Concluding Remarks. Changing roles of international organizations: global administrative law and the interplay of legitimacies

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Changing Roles of International Organizations: Global Administrative Law and the Interplay of Legitimacies

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Abstract
Looking back over the last sixty years, there is no doubt that the role and the capacity of international organizations to conduct operations have greatly evolved. Their mandates have expanded and the objectives to be reached have been diversified. Field operations have increased in a dramatic way. It has become increasingly necessary for international organizations to resort to innovative legal mechanisms to be able to fulfil the new tasks they have been assigned. In the meantime, the appearance on the world stage of a large number of non-State actors carrying out tasks which were traditionally incumbent upon State authorities and intergovernmental organisations, has led to the establishment of specific mechanisms allowing them to collaborate closely with the latter. In face of the challenges raised by these complex interlocking legal relationships, numerous administrative law type principles have emerged as instruments for adapting the classic international system of States and intergovernmental organizations to contemporary requirements.

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1. About Needs and Partnerships

The emergence of new needs and demands has led to the question being asked whether the mandate of international organizations, as framed in their constitutive instruments, allows them to perform these new tasks and whether it should be extended and new tools thought about. Answers have varied over the years. The appearance of new missions which exceeded the mandate of existing organizations has led to the creation of new institutions specifically devoted to dealing with a new issue, as full-fledged international organizations or as new organs or programs of an existing international organization. Another trend has been to extend the mandate of existing organizations. The International Fund for Agricultural Development (IFAD),¹ a relatively new organization created to fulfil a new task, has also over the years put in place a large array of mechanisms, allowing the organization to act in a domain or in a way that was not initially foreseen.

In other circumstances an organization may have the mandate and the ability to accomplish a new task but it lacks the technical or financial means to do so in an efficient manner. In this context, the assistance provided by non-State actors can be useful. Non-State actors, including *inter alia* individuals, non-governmental organizations, foundations, scientific associations and the private sector, play an increasingly important role in the life of international organizations. New tools have been put in place to allow for a close collaboration between these different actors. As mobilizing new resources has become crucial, partnerships have been established, as for example between the World Health Organization and other institutions through the Global Alliance for Vaccine and Immunization (GAVI Alliance) or the Global Fund to fight AIDS, Malaria and Tuberculosis.²

The growth in importance of non-State actors and the benefits international organizations may derive from collaboration with them has inspired inclusiveness. The participation of all interested and concerned actors in


² G.-L. Burci, “Public/Private Partnerships in the Public Health Sector”, in this Symposium.
international organizations can greatly benefit both international organizations and non-State actors. From the international organizations’ standpoint, promoting inclusiveness increases their representativeness, legitimacy and effectiveness. Inclusiveness benefits non-State actors in allowing them to reach a public scene and get an outreach exposure for activities and programs which would otherwise remain more or less in the shadows.

Facing the challenge of the extension of the mandate of international organizations and the growing importance of non-State actors in implementing public policy through various types of partnerships, the assessment of and control over such activities have come on the agenda. However, it is difficult to find the right tools for assessing and controlling activities of both international organizations and other actors involved in partnership relations. In addition, the growing complexity of the partnership schemes which are put in place renders any attempt at standardizing such tools rather complicated.

If the added-value of partnerships is quite clear from the functional and operational points of view, the multiplication and coexistence of different structures of partnership creates complexity. Partnerships can take many forms. They can be laid down in formal or informal agreements which, however, are sometimes far from clear about the objectives, the role and responsibilities of each participant. In practice, a wide range of institutional models have been used, going from loosely structured entities, such as networks, to collaboration through semi-autonomous entities.

Various mechanisms have been put in place within international organisations as well as in the context of public-private partnerships for oversight purposes and in order to sanction misconduct. They are of an endogenous nature, revealing the specificities of their “creators” as well as of the legal structures in which they find application. The case of the World Anti-Doping Agency (WADA) is a prime example of these features.3 The functioning of these mechanisms might raise concerns regarding the protection of human rights, especially with respect to due process requirements. The establishment of review mechanisms and the strengthening of the fair hearing criterion are answers to these concerns.

Alongside these institutional evolutions, the necessity for international organizations to have a presence on the ground has caused a huge growth of offices in the field. During the last decades, States have been requesting international organizations to set up a presence in the field in order to create the kind of direct action that is sometimes difficult to achieve from the headquarters. Many challenges and difficulties were caused by the ensuing “explosion” of field offices. This is the case in particular with relationships of field units with headquarters as well as between field offices and host states and local political actors.4 A better coordination between actors involved, including between the various offices of international organizations acting “on the ground”, is a requisite to improve effectiveness.5

Like public-private partnerships, the emerging branch of the “field administration of international organizations”6 is characterized by institutional complexity. A wide range of means is used to establish presence in the field, going from the establishment of permanent field offices to the sending of a temporary field team or the participation of other public or private agencies. Although useful in order to give a dynamic, more action-oriented dimension to international organizations’ work, field operations bear the risk of being ineffective in practice if the technical and, more largely, systemic challenges are not addressed. The viability of the work of international organizations is in large part conditioned by how they are able to address these problems and find solutions.

A way of creating a solid foundation for this archipelago of legal relationships is to promote the application of cross-cutting administrative law type principles that can find application in all of these situations. Sometimes described as “values”7 or concepts, these emerging principles are approaching sufficient normativity at the international level to be qualified as rules or norms.

6) Kingsbury and Casini, supra note 4.
7) See for example the website of the Global Fund in which it is affirmed that “The Global Fund was created based on values such as transparency, effectiveness, and inclusiveness of all groups of society”, <www.theglobalfund.org/en/innovativefinancing/debt2health/transparency/>, visited on 1 September 2009.
2. The Quest for Transparency and Participation

Recent years have clearly shown a trend towards increasing transparency in international organizations’ activities and operations. In contrast to opaqueness, transparency has a symbolic dimension. It is shedding light on activities no longer hidden by some form of confidentiality. However, it is not an easy task to define transparency properly. The definition must, at the same time, be broad enough to cover many different situations and precise enough to find application in practice. The difficulties of defining this concept are due in the eyes of some to the fact that transparency is a “myth”.8

The positive aspect of transparency as a factor of legitimacy is counterbalanced by the risk of potential misuse of the notion. This risk is increasingly prevalent since international bodies frequently refer to it, sometimes as a reaction in response to the growing complexity of certain mechanisms.9 Furthermore, when reference to transparency is made a priori, in the constitutive instruments of international organizations, it usually lacks a precise and clear definition.10 This feature is the strength and the weakness of the concept at the same time.

In practice the concept of transparency covers a large array of different mechanisms. Transparency is primarily achieved through access to information, by providing access to documents. Examples of application of such “informational transparency” can be found in the World Trade Organization. It has allowed for example the swift broadening of the mandate of the organization through the granting of access to the general public of the second monitoring report released by the Director-General to manage the

9) See the call made by the Fifth Committee (Administrative and Budgetary) of UN General Assembly to “reform the United Nations procurement system, which required strengthened internal controls and transparent management to match the growing dimensions of its work”. “Enhanced Transparency, Strengthened Accountability needed, as United Nations Procurement grows in size, complexity, budget committee told”, 23 October 2006, <www.un.org/News/Press/docs/2006/gaab3760.doc.htm>, visited on 1 September 2009.
10) See Article 5 par.7 of the Agreement of 3 April 2001 establishing the International Organization for Vine and Wine, which declare that its constitutive bodies “shall function in an open and transparent manner”, <news.reseau-concept.net/images/oiv_uk/client-VersionofficiellANG-Agreement_April_2001.pdf>, visited on 1 September 2009.
effects of the financial crisis. Such informational transparency can also be applied in the context of public-private partnerships, by ensuring access to information through websites and other means, and this increases the legitimacy and standing of such partnerships.

Transparency may be achieved by greater proximity between international organizations, non-State actors and individuals. Transparency, access to information and public participation are more and more intertwined. In this context, mechanisms allowing non-State actors to participate in decision-making processes can be seen as a form of transparency. Such is the case of the World Bank Inspection Panel and other compliance procedures which allow non-State actors to challenge the decision of an institution or of a State.

The concepts of transparency and participation are linked in many ways. Like transparency, participation is a multidimensional concept, which can take many forms and that can concern many different actors. Traditionally, participation has been understood as allowing individuals or States affected to have their views and opinions heard and considered before a decision is taken. It is quite clear that participation procedures require transparency to be meaningful. As an example, affected actors need to be informed about the ins and outs of a situation to be able to participate.

In the context of international procedures, participation has not only been confined to individuals or States targeted by a specific decision.

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There is a broader understanding of participation which aims to allow different actors, such as NGOs, that are not directly affected by a decision to be able to participate in regulatory activities. It is however important to identify criteria for determining and identifying the actors entitled to participate to formal or informal decision-making processes, in order for example to make sure that public means will not be used to pursue private interests. Similar issues can be raised with respect to *amicus curiae* in the context of dispute settlement procedures. Given the exponential growth of NGOs on the international scene, procedural rules need for example to be established to condition the acceptance of *amicus curiae* briefs and the ensuing proceedings.\(^\text{16}\)

Participation is also linked to accountability. For example, in the case of participation before a dispute settlement body the claimant is able to hold a decisionmaker to account by presenting argument and evidence.\(^\text{17}\)

3. The Quest for Accountability

Accountability is also a concept of crucial importance. It can be defined as a “mechanism to control power of a public body by calling it to account”;\(^\text{18}\) It stands for answerability for the performance of an actor towards others and contributes to impose a model of proper conduct on the concerned actors. Accountability can be achieved through various steps.\(^\text{19}\) An institution informs the authorities which it is accountable to on its activities and decisions. Thus understood, accountability implies transparency. These links were rightly pointed out in the context of specific initiatives, such as the WTO Aid for Trade Initiative, in which informational transparency


has been perceived as a tool for promoting accountability by exposing decisions and relevant documents to public scrutiny.\textsuperscript{20} This aspect was also highlighted in the context of election observer missions.\textsuperscript{21} Transparency is a requisite for ensuring an adequate level of accountability. The channels of transparency may vary, depending on the addressees. Most of the time transparency will be directed to the authority to which the institution is accountable, but there may be other addressees. In the case of election observer missions, transparency materializes through the release of internal reports to the international organization that established the mission and through a public report that will be accessible to State authorities, the media and civil society. The institution is thereafter required to justify its actions and decisions towards the authorities and, bear the consequences of these acts in the case of eventual misconduct, but also vis-à-vis other actors in a more general manner due to its “public exposure”.

Given the multiplication of actors and the differences of status between them, it is sometimes difficult to identify accurately to which “constituency” a non-State actor or even an international organization is accountable. As has been demonstrated in respect of field operations dealing with arms control, it is sometimes difficult to identify the “higher authority” since many different authorities are normally involved in a field operation.\textsuperscript{22} Efforts have been made to render channels of accountability more visible.

Distinguishing between accountability and responsibility is not easy. A sequencing approach demonstrates that accountability belongs to the category of primary norms, i.e. norms of behaviour incumbent upon international organizations and responsibility determines the consequences of a failure to these commitments as well as to other commitments. The relations between accountability and responsibility should be seen as complementary. Responsibility can induce a “culture of accountability” and accountability strengthens the role of responsibility as a sanction mechanism.

The demand for accountability mechanisms may counterbalance the immunity accorded to international organizations officers both at headquarters

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\item G. Marceau and O. Illy, “Global Administrative Law Perspective on the WTO Aid for Trade Initiative”, in this Symposium.
\item A. van Aaken and R. Chambers, “Accountability and Independence of International Election Observers”, in this Symposium.
\item A. Marschik, “Arms Control in the Field: Accountability and Legitimate Participation in Missions”, in this Symposium.
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and in the field. Immunity is an appropriate mechanism with a view to protecting international organizations and their officers from suit at the domestic level and in order to guarantee the independence and efficiency of their work. It contributes to preserving the integrity of their functions. However, international organizations must be controlled also by being held accountable to both their Member States and the international community at large. Immunity does not imply exemption from accountability. The same can be said with respect to sui generis institutions, such as public-private partnerships, when they are granted privileges and immunities. As soon as they are granted privileges and immunities equivalent to those of a public international organization, it would seem normal that they also bear obligations similar to those of international organizations in terms of accountability. This increasing demand for accountability can lead international organizations and public-private partnerships to set objective standards and rules which their staff must adhere to in the form of operational standards and procedures or through mechanisms which aim at assessing their conduct as in the case of the World Bank Inspection Panel. Accountability also plays a role when international organizations engage themselves with “non-classical” actors such as rebel groups within the context of field missions. Such “unusual contacts” should be based on accountability to ground their legitimacy. Clarity on the legal commitments

23) See for example the Swiss Host State Act of 2008 (full text available at <www.admin.ch/ch/e/rs/192_12/index.html?task=print&lang=fr>, visited on 1 September 2009). Both GAVI (agreement signed in June 2009) and the Global Fund (Host agreement in 2003) benefited from similar privileges, immunities and facilities as international organizations based in Switzerland.


on the part of these groups strengthens the accountability of the concerned international organizations.\textsuperscript{27}

4. Towards Increased Legitimacy

Both transparency and accountability in the end are eventually part of the contemporaneous preoccupation of legitimacy of international organizations. The quest for legitimacy in international law has been discussed quite extensively.\textsuperscript{28} Nevertheless the distinction between concepts of legality – understood as compliance with the law – and of legitimacy is sometimes difficult to draw. One way might be to distinguish the political side from the legal side of legitimacy. If it is indeed pretty clear that legitimacy concerns can be discussed in political terms, it is also increasingly relevant to say that legitimacy is not simply a political question but also a legal one. This “legal legitimacy”\textsuperscript{29} however remains hard to grasp. While focusing on transparency and accountability, an answer that comes to mind is that legitimacy of an institution can be checked regarding its conformity to “values”, while its “legal status” comes from the respect of legal norms. The criterion of distinction will be the nature, legal or not, of the source. When the normativity of a concept is not clear, its value-added will be analyzed in terms of legitimacy. The inclusion of transparency elements in the decision-making rules of international organizations has a legal effect, even though this is not required by a rule of law. A norm produced by an organization, through a transparent procedure, will not be “more legal” in this way but it may have higher legitimacy. In these circumstances, transparency has a procedural function and will produce effects in terms of legal legitimacy rather than legality. In a nutshell, legal legitimacy stands in-between legitimacy and legality. It cannot be qualified as a legal issue because with some exceptions, it is not based on legal requirements and it cannot be qualified as a pure political legitimacy issue because it has concrete legal effects.

\textsuperscript{27) See F. Rawski, “Engaging with Armed Groups: A Human Rights Field Perspective from Nepal”, in this Symposium.}


Although legal legitimacy, according to our viewpoint, is a specific category, it also could be seen as a transitional phase towards legality. As legal legitimacy and legality are distinguished by a criterion deriving from the nature of the source, as soon as the values mentioned earlier can be qualified as rules, legality takes pride of place and legitimacy lags behind. That is not to say, however, that political legitimacy is not distinct, and at the same time connected, to legality. The political legitimacy of international organizations requires respect for the rule of law. Efforts still have to be made within international organizations to recognize the relevance of principles and norms of international law in the context of their activities. Respect for the rule of law contributes to their increased legitimacy.

All in all, the multiplication of areas in which contemporary international organizations are involved as well as the establishment of new types of relationships between international organizations and other actors give rise to innovative principles and mechanisms that help to increase the legitimacy of the overall system. By clarifying the legal meaning of these principles and thoroughly studying their contours, the Global Administrative Law (GAL) perspective fulfils an important role. The questions and challenges with respect to the governance of international organizations and the proliferation of authorities and institutions involved in the running of public affairs are numerous. There is a need to bring a more global as well as more inclusive approach to such phenomena.

Indeed, international organizations are no longer the only international frames for institutional cooperation. International organizations continue to be crucial and necessary mechanisms for achieving public goals and the focusing on their legitimacy remains necessary. In the same time, international organizations interact and cooperate more and more with a wide range of new actors. The potential of these emerging means of action should not be underestimated. However, there is also a need to increase the legitimacy of these new types of relationships. According to what may be termed an “interplay of legitimacies”, it increasingly appears that the strengthening of

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the legitimacy of international organizations’ partners is not only an option but a condition of the viability of the overall cooperative system.