10 EJIL, 655–78.

²² As Douzinas sarcastically observed, God may be dead, but at least there is international law. See Costas Douzinas, *The End of Human Rights* (Oxford, 2000), p. 9.

²³ See Louis Henkin, 'International Law: Politics, Values and Functions' (1989/IV) 216 RdC, 9–416, p. 24.

²⁴ Note, however, that the most serious attempt to present a coherent liberal vision along these lines nevertheless ends up partly defending the state, precisely because of the state's dual nature: on the one hand, traditionally the violator of human rights and democracy, but on the other hand also capable of protecting (and giving effect to) human rights and democracy. See Thomas M. Franck, *The Empowered Self: Law and Society in the Age of Individualism* (Oxford, 1999).

form of supervision and without any form of accountability. While we expect our statesmen to be democrats, and while we try to sell the blessings of it to those that have hitherto remained deprived of democracy, we simultaneously allow our spirits to be uplifted by the utterly undemocratic politics of civil society, conveniently ignoring the circumstance that civil society not only includes our noblest dreams, but may also include our worst nightmares.

In sum: we seem to have surrendered to the limited and overseeable world of single-issue, substantive politics. The end justifies the means: we are for human rights, but do not rally Pinochet's right to a fair trial. We are for democracy and elections, but not if we do not like the people's choice, as in Algeria or Austria. We are for liberty, and cheerfully impose liberty upon others through mechanisms of conditionality. We are for peace, but have little problem in justifying the unauthorized bombing of places if we think that the bombing is, er, well, justified. We internationalists, moreover, have combined our affection for civil society with our traditional international project.

What has gone missing is the counterweight of formal politics, the type of politics that insists on rules relating to voting and decision-making, that knows an *ultra vires* decision when it sees one, and insists that the ends do not always justify the means, precisely because, ultimately, we cannot agree on the ends and thus end up imposing our ideals, or at least our superior techniques, on others.

Partly, this has gone missing because formal politics tend to become bureaucratic, slow, protracted, deliberative rather than decisive. Partly it has also gone missing because the institutions we associate with formal politics are the same institutions that, when we were not watching, got carried away and started to multiply, creating big government and even bigger government.

This holds true for states, but no less for international organizations: it is worth noting that during the golden years of deregulation, the 1980s of Thatcher and Reagan, the already obese UN organization managed to create a whopping 173 new agencies, while laying to rest a mere 73.²⁵ Brian Urquhart, a former high-ranking UN servant, vividly explains how such things may take place: 'Cockeyed ideas from member-states or other sources

²⁵ Cheryl Shanks, Harold K. Jacobson & Jeffrey H. Kaplan, 'Inertia and Change in the Constellation of International Intergovernmental Organizations' (1996) 50 *International Organization*, 593–627, esp. pp. 602–3.

begot studies which produced reports which set up staffs which produced more reports which were considered by meetings which asked for further reports and sometimes set up additional bureaucratic appendages which reported to future meetings. The process was self-perpetuating.²⁶ Nonetheless, this power grabbing by international organizations (itself, admittedly, often uncontrolled: as we have seen, the *ultra vires* doctrine is in the end a rather helpless attempt at stemming the tide²⁷) came with one benefit: at least as a formal matter, so to speak, it retained a place for formalism. Accountability of our political leaders, while not overly visible in practice, could still be exercised, even if it was not. At least our international agencies were accountable, and their activities remained, potentially if not effectively, within our grasp.

Thus, we run the risk of throwing the baby out with the bathwater if we all too warmly welcome civil society and transgovernmental networks: it may well be the case that in order to organize (never mind regulate) our lives, we cannot do without a style of politics where the interests of the minority find some protection, and where it is possible to argue before a court of law that a decision ought never to have been taken, or ought to have been taken by somebody else. It is such ideals which form the basis of modern conceptions of the *Rechtsstaat* or the Rule of Law, and those ideals can only be honoured by means of conducting our politics through agreed-upon procedures and in accordance with agreed-upon standards.

In this light, it is no surprise that the state has met with approval again in recent years, being form without contents: precisely because there is nothing natural or authentic about the state (in contrast to the nation), it turns out to be the ideal place in which to conduct politics.²⁸

A similar role could be played by international organizations: no longer the champions of internationalism and the automatic guarantors of happiness, we should not immediately discard them either. It may be worthwhile to view organizations too as invaluable fora for the conduct of politics, where meaningful debate can take place, and meaningful agreement can be reached, on matters that concern us all. Only through such formalized

²⁶ Brian Urquhart, *A Life in Peace and War* (New York 1987), p. 108.

²⁷ For an impressive overview of how the position and methods of the Security Council have been changed with little formal amendment of the UN Charter, see Frederic L. Kirgis, Jr, 'The Security Council's First Fifty Years' (1995) 89 AJIL, 506–39.

²⁸ Compare in particular Martti Koskenniemi, 'The Wonderful Artificiality of States' (1994) 88 *Proceedings of the American Society of International Law*, 22–9; see also his 'The Future of Statehood' (1991) 32 *Harvard ILJ*, 397–410.

procedures can we prevent might from becoming right; only through such a formalized style of politics can we make sure that power is exercised through legal channels rather than nakedly.²⁹

That is not to say that what is needed is a reform of the institutional structures of international organizations. Reform projects tend to be more successful on paper than in practice,³⁰ and some organizations may be, quite literally, unreformable.³¹ Moreover, as Franck has astutely observed, it is not so much that we need new forms, but rather that we make more intelligent use of those that already exist while accepting the realities of the general conditions under which we live.³²

Concluding remarks

The law of international organizations, as this book hopes to have indicated, does not add up to a clear set of plain, unequivocal legal rules: there is much uncertainty in the law of international organizations, and much of that uncertainty finds its cause in the tense and problematic relationship between the organization and its member-states – it is difficult to tell the acts of an organization from those of states acting *en groupe*, which in turn allows states and organizations to hide behind one another, in fact even to become indistinguishable. And this is no coincidence, as they stand for the same thing: politics in accordance with the law. That the law itself is unclear in no way diminishes this circumstance.

By the same token, the unclarity of the law is no reason to lose faith in international organizations.³³ The more proper response is to accept and to live with the ambiguity of the law, and to accept and live with international

²⁹ It is surely no coincidence that, in influential sociological circles, a call for international regulation can be heard with an increasing sense of urgency. See Will Hutton & Anthony Giddens (eds.), *On the Edge: Living with Global Capitalism* (London, 2001).

³⁰ See, e.g., Maurice Bertrand, 'The Historical Development of Efforts to Reform the UN', in Adam Roberts & Benedict Kingsbury (eds.), *United Nations, Divided World* (2nd edn, Oxford, 1993), 420–36; see also Rosemary Righter, *Utopia Lost: The United Nations and World Order* (New York, 1995).

³¹ For an argument that the UN is unreformable, see Marie-Claude Smouts, 'United Nations Reform: A Strategy of Avoidance', in Michael G. Schechter (ed.), *Innovation in Multilateralism* (Tokyo, 1999), 29–41.

³² Compare Thomas M. Franck, *Nation against Nation: What Happened to the UN Dream and What the US Can Do about it* (Oxford, 1985), pp. 182–3.

³³ See also Jan Klabbers, 'The Life and Times of the Law of International Organizations' (2001) 70 *Nordic JIL*, 287–317.

organizations, if only because without them the world could easily become a far worse place. While there is no longer a reason to believe that they alone can guarantee the dream of instrumental reason, with more modest expectations about what they can achieve (or indeed about what they ought to aspire to) we might just be able to rescue what is valuable. But one thing is imperative, and that is that certain aspects of the law be developed in serious fashion: the weakness of the *ultra vires* doctrine, to name just one example, must be recognized for what it is and turned into a source of strength, for it is only the analysis of its weaknesses that can facilitate a different, more balanced use in the future.

In other words: while it is true that the law of international organizations is a volatile set of ideas (some more or less hard rules, others merely popular policy preferences), it is also clear that we can hardly imagine a world without international organizations anymore. Indeed, there is a distinct role for the organization: not as the *deus ex machina* of yesteryear, entering the scene in order to save the day or to save the world, but rather as the type of bounded political community which facilitates discussion and debate; no longer as regulatory agencies *par excellence*, but simply (and most importantly) as places where international politics is conducted.