The contribution of international courts and tribunals to the methodology of international law

OC - (ILA-14151) - REPARATION FOR INJURIES AND BEYOND - THE DESIGN OF THE PERSONALITY AND POWERS OF INTERNATIONAL ORGANISATIONS BY INTERNATIONAL COURTS

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Ph.D student – KU Leuven (since September 2018)
Research Topic: Cooperation between international organisations and the development of new rules of international law
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Master of Laws cum laude, specialisation in Public International Law - Leiden University Law School (September 2014 - July 2015)
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Bachelor of Laws - Faculty of Law of NOVA University of Lisbon (2010 - 2014)
Academic Merit Award, for graduating with the highest grade of the class

II. Academic experience

Junior Researcher at the Leuven Centre for Global Governance Studies (since September 2018)

Research Assistant to Prof. Patrícia Galvão Teles, International Law Commission, United Nations (since September 2017)

Guest Researcher at CEDIS - Research Institute of Faculty of Law of NOVA University of Lisbon - member of the research group "New Challenges of International Economic Law" (http://ttip.cedis.fd.unl.pt) (since October 2016)

Member of the International Law Association; Member of the Direction in 2013-2015; Secretary of the General Assembly of the Portuguese Branch (2017-2019)

III. Conferences and publications

Prática internacional em matéria de imunidades - 2017 em revista (International Practice on the matter of immunities - review of 2017), in Anuário Português de Direito Internacional 2017 (Portuguese Yearbook of International Law), Ministério dos Negócios Estrangeiros, Instituto Diplomático, 2019 (forthcoming)

Speaker at the Conference "70 years of the International Law Commission" on the panel on "Current Topics on the Agenda - Identification of Customary International Law" (April 2018, Braga)

Igualdade Soberana dos Estados (States Sovereign Equality); Registo e Publicação de Tratados (Registration and Publication of Treaties), in Enciclopédia Luso-Brasileira de Direito Internacional (Luso-Brazilian Encyclopedia of International Law), Manuel de Almeida Ribeiro et al. (editors), 2019 (forthcoming)

Arbitragem de Investimento, Soberania dos Estados e Interesse Público: Críticas e Respostas no CETA (Investment Arbitration, State Sovereignty and Public Interest: Criticism and Responses in CETA), in Os Desafios do TTIP à luz do CETA (The challenges for TTIP in light of CETA), Francisco Pereita Coutinho et al. (editors), ebook, CEDIS, 2018

The Cases Where the International Court of Justice Lacked Jurisdiction: a brief analysis and commentary, Rita TEIXEIRA and Ricardo BASTOS, in Towards a Universal Justice? Putting International Courts and Jurisdictions into Perspective - Collected

papers of the ILA regional conference held in Lisbon in 2014, Dário Moura Vicente (editor), Brill-Nijhoff, 2016

Presenter at the International Law Association Regional Conference 2014 – presentation of the paper "The cases where the International Court of Justice lacked jurisdiction a brief analysis and commentary" (published) (11-12 September 2014, Lisbon)

Abstract

Much has changed since, in 1874, a group of 22 states decided to establish the Universal Postal Union to coordinate policies and guarantee the efficacy of postal services across borders. Today, the international system is densely populated by hundreds of international organisations, covering a broad range of issues, and many of them with widespread or near universal membership. To what is more, they have become one of the defining features of contemporary international cooperation.

However, the emergence of a new actor in the international scene has been anything but uncontroversial. Since the end of the 19th century, the debate on the legal status and the extent of powers of international organisations has occupied practitioners and academics alike. The Permanent Court of International Justice ("PCIJ"), first, and later the International Court of Justice ("ICJ") have weighed in and played an important role in the discussion. In fact, the traditional departing point (Gazzini, 2011: 33) to discuss the personality of international organisations is nowadays the 1949 ICJ Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations ("*Reparation opinion*"), where the ICJ recognised that international organisations can possess international legal personality, albeit different from the one enjoyed by states. This finding would be reiterated in a number of subsequent opinions. Although that seemed to settle the question of the enjoyment of personality, several questions remained concerning the basis for that personality, the process for its acquisition, and its implications (namely what is the exact extent of powers of organisations).

This paper will look into the contribution of the world courts to the conceptualisation of the legal status and scope of the powers of international organisations. It will discuss both the historical significance of their decisions and the impact they still have in today's debate. It will conclude that, not only has their jurisprudence irremediably shaped the approaches in practice and literature for the future, but it seems also to have built upon and reacted to specific challenges facing the law of international organisations as it was developing at the time. In the end, the measure in which contemporary debates can be transposed into the case law of the ICJ, and can come to influence it, is speculated upon.

The paper is structured in three parts. The first part briefly overviews the doctrinal discussions in the first half of the 20th century. While at the turn of the century authors still confidently referred to states as the sole actors in international law, the debate started to change by mid 1920s (Bederman, 1996: 335-336, 343 *et seq.*). Academic works started to emerge that favoured the granting of legal personality to the League of Nations and portrayed organisations as autonomous actors, with a legal status and specific powers that were both conferred by member states and derived from international law. Furthermore, an analysis of the PCIJ's case law also reveals that, while at first the Court seemed to reject the idea that international organisations could be independent legal actors in international law, it gradually accepted a level of autonomy from member states and laid the first stepping stones for the establishment of the theory of implied powers. The final determination in this regard would come about with the *Reparation opinion*, after which the discussion on the subjecthood of organisations largely became mute.

The second part of this paper analyses the cases where the ICJ discussed the legal status of international organisations and their powers. Departing from the *Reparation opinion* as the landmark case, this part will critically analyse the reasoning of the Court at that date and compare it to the reasoning followed in later cases. In particular, the differences between the broader functionalist construction of the powers of organisations in the 1962 Advisory Opinion on Certain Expenses of the United Nations and the seemingly stricter functionally-delimited construction of the powers of the World Health Organization in the 1996 Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict will be discussed. Surely, there are factual differences between both cases that can justify the different findings of the Court – namely those differences between the broad mandate of the United Nations and the more limited mandate of a specialised organisation. However, it is proposed that the differences in reasoning can equally be explained by the differences in the international context and in the state of development of the law of international organisation in which the opinions were issued.

Part three of this paper will investigate how the reasoning of the Courts have definitively shaped the debate on the personality and powers of international organisations, to the extent that any theories must be able to refer back to their case law in order to be validated. However, it will also highlight difficulties that remain to be overcome today. In the post-Reparation era, two main schools of thought have emerged that aim to explain how international organisations acquire international legal personality: be it through the will of the parties or by compliance with objective criteria. Both of them rely on the *Reparation opinion* to ground their reasoning, making it difficult to validate one over the other. Furthermore, the different possible constructions of the scope of implied powers of organisations (sometimes broadened, other times limited by the functionalist approach adopted by the ICJ in different cases) (Engström, 2011: 62-66) highlights the shortcomings of functionalism as an explanatory theory of the powers of organisations. Finally, this paper looks into new approaches to powers of international organisations, namely constitutionalism, discussing its merits, attempting to refer them back to the legacy of the advisory opinions and speculating whether they could actually determine a different reasoning by the ICJ were it consulted today.

Palavras-chave : international organisations, international legal personality, international courts