CHAPTER 29

Revealing the Publicness of International Law

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Introduction

Most introductory lectures on international law emphasize the differences between international and domestic legal systems. Where the latter are usually explained from the perspective of a legislator (preferably democratically chosen and controlled) as part of an institutionalized legal system, the narrative in relation to international law is different. Rather than departing from an institutionalized setting, the traditional focus is on the contractual freedom of states. Hence, following the well-known first question raised by Akehurst, namely, whether “International law is really law,”1 textbooks teach us that “[T]he relations between States comprising the International Community remain largely horizontal. No vertical structure has as yet crystallized, as is instead the rule with domestic systems of States,”2 “the international legal community is so far mainlystructured horizontally,”3 or “[I]nternational law is sometimes called public international law to distinguish it from private international law, though […] even the latter term can lead to misunderstandings. [I]t is clearly distinguished by the fact that it is not the product of any one national system, but of States.”4 This approach of international law as “rules emanating from the free will of states”5 (in a way using the interpretative framework of domestic civil law rather than public law) increasingly blurs our view of another dimension of international law. The question raised in the present essay is what is wrong with the classic narrative?

Where the origin of international law may be found in agreements between nation-states (underlying the (in)famous non-hierarchical or “flat” structure of

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5 As famously argued in Lotus (France v. Turkey), PCIJ, judgment of 7 September 1928, judgment no. 9, series A, no. 10, ICGJ 248.
the international legal order), the creation of international organizations (and above all their further development) seems to highlight the “public” or “vertical” dimension of the international legal order. The proliferation and law-making functions of many international organizations made us aware of the existence of – perhaps not the emergence of a world government⁶ – but at least of global governance “beyond the state” in what is sometimes normatively framed as a “world community.”⁷

Over the past years many scholars pointed to the emergence of new actors and the law-making functions of international organizations, and the question may rightfully be posed as what could possibly be added to the vast amount of literature in this field. The aim of the present short essay, therefore, is necessarily modest. It merely aims to point to a consequence of the mentioned changes in the international legal order that is at best noticed only at the background: the development of the “publicness” of international law as a result of an emerging system of global institutional governance; or – as phrased by Kadelbach – the development “from Public International Law to International Public Law.” The emergence of an “institutional global normative web”⁸ has partly changed the nature of international law through the creation of a level of governance where the interests of nation-states are still visible and effective, but where these interests are more frequently embedded in and restrained by an interconnectivity of norms set by different formal and informal international institutions.

Some textbooks do take this dimension into account in explaining the structure of international law. Thus, Klabbers points to the fact that “many of the rules are shaped not just between states but also involve representatives of international organizations (such as the United Nations (UN)), or civil society organizations (such as Greenpeace).” Brownlie acknowledges the idea that “international law underwent a profound process of expansion […] inter alia including the creation of international organizations of universal

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⁷ But see M. Koskenniemi, “The Subjective Dangers of Projects of World Community” in A. Cassese (ed) Realizing Utopia: The Future of International Law (Oxford University Press, Oxford: 2012) 3–13; as well as the other contributions in Part 1 of this volume under the heading “Can the World become a Global Community?”