OECD

INTERNATIONAL REGULATORY CO-OPERATION:
Fostering the Contribution of International
Organisations to Better Rules of Globalisation

SESSION 1.

HOW DO IOs SUPPORT BETTER RULES OF GLOBALISATION

Alain PELLET (Keynote Speech)

Mr Chairman, Ladies and Gentlemen,

It was a strange idea in Céline Kauffman's imaginative mind to have kindly insisted that I introduce this session. I am much less imaginative and have been, and still am, a bit puzzled by this kind, and honourable but quite perplexing proposal… I am only a lawyer and the only perspective with which I can deal with the topic assigned to me is legal. Even if it is the "best school for imagination", law is certainly unable to account for all aspects of this promising and wide topic. Happily others are more likely to analyse it in all its complexity.

Whether legally or factually, international organisations do not exist nor act in a vacuum. Their actions and, in particular the role they play – or not – or could play, or should play to support a better governance in the framework of our global (or globalizing) World cannot be examined in "clinical isolation". And a brief explanation for my preference for the word "globalizing": it implies a move, while "global" is static and presupposes that the goal has been reached or that the change is already effective – in other words, that we would have passed from a Westphalian World entirely shared and governed by sovereign States to a "post-modern" society where a diversity of non-State entities exercise a decisive influence. Although I am fully conscious that we do not live anymore in a purely Westphalian World – admitting that it had existed at all in the past, which is dubious – I am also convinced, to paraphrase the well-known formula of the late Professor Henkin, that « *The Reports of the Death of [Sovereignty] Are Greatly Exaggerated* »[1] !

---

[1] V. Louis Henkin, « The Reports of the Death of Article 2(4) Are Greatly Exaggerated », *A.J.I.L.* 1971, pp. 544-548.

Now, as a rather (not entirely!) classical lawyer, I am struck by a very salient trait of our globalizing World: another division superimposes itself to the traditional geographical division of our planet between sovereign States. It is a functional division based on the distinction between various human activities. Each category of them relates to a particular *corpus juris* – that late François Rigaux had named "*espace juridique*" ("legal space") which can be made of rules from various origins (domestic or international law; EU law; rules issued by other international organisations; "private legal orders" like *lex mercatoria*, *sportiva* or *electronica*), etc. Thus we can speak of the legal space of health – which is composed of all rules which apply (or could apply) in all situations concerning health issues and calling for a legal handling. Similarly, the legal space of education is made of all rules applying to this activity. And you can envisage as well a legal space of agriculture, or tourism or sport (which would go beyond the *lex sportiva*); etc.

Such an approach breaks with the traditional (Hegelian) presentation which assimilates law with the State. The "legal space" analysis de-territorializes law – which, in this perspective, is not limited to a territory (domestic law) nor framed to regulate relations between entities defined (e.g.) by the possession of a territory with fixed boundary.

It is quite evident that in the legal spaces thus defined international organisations have a special role to play. As is very generally accepted and admirably expressed in the World Court's Advisory Opinion of 1949 concerning *Reparation for injuries suffered in the service of the United Nations*: "Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."[2] As a consequence, the division of competences between international organisations is based on what is usually called the "principle of speciality" or "of specialisation" or "specification" (the French offers less choice: it is the "*principe de spécialité*"), which governs and legally frames and limits the activities of international organisations. As the ICJ specified in its 1996 Advisory Opinion: "The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, *the*

---

[2] ICJ, Advisory Opinion, 11 April 1949, *Reparation for injuries suffered in the service of the United Nations*, *ICJ Rep*. 1949, p. 180.

limits of which are a function of the common interests whose promotion those States entrust to them."[3] The OECD Report does not say otherwise when it states: "IOs have a key role to play in fostering a multilateral approach and in addressing the fragmentation that may undermine the effectiveness of domestic regulatory action." (para. 2).

This points at the supposed eminent – we can say "preeminent" – role incumbent upon international organisations in promoting and implementing better governance in our globalizing World. Yet, without being provocative nor, hopefully, rude, they are but secondary actors in the World governance; as the OECD Report puts it: "even with the best of intentions, IOs may be – I'm afraid that it should be 'are' – limited in their ambition. Critically, structured evidence on their impacts remains scant, casting a doubt on the effectiveness of their action." (para. 3). In view of this excellent Report and, in part, of my twenty-five year experience as the Legal Adviser of the World Tourism Organisation (UNWTO) I will try not to explain why we are reduced to this rather pessimistic view – it would be arrogantly ambitious, but to suggest some possible tracks to find out the reasons for the present situation. And it goes without saying that, in doing this, I will be fully unable to forget and leave aside my purely legal background. As far as possible, I'll focus on their role in international regulatory cooperation (IRC) – but I'd think that the diagnosis must be global: the impotence in question covers regulation as well as – and even more – implementation and action.

To put things simply, I suggest that the causes for the relative powerlessness of international organisations in the World game are both endogenous and exogenous – the latter being, in my mind, probably more explanatory than the former.[4]

I. ENDOGENOUS CAUSES

The Report, which is the backbone of our Meeting, mainly stresses the endogenous causes explaining international organisations' impotence to take full charge of – even to make a significant impact on – global governance. I fully share the view that overlaps between the functions of the various organisations and the lack of cooperation among them are

---

[3] ICJ, Advisory Opinion, 8 July 1996, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* ("WHO Opniion"), *ICJ Rep*. 1996, p. 78, para. 25; italics added.
[4] For an interesting attempt to shaping factors that make positive change so difficult, see: Oxford Martin Commission for Future Generations, *Now for the Long Term*, October 2013, available at http://www.oxfordmartin.ox.ac.uk/downloads/commission/Oxford_Martin_Now_for_the_Long_Term.pdf.

among the most worrying causes for these averred deficiencies. However, on one other aspect I'm afraid I have to nuance the over-optimistic assertions of the Report concerning the technical expertise and skill of the staff.

Overlaps first. Who deals with human rights in the international institutional system? Primarily the UNO itself – but this is quite a sprawling organisation – and also the UNESCO, the ILO, and virtually all of the specialized agencies, each in their own field; and even at the European level, have a look at the kind of competition existing between the EU and the Council of Europe and its very autonomous judicial organ the European Court for Human Rights in the field of Human Rights. And I am not sure at all that the still pending adhesion of the EU to the European Convention on Human Rights will help solving the issues resulting from the actual situation.

Another striking – not to say scandalous – example of overlaps: the duo formed by the WTO on the one hand, the UNCTAD on the other hand. From my point of view, and despite the efforts of both organisations to cooperate (I have in mind in particular their 2003 MoU giving effect to their "strategic partnership"), one of those institutions is superfluous and I cannot help seeing the UNCTAD as a survival of the 1960s and 1970s challenge of the then existing economic order. But it is a symbol in the eyes of numerous countries from the South and it sustains half a thousand of staff members…

And a third example – of much lesser importance, but which I know from inside: the overlaps for dealing with tourism between the WTO and … the UNWTO. Besides the usurpation of the acronym of the pre-existing WTO (which has been solved by an agreement by which the newly founded World Trade Organisation would not use "WTO" when it deals with tourism – an agreement which does not seem to be very scrupulously respected by our colleagues in Geneva… – a *modus vivendi* has been found which leaves the commercial regulation of tourism to the WTO/OMC while the UNWTO deals with statistics (its strong point I am said). This being said, the UNWTO is preparing a Convention on the protection of tourists – the WTO/OMC has not protested … so far.

Very honestly, and leaving aside the unequal and rather anecdotic rivalry between the two WTOs, I do not foresee any possibility to overcome these overlaps (and many others): each organisation claims for itself a kind of "sovereignty" and the bureaucratic

resistances and personal interests of staff members give no hope for in depth reform of the system.

There might be some more reason for hope concerning the *coordination* within the system (or non-system?) of international organisations. It has been built from bits and pieces around the nearly Cartesian UN limestone conceived after World War II. But the very idea of a nebula instead of a solar system, with the UNO as a *primus inter pares*, has never convincingly worked. The Bretton Woods financial organisations have secreted a sub-system by themselves, even less well integrated. Instead of being an efficient coordinating body, as envisaged by the UN Charter, the ECOSOC has evolved as a mail box receiving reports but without any authority on the 17 specialized agencies of the system – let alone on international organisations off the system (even though some among them like the WTO, the IAEA participate in the coordination meetings of, for example, the Chief Executives Board for Coordination (CEB) or the yearly meeting of the Legal Advisers).

This is not to say that these (very) soft forms of cooperation are useless. I participate with interest to the yearly meetings of the Legal Advisers of the UN system (to which Legal Advisers of a number of organisations outside the system are associated) and I find our exchanges of views on topics of common interest quite useful. Moreover, these meetings are prolonged by e-mail exchanges through the Network of Legal Advisers, the efficiency of which has been threatened since the previous UN Legal Adviser has refused to assign to it a part time coordinator as was the case before.

And the regional organisations (which can be – and have largely been – accepted as observers to the UN including in the ECOSOC) remain outside these forms of cooperation. And I note with great regret that the same holds true for more concrete actions. Thus, the Regional Coordination Mechanisms are, as far as I understand, essentially limited to enhancing UN system-wide coherence.

As a reminder, I note that the situation is not more satisfactory as far as international peace and security are concerned. At the World level, cooperation between the Security Council of the UNO – which has been granted "the primary responsibility for the maintenance of international peace and security" by Article 24 of the Charter, and other organisations having competences on related matters like the OPCW or the IAEA seems to be

rather softly implemented.[5] And I have some doubts concerning the compatibility of the Constitutive Act of the African Union – and in particular its Articles 4(h) and (j) – with Chapter VII the UN Charter.

It must, however, be acknowledged that, by contrast with the moderately convincing success of the global coordination, sectorial cooperation on technical matters seem more promising. The Inter-Agency Cluster on Trade and Productive Capacity or the Inter-Organization Programme for the Sound Management of Chemicals and some other forms of cooperation based on MoUs are briefly described at paragraph 99 of the Report and seem to be rather productive.

Before leaving the subject of coordination, I wish to draw attention on another issue which might be more an exogenous factor than an endogenous cause rendering coordination difficult. It concerns the representation of States inside the organisations. More often than not, even when important States with developed and well trained civil service are concerned, States are represented in various international organisations by delegates coming from various Ministries, who can take different positions on the same or proximate issues. It is quite frequent in particular that representatives coming from the Ministry in charge of the budget take positions a bit – or quite – different from those representing the Minister of Foreign Affairs or the technical Minister or Ministers concerned. And, still in my UNWTO, I have witnessed quite different positions from the delegates coming from the Ministry of Tourism and that of diplomats – including from France…

As for the *quality of staff*, I am afraid that the OECD Report is a bit optimistic. Yes, there are indeed remarkable international civil servants. Nevertheless the picture is not so rosy:

- As noted by the Joint Inspection Unit in a 2012 Report,[6] ""[i]n the case of recruitment, unfairness and inequalities may arise and weak transparency and lack of accountability may

---

[5] See however : See e.g. the Agreement concerning the Relationship between the United Nations and the Organization for the Prohibition of Chemical Weapons, 17 October 2000 (http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/55/283) or the Agreement Governing the Relationship Between the United Nations and the International Atomic Energy Agency, approved by the General Conference of the Agency on 23 October 1957 and by the General Assembly on 14 November 1957 (resolution 1145 (XII) in particular Art. IX).

[6] P. L. Fall and Y. Zhang, UN Joint Inspection Unit, "Staff recruitment in United Nations system organizations: a comparative analysis and benchmarking framework", JIU/NOTE/2012/1, Geneva 2012.

lead to a wide range of malpractices. Such recruitment malpractices have serious implications for the efficiency of organizations, since the best qualified and most competent individuals may be excluded as a result. The risks for the competence and reputation of organizations are clear."

- These weaknesses in recruitment are very general. But the greatest worries concern universal organisations where the apparently appropriate principle of an equitable geographical distribution wreaks havoc both in the organisations concerned and in some (maybe many) least developed countries which thus lose scarce human resources.

- The lack of transparency is particularly acute concerning the highest levels of the hierarchy. with as an often cited consequence a *lack of leadership* at the secretariat level: too many organisations are made of feudalities more juxtaposed than coordinated for a common aim. And the Executive Head will have as a main function to arbitrate between them while he's denied political leadership by Member States – even if some outstanding personalities succeed in imposing themselves – like Dag Hammarskjöld in the UN, Albert Thomas, Wilfred Jenks or Francis Blanchard at the ILO, or René Maheu at the UNESCO long ago or, recently, Pascal Lamy at the WTO – but imposing themselves does not mean that they succeeded in imposing their vision for their organisation let alone for the system…

II. EXOGENOUS CAUSES

This question of lack or insufficient leadership is most important and not limited to the Heads of Secretariat.[7] As aptly written by Drs Wouters and Odermat, "[w]hile there are many reasons for these roadblocks, they largely stem from the fact that there is no longer a group of states able to show leadership."

But this is the present state of our World. The good old time of the Cold War has gone, the *Pax Americana* is faltering, even the rise of the BRICS and other emergent countries seems to have reached a threshold. And neither 9/11 nor the terrorist renewed attacks have

---

[7] On the global issue of leadership see World Economic Forum, Effective Leadership in International Organizations, April 2015, available at https://www.bsg.ox.ac.uk/sites/www.bsg.ox.ac.uk/files/documents/ Effective_Leadership_International_Organizations_report_2015_0903.pdf or J. Wouters and J. Odermatt, "Individual Leadership in Guiding Change in Global Governance Institutions: Theory and Practice", Working Paper No. 171, March 2016, available at https://ghum.kuleuven.be/ggs/publications/working_papers /new_series/wp-171-180/wp171-wouters-odermatt.pdf.

created a trauma deep enough to envisage a complete overhaul of the international institutional system comparable with the global reconstructions which followed the two World Wars. Right to the contrary, I have the (rather disappointing) feeling that the recent dramatic events whether in the field of economics or the rise of insecurity has led, up to now, to more inertia if not regression – and this holds true at the world level as well as at the regional (at least European) level.

The main reason is, I think, that in these times of instability, insecurity, not to say anxiety – whether obvious or resented – feelings of solidarity close in the more traditional and closer circles: family, ethnicity, religion or nation. Hence the lack of common values which frustrates any grand design with an international vocation – all the more so that States, not without success, attempt to capture these new (or renewed) solidarities at their benefit and flatter the rising tide of nationalisms by multiplying sovereignist measures.

In this situation, it is obvious that the role of international organisations for a better governance can only be limited. As Pascal Lamy wrote (in spite of his well-known aversion for the so-called "Westphalian system"): "For policy or political purposes, the Westphalian Nation State matrix retains an indisputable comparative advantage. It reflects the conventional wisdom that all politics are local. It is based on an '*affectio societatis*' linked to proximity. This feeling is obviously lacking globally."[8]

This being said, are we condemned to go back to a purely Westphalian system with juxtaposed States buttressing themselves on their sacrosanct sovereignty? Indeed not. And first for very obvious reasons: pollution which doesn't know any border, climate change which requires a coordinated action from all the countries, the risk of epidemics which is increased by the ease of communication, terrorism which has become a global threat, etc.; none of these challenges can be successfully faced in isolation by any nation-State. And, more concretely, the OECD Report gives hope for a role for the international organisations in the regulation of the international governance of our globalizing World since it shows, very neatly I think, that, in

---

[8] P. Lamy, "Is Globalization in Need of Global Governance?", Raymond Aron Lecture, 28 October 2013, p. 3, available at http://www.brookings.edu/~/media/events/2013/10/28-global-governance/20131028_aron_lecture_lamy_remarks.pdf; see also: P. Lamy, "Bien commun et globalisation", Rentrée inaugurale de l'École d'affaires publiques de Sciences Po, 30 août 2015, on file with the author; P. Lamy, « Peut-on parler de valeurs globales ? », Colloque au Collège des Bernardins, *Le XXIe siècle sera spirituel ou ne sera pas*, 6 novembre 2015, on file with the author.

spite of all the difficulties I have mentioned, international organisations are strongly involved "in the upstream activities of the policy cycle, in particular exchange of information, data collection and development of norms, standards and best practice. By contrast, [they] are much less involved in the downstream activities of enforcement" (para. 5).

But I would think, that, even at this level, they probably could enhance their role

- by opening more fully to non-state actors (precisely for counteracting the disinterest – or purely routine interest – of the States *vis-à-vis* the institutional international action);

- by trying to invent new models of administrative leadership; and – but this is probably the most difficult, maybe inaccessible, step, because it implies a change in mentalities,

- by thinking themselves as part of a global enterprise and thus abandoning their "organisational nationalism" – could we say "organisationalism"?

As Professor Ngaire [Nyree] Woods convincingly warned in her Report to the Davos Meeting in 2015:

> No transformative overhaul of international institutions should be expected in the foreseeable future. In no way should the pertinent players give up on existing institutions; rather, the only realistic alternative seems to be incremental reform. Scarce political capital should be applied to improving the performance of multilateral institutions, as radical transformations of the existing overall framework cannot be counted on."[9]

I share this "guarded optimism".

---

[9] N. Woods, "Effective Leadership in Internatonal Organizations", *World Economic Forum*, April 2015, p. 6, available at https://www.bsg.ox.ac.uk/sites/www.bsg.ox.ac.uk/files/documents/Effective_Leadership_International_Organizations_report_2015_0903.pdf.