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THE SEPARATION OF POWERS IN THE GLOBAL ARENA: PROMISES AND BETRAYALS

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Of Cheques and Balances: Separation of Powers in International Organizations Law

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An Introduction

These working papers were borne from the collaboration between The Jean Monnet Center at NYU School of Law and the IRPA (Istituto di ricerche sulla pubblica amministrazione - Institute for research on public administration). IRPA is a nonprofit organization, founded in 2004 by Sabino Cassese and other professors of administrative law, which promotes advanced studies and research in the fields of public law and public administration.

This paper serves as Introduction to the seminar on *The Separation of Powers in the Global Arena: Promises and Betrayals* that was held on December 16th, 2022 at the LUISS Guido Carli University in Rome.

The seminar's purpose has been to collect the contributions by international legal scholars to the study of the principle of the separation of powers and its transformations in a global context, and namely when adopted international and supranational institutions and challenged by global crises.

The seminar has gathered scholars with different legal backgrounds -history of institutions, international law, administrative law, environmental law- and with expertise at various levels, i.e. international, supranational and domestic.

The presentations discussed during seminar have resulted in seven papers, in addition to the present Introduction.

The principle of separation of powers, as theorized by Montesquieu, has been at the basis of modern democracies. With the evolution of democratic governance, however, it seems to have gained more a formal and normative value than a heuristic capacity as a principle capable of providing an interpretative key of the existing reality. Gradually that model, explicitly or implicitly adopted by democratic Constitutions, has suffered exceptions and deviations which the Covid-19 pandemic has even worsened.

In Western democracies the executive branch has often vested itself with legislating powers through decree-laws or equivalent. Parliaments have allowed this invasion, at the same time adding subsequent lengthy changes to these laws to meet local, sectorial, or corporate needs. In other instances, Parliaments have aimed at making the rules and applying them, through "self-executive" laws which are so detailed that they leave no room for any exercise of discretion by the administrations. The judicial branch has exercised regulatory powers in many sectors, expanding or shrinking principles or creating new rights and duties.

Exceptions and deviations are such as to make some scholars observe that the separation of powers no longer exists and has been replaced by different balances. Already in 1984 Lijphart argued, for example, that majoritarian democracies have been characterized by the concentration of powers on the executive, by the fusion of legislative and executive powers, and by the cabinet dominance over the legislative branch[1].

Although the literature on the separation of powers and on its crisis is very rich, the perspective from which this symposium intends to delve into the phenomenon is relatively novel as it aims to combine four elements.

First, the objective of the symposium is to analyse the phenomenon mainly through the lens of administrative law and from the point of view of public administrations. The articles deal with the principle of separation of powers and include the analysis of all the three branches and investigate the relationships among them. However, the focus of the symposium is mainly on exploring the *transformations in the exercise of administrative power* as a result of the intrusion by

[1] A. Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries*, New Haven / London: Yale University Press, 1984, *passim*.

the other branches into the administrative arena or, on the contrary, as a result of the appropriation by the executive branch of functions that are typically attributed to the other branches.

Second, the chosen perspective combines *different time planes*. The symposium looks, on one hand, at the origins of the principle of separation of powers, by identifying the "good promises" that through the principle were intended to be fulfilled. On the other hand, it should try to grasp the current trends, long-term o short-term, which militate in the direction of "betraying" the principle of separation of powers in its original meaning.

Third, in the analysis of "betrayals", the perspective will focus on the interaction between the principle of separation of powers and the direct and indirect *impact of globalization on this principle*. This interaction is examined under two respects: the first is that of the application of the principle by international and supranational organizations, established and operating to deal with global problems; the second is that of the impact that international and supranational bodies (and the regulation dictated by these bodies to address global problems) have had on the interpretation of the principle of separation of powers by the States. In this regard, without claiming to be exhaustive, three sectors have been chosen in which globalization, and the crises connected to it, have induced an alteration of the principle of separation of powers, determining a concentration of powers in the executive branch to the detriment of the legislative and the judiciary branch or, vice-versa, a subtraction of these powers from the executive branch by the judiciary. These sectors are democracy (and the democratic crisis, taking as case studies Poland and Hungary), health (and the consequences of the health crisis), and environment (and the consequences of the environmental crisis).

Finally, the perspective is mainly focused on the experience of American and European democracies.

More in detail, the first part on the promises and, thus, on the history of the principle of separation of powers includes two articles. *La constitution de l'Angleterre": Montesquieu and the reasons for separating the powers* by Pasquale Pasquino explores the historical evolution and interpretations of the separation of powers, from Montesquieu's influential work to contemporary political-constitutional systems. It examines Montesquieu's trinity of powers—legislative, executive, and judicial —and its role in shaping modern constitutionalism. The American

Constitution's system of checks and balances is analysed as a refinement of Montesquieu's doctrine. Challenges to this system, such as political party control and the growing power of executives, are discussed, along with the evolving role of constitutional courts. The article concludes by highlighting the need for a re-evaluation of the separation of powers in the 21st century, considering the dispersal of power among elected and non-elected entities in modern political systems.

Along these lines, the following article entitled *Montesquieu's legacy in the construction of American democracy* by Noah A. Rosenblum stems from the observation the most recent evolution of American constitutional law. While Montesquieu's ideas on separating government powers were central to late 18th-century American constitutional debates, the current Supreme Court majority, despite claiming fidelity to the Founders, largely overlooks his influence, opting instead for a selective and formalist interpretation of history.

This absence of Montesquieu prompts inquiries into the original meaning of separation of powers and its alignment with the Court's recent rulings. Thus, the article reconstructs the Supreme Court's evolving formalism on the separation of powers, tracing its roots back to opposition to the New Deal in the 1930s. It explores how this doctrine has reshaped American administrative law, particularly in recent years.

It, then, examines the Court's reliance on historical practices in recent cases but points out its selective disregard for historical evidence contradicting its formalistic interpretation of the separation of powers.

Finally, it delves into the pragmatic approach of the Founding Fathers towards separation of powers, suggesting they prioritized governance outcomes over rigid doctrinal adherence. It argues that Montesquieu's influence on American democracy lies in his understanding of how institutions shape political practices, a concept embraced by the Framers but overlooked by the modern Supreme Court.

The second part of the symposium, then, moves to analyse the role that the principle of separation of powers has in international and supranational organizations. The article entitled *Of Cheques and Balances: Separation of Powers in International Organizations Law* by Jan Klabbers explores the application of separation of powers principles within international organizations, a topic notably absent in current literature, especially if one excludes the European Union.

While international organizations are traditionally viewed as entities delegated tasks by member states, the paradigm of separation of powers, common in domestic governance, does not easily align with their collaborative nature. Unlike states, international organizations pursue specific goals outlined in their constitutive instruments, fostering cooperation among organs rather than checks and balances. Despite this, examining international organizations through the prism of separation of powers may offer insights into their evolving governance structures. The paper argues that while the autonomy of international organizations from member states is increasing, the development of a separation of powers doctrine remains limited, with recent funding practices further complicating the prospect. By exploring the impact of market-based funding on separation of powers, the paper underscores the challenges in controlling international organizations' activities, ultimately questioning the feasibility of implementing separation of powers within their governance frameworks. The analysis intentionally excludes the European Union and financial institutions due to their unique funding mechanisms and evolving roles beyond traditional international organization frameworks.

Indeed, a specific article of the symposium deals with the European Union. *The separation of powers and the administrative branch in the European Union* by Marta Simoncini explores the application of the principle of separation of powers to EU institutions. It examines how the EU's interpretation of this principle by the Court of Justice of the EU shapes the functioning of its administrative arm and argues that the principle has not contributed to framing the accountability of the EU administrative branch.

The analysis focuses on the limitations of the current framework in ensuring accountability within the administrative sphere, with specific attention to the non-delegation doctrine as interpreted by the Court of Justice. Despite efforts to uphold the principle of separation of powers, challenges remain in framing administrative accountability effectively within the EU context.

The third part of the symposium aims to provide a selective overview of the areas -democracy, environment, health- in which the principle of separation of powers has been especially challenged by global crises and it does so by focusing on some case studies.

With reference to democracy, the proliferation of democratic backsliding in many countries has been characterised *inter alia* precisely by the torsion of the principle of separation of powers. The decline of democracy globally has reverberated within the traditional structures of separation of powers, with authoritarian transitions notably emerging within the European Union, particularly in Hungary and Poland. The article entitled *The Dismantling of Power Sharing in Hungary and Poland. Two Roads to the Same Destination?* by Zoltán Szente and Wojciech Brzozowski shows that, despite their constitutional systems being labeled as "abusive constitutionalism", "illiberal democracy", or "populist constitutionalism", these countries share characteristics of anti-democratic transformations that undermine the system of checks and balances. This article delves into the nuanced constitutional changes in Hungary and Poland, examining how these regimes, while maintaining the facade of constitutional democracy, have weakened the division of power. It explores the methods employed by these governments to consolidate power while ostensibly adhering to democratic norms. Furthermore, the study investigates how contemporary challenges to separation of powers, such as the expansion of judicial power and multi-level constitutionalism, are addressed in these contexts. Through a comparative analysis, it seeks to discern whether the paths taken by Hungary and Poland represent distinct trajectories or share fundamental similarities. Ultimately, the paper aims to draw lessons from these experiences and their implications for the future of democratic governance.

Alongside with the democratic crisis, the climate change crisis has impacted the principle of separation of powers. *Climate Change, Narrative, and Public Law Imagination* by Liz Fisher argues that the interaction between climate change and public law presents a complex narrative landscape, shaping the imagination of legal frameworks and responses. Current narratives predominantly emphasize strategic litigation as a means to achieve low carbon futures, yet these narratives oversimplify the role of public law and often lead to narratives of promises and betrayals. By taking the separation of powers as an example of narrative in action, the article explores alternative narratives that present law as offering institutional and reasoning capacities necessary for the large-scale transformations demanded by climate change. It argues for a broader engagement with the substance of public law in addressing climate change and highlights the importance of understanding narrative dynamics in shaping public law imagination. It examines the prevailing narrative surrounding

public law and climate change, and proposes an alternative narrative. It concludes by considering the implications of these narratives for administrative law imagination. While primarily focusing on examples from administrative law in the US, UK, and Commonwealth, the insights presented resonate across legal cultures and public law contexts.

The impact that the global health crisis, following the Covid pandemic, has had on the principle of separation of powers is analysed in the last article of the symposium. *Following in the footsteps of Ginsburg &Versteeg. The bound executive during the pandemic: Italy as a case study* by Elisabetta Lamarque examines the impact of the COVID-19 pandemic on constitutional guarantees by comparing the findings of a recent comparative law study with developments in the Italian legal system. The study largely confirms the hypothesis that despite the pandemic's centrality to policymaking, the Italian Executive faced democratic constraints from an independent judiciary and efficient parliamentary oversight. However, contrary to expectations, regional and local authorities did not significantly constrain the national Executive due to Italy's small size and the global nature of the health threat. The article argues that Italy lacked democratic safeguards against technical-scientific power, emphasizing the need to integrate such powers into checks and balances for safeguarding individual rights.

Sabino Cassese

Elisabetta Morlino

Of Cheques and Balances: Separation of Powers in International Organizations Law

Jan Klabbers[1]

I. Introduction

This paper is written as part of a broader symposium on separation of powers in public law, and that seems appropriate enough. International organizations such as the World Health Organization (WHO), the International Organization for Migration (IOM) or the Universal Postal Union (UPU) are public institutions and have always been treated as such,[2] and thus *ex hypothesi* come within the ambit of public law. Still, there is very little literature available on public law, including the separation of powers, within international organizations,[3] especially if the EU is excluded from the analysis.[4] International organizations are generally considered to exercise tasks delegated to them by their member states, and while this involves some public law doctrines (powers doctrines, the *ultra vires* doctrine perhaps), the paradigm is predominantly one of delegated tasks and powers, with relative disregard for how tasks and powers are distributed.[5]

This insistence on thinking in terms of principals and agents helps explain the almost total absence of pertinent literature: if the *trias politica* was invented with a view to the different organs of states keeping each other under control, the point is lost on international organizations.[6] The very idea behind international organizations is that they

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[1] University of Helsinki. This paper was finalized in February 2024.

[2] Witness the title of what is arguably the first systematic study of international organizations law: PAUL S. REINSCH, PUBLIC INTERNATIONAL UNIONS: THEIR WORK AND ORGANIZATION – A STUDY IN INTERNATIONAL ADMINISTRATIVE LAW (1911). For the record, of the three mentioned, only the UPU existed under that name when Reinsch published his work.

[3] Rare exceptions include Jan Klabbers, *Checks and Balances in the Law of International Organizations*, in MORTIMER SELLERS (ED.), AUTONOMY IN THE LAW 141 (2007), and Adrien Schifano, *Distribution of Power within International Organizations*, 14 INT'L ORG L.R. 346 (2017).

[4] For the EU see, among many others, DEIRDRE CURTIN, EXECUTIVE POWER OF THE EUROPEAN UNION: LAW, PRACTICES, AND THE LIVING CONSTITUTION (2009).

[5] See generally DARREN G. HAWKINS ET AL. (EDS.), DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS (2006).

[6] For a brief but sufficient (for present purposes) statement: "The principle of the separation of powers supposes that the business of the State can be divided into three functions: Legislative, executive, and

represent a common enterprise, whose organs should collaborate and strengthen each other rather than control and limit each other. The plenary organ of an international organization is not expected to keep an eye on the executive organ, but rather to make sure that the executive organ can do things the plenary itself is incapable of doing, e.g. because it cannot be in constant session. On this logic, it is no coincidence that courts capable of exercising judicial review are by and large absent within international organizations, as are parliamentary bodies. And secretariats are supposed to serve the political organs along with the organization's function, rather than share power with them: the secretariats form the civil service, supposedly neutral, administrative and supportive. Rightly or wrongly, they generally not considered to be part of the political system.[7]

In other words: the logic behind international organizations differs from what is usually held to be the logic behind states,[8] and most domestic analogies tend to be inappropriate, including the separation of powers idea. States have no particular function to work towards; they lack a horizon or, put differently, the function of Canada is mostly to be, well, Canada. By contrast, international organizations do have a function, usually quite specific, and usually written down explicitly in their constituent instruments. They have a horizon, something to aim for, and the idea is that all organs work together to achieve that final objective, whether it is the orderly regulation of migration (IOM) or the streamlining of postal services, as with the UPU. States lack such an explicit, singular goal.[9] What is more, the moment states start to prioritize such a singular goal (usually related to national security), it will come to prevail over thoughts about separation of

judicial, and that each function ought to be carried out by a different institution, each institution being separated from the other two... Each institution should stick to its prescribed function, and should ensure that it does not trespass onto the territory of the other two." ADAM TOMKINS, PUBLIC LAW 36 (2003).

[7] Important work on the political role of the domestic civil service has been done by JUDITH GRUBER, CONTROLLING BUREAUCRACIES: DILEMMAS IN DEMOCRATIC GOVERNANCE (1987).

[8] As Loughlin points out, Montesquieu (usually credited with the separation of powers doctrine) actually envisaged that the separation of powers helped the institutions of state to work together. MARTIN LOUGHLIN, THE IDEA OF PUBLIC LAW 23-24 (2003).

[9] States do have a *telos* of sorts (to be Canada, in case of Canada), but this remains rather abstract. The need for organizations (any organization) to have a *telos* is spelled out in SEAMAS MILLER, THE MORAL FOUNDATIONS OF SOCIAL INSTITUTIONS (2010).

powers or checks and balances: where the goal is threatened, the organs of state pull together and circle the wagons, while control functions will typically be suspended.[10]

Still, while much of the *trias politica* logic does not seem to apply to international organizations, it might be useful to look more closely at developments with and within international organizations through the *trias politica* prism. For, hypothetically, even if it is accurate to say that the logic behind international organizations does not easily accommodate the separation of powers, it may nonetheless be the case that international organizations are moving in a direction that is more accommodating. Moreover, normatively, one can well make an argument that introducing the separation of powers doctrine to international organizations might be a good idea: the more autonomous international organizations become from their member states (a trend that is difficult to deny[11]) and therewith also more insulated from member state control, the more desirable it may be to find other mechanisms of control, including quite possibly in the form of the separation of powers doctrine.[12]

After all, the only feasible kind of control over the acts of international organizations came in the form of member state control: the principal (i.e., the member states together, as a collective principal) controlling its agent. But as so often, the agent needs at least a minimum amount of discretion, and if the principal is either not very interested in monitoring the agent, or actually supports the agent, then control rapidly becomes a chimera. Control by domestic courts, moreover, is generally precluded by the existence of

[10] A variation is generally recognized in international human rights law: the possibility to derogate in times of emergency. See, e.g., Article 15 European Convention on Human Rights, and Article 4 International Covenant on Civil and Political Rights.

[11] RICHARD COLLINS AND NIGEL WHITE (EDS.), INTERNATIONAL ORGANIZATIONS AND THE IDEA OF AUTONOMY (2010). One indication of increasing autonomy is the role of expert governance: useful in different ways are ANNABELLE LITTOZ-MONNET (ED.), THE POLITICS OF EXPERTISE IN INTERNATIONAL ORGANIZATIONS: HOW INTERNATIONAL BUREAUCRACIES PRODUCE AND MOBILIZE KNOWLEDGE (2017), and JENS STEFFEK, INTERNATIONAL ORGANIZATION AS TECHNOCRATIC UTOPIA (2021).

[12] Control in one form or another has dominated the literature on international organizations for much of the 2010s and the early 2020s, stimulated by such developments as the adoption of Articles on the Responsibility of International Organizations and events such as the introduction of cholera in Haiti by UN peacekeepers. A small selection: RANDALL W. STONE, CONTROLLING INSTITUTIONS: INTERNATIONAL ORGANIZATIONS AND THE GLOBAL ECONOMY (2011); MAURIZIO RAGAZZI (ED.), RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS: ESSAYS IN HONOUR OF SIR IAN BROWNLIE (2013); CARLA FERSTMAN, INTERNATIONAL ORGANIZATIONS AND THE FIGHT FOR ACCOUNTABILITY (2017); ANA SOFIA BARROS, GOVERNANCE AS RESPONSIBILITY (2019); GISELA HIRSCHMANN, ACCOUNTABILITY IN GLOBAL GOVERNANCE (2020); and MEGAN BRADLEY ET AL. (EDS.), IOM UNBOUND: OBLIGATIONS AND ACCOUNTABILITY OF THE INTERNATIONAL ORGANIZATION FOR MIGRATION IN AN ERA OF EXPANSION (2023).

immunities, including immunities from suit; while control by international bodies, judicial or otherwise, is hampered by the limited existence of international obligations resting on international organizations and by considerations of attribution.[13]

The aim of the present contribution is not so much to present or developed a refined and sophisticated separation of powers model, but rather to evaluate what the prospects for separation of powers are within international organizations. The main argument will be that such prospects are limited: while the autonomy of international organizations from their member states may be increasing, this does not translate into further development of a separation of powers doctrine. Quite the opposite: several noticeable trends suggest that separation of powers will become even more out of reach. This paper will zoom in on one of those trends: the different funding practices that have been put in place in recent decades.

Section IV of this paper examines how the separation of powers is affected by changing patterns of funding, mindful of Graham's observation that "funding rules – the rules that specify how IOs are financed by member states and other actors – are a critical and often overlooked factor in producing IO governance."[14] Over the last two decades in particular, some organizations have left behind the classic mode of demanding a compulsory membership fee and have started to tap into different ways of acquiring funding, including calls on the private sector and the creation of public-private partnerships. This article aims to identify some novel ways of fund-raising, and to assess the effect thereof on the separation of powers, broadly conceptualized, within international organizations. Before doing this, however, it may be useful to situate the separation of powers idea in positive international organizations law, such as it is (section II), and discuss some possible analogies (section III), without prejudice to the pitfalls of applying analogy.[15]

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[13] Jan Klabbers, *Responsibility as Opportunism: The Responsibility of International Organizations*, in SAMANTHA BESSON (ED.), THEORIES OF INTERNATIONAL RESPONSIBILITY LAW 119 (2022). The point on limited obligation is contested: see Kristina Daugirdas, *How and Why International Law Binds International Organizations*, 57 HARVARD INT'L L.J. 325 (2016). The topic of dispute settlement involving international organizations has caught the attention of the International Law Commission, which appointed its member August Reinisch as special rapporteur.

[14] Erin R. Graham, *Money and Multilateralism: How Funding Rules Constitute IO Governance*, 7 INTERNATIONAL THEORY 162, 163 (2015).

[15] For a spirited defense, see FERNANDO LUSA BORDIN, THE ANALOGY BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (2018).

Finally, section V will conclude by noting that market-based funding renders the separation of powers as a political practice to be exercised within international organizations problematic. If the underlying philosophy of international organizations as collaborative projects already entails that there is little space for a separation of powers doctrine, the overview of recent funding practices only strengthens the conviction that it is well-nigh impossible to control the activities of international organizations.

One caveat is in order: I will purposefully refrain from looking at the European Union and from looking at the financial institutions. The latter's way of raising funds owes much to their lending activities, in ways that cannot be matched by other organizations.[16] And the EU, in addition to employing different funding methods already for decades,[17] has become so much more than an international organization that it can no longer be deemed representative of the species, if it ever could.[18]

II. Situating Separation of Powers in International Organizations

The story goes that in 1984, at the height of famine in Ethiopia (the famine that gave rise to Live Aid), the director-general of the Food and Agriculture Organization (FAO) at the time, Edouard Saouma, held back food aid to Ethiopia for close to three weeks. The reason, so the story continues, is that he disliked Ethiopia's Assistant Delegate to the FAO; Saouma only released the food once the Assistant Delegate had been recalled to Addis Abeba.[19] The story, incredible and unpalatable as it, suggests that international organizations and their leadership can do wrong – and it suggests a need for corrective devices, e.g. in the form of internal action, possibly through doctrines relating to institutional balance or separation of powers.

Yet, international organizations lawyers have devoted little attention to doctrines such as separation of powers or institutional balance, and to the extent that they have, it has mostly been about vertical divisions, involving the power division between the

[16] NGAIRE WOODS, THE GLOBALIZERS: THE IMF, THE WORLD BANK AND THEIR BORROWERS (2006).
[17] See already C.-D. Ehlermann, *The Financing of the Community: The Distinction between Financial Contributions and Own Resources*, 19 CMLREV 571 (1982).
[18] Seminal is J. H. H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).
[19] The story is told in GRAHAM HANCOCK, LORDS OF POVERTY 84-85 (1989). Hancock is a former East Africa correspondent for *The Economist*.

organization and its member states. And fair enough: this too can qualify as 'separation of powers'. On such a conception, a power transferred to an organization cannot be exercised by the member states, as there is no policy space left to do so: the policy domain either 'belongs' to the organization or to its member states.

Still, while the relations between organizations and their member states have been much-discussed in the literature and can possibly be framed in separation of powers terms, this is rarely, if ever, done. The analytical prism of international organizations law, instead, is that of principal-agent theory, with the organization as the agent performing tasks for the principal. There is a twist, in that the principal here is a collective principal, but eventually that is but a minor twist: much of the law, as well as much of the literature, is informed and coloured by the principal-agent *motif*.[20]

Instead, the separation of powers idea, in its most basic form (I will refer to separation of powers, checks and balances, and *trias politica* interchangeably), typically makes its way into discussions of relations among organs of one and the same international organization, rather than between the organization and its member states. To be sure, such discussions too have been rare, almost to the point of being non-existent. There is very little literature on judicial review of the acts (or omissions[21]) of international organizations, e.g., and understandably so in light of the general absence within international organizations of constitutional or quasi-constitutional courts.[22] Every now and then something happens in the real world which makes scholars return to the issue – the *Lockerbie* affair[23] three decades ago was such a moment,[24] raising the question

[20] See further Jan Klabbers, *The EJIL Foreword: The Transformation of International Organizations Law*, 26 EJIL 9 (2015).

[21] Jan Klabbers, *Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act*, 28 EJIL 1133 (2017).

[22] Taken seriously, only the EU and the UN can claim to have a court with something approximating a constitutional jurisdiction. The World Trade Organization (WTO) has a dispute settlement mechanism, but this settles trade disputes between members, not WTO-related constitutional issues; and the Council of Europe may host the European Convention on Human Rights, but this lacks jurisdiction over the Council of Europe as such.

[23] See *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libya v UK; Libya v USA), order, [1992] ICJ Reports 3 (UK); 114 (USA).

[24] See, e.g., Geoffrey Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 HARVARD INT'L L.J. 1 (1993); Thomas M Franck, *The "Powers of Appreciation": Who is the Ultimate Guardian of UN Legality?*, 86 AJIL 519 (1992).

whether Security Council resolutions were subject to judicial review by the International Court of Justice – but by and large, attention for judicial review is scant.[25]

By the same token, there has been scant attention for relations between plenary and executive organs, even though there is some case-law of the International Court of Justice (ICJ) on the point, in particular perhaps the second *Admissions* case of 1950.[26] The ICJ here held that the UN Charter had created something of an institutional balance with respect to the admission of new members, and this balance had to be respected by the General Assembly – the latter could thus not admit new member states in the absence of a positive recommendation by the Security Council. The application of the point may have become moot (in that there a few states left outside the UN nowadays), but the principle stands, and would likely find some application if, e.g., the UN were ever to consider to expel a member state.[27] It is not immediately clear, however, whether and how it can be transposed to other international organizations: *Admissions II* effectively involves an interpretation of a provision of the UN Charter, rather than the application of a general principle of international organizations law.

And there has been little attention for questions relating to the sort of activities of international organizations where it might be appropriate to think in terms of separation of powers, such as (possibly) legislative processes within international organizations, procedures relating to treaty-making by international organizations, relations between different member state organs and secretariats,[28] the creation of subsidiary organs, and delegations of powers. Barring the occasional incident giving rise to legal-academic reflection (the *Tadic* decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, e.g.[29]), it seems fair to say that international

[25] Jan Klabbers, *Straddling Law and Politics: Judicial Review in International Law*, in R.ST.J. MACDONALD & D.M. JOHNSTON (EDS.), TOWARDS WORLD CONSTITUTIONALISM 809 (2005).

[26] *Competence of the General Assembly for the Admission of a State to the United Nations*, advisory opinion, [1950] ICJ Reports 4.

[27] The expulsion procedure (Article 6 UN) follows the model of the admission procedure (Article 4 UN): a decision by the General Assembly upon a recommendation by the Security Council. No state has ever been expelled from the UN.

[28] Although there has been some useful work done (not always by lawyers) on the relationship between the UN Secretary-General and the Security Council: see MANUEL FRÖHLICH & ABIODUN WILLIAMS (EDS.), THE UN SECRETARY-GENERAL AND THE SECURITY COUNCIL: A DYNAMIC RELATIONSHIP (2018).

[29] José E. Alvarez, *Nuremberg Revisited: The* Tadic *Case*, 7 EJIL 245 (1996); Georges Politakis, *Enforcing International Humanitarian Law: The Decision of the Appeals Chamber of the War Crimes Tribunal in the Dusko Tadic Case (Jurisdiction)*, 52 Zeitschrift für öffentliches Recht 283 (1997).

organizations law has yet to develop a full set of doctrines to address relations between or amongst organs of the same organization.

To the limited extent that work on separation of powers exists, the consensus seems to be that checks and balances need to be derived from the constituent document, and where the constituent document is silent, each organ is an island of its own.[30] In some cases constitutional documents are more or less explicit, e.g. when it comes to admission of new members to the UN, as referred to above. In other cases, however, where constitutions are by and large silent, the general position seems to be twofold.[31] First, under reference to the ICJ's *Certain Expenses* opinion, it may be postulated that at least in the first instance, each organ is responsible for the interpretation of provisions relating to it.[32] This may entail, of course, that different organs reach different conclusions, in which case an underlying principle may need to be recognized: the principle that eventually, the most representative organ prevails. This conclusion is not traceable to any authoritative judicial decision, but would seem to follow logically from the value of representation. Political theory is rife with *topoi* such as 'no taxation without representation', or the '*quod omnes tangit*' principle; in this light, it would be difficult to justify having a non-representative organ run the rule over a representative organ.[33]

Relations among organs play out in settings where organs take administrative decisions, geared towards managing the organization iself *qua* organization, but they can also play out when it comes to the law-making and operational activities of international organizations, and increasingly, the line between those is blurred.[34] Or, more accurately perhaps in light of the circumstance that few organizations have proper law-making

[30] This also seems to follow from *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, advisory opinion, [1960] ICJ Reports 150.

[31] See further Jan Klabbers, *Checks and Balances in International Organizations*, in MORTIMER SELLERS (ED.), AUTONOMY IN THE LAW 141 (2007).

[32] *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, advisory opinion, [1962] ICJ Reports 151.

[33] Sometimes this is recognized, and organs cooperate voluntarily, if only to fend off outside competitors: the UN Peacebuilding Commission, created in 2006, is a joint venture of the General Assembly and the Security Council, and reports to both. Its creation suggests that the UN is the first port of call when it comes to peacebuilding (rather than, say, the EU, OSCE or NATO). See further Jan Klabbers, *Reflections on the Politics of Institutional Reform*, in PETER DANCHIN & HORST FISCHER (EDS.), UNITED NATIONS REFORM AND THE NEW COLLECTIVE SECURITY 76 (2010).

[34] See generally José E. Alvarez, *Standard-Setting in UN System Organizations*, in JAN KLABBERS (ED.), THE CAMBRIDGE COMPANION TO INTERNATIONAL ORGANIZATIONS LAW 120 (2022).

powers to begin with, many operational activities tend to acquire law-making effects. This can take place in two ways. First, it is at least arguable that when organizations repeat activities following similar patterns, something akin to customary law may arise: the prime example is perhaps peacekeeping. UN peacekeeping operations are separate from each other, operating with separate budgets and a separate apparatus, but tend to be organized along the same lines, involving standard agreements with troop-contributing countries and with the states where the mission shall be based, concerning such things as privileges and immunities, access for officials, et cetera. Over time, a general peacekeeping practice builds up, which may well be accompanied by a sense of legal obligation.[35] Second, the operational activities of the organs of international organizations may themselves lapse into something coming close to law-making,[36] even if the organization concerned lacks formal legislative powers. In such a case, it remains to be seen whether any meaningful separation of powers can be discerned.

An examination of the role of separation of powers doctrines within international organizations necessarily raises the question between whom those powers should be separated. The easy answer is to hold that seperation of powers implies separation of powers between organs of the organization, and this is no doubt a useful starting point. But this in itself raises a further question: what exactly are the organs of international organizations?

Three separate issues surface here. The first, and probably least important, involves the status of subsidiary organs, committees, and similar entities, such as semi-permanent programs enjoying a certain autonomy and a certain level of institutionalization (think, for instance, of the UN Environmental Program, or the UN Development Program). The basic principle seems clear enough: any possible conflict between a subsidiary organ and a principal organ will involve institutional hierarchies, fashioned on the basis of the internal law of the organization (typically starting with its constituent document): the Sixth Committee of the General Assembly will have to give way to General Assembly

[35] In a similar vein, if using a different vocabulary, Nigel White, *Peacekeeping Doctrine: An Autonomous Legal Order?*, 88 NORDIC J. INT'L L. 86 (2019).

[36] Alison Duxbury, *Operational Activities*, in JAN KLABBERS (ED.), THE CAMBRIDGE COMPANION TO INTERNATIONAL ORGANIZATIONS LAW 147 (2022).

itself.[37] Whether the same also applies when the subsidiary organ is not subordinate to its 'own' principal organ (the one under which it ressorts) but stands in tension with one of the other principal organs (Sixth Committee v Security Council, e.g.), is less clear, and is something that probably would have to be decided, for the time being, on a case by case basis.[38] No general principles seem to have developed. And a further caveat involves the position of judicial or quasi-judicial organs: being created by a 'principal' organ does not automatically involve a subordinate role – such would be difficult to reconcile with the independence of the judiciary, as was indeed recognized by the ICJ in *Effect of Awards*.[39]

The second setting that presents itself is with entities shared by several international organizations: think of the World Food Programme (WFP), the Codex Alimentarius Commission, or the Intergovernmental Panel on Climate Change. All three are joint creatures of two international organizations, and thus may play an institutional role in both of these, one of these, or none of these.[40] In the latter case, separation of powers is clearly excluded; the other two scenarios can be legally regulated, although at least with respect to the Codex Alimentarius Commission little seems to have been made explicit; the leading study merely notes that the Commission "has to be classified as a subsidiary organ of both the FAO and the WHO."[41]

There is, additionally, at least one international organization in existence (known as the Joint Vienna Institute) that was wholly created by several existing international organizations but with a clear separate existence and international legal personality of its

[37] Some support for this can be derived from the various decisions and opinions by the ICJ concerning the supervisory role of the League of Nations and the UN over the mandated territories.

[38] It has been noted that within the UN, subsidiary organs become organs of the UN as a whole, which may be of relevance for purposes of attributing international responsibility. See ROSALYN HIGGINS ET AL., OPPENHEIM'S INTERNATIONAL LAW: UNITED NATIONS vol. I 159-160 (2017).

[39] This revolved around the creation of the UN Administrative Tribunal by the General Assembly. The Tribunal was, so the Court held, established as "an independent and truly judicial body pronouncing final judgments without appeal" – judgments also binding its creator. See *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, advisory opinion [1954] ICJ Reports 47, at 53.

[40] According to its Statutes, the Codex Alimentarius Commission is subject to the scrutiny of both its principals (FAO and WHO), and has not been endowed with international legal personality. Its budget is borne by both organizations, but administered by the FAO (article 9 CAC). To the extent relations with other organizations are envisaged, these relations concern participation of such other organizations in CAC's work rather than the participation of CAC in the work of others. See CODEX ALIMENTARIUS COMMISSION, PROCEDURAL MANUAL, 21st edn. 189-191 (2013).

[41] MARIËLLE MASSON-MATTHEE, THE CODEX ALIMENTARIUS COMMISSION AND ITS STANDARDS 20 (2007). Much the same seems to apply to the WFP, set up as a "joint undertaking" because neither the FAO nor the UN "would yield to the other". See D. JOHN SHAW, GLOBAL FOOD AND AGRICULTURAL INSTITUTIONS 77 (2009).

own. This owes the regular agentic obligations to its collective principal, but the question of intra-organ relations does not quite play out in the same way.[42]

The third setting is practically speaking the most relevant though: what is the position of member states? International organizations have relatively few organs by definition, and especially very few that can help to execute policies – they usually depend on member states for the implementation or execution of policies. The World Customs Organization (WCO), for instance, has no customs officers, but relies on the customs officials of its member states to provide it with information and enforce whatever guidelines the WCO devises - this reflects the typical situation. Think also of the weapons inspectors sent by the International Atomic Energy Agency (IAEA) or the Organization for the Prohibition of Chemical Weapons (OPCW). These may be national officials sent on organizational missions; they are not always on the payroll of the organization itself. Thus, in an important sense, the member states are not only the creators of the organizations, but also organs of the organization, something recognized with respect to the EU but rarely with respect to other organizations.[43]

Another conceptual issue that presents itself relates to the question under which circumstances separation of powers should be considered appropriate. In a domestic setting, it is usually associated with the making and application of law: the classic *trias politica* distinguishes between the legislative, the executive, and the judiciary. This division has taken a strong hold of our political imagination: the legislative legislates, the executive carries out, and the judiciary controls both. Still, few international organizations are endowed with explicit law-making powers: the only proper example, most likely, is the International Civil Aviation Organization, which has the power to set rules for air traffic over the high seas.[44] As a result, the domestic *champ d'action* of the *trias politica*, the making and application of law, has little traction within international organizations – a different *champ d'action* is called for.

[42] The JVI was set up by the Bank for International Settlements, the OECD, the EBRD, the World Bank and the IMF, and was open for accession by other international organizations and, alone among states, Austria (article 16 JVI). According to its constitution, it can conclude headquarters agreements with third states (article 8 JVI) and enjoys "full juridical personality" (article 1 JVI).

[43] See, e.g., Article 216(2) TFEU, holding that treaties concluded by the EU are binding upon its institutions and its member states.

[44] Seminal is JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2005).

III. Separation of Powers Analogies

For a brief moment it seemed that the reconceptualization of international organizations law as Global Administrative Law (GAL), some two decades ago, could also provide a fresh impetus to separation of powers ideas.[45] Hence, it was noticed that much global administrative law consists of regulation by administrative bodies (often, though not invariably, stemming from international organizations), to be exercised by implementing bodies, and under some control of (quasi-) judicial organs – all this seemed but a small step removed from the classic distinction between legislative, executive and judicial branches.[46] And yet, on closer scrutiny the fresh impetus points to something else: it applies the *trias politica* in a different way, if only because the (quasi-) judicial organs rarely, if ever, are in a position to address constitutional questions. These can discuss whether trade measures taken by states have been proportional, or whether UNHCR has lawfully applied the Refugee Convention in assessing an asylum application, but have little to say about whether UNHCR is empowered to do so, or whether the trade measures sufficiently take environmental concerns, or labour concerns, or human rights, or any other concerns into account – and yet it is precisely here that the 'constitutional' issues present themselves, as Kratochwil has astutely noted.[47] The controlling role of judicial organs over the legislative and executive branches is therewith minimalized; the analogy is not entirely off target, but its centre of gravity lies elsewhere. In the GAL setting, judicial bodies may guard legality, but not constitutionality.

For some, it might also seem that the advisory jurisdiction of some international tribunals (most notably the international Court of Justice - ICJ) might come to function like an application, mutatis mutandis, of the classic *trias politica*, with the ICJ sometimes in a

[45] The clarion call is Benedict Kingsbury, Nico Krisch and Richard Stewart, *The Emergence of Global Administrative Law*, 68 L. AND CONT. PROBLEMS 15 (2005). A representative overview is SABINO CASSESE (ED.), RESEARCH HANDBOOK ON GLOBAL ADMINISTRATIVE LAW (2015), while a related approach is developed in ARMIN VON BOGDANDY ET AL. (EDS.), THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS (2010).

[46] For an authoritative rendition of the argument, see Lorenzo Casini, *Global Administrative Law*, in JEFF DUNOFF & MARK POLLACK (EDS.), INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS 199 (2022).

[47] FRIEDRICH V. KRATOCHWIL, THE STATUS OF LAW IN WORLD SOCIETY: MEDITATIONS ON THE ROLE AND RULE OF LAW (2014).

position to discuss not merely the legality of acts of international organizations, but also their constitutionality. To date, however, the ICJ has firmly resisted the temptation to do so in cases of questionable constitutionality. The closest it has come was its acceptance of the validity of the unwritten practice that had emerged in the Security Council with respect to abstentions by the Council's permanent members. Following the letter of article 27, paragraph 3 of the UN Charter, a valid Security Council decision requires the 'concurring vote' of the five permanent members. In practice, ever since the Soviet boycott in 1950, it was standard practice to treat abstentions as 'concurring'. When South Africa complained that resolutions addressed to it were not taken conform article 27, paragraph 3, the Court nonetheless upheld their validity, pointing to the emergence of a 'practice of the organization'.[48] Where there was broad consensus that this could be upheld (and broad antipathy towards South Africa), the Court covertly engaged in review of Security Council action. When asked, however, to do so at Libya's behest two decades later, the Court was much less enthusiastic, and refrained from exercising judicial review.[49]

At any rate, the advisory jurisdiction of the ICJ has been transformed over the last two decades or so: many requests take the form of asking the Court to assess the legality of the actions of particular states, and have not all that much to do with the acts of international organizations. This applies to opinions such as the Wall, or Chagos, or Kosovo's Declaration of Independence, as well as the attempt launched in 2023 to again test the legality of some of Israel's acts. Other advisory opinions have effectively been appeals against decisions of international administrative tribunals, for instance against a decision of the ILO Administrative Tribunal involving the International Fund for Agricultural Development.[50] This facility has in the meantime by and large been

[48] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, advisory opinion, [1971] ICJ Reports 16.

[49] See *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libya v UK; Libya v USA), order, [1992] ICJ Reports 3 (UK); 114 (USA). The Court construed the problem as one of conflicting treaty obligations (UN Charter v Montreal Convention), and suggested that *prima facie*, obligations for states under the Charter would prevail, without further reviewing the matter. This was a set of contentious proceedings, but that particular circumstance seemed not to make much difference for the principled question whether or not the ICJ could review Security Council acts.

[50] The most recent opinion of this kind was delivered in 2012. See *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed Against the International Fund for Agricultural Development*, advisory opinion, [2012] ICJ Reports 10.

abolished, largely because of its inherent unfairness: only international organizations could appeal, but not the injured individuals. On some interpretations, the era of the 'proper' advisory opinion before the ICJ lasted only from 1949 (*Reparation for Injuries*) until 1980 (*WHO/Egypt Headquarters Agreement*).[51] Intervening opinions either involved appeals against administrative tribunals; were based on a specific jurisdictional clause in the 1946 General Convention on the Privileges and Immunities of the United Nations, or belong to the wave of contentious proceedings in disguise.[52]

Finally, it might be suggested that the occasional manifestation of 'horizontal review' forms a re-working of the *trias politica* in the international organizations context. The most obvious form this has taken in recent decades is the exercise of some kind of judicial review by local courts. Emblematic is the *Kadi* case-law of the Court of Justice of the European Union, with the CJEU (indirectly) refusing to accept the validity of a Security Council resolution, for conflict with fundamental norms of EU law.[53] A different manifestation is that the parliamentary assembly of the Council of Europe discussed decision-making in the World Health Organization in connection with the outbreak of the so-called 'swine flu'.[54]

Both forms come with problems though, not the least of which is the 'polity dissonance': surely, the parliamentarians of the Council of Europe, an organization with large but still limited membership (46 states, in 2024), cannot tell the WHO, an organization whose membership spans the globe (194 states, in 2024), what to do and how to do it. Likewise, while local courts are entitled to their opinions, things could become very messy indeed

[51] Respectively, *Reparation for Injuries Suffered in the Service of the United Nations*, advisory opinion, [1949] ICJ Reports 174, and *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, advisory opinion, [1980] ICJ Reports 73. This is without prejudice to the advisory jurisdiction of the Permanent Court of International Justice.

[52] And note that the two mid-1990s requests concerning nuclear weapons also focused on what states could or could not do; they had little to do with the legal setting of international organizations beyond discussing the competence to ask for advisory opinions.

[53] Actually, the case before the CJEU (the well-known *Kadi* case, C 402/05 P and 415/05 P, *Kadi* and *Yusuf* v *Council and Commission*, ECLI:EU:C:2008:461) revolved around an EU instrument reproducing a Security Council resolution, rather than that resolution itself. Insightful discussions include, among many others, ANTONIOS TZANAKOPOULOS, DISOBEYING THE SECURITY COUNCIL (2011), and GAVIN SULLIVAN, THE LAW OF THE LIST (2020). See also JAN KLABBERS & GIANLUIGI PALOMBELLA (EDS.), THE CHALLENGE OF INTER-LEGALITY (2019).

[54] See Abigail Deshman, *Horizontal Review between International Organizations: Why, How and Who Cares about Corporate Regulatory Capture*, 22 EJIL 1089 (2011); see also EYAL BENVENISTI, THE LAW OF GLOBAL GOVERNANCE (2014).

when authoritative evaluation of the acts of international organizations would result in diverging judgments by a diversity of local courts.

In the end, there seem to be precious few plausible 'substitutes' for any separation of powers practice in international organizations law. The GAL approach's main focus rests elsewhere, mainly on the propriety of legal decisions rather than the propriety of the rules on which such decisions are based; judicial review by the International Court of Justice is nigh-on absent, whether in contentious or advisory proceedings; and parallel review of one organization by another meets with all kinds of practical and principled obstacles – at best, or so it seems, it can lead to a political dialogue.[55]

IV. The Power of the Purse?

Traditionally, the income of international organizations consisted predominantly of compulsory member state contributions, and to this day, the standard treatises start their dicsussions on financing by pointing to these membership fees.[56] In some organizations, member states pay an equal amount; in most, however, capacity to pay is taken into acount in one way or another. Either way, there are several possible widely acknowledged ramifications of compulsory fees. One of these is the risk that the organization becomes overly dependent on a single member state (which is why the US contribution is often 'capped') or a small group of states ends up exercising a disproportionate amount of influence – it is likely no coincidence that in recent decades both Japan and the Netherlands, two of the largest contributors to the UNHCR budget, have been the home states of UNHCR's leadership.[57] A second risk for the organization is the possibility of

[55] LAURENCE BOISSON DE CHAZOURNES, INTERACTIONS BETWEEN REGIONAL AND UNIVERSAL ORGANIZATIONS: A LEGAL PERSPECTIVE (2017).

[56] See, e.g., H.G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY 657 (2018, 6th edn.); Jacob Katz Cogan, *Financing and Budgets*, in JACOB KATZ COGAN ET AL. (EDS.), OXFORD HANDBOOK OF INTERNATIONAL ORGANIZATIONS 903 (2016).

[57] Holland's Ruud Lubbers between 2001 and 2005, succeeding Japan's Sadako Ogata (1991-2000). The link between contribution size and leadership role has become less blatant: Portugal, the national state of Lubbers' immediate successor Antonio Guterres (now UN Secretary-General) is a very modest contributor. Italy, the home state of current incumbent Filippo Grandi, contributes much more, but not at the level of the Netherlands, let alone Japan.

member states refusing to pay (despite a legal obligation to do so); systematically staying in arrears; or attaching unwarranted conditions to their compulsory fees.[58]

In addition to compulsory membership fees, quite a few international organizations attract voluntary donations and, sometimes, one-off gifts, especially within the UN system.[59] The voluntary donations may – and often do - stem from member states, and their big appeal resides in the possibility of earmarking. Compulsory fees end up in the general books; earmarked contributions, by contrast, can be used for specific projects and can be given with strings attached. As a result, as Graham puts it, control over the "power of the purse, a critical accountability mechanism, shifts from intergovernmental bodies to individual donors."[60]

Allowing the organization to do as it saw fit also meant a loss of control for the member states. These recognized that the infrastructural capacities of the organization could be useful, but could live without much of the bureaucracy – hence the tendency to provide voluntary donations, many of them 'earmarked' or specific'. The WHO budget for 2021, e.g., was set at some $ 7,5 billion; of this, less than $ 1 billion stems from assessed contributions (the compulsory membership fees), while almost $ 6 billion stems from 'specified' voluntary donations.

Typically, and quite naturally, voluntary donations emanate from the richer states, and sometimes from philanthropists. Often, they result in the creation of separate trust funds, set up to manage that particular source of income, and together resulting in a veritable labyrinth of trust funds. And in much the same way that academics can spend a lot of time trying to attract research funding, so too international organizations may need to invest considerable efforts in raising money and managing donations.[61] A further variation is

[58] Seminal is José E. Alvarez, *Legal Remedies and the United Nations' à la Carte Problem*, 12 MICH. J. INT'L L. 229 (1991).

[59] Literature on funding is scarce, with some of the relevant studies dating back to the work of social scientists written in the early 1960s, generally pre-dating the emergence of voluntary donations. See, e.g., JOHN STOESSINGER, FINANCING THE UNITED NATIONS SYSTEM (1964). A relatively rare and relatively recent legal analysis is Thordis Ingadotttir, *Financing International Institutions*, in JAN KLABBERS & ÅSA WALLENDAHL (EDS.), RESEARCH HANDBOOK ON THE LAW OF INTERNATIONAL ORGANIZATIONS 108 (2011).

[60] Erin R. Graham, *Money and Multilateralism: How Funding Rules Constitute IO Governance*, 7 INTERNATIONAL THEORY 162, 175 (2015). Graham astutely suggests that this turns the collective principal of principal agent theory into a 'multiple principal'.

[61] Kristina Daugirdas & Gian Luca Burci, *Financing the World Health Organization: What Lessons for Multilateralism?*, 16 INT'L ORG L.R. 299, 321 (2019).

the establishment in the global health domain, in 2020, of the WHO Foundation: an independent charity aiming to attract private money from so-called High Net Worth Individuals, made all the more appealing by offering the possibility of tax deductions.[62]

Both compulsory fees and voluntary donations by member states create a relationship of dependence: the organization is dependent on its member states for everything it does and wants to do; the purse strings are likely the tightest form of control member states can possibly exercise, even if they have to skirt the boundaries of legal obligation on occasion.

Typically, membership comprises states (and thus membership fees tend to come from states), but several creative alternative avenues have been explored in some policy domains or within some organizations. Relatively prominent in the global health sector is the public-private partnership, with new entities being created who count private actors as members: GAVI, the Vaccine Alliance is an example,[63] as is the Global Fund, and there are many more.[64] Other organizations have created distinct categories of membership: the International Telecommunication Union (ITU), e.g., accepts private actors, alongside member states, as either 'gold' or 'platinum' holders, much like airline loyalty schemes: the color of the 'card' helps determine the access (including participatory rights) to formal ITU events.[65]

Additional methods of fund-raising include the sale of goods and services, from Unicef's Christmas cards to the merchandise available at many organizations (mugs, t-shirts, some publications perhaps). More serious money is involved in performing tasks, whether for member states or others, against a fee. Thus, the World Intellectual Property Organization (WIPO) assists with patent registration, therewith generating much of its income;

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[62] See Helmut Aust & Prisca Feihle, *The WHO Foundation and the Law of International Organizations: Towards Better Funding for Global Health?*, 19 INT'L ORG L.R. 332 (2022).

[63] See Eelco Szabo, *Gavi, the Vaccine Alliance: A Unique Case Study in Partnership*, 13 INT'L ORG L.R. 149 (2016).

[64] It has been suggested that there are more than 50 partnerships in the global health domain alone: see KELLEY LEE, THE WORLD HEALTH ORGANIZATION 116 (2009). For useful general discussion, see CHELSEA CLINTON & DEVI SRIDHAR, GOVERNING GLOBAL HEALTH (2017); LILIANA ANDONOVA, GOVERNANCE ENTREPENEURS: INTERNATIONAL ORGANIZATIONS AND THE RISE OF GLOBAL PUBLIC-PRIVATE PARTNERSHIPS (2017).

[65] Jan Klabbers, *Reflections on the International Telecommunication Union: International Organizations as Epistemic Structures*, in ANDREA BIANCHI & MOSHE HIRSCH (EDS.), INTERNATIONAL LAW'S INVISIBLE FRAMES 219 (2021).

somewhat more darkly, the International Organization for Migration (IOM) helps states to run migration processing (or detention) centers.[66]

The situation in the global health domain may well be illustrative. With the fifty or so public-private partnerships, often the WHO is involved, but in a construction in which private donors too occupy a prominent place. The Board of GAVI, the Vaccine Alliance, e.g., reserves one seat out of 28 for the WHO (and one each for UNICEF and the World Bank), but also one for the Bill and Melinda Gates Foundation, five each for donor countries and implementing countries, and two or three for industry. Nine are reserved for independent individuals.[67] This cannot but affect the prospects for applying any kind of separation of powers doctrine: who needs to keep who in check?

What many of these public/private partnerships also have in common is their strict focus. GAVI is geared towards vaccinations, which are (once developed) relatively easy to administer and monitor, while success can easily be measured and is often all but guaranteed. This can lead to spectacular successes, but may take place at the expense of less easily measurable health work: stimulating a healthy life style, e.g., or providing health care coverage or getting people to quit smoking. It is not so much the case that the emergence of private funding erodes the existing power balances with the organization: the separation of powers within the WHO is left by and large unaffected by the emergence of public/private partnerships. Instead, their emergence entails that the role of the WHO itself is considerably less prominent. Successes can be attributed to private donors and their eye for efficiency and effectivenes, whereas failures are invariably laid on the WHO's doorstep – and much the same applies elsewhere.

It is perhaps too early to identify a trend, but at least in the global health sector the collecting of funds is also increasingly taken out of the hands of the classic international organization. There are the voluntary contributions by philanthropic associations who know the way to Geneva, but increasingly, it seems, fundraising takes place through other means as well. Very innocent (but telling) is that the website of many organizations offer

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[66] Jan Klabbers, *Notes on the Ideology of International Organizations Law: The International Organization for Migration, State-making, and the Market for Migration*, (2019) 32 LEIDEN J INT'L L 383 (2019). The other side of the coin consists of procurement. On this, see the excellent study by ELISABETTA MORLINO, PROCUREMENT BY INTERNATIONAL ORGANIZATIONS: A GLOBAL ADMINISTRATIVE LAW PERSPECTIVE (2019).

[67] https://www.gavi.org/our-alliance/governance (visited 5 February 2024).

visitors (that is, you and me) the possibility to contribute or donate. Googling UNHCR will immediately present a donation page, where the visitor can choose whether to donate regularly or as a one-off, and can choose between various sums of money to donate.[68] UNESCO too offers a donation option,[69] as does the IOM.[70]

If this is unlikely to raise large sums of money, two other initiatives are. First, fundraising is sometimes outsourced to specialist fund-raisers. Among the most prominent is the Coalition for Epidemic Preparedness Innovations (CEPI), an Oslo-based not-for-profit association aiming to raise money from public and private sources by collecting 'contributions' and 'pledges', the latter being public promises to contribute.[71] CEPI stems from the World Economic Forum and is a joint venture involving the governments of Norway and India as well as the Bill and Melinda Gates Foundation and the London-based charity Wellcome. The surprising thing here is that some governments are seemingly very keen to offer funds in this manner: the largest is, again, Germany. The private sector proves considerably more reluctant though, with the large exception of the Bill and Melinda Gates Foundation, here too the second biggest overall contributor.[72] And what makes CEPI stand out is that its structure resembles that of a company, with a Chief Executive Officer, Chief Financial Officer, et cetera. Fundraising for vaccines, in other words, is left to a private sector-like entity, getting governments (and others, but mostly governments[73]) to contribute to public goals, i.e. prepraredness for epidemics. In this picture, the WHO has all but disappeared, which suggests that the centre of gravity of global governance may be moving away from public institutions altogether.

The 'power of the purse' is a classic trope, valid also within international organizations. Possibly the most telling example involved the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY). The ICTY was set up under article 41 of the

[68] https://donate.unhcr.org/int/en/winter-2022?gclid=Cj0KCQiA1sucBhDgARIsAFoytUt1odxgmdDKp6yOJ4HlMPGMOElwmwVKWK128IJqdnDd8-kTH0zbsAAaAsQ8EALw_wcB&gclsrc=aw.ds (visited 5 February 2024).

[69] https://www.unesco.org/en/take-action (visited 5 February 2024).

[70] https://www.iom.int/ (visited 5 February 2024).

[71] Some have already announced the imminent arrival of a new 'pledging world order': see Melissa J. Durkee, *The Pledging World Order*, 48 YALE J. INT'L L. 1 (2023).

[72] https://cepi.net/wp-content/uploads/2022/11/CEPI-Investment-Overview-2022_09_11.pdf (visited 9 December 2022).

[73] Intriguingly, CEPI constantly refers not to states, but to governments.

UN Charter by the Security Council as a non-forcible measure to achieve international peace and security, but the Security Council itself has no control over the UN budget. And yet, the ICTY needed funding in order to become operational in any meaningful way.[74]

The budgetary power in the UN resides with the organ in which all member states are represented: the General Assembly. As a result, creating a criminal tribunal such as the ICTY is ineffective unless accompanied by funding approved by the General Assembly, and this now proved problematic in the first years of the ICTY. The General Assembly was not all that convinced of the wisdom of prosecuting putative war criminals in the midst of an ongoing armed conflict; it worried that such might only harden those war criminals' attitudes,[75] and it thus endowed the ICTY with only very limited funding. Things changed after a while, but the point for present purposes is that there is a certain institutional balance in play here: the Security Council can aspire to create whatever it wants, but without Assembly funding its initatives will prove still-born. In yet other words: the fact that the budgetary power rests with the Assembly provides a check on any overly imperial ambitions the Security Council may harbour.[76]

With the emergence of voluntary donations and the rise of public-private partnerships, it can no longer be confidently maintained that the idea of representation and the connection to taxation (i.e., the compulsory membership fee) demands that the budgetary power rests with the plenary, and that accordingly it is through the budget that the plenary can keep other organs under control. If there is something persuasive about the maxim that those who pay, get to decide, the emergence of private sector funding and the adoption of market ideologies may well come to affect institutional balances.

In such a scheme, two things need to be considered, for present purposes. The first is that the exercise of any competence usually requires some financial contribution. The International Labour Organization (ILO) or International Maritime Organization (IMO)

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[74] The story is told in GARY J. BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 220-224 (2000).

[75] Here too underlying *topoi* can be discerned, such as the popular 'no peace without justice'. On the importance of such *topoi* for our political thinking, see FRIEDRICH V. KRATOCHWIL, RULES, NORMS AND DECISIONS (1989).

[76] The point is often overlooked in conversations involving the veto power: the five permanent members can prevent action from being taken, but can do little to take action themselves without securing a majority in the Security Council and financial backing within the General Assembly.

can hardly provide technical assistance or even collect statistics without having the resources to do so. Equipment costs money; staff costs money. There are meaningful powers that can be exercised in a meaningful way without it costing the organization much – the plenary body of the WHO, e.g., has the competence to appoint the WHO's Director-General. Assuming that plenary meetings are paid for by each member state attending, such a power does not come at great immediate financial cost to the organization. But even then there might be catch: it might still come out of national budget lines dedicated to the WHO and related costs, and thus represent money that could have gone to the WHO but did not. Plus, such costs as for the meeting venue will probably rest on the organization, as will the DG's salary. There is thus, generally speaking, a link between financing, the exercise of powers, and the fulfilment of an organization's function. The second thing to consider then is who gets to decide on financing (income as well as expenses) within the organization, and how. This relates to decision-making processes and budgetary powers, and may owe something to validity concerns as well, in that one cannot be expected to pay for a decision taken either *ultra vires* the organization at large or *ultra vires* a particular organ – indeed, this was precisely the gripe of France and the USSR at the heart of *Certain Expenses*.[77]

V. To Conclude

The sociologist Gianfranco Poggi once observed that, within states, one of the effects of divisions of power and powers was, paradoxically enough, the accumulation of power: "Far from helping to contain the state within its boundaries, the division of powers in fact led the state as a whole to increase its prerogative through the competition engendered among all its units and subunits over *their* respective prerogatives."[78] Despite the different logic behind international organizations, the development of international organizations has shown something similar over the last 150 years: competing claims by organizations and their member states often lead to an expansion of powers of

[77] *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, advisory opinion, [1962] ICJ Reports 151.
[78] GIANFRANCO POGGI, THE DEVELOPMENT OF THE MODERN STATE: A SOCIOLOGICAL INTRODUCTION 136 (1978).

international organizations, with organizations often teaching those member states how to be states.[79] Likewise, competition amongst organs has usually resulted in an expansion of the powers of those same organizations – power is rarely the zero-sum game it is so often thought to be. In this setting, the pattern cannot be broken by 'more of the same'. A 'repatriation'[80] of powers may be a theoretical possibility, but is usually no more than a pyrrhic victory, as the UK, having nominally regained its sovereignty after Brexit, is rapidly discovering. The only way to limit international organizations, it seems, it simply to bypass them.

This paper has identified the increased autonomy of international organizations and examined the seemingly increased irrelevance of international organizations through the financial involvement of private actors and private sector techniques and structures. Noticeable is the abdication of the primacy of the political, if by 'political' is meant the public deliberation about common goals and futures, both short-term and long-term. Both mark a turn towards technocracy, marked by expertise, efficiency and effectiveness. This spells continuity with the classic trope in international organizations law according to which the end justifies the means, but without even the meagre, merely nominal level of control so characteristic of functionalist international organizations law.

And as for the story inspiring this paper, about FAO Director-General Saouma and the blocked food aid to Ethiopia, it is doubtful whether a formal separation of powers between the various organs of the FAO would have been of much use at any rate. In cases such as this, there might be much more merit in controlling the appointment procedure, and that is something the member states can take care of without requiring much legal argument.[81] Saouma's term, incredibly perhaps, was extended in 1987. And when the member states fail collectively, no manner of institutional design will be of much help.

[79] GUY FITI SINCLAIR, TO REFORM THE WORLD: INTERNATIONAL ORGANIZATIONS AND THE MAKING OF MODERN STATES (2017).
[80] The felicitous term stems from Daniela Obradovic, *Repatriation of Powers in the European Community*, 34 CMLREV 59 (1997).
[81] See further JAN KLABBERS, VIRTUE IN GLOBAL GOVERNANCE: JUDGMENT AND DISCRETION (2022).