

Some Challenges for (Teaching) the Law of International Organizations

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As the title suggests, in this contribution we will devote some reflections to a number of challenges we see for the law of international organizations, and more specifically for the teaching of this discipline. This exercise is part of the introduction of a masters' course on the law of international organizations in the framework of the Bachelor-Master (more popularly: "Bama") reforms at Leuven University. As such, it reflects our personal point of view, but we hope it may be useful for our colleagues – likewise, we would be very grateful for any constructive comments as this is an ongoing process.

First, we will address the teaching method, second, the link between research and teaching and third, the study material. We will conclude by briefly outlining our approach to teaching in this field of law, as one possible way this teaching can be done.

1. Teaching method

One of the first and main challenges for the teaching of the law of international organizations appears to be balancing the issues and rules common to all or most international organizations with the vast variety of specific rules in each organization. In terms familiar from Schermers and Blokker's classic work on the law of international organizations:³ how can one address both the "unity" and "diversity" and do so within the confines of one course?

When one considers that the most recent edition of the aforementioned reference work, which aims at identifying this "unity in diversity", numbers 1213 pages of actual text, excluding annexes and the like, it becomes clear that this is no easy task.

The difficulty manifests itself in particular regarding the selection of topics that are relevant to the law of international organizations, the appropriate depth of treatment of these topics, and the selection of relevant materials.

Determining the precise topics and the appropriate depth of treatment is challenging. There are many issues to be covered and even a discussion of only the common issues and rules and their main variations can easily fill one course. Without fixing the order of things, it seems appropriate to address at least the question of definition of international organizations (even if only to illustrate their great diversity and to make a number of typologies, from government networks to supranational organizations⁴); their legal position at the international and domestic levels (legal personality, submission [or subjection?] to international law, responsibility, immunities, etc.); issues of competences, organs, the process of decision-making and the legal status of the instruments adopted; judicial review of decisions; mechanisms for the implementation of decisions; dispute settlement; external relations.

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³ H.G. Schermers and N.M. Blokker, *International Institutional Law. Unity Within Diversity* (Martinus Nijhoff, 2003, 4th ed.), xxxiv + 1302 p.

⁴ See, e.g., A.-M. Slaughter, "Governing Through Government Networks", in M. Byers (ed.), *The Role of Law in International Politics* (Oxford University Press, 2000), 177-205; A.-M. Slaughter, *A New World Order* (Princeton University Press, 2004), at 22.

Yet even a class covering these aspects would fail to show the great variety and rich detail that can be found on many issues. However, it is only possible to go into such detail and variety on a few issues if the common thread is not to be lost.

As to the selection of materials, it is difficult to both cover the diversity and illustrate the unity without burdening students with an unmanageable quantity of material. Three examples may illustrate this difficulty. First, within NATO alone there are several treaties dealing with privileges and immunities, including those of the organization itself, those of third States' missions to NATO, those of NATO's military headquarters and those of Member States' military forces.⁵ Second, there is great variety in the constituent instruments of regional international organisations, *inter alia* reflecting different levels of (economic and/or political) integration. Third, in many organizations the constituent instrument alone insufficiently reflects the functioning of the organization and must be read together with rules of procedure and subsequent practice, including (a sometimes considerable *acquis* of) decisions adopted by the organization's organs.

2. Linking teaching and research

Universities pride themselves that their teaching is linked to research. We wish to elaborate a little on one element of this linkage, namely integrating new developments and challenges into the teaching. We will briefly discuss four such developments which we feel should be addressed in teaching the law of international organizations.

First, the increase in international organizations and their scope of action and the development of regional integration organizations has led to enhanced relationships between international organizations at the global and regional levels.⁶ These forms of cooperation are becoming more and more formalized and institutionalised (one may think, for instance, of the increasing number of agreements between the UN and the EC/EU)⁷ and these legal linkages are themselves becoming an important element of the law of international organizations. The relationship between regional and universal international organizations is likely to become a key issue in areas as diverse as human rights, security and trade. One further development is closely related to this: it is becoming more frequent for an international organization to become a member of another international organization (e.g., the European Community's membership of the World Trade Organization) or participate in the work of another international organization in one way or another. This phenomenon raises many complex issues.

Second, while globalization and a more interdependent world demand effective international cooperation, the need for effectiveness⁸ may well clash in a number of cases with demands of

⁵ For an overview of most of these agreements, see <http://www.nato.int/docu/basics.htm>.

⁶ Obviously, at the global or regional levels alone there will remain challenging questions of increased coordination, cooperation and even integration of international organizations: one may for instance think here of the relationship between the EU and the Council of Europe, or the question of the coordination at UN level of all agencies and bodies which are active in the field of sustainable development.

⁷ See, e.g., in the area of conflict prevention, J. Wouters, "The United Nations, the EU and conflict prevention: interconnecting the global and regional levels", forthcoming as Chapter 17 in V. Kronenberger and J. Wouters (eds.), *The European Union and Conflict Prevention: Policy and Legal Aspects* (T.M.C. Asser Press, 2004).

⁸ Interesting studies from an effectiveness point of view can be found in H. Ruiz-Fabri, L.-A. Sicilianos and J.-M. Sorel (eds.), *L'Effectivité des organisations internationales* (Pedone, 2000).

accountability, democracy, fundamental rights, legitimacy and the rule of law. Developing a legal and institutional framework that accommodates these sometimes conflicting requirements is one of the key challenges for the future of international organizations. This challenge also brings to light the fact that a strictly legal approach is too restrictive for a course on the law of international organizations: one needs a good dose of openness vis-à-vis the other social sciences, such as economics (e.g. “agency”⁹ and “public goods”¹⁰ analyses of international organizations help in better understanding their actions and shortcomings), political science (*inter alia* for a better understanding of complex concepts such as accountability¹¹, democracy, [distributed,¹² global,¹³ good,¹⁴ multilevel,¹⁵ ...] governance, legitimacy¹⁶, but also to make empirical analyses of international organisations)¹⁷, international relations and regimes theory approaches to certain organizations or gremia¹⁸, and ethics.¹⁹

⁹ See, e.g., with regard to the WTO, R. Howse, “How to Begin to Think about the ‘Democratic Deficit’ at the WTO”, http://faculty.law.umich.edu/rhowse/Drafts_and_Publications/howse7.pdf ; see also, in the area of human rights, D.H. Moore, “Agency costs in international human rights”, 42 *Columbia Journal of Transnational Law* (2004), 491-519.

¹⁰ See, e.g., I. Kaul et al. (eds.), *Global Public Goods. International Cooperation in the 21st Century* (Oxford University Press, 1999); I. Kaul et al. (eds.), *Providing Global Public Goods: Managing Globalization* (Oxford University Press, 2003); J. Wouters and B. De Meester, “The Role of International Law in Protecting Public Goods. Regional and Global Challenges”, *Lirgiad Working Paper No 1*, www.lirgiad.be (2003).

¹¹ See for legal analyses, e.g., P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruylant, 1998); the contributions of W.E. Holder, G. Hafner and K. Wellens to *Proceedings of the 97th Annual Meeting of the American Society for International Law* (2003), 231-245. See also the interesting case-study of B.N. Patel, “The accountability of international organisations: a case study of the Organisation for the Prohibition of Chemical Weapons”, 13 *Leiden Journal of International Law* (2000), 571-597.

¹² See, e.g., F.M. Abbott, “Distributed Governance at the WTO-WIPO: An Evolving Model for Open-Architecture Integrated Governance”, 3 *Journal of International Economic Law* (2000), 63-81.

¹³ See, e.g., V. Rittberger (ed.), *Global Governance and the United Nations System* (UNU Press, 2001).

¹⁴ Although still mainly applied vis-à-vis States, the concept of “good governance” is increasingly also studied in its application to international organizations proper: see, e.g., J. Wouters and C. Ryngaert, “Good Governance: Lessons from International Organisations”, forthcoming in D. Curtin and R. Wessel (eds.), *Good Governance and the European Union: Concept, Implications and Applications* (Intersentia, 2004).

¹⁵ This has become a “buzzword”, especially in an EU context: see, e.g., T.E. Aalberts, “The future of sovereignty in multilevel governance Europe: a constructivist reading”, 42 *Journal of Common Market Studies* (2004), 23-46; N. Bernard, *Multilevel Governance in the European Union* (Kluwer Law International, 2002); B. Kohler-Koch (ed.), *Linking EU and National Governance* (Oxford University Press, 2003).

¹⁶ See *inter alia* the contributions in J.-M. Coicaud and V. Heiskanen (eds.), *The Legitimacy of International Organizations* (United Nations University Press, 2001).

¹⁷ See, e.g., concerning WTO disputes, M.L. Busch and E. Reinhardt, “Testing international trade law: empirical studies of GATT/WTO dispute settlement”, in D.L.M. Kennedy and J.D. Southwick (eds.), *The Political Economy of International Trade Law* (Cambridge University Press, 2002), 457-481.

¹⁸ See *inter alia* R.O. Keohane, “International Institutions: Two Approaches”, in R.J. Beck, A.C. Arend and R.D. Vander Lugt (eds.), *International Rules: Approaches from International Law and International Relations* (New York, Oxford University Press, 1996), 187-204; D. Snidal, “IGOs, Regimes, and Cooperation: Challenges for International Relations Theory”, in M.P. Karns and K.A. Mingst (eds.), *The United States and Multilateral Institutions: Patterns of Changing Instrumentality and Influence* (Boston, Mershon Center, London, Unwin Hyman, 1990), 321-350; S.M. Tarzi, “International Regimes and International Relations Theory: Search for Synthesis”, *International Studies* (2003), 23-39.

¹⁹ Ethical issues pertain not only to the fields of activities of international organizations (from international trade to international security, including problems such as humanitarian intervention), but also to their actual mode of operation, e.g. in order to improve the participation of developing countries in international organizations such as the WTO. See *inter alia* J.-M. Coicaud (ed.), *Ethics and International Affairs: Extent and Limits* (UNU Press, 2001); J.-Y. Morin, “La mondialisation, l’éthique et le droit”, in D. Mockle (ed.), *Mondialisation et Etat de Droit* (Bruylant, 2002), 81-137; T.W. Pogge (ed.), *Global Justice* (Blackwell, 2003); P. Singer, *One World: The Ethics of Globalization* (Yale University Press, 2002).

Third, there are a number of fundamental legal issues that have not yet been settled and that may have an impact on the above-mentioned issues. These include the conditions and scope of international legal personality, the extent to which international organizations are themselves bound by international law (especially customary international law and general principles of law, but also the question of increased accession to treaties, e.g. on human rights) and the legal responsibility of international organizations (though the International Law Commission and International Law Association are working on the latter issue).

Fourth, there is the impact of the practice of international organizations on the development of international law in general and its sources in particular. This fundamental issue is still insufficiently addressed in the study of international law. While this transcends the institutional level and – at least to some extent - even the law of international organizations, it is a crucial issue in the borderline between general international law and the law of international organizations that should not be ignored.

3. Study material

Apart from the challenge of selecting the most relevant materials, a number of other difficulties arise, not only in teaching but also in researching the law of international organizations. We will mention just two of these.

The first problem is the availability of domestic case law on international organizations in various jurisdictions in languages accessible to most practitioners and students.²⁰ While publications such as the *International Law Reports* and the various country-specific international law journals and yearbooks publish some of this case law, it would appear that this reporting is rather fragmented and requires keeping track of a large number of publications. Moreover, for some students and practitioners, publication in country-specific journals or yearbooks without translation into a frequently used language will not make this material accessible. In our view, this journal could provide further added value by publishing such case law, in translation where appropriate, and/or with annotations.

A second difficulty seems to be the imbalance in literature, in particular the limited literature on less well-known organizations. This primarily affects the study of such organizations, for instance with strong reliance being placed on their constituent instruments without sufficient knowledge of or attention to the actual practice of the organizations. However, it may also have an impact on what rules organizations are believed to have in common: the risk exists that rules of the more familiar organizations are regarded as common rules whereas in fact this may not be the case. Thus caution is appropriate with respect to extrapolation from much-studied organizations that are, at least in some respects, rather exceptional, such as the EC/EU.²¹

4. A possible approach to teaching the law of international organizations

We believe a mix of more general and theoretical aspects on the one hand (with attention to non-legal approaches: see above) and more detailed, in-depth case studies on the other hand is

²⁰ See the important work, though, of A. Reinisch, *International Organizations Before National Courts* (Cambridge University Press, 2000).

²¹ One can think, e.g., of the question of extrapolating EC/EU experiences to the WTO: see *inter alia* the contributions to G. De Búrca and J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues* (Hart, 2001).

best suited to addressing both the common issues and rules and the variety and detail of the law of international organizations in a fruitful manner.²² At every stage in this approach, recent developments and challenges as outlined above should be taken into account. As to the material, it would seem inevitable to use a great many shorter excerpts in order to be able to illustrate both unity and diversity, and go into detail every now and then, while keeping the amount of material within reasonable limits. Consequently, a “text, cases and materials”-book appears to be the most apt instrument for use in teaching the law of international organizations.²³

²² Which is not to say that a number of recent textbooks are not of great use for courses in the law of international organizations: apart from the aforementioned standard work of Schermers and Blokker (*supra* note 3), mention should be made of the high-quality work of J. Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press, 2002) and P. Sands and P. Klein’s *Bowett’s Law of International Institutions* (London, Sweet & Maxwell, 2001, 5th ed.).

²³ An example is F.L. Kirgis, *International Organizations in their Legal Setting* (West, 1993, 2th ed.). However, the author has recently acknowledged that his casebook is “pretty much out of date”: see the report of the discussions of the ILA Teaching Committee of 3 April 2004, at http://www.ila-hq.org/html/layout_committee.htm, p. 17.