

# The Normative Force of Decisions of International Organizations\*\*

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## 1. Introduction

The creation of norms is one of the primary functions of international organisations. The capacity to adopt norms is even considered as constitutive of the very existence of such organisations. Norms produced by organisations vary significantly according to their addressees, subject-matter, the degree of influence they exercise or aim to exercise on the conduct of their addressees, the kind of sanction (or lack of sanction) they envisage and the form under which they are adopted. There are no rules of general international law which determine *a priori* the kind of norms that organisations can produce<sup>1</sup>. Consequently, the only determinative instrument in this respect remains the treaty constitutive of the organisation which can contain the relevant power-conferring norm. In the absence of such a norm, the power to produce norms (*pouvoir normatif*) can be implied from the objectives assigned to the organisation if the recognition of such a power is indispensable to achieve those objectives.

## 2. Definition of the Subject-Matter of the Paper

The subject matter of this paper concerns ‘normative force’ of ‘decisions’ of international organisations. The terms ‘normative force’, ‘decisions’ and ‘international organisations’ need to be clarified.

First of all, the paper is concerned with normative activities of the organisations, and not with the factual behaviour of their organs or personnel. A norm is defined in juridical logics as a sentence expressing an obligation. Norms can be general and abstract or concrete and individual. Norms may have a sanction – if the sanction is an organized one, we can speak about *legal (juridical)* norm. Sanctions can also be diffused, then the norm can be characterised as social, moral etc. Some norms do not have a clearly identifiable sanction, e.g. technical norms such as instructions accompanying technological equipment, cooking recipes, advisory books etc.

‘Normative acts’ are acts in a written form, through which an organisation expresses its will to establish rules of conduct<sup>2</sup>. Those rules can either concern matters external to the organisation or internal ones, having as their subject matter the internal structure and procedure of an organisation. Their scope can be general or individual<sup>3</sup> and the normative acts can either

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<sup>1</sup> It is however to be noted that international organisations cannot participate in the process of formation of *ius cogens*, which remains the exclusive domain of States according to art. 53 of the Vienna Convention of 21 March 1986.

<sup>2</sup> A similar definition of a normative act of an international organisation is adopted by Dominicé, ‘Valeur et autorité des actes des organisations internationales’, in R.-J. Dupuy (ed.), *Manuel sur les organisations internationales* (2<sup>nd</sup> ed., 1998) 441.

<sup>3</sup> Cfr. Dominicé, who excludes from the scope of normative acts of organisations individual acts which do not create general rules. He notes that ‘[t]ous ces actes ponctuels ne sont pas de type

concern conduct of the member states, or of individuals (legal or natural persons) or even other international organizations<sup>4</sup>.

The concept of 'normative force' is wider than 'legal force'; it refers to different normative orders, e.g. the social order. The international community, as a human community, is also governed by different normative orders – the international legal order, the *comitas gentium*, the international political order<sup>5</sup>; one may even speak of an international moral order.

The expression 'normative force' should thus be understood broadly, as encompassing the way in which a normative act influences or aims to influence the social reality. It is to be distinguished from the problem of an appropriate legal basis for a given normative act, which determines the legality of the act in question (whether it is adopted *ultra vires*). The study of the 'normative force' goes beyond the classical division of normative acts into legally binding and non-binding acts. It rather aims to analyse the real effects of an act, regardless of its formal character as binding or 'non-binding'. Closely related with this subject is the issue of control mechanisms established in order to bring about compliance with normative acts of organisations.

As regards the term 'decision', it certainly designates a unilateral declaration of will of an international organization aimed at a change in the objective reality. Thus, the term 'decision' should be understood broadly, as encompassing all forms of unilateral expressions of will in a written form, of a normative character, whether or not they are *per se* legally binding<sup>6</sup>. A 'decision' for the purpose of this paper has a broader scope than a 'legal act', which necessarily entails production of legal effects<sup>7</sup>. It also has to be mentioned that decisions of all organs of a given organisation have to be taken into account, including decisions of judicial organs (judgments, orders, opinions). An organ of the organization acts on its behalf, hence the will of the organ is to be treated as the will of the organization.

Such a definition excludes multilateral instruments which involve other declarations of will. Thus, we are not going to deal with international conventions prepared under the auspices of an organisation or to which an organisation is a party..

In order to embrace the greatest possible spectrum of unilateral norms, it seems useful to adopt a wide definition of the subjects producing them. Therefore, the so-called 'soft organisations' of doubtful status should also be included in the study. The acceptance of the *sensus largus* is justified by the fact that both 'hard' as well as 'soft' organizations exercise *de facto* a norm-creating activity. The norms emanated by 'soft' organizations do not *per se* have legally binding force, nevertheless they exist as norms in other normative orders. What is more,

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normatif, car, même obligatoires, ils ne visent pas à établir des règles générales' (Dominicé, *Ibid*, at 2).

<sup>4</sup> A clear example of such a relationship will arise when the EU joins the ECHR. At the present moment such a relationship already exists between the UN and regional international organizations.

<sup>5</sup> Some authors negate the existence of a separate international political order, arguing that it belongs to the sphere of law, see e.g. J. Klabbers, who doubts the existence of politically binding commitments which are not automatically legally binding (Klabbers, 'Institutional ambivalence by Design: Soft Organizations in International Law', 70 *Nordic Journal of International Law* 403 (2001) 412.

<sup>6</sup> In the literature, a generic term 'institutional acts' is also used to designate all forms of acts adopted by international organisations, see e.g. P. Sands, P. Klein, *Bowett's Law of International Institutions*, (5<sup>th</sup> ed., 2001) 261.

<sup>7</sup> *ibid*.

they may have important persuasive and declaratory force. In order to determine whether an entity is an international organisation all circumstances of its operation should be taken into account, and not only the intent of its founders. Under such an approach, entities such as the OSCE would also be considered as international organisations producing unilateral norms, despite contrary intent of the drafters.

Futhermore, it is also important to include decisions taken not only by ‘classical’ international organisations, but also by the so-called ‘integrated’ organisations (also called supranational organisations), such as the European Communities or Mercosur. Little attention has also been devoted to the normative activity of the European Union, which is an international organisation<sup>8</sup>, albeit without legal personality (although even its legal personality can be adduced on the basis of several factors<sup>9</sup>). Generally, there is a tendency in the literature on the subject of international organisations to treat supranational organisations as constituting *sui generis* entities. It is suggested that such an approach is not the most adequate since supranational organisations continue to be subject to international law and their decisions have to be treated as acts of an international organisation, forming part of the system of international law (as long as they do not form a federal state).

### 3. Different Shades of Grey - The *criterium divisionis*

Keeping in mind the basic premise, i.e. that a norm is any sentence containing obligation, either general or individual, the scope of normative production of international organizations is extremely wide. It requires, therefore, ordering and classification according to relevant criteria. An attempt can be made to group the different decisions of international organisations so as to form a spectrum of different shades, rather than a clear-cut division into binding and non-binding decisions. Such an approach is based on the theory of legal realism. It implies that not only legally binding acts influence a given system of law. Therefore, one must also take into account all other expressions of will which can potentially influence the behaviour of States and individuals. It is all the more so given that very few international organisations are empowered to take legally binding decisions outside of their internal sphere<sup>10</sup>.

An example of an attempt to group all the decisions according to a given criterium could be a division of the decisions into acts obliging the members to act in a specific way *in foro externo* and *in foro interno*. The latter can in turn be subdivided into:

- acts directly enforceable in the internal legal orders of the members (the organization legislates *in loco* of the member state). E.g.: EC regulations

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<sup>8</sup> See D. Curtin, I. Dekker, ‘The EU as a ‘Layered’ International Organisation: Institutional Unity in Disguise’, in P. Craig, G. de Burca (eds.), *The Evolution of EU law* (1999) 83 and by the same authors ‘Governance as a Legal Concept within the European Union: Purpose and Principles’, 4 *International Law Forum* 134 (2002) 136-138, who on the basis of the institutional theory of law perceive the European Union as a single legal institution.

<sup>9</sup> See Wessel, ‘Revisiting the International Legal Status of the EU’, 5 *European Foreign Affairs Review* (2000) 507.

<sup>10</sup> See Verhoeven, ‘Les activités normatives et quasi normatives. Élaboration, adoption, coordination’, in *Manuel sur les organisations internationales*, *supra* note 2, at 422 (‘...il n’y a pratiquement pas d’organisations qui soient dotés en matière normative d’un réel pouvoir de décision.’)

- acts obliging or urging the members to give them direct effect by endowing it with legal force in the internal order of a state via a legislative act (failure to comply results in international responsibility vis-a-vis the organization but does not enable individuals to rely on such provisions). E.g. OSCE decisions, technical norms and standards

- acts obliging or calling upon the members to achieve a certain objective in their internal legal orders, e.g. EC directives, recommendations of the ILO.

Another division of decisions can also be proposed, which is based on its addressees, which can be:

1) the members of the organization (including other organizations, e.g. EU as a member of WTO)

2) individuals, sc. citizens of the member states (which does not necessarily entail direct vertical or horizontal effect)

3) the organization itself (organs of the organization)<sup>11</sup>.

#### **4. An Evergreen Issue: Article 38 of the ICJ Statute and Decisions of International Organisations**

One of the main issues that received considerable attention with the rise of regulatory activity of international organisations is the nature of art. 38 of the ICJ Statute. Art. 38 of the Statute is state-based since it only envisages those sources of law which are based on the consent of states. Given that international organisations adopt an ever increasing number of decisions, some of them even directly binding on the members, a question has arisen whether such decisions constitute a source of international law. To give just one example, there is a considerable pressure from the developing countries to regard General Assembly resolutions as a new source of international law. The opponents of such an idea often put forward arguments of legal certainty and unity of international law which the closed catalogue of sources guarantees<sup>12</sup>.

Another related issue is to what extent can decisions of organisations influence the formation of other existing sources of law, namely international customary rules and general principles of law.

#### **5. Effectiveness of Decisions**

One of the principal issues related to the normative force of decisions of international organisations is their effectiveness. The mere adoption of a decision does not obviously guarantee that it will exercise the desired influence on its addressees. Moreover, the same decision can be subject to divergent interpretations by the Member States, depending on their legal systems. Therefore, according to the theory of legal realism, the 'inner life' of a given decision becomes of crucial importance. By 'inner life' it is understood here the way in which a given norm actually functions within the Member States. The integrated organisations are by no means an exception here, since even their binding decisions have often to be implemented in the internal legal orders

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<sup>11</sup> An example is provided by the Charter of Fundamental Rights which was enacted by the organs of the European Union. They expressly self-bound themselves with the Charter. However, it is not legally binding on the Member States or their citizens.

<sup>12</sup> On the concept of formal sources in international law see G. Danilenko, *Law-Making in the International Community*, (1993) 16-43.

of the Members (eg. EC directives). This is closely connected with the issue of to what extent the individuals can directly rely on a given norm of international law, either vis-a-vis the national authorities, or before the organs of international organisations. The *effet utile* of a decision is greatly enhanced if individuals can directly enforce it. Moreover, direct applicability allows the decision to become effective in a much quicker way than if it were subject to implementation procedures. As regards divergent interpretations of the same provision, the most effective way to avoid this problem is the creation of a specialised body, judicial or non-judicial, with power to interpret the relevant decision.

The second issue, connected with the first one, is the control mechanism at the disposal of an organisation to bring about compliance with decisions it adopts. International law has been viewed for a long time as an imperfect system of law due to the lack of an organized sanction. However, with the emergence of the UN system, an organized system of sanctioning norms of international law has been developed – the ultimate sanction being the legalization of war by the Security Council against the state violating a specific norm. Nevertheless, such direct sanctions remain the exception. International organisations, devoid of the possibility to impose direct sanctions for non-compliance, seek other means to exercise influence on their members. The most common way is to provide for periodical reports on the state of implementation of a given decision or set of decisions. There are also different kinds of commissions composed of experts which evaluate the reports submitted by members and examine individual complaints. Such reports can be made public and thus exercise considerable political pressure (through various groups of interests, be it business or NGO's) on a non-complying member state.

## 6. Final Remarks

The fact that most of the decisions of international organisations, with the exception of the European Communities<sup>13</sup>, are not legally binding in the traditional sense cannot lead us to think that they are not influencing our daily lives. Non-binding decisions are much easier to adopt, they are not subject to much public attention and in many cases they prove to be an efficient means of regulation. The 'softening' of international law may thus be even viewed as a danger for the transparency of the international law-making process and an attempt to escape accountability. In sum, 'flexibility without accountability', as one author summarised the normative activity of the so-called soft organisations<sup>14</sup>. Furthermore, such a situation raises issues of legitimacy, since apparently non-binding decisions are not scrutinised with such attention by national parliaments and the public opinion.

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<sup>13</sup> Obviously not all of EU decisions are legally binding, there is also a significant production of soft-law instruments by the EU.

<sup>14</sup> Klabbers, 'Institutional Ambivalence'..., *supra* note 5, at 420.

