

ROLE OF INTERNATIONAL LAW INSTRUMENTS IN INSTITUTIONALISING REGIONAL COOPERATION IN SOUTH EAST EUROPE

Abstract

This article explores the role of international law instruments in the process of institutionalisation of regional cooperation in South East Europe. The institutionalisation has been defined as the process of creation of regional organisations composed by the states and other subjects involved in regional cooperation. The article examines how primary and secondary international legal acts are used to enable creation of these organisations and their functioning. The article concludes that the founders of the said regional organisations have relied on the international law instruments typically used in the process of establishment of international organisations and that the bodies of the regional organisations have produced various legal acts enabling internal management and conduct of operations of these organisations.

Keywords: regional organisations, South East Europe, regional cooperation, international treaties, resolutions.

1. Introduction

Since the late 1990s, another wave of regional cooperation has been promoted throughout the region of South East Europe (SEE) and the Balkans.¹ This wave of regional cooperation, principally motivated by the European Union,² has covered a number of areas of governmental activities and steered to the creation of structured institutional frameworks. These processes require political commitment of the involved governments, on the one hand, but they also necessitate to be institutionally shaped and legally grounded,

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¹ It has always been interesting to define limits of the region of South East Europe or that of the Balkans. Delević (2007, p. 11) uses the following description: “The Balkans is the historic and geographic name used to denote the territory in southeast Europe south of the rivers Sava and Danube. It is often referred to as the ‘Balkan Peninsula,’ as it is surrounded by water on three sides – the Black Sea to the East and branches of the Mediterranean to the South and West.”

² One of the key documents with the above-mentioned aim is one establishing the Stabilisation and Association Process, which, *inter alia*, entails the active contribution to regional cooperation by the concerned countries. Refer to: Commission des Communautés Européennes, 1999.

on the other hand. Some inherent advantages of international organisation that provide for a predefined form and a permanent institutional structure, render this manner of institutionalisation more efficient to conduct any cooperative process within the framework of an organisation (Diez de Velasco Vallejo, 2002, p. 10). For the purpose of this article, the institutionalisation of regional cooperation should be understood as creation of intergovernmental organisations composed of the international legal subjects involved in regional cooperation. Given its importance for international conduct of state's affairs, such institutionalisation requires the use of international law instruments at different stages of establishment and operations of the regional organisations.

Therefore, this article will focus on two major roles of international law in the process of institutionalisation of regional cooperation in South East Europe: firstly, international law instruments enable creation of institutional frameworks for concrete forms of regional cooperation through the establishment and prescribing the responsibilities of regional intergovernmental organisations, and, secondly, these instruments, as adopted by the organisation's decision-making bodies, define conditions and procedures for the functioning and operations of these organisations in the form of secondary rules (compare: Diez de Velasco Vallejo, 2002, p. 107; Daillier, Forteau & Pellet, 2009, p. 641).

2. Creation of regional international organisations: from political reasons to the conclusion of constituent instruments

The following paragraphs will examine both theoretical and practical reasons which justify embodying regional cooperation in the form of intergovernmental organisations, on the one hand, and the importance and various forms of the constituent instruments, as founding documents of these organisations, on the other hand.

2.1. Raison d'être of the regional organisations in South East Europe

As the examined regional organisations fall within the category of international public organisations, a number of theoretically defined and practically verified features of the latter are also pertaining to the former. The following lines will briefly examine these features. When discussing *raison d'être* of creation of the international organisations, one often refers to the widely accepted understanding of their relevance for the functioning of intergovernmental cooperation in an institutionalised manner. Amerasinghe (2005, p. 10) has outlined the political and legal steps for the creation of intergovernmental organisations:

“(I) establishment by some kind of international agreement among states; (II) possession of what may be called a constitution; (III) possession of organs separate from its members; (IV) establishment under international law; and (V) generally, but not always, an exclusive membership of states or governments, but at any rate predominant membership of states and governments”.

The status of an international organisation, which is defined as an association of states, possessing a distinct legal personality from the one of its members, and which is assigned to achieve lawful goals, disposing of its organs, and vested with legal powers (Bronwlie, 2001, p. 679), offers the most convenient way of institutionalisation. Actually, despite some arguments that the international organisations tend to be overly bureaucratic in their functioning, expensive in monetary terms and sometimes excessively autonomous in their actions, they still remain the best fora for intergovernmental interaction and they are facilitators of international bargaining processes, implementation of international commitments, management of interstate projects, and other related efforts (Abbot & Sindal, 1998, p. 5).

In favour of establishing international organisations, two main features of these bodies are often highlighted – their centralisation and independence. Namely, centralisation enables concentrated interstate actions in a formalised and neutral framework/structure. It further constitutes a legally framed decision-making process among the participating states and introduces some leverages among the governments disposing of different power at the international stage.³ Even though the international organisations are subject to influences by the members' governments, they, however, enjoy certain level of substantive independence which is guaranteed by their constituent instruments. This independence may be perceived in managing the operations falling within the assigned responsibilities of an organisation, on the one hand, and by securing their neutrality, on the other hand. The operations are usually managed according to the rules of the organisation, whilst their neutrality may be exercised in different forms, including, but not limited to, information provision to the member states and third parties, dispute settlements, allocation of resources and managing funds. It is noteworthy that neutrality helps displaying impartial image of the international organisation's actions, but it requires the organisation's bodies to be protected from any sort of interference that may be exerted by the member governments (Abbot & Sindal, 1998, pp. 9-23). In this respect, structured and durable regional cooperation requires the institutionalisation of processes and interaction between the involved actors through establishing regional organisations (Glodić, 2017, p. 271).

From a substantive aspect, regional cooperation in the Balkans has covered many areas of State activity: political framework of cooperation, security cooperation, economic and trade relations and administrative cooperation (Glodić, 2017, p. 270). These cooperative efforts were institutionalised through a number of regional organisations, among which the most notable are: the Regional Cooperation Council, the Energy Community, the Transport Community, the Regional School of Public Administration, the Western Balkan Fund, the Regional Youth Cooperation Office, the Security Centre – RACVIAC, and the Centre of Excellence in Finance.⁴ Given its size, this article will analyse the most typical

³ The manner in which Archer described the purpose and functions of international organisations is worth citing: "The role of international organisations is that of their being arenas or forums within which actions take place. In this case, the organisations provide meeting places for members to come together to discuss, argue, co-operate or disagree. Arenas in themselves are neutral; they can be used for a play, a circus or a fight" (Archer, 2001, p. 73).

⁴ It should be noted that the European Union is a party to the Treaty Establishing the Energy Community and the Treaty Establishing the Transport Community.

international law instruments related to these organisations and representative of their practices without comprehensive approach.

2.2. Constituent instruments and the establishment of regional organisations

Although each international (universal or regional) organisation has its own specificities and is based on a distinct international legal document, there are, however, some traits common to the majority of the organisations. Many issues related to the establishment and functioning of international organisations are comparable and there is a significant level of 'cross-influencing' among them (Amerasinghe, 2005, pp. 16-17).

The dominant international practice proves that the constituent instruments are usually made in the form of treaties, which are a formal and legally binding expression of concurring will of international law subjects (Bederman, 2002, p. 40; Cassese, 2005, p. 170). In addition to establishing a new legal subject on the international plane, the constituent instruments stipulate their powers and responsibilities, mandate, institutional structure and relevant decision-making procedures (Shaw, 2003, p. 1193; Rosenne, 2004, p. 253). In the same vein, the International Court of Justice highlighted that "the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals" (ICJ, 1996, p. 75).

The constituent instruments almost regularly contain such names and titles which unambiguously demonstrate their purpose and subject. The international practice has shaped some usual denominations, such as: constitutions, statutes, pacts, agreements establishing an organisation, etc. Although, due to imminent advantages of concluding the constituent instruments in the form of a legally binding international act, a limited number of cases prove that the States also use political documents for creating international organisations, which do not produce the same legally binding effect as the treaties. The notorious examples of such practice are the documents by which the relevant governments established the Organisation for Security and Cooperation in Europe and the Nordic Council (Diez de Velasco Vallejo, 2002, pp. 11-12).

While considering the development of a constituent instrument, which constitutes primary rules of an organisation, it should be noted that such an instrument was a subject of negotiations between the founding members of the organisation and it represents the initial and basic legal document whose entry into force enables the legal existence of an international organisation (Diez de Velasco Vallejo, 2002, p. 11). The primary rules precede the establishment of the organisation (Daillier, Forteau & Pellet, 2009, p. 641).

Regarding implementation and interpretation of the constituent instruments, the International Court of Justice has established that "from a formal standpoint, the constituent instruments of international organisations are multilateral treaties, to which the well-established rules of treaty interpretation apply" (ICJ, 1996, p. 74) and "moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation" (ICJ, 1971, p. 19). Thus,

they will be subject to the defined international legal principles of treaty interpretation and other relevant prevailing rules.

The practice related to the establishment of the regional intergovernmental organisations explored by this article demonstrates the use of the both types of documents: treaties and political declarations. For the sake of example, the Transport Community was established by a multilateral treaty (see: Treaty Establishing the Transport Community),⁵ whilst the Regional Cooperation Council (RCC) was established by a joint declaration adopted by the ministers representing the participants of this body (see: Joint Declaration on the Establishment of the RCC). This Joint Declaration lays down the RCC Statute as its Annex II, thus no formal treaty was signed, but the parties recognise the existence of the RCC since its establishment.⁶ A more traditional approach was in place in the case of establishment of the Regional School of Public Administration (ReSPA) which was founded by an international agreement (Agreement Establishing the Regional School of Public Administration, hereinafter: ReSPA Agreement).⁷ Similar instruments were used for establishing the Centre of Excellence in Finance (see: Agreement on Establishing the Centre of Excellence in Finance) and the RACVIAC (Agreement on RACVIAC – Centre for Security Cooperation).⁸

Another example of the use of constituent instruments is in the case of the Regional Youth Cooperation Council (RYCO), which is established by the Agreement on the Establishment of RYCO (hereinafter: RYCO Agreement), whilst its functioning is in more details regulated by the Statute of RYCO (RYCO Statute) constituting, pursuant to Article 3(1) of the said Agreement an annex thereto.⁹ Article 12 of the RYCO Agreement has stipulated that the Agreement and its annexes constitute a legally binding instrument between the parties. This provision has highlighted the character of the document. Since there is no any provision in the Agreement which would lead to interpretation that the Statute does not produce the same legal effect as the Agreement, it remains unclear what

⁵ Article 1(1) of the Treaty Establishing the Transport Community define its aim as follows: “The aim of this Treaty is the creation of a Transport Community in the field of road, rail, inland waterway and maritime transport as well as the development of the transport network between the European Union and the South East European Parties, hereinafter referred to as ‘the Transport Community’”.

⁶ Point 7 of the RCC Statute stipulates: “The RCC, through RCC Secretary General and the RCC Secretariat, provides political guidance, supports and monitors and, where necessary, facilitates the work of relevant regional taskforces, initiatives and organizations active in specific thematic areas of regional cooperation in SEE. In particular, the RCC assists the taskforces/initiatives in gaining access to regional and international political, technical and financial support required to fulfil their objectives. The RCC establishes appropriate relationships with individual taskforces/initiatives and organizations in order to reinforce their efforts and avoid unnecessary overlapping. The RCC, in close coordination with the SEECF, streamlines regional taskforces and initiatives with the aim of achieving enhanced effectiveness, synergy and coherence.”

⁷ Article 1 of the ReSPA Agreement stipulates: “ReSPA is established as an international organisation.” Article 4 defines the objectives and Article 5 lays down activities of the organisation.

⁸ Article 1.1) of this Agreement stipulates the establishment of the organisation, whilst Article 1.3) defines it as “an international, independent, non – profit regionally owned, academic organisation.”

⁹ Article 3(1) of the RYCO Agreement reads: “The Statute of RYCO is hereby adopted and constitutes an annex thereto.” The identical procedure for amendments is envisaged for the RYCO Agreement and the RYCO Statute, as stipulated by Article 8 of the RYCO Agreement.

reasons inspired the parties to opt for such a drafting technique. In addition, the same legal technique was applied in relation to the establishment of the Western Balkans Fund (Agreement Concerning the Establishment of the Western Balkans Fund and Statute of the WBF, hereinafter: WBF Agreement, *respective* WBF Statute).

The treaty-making practice between the members of some of these organisations and related to the policy objectives of regional cooperation may go beyond the conclusion of the constituent instrument. The best illustration is the Agreement on the Price Reduction of the Roaming Services in Public Mobile Communication Networks in the Western Balkans Region of 4 April 2019 under the auspices of the RCC.

3. International law instruments enabling functioning and operations of the regional organisations

The entry into force of the constituent instrument enables the organisation to start with its own *life* through exercise of its legal prerogatives and, hence, executing the conferred responsibilities. These functions are usually performed by its institutional structures composed of the governing (decision-making bodies) and its executive machinery – a permanent secretariat composed of the organisation's officials (Glodić, 2019, pp. 130-132). In order to enable implementation of the founding instrument, the organisation produces its own legal acts – secondary rules and concludes an international agreement which regulates its status within the country where its headquarters are located.

3.1. Headquarters Arrangements defining the position within the Host State of the organisation

An international organisation should be independent from any type of interference of its members in the conduct of its operations and discharge of the conferred functions. This independence should be particularly maintained *vis-à-vis* the country in which the organisation's headquarters are situated, so called the Host State. This type of a particular international relation between an international organisation and its Host State is regulated by the headquarters arrangements (Brownlie, 2001, pp. 682-683). The most important provisions of the headquarters arrangements are those which stipulate the privileges and immunities of the organisation within the host country, freedom of operations and the status of its administrative head and its officials (Amerasinghe, 2005, pp. 315-317). On a theoretical level, legal justification for according immunities to an international organisation is explained by the functional necessity of the organisations, *i.e.* the international organisations should enjoy those immunities that appear indispensable for the exercise of their functions (Klabbers, 2009, p. 132). At the practical level, by concluding such an agreement with the Host State, the international organisation in question manifests *ius tractationis* as a component of its international legal personality.

The examined regional organisations have mainly followed the practice of other international organisations to conclude such agreements with the Host State. For the sake of example, we will mention some of them. ReSPA concluded the headquarters arrangement with the Government of Montenegro (Agreement between the Government of Montenegro

and ReSPA on the Seat and Functioning of ReSPA in the Host Country of 22 June 2011)¹⁰, RYCO has signed an agreement with the Albanian Government (Host Country Agreement between the RYCO and the Republic of Albania of 28 August 2018)¹¹.

In the case of the RCC, there is a different situation. The headquarters arrangements were concluded between the Council of Ministers of Bosnia and Herzegovina, representing the host country, on the one hand, and the countries participants of the South East Europe Cooperation Process (Agreement between the Council of Ministers of Bosnia and Herzegovina and the Governments of the Other SEECP Participating States, the United Nations Interim Administration Mission in Kosovo on behalf of Kosovo in accordance with the UNSCR 1244 on the Host Country Arrangements for the Secretariat of the Regional Cooperation Council of 14 September 2007). This practice is somewhat unusual since such agreements are typically concluded between the Host State and administrative head of an international organisation. The practice in the case of the RCC may demonstrate a different approach given the manner of constituting the RCC itself on the basis of a declaration and not a treaty. Since the RCC has established a liaison office in Brussels (Point 18 of the RCC Statute), its Secretariat has concluded the headquarters arrangements with Belgium (Headquarters Agreement between the Kingdom of Belgium and the Regional Cooperation Council Secretariat of 29 August 2008). Article 2.2. of the above referred Agreement on the Host Country Arrangements for the RCC Secretariat has stipulated the legal capacity of the latter to conclude the headquarters arrangement with the Belgian authorities.

3.2. Acts adopted by the regional organisations' bodies

In addition to the primary rules, the international organisation's operations are managed and conducted according to the secondary rules enacted by its organs pursuant to the constituent instrument and, to a lesser extent, by its institutional practice (Amerasinghe, 2005, pp. 20-21). Thus, the creation of an international organisation as a separate legal entity makes sense only if such an organisation is vested with law-making powers pursuant to its constituent instrument (Klabbers, 2009, p. 178).

The acts adopted by the organs of an international organisation produce binding effect on the organisation, its organs and, sometimes, on its members. Such binding effect is enshrined by the provisions of the constituent instrument of an organisation and they govern administrative rules of the organisation, rules of procedures of different organs, establishment of advisory and subsidiary bodies, employment relations within the organisation, financial procedures, procurement rules, etc. (Amerasinghe, 2005, pp. 164-165; Diez de Velasco Vallejo, 2002, pp. 113-116). These acts enable running of the organisation and are translating the responsibilities conferred by the organisation's members into more tangible deliverables through the organisation's institutional mechanism (Glodić, 2019,

¹⁰ Concluded pursuant to Article 3(2) of the Agreement Establishing ReSPA: "A Headquarters Agreement shall be concluded between ReSPA and Montenegro." These arrangements define, inter alia: seat, legal status, freedom to work, inviolability, immunities, communications, exemptions from taxes and duties, privileges and immunities of the director and the staff.

¹¹ Concluded pursuant to Article 3.2. of the Agreement on RYCO.

p. 77). The form, content and scope of these acts are predetermined by the constituent instrument and while exercising their law-making powers, the organs of the organisation should observe the constituent instrument's relevant provisions and should not undermine intention of the members of the organisation (Amerasinghe, 2005, p. 163).

A common denomination for the secondary acts adopted within an international organisation is the term "resolution", although various other names may be used. However, its generic character implies that its effects, scope of application and meaning within the legal system of an international organisation will rely heavily on the terms of the constituent instrument of such an organisation, as well as on interpretation and subsequent practice of the parties to this constituent instrument (Jennings & Watts, 1992, p. 48).

The regional organisations in South East Europe widely follow this international practice and their constituent instruments confer powers upon the governing bodies (composed of the members' representatives) to adopt secondary rules. For the sake of illustration, few examples will be presented. Point 15b) of the RCC Statute has envisaged that the Board of this organisation, inter alia, *adopts decisions pertinent to the activities of the Secretariat of the RCC*. Article 11(2) of the ReSPA Agreement lays down that *the Governing Board shall adopt Resolutions for all matters pertaining to its responsibilities [...] including Rules of Procedure, Financial Regulations, Staff Regulations and accession of new members*. Article 18.1 of The RYCO Statute stipulates that its Governing Board shall *adopt the Rules of Procedure and other secondary regulation required for the functioning of RYCO*. Article 30 of the Treaty Establishing the Transport Community envisages that the Regional Steering Committee *shall lay down rules of the Permanent Secretariat, in particular for the recruitment, working conditions and geographical equilibrium of the Secretariat's staff*. Article 14 of the RACVIAC Agreement defines the power of the Multinational Advisory Group to adopt the Staff Regulations of this organisation. On a more descriptive side, Article 35(3) of the WBF Statute provides for the minimum content of the Staff Regulations containing *rules, principles and procedures governing the selection of staff, their recruitment, classification of posts, and the efficient operation of the WBF's Secretariat in attainment of the objectives of this Statute*. The foregoing examples lead to the conclusion that the constituent instruments use different wordings to establish the power of the intergovernmental governing bodies for adopting the secondary rules of the organisations. There a number of instances demonstrating that, pursuant to the powers conferred upon them by the constituent instruments, the governing bodies enacted different pieces of secondary rules – staff regulations (see: Transport Community Staff Regulations; ReSPA Staff Regulations), financial regulations, rules of procedure (see e.g. Rules of Procedure of the ReSPA Governing Board; Rules of Procedure of the Regional Steering Committee of the Transport Community; Terms of Reference of the RACVIAC Multinational Advisory Group),¹² recruitment rules (Rules of the recruitment of the Transport Community), etc.

Besides adoption of legally binding acts, the regional organisations may also enact a number of legally non-binding documents containing policy recommendations and falling within the category of *soft law*. Due to its nature, *soft law* can be more easily used in order

¹² Also, different rules of procedure for the bodies of the WBF available at on the WBF website.

to define some relationships and processes on the international plane for which there is no readiness to create a legally binding document (Abbot & Sindal, 2000, p. 423; Amerasinghe, 2005, p. 175). Although the *soft law* instruments do not produce binding effect, there is, however, certain reaction to be expected from the addressees of these instruments. Namely, they are expected to consider the provided recommendations or other relevant documents when they shape the policies concerned by these instruments (Amerasinghe, 2005, p. 177). Besides the expected consideration of policy recommendations, the states participating in an international organisation have committed to cooperate with the organisation and other members of the former. Therefore, one may highlight their duty to cooperate on implementing what was recognised as the objectives of cooperation (Amerasinghe, 2005, pp. 178-179). The regional organisations and the intergovernmental conferences operating within their framework issued a number of recommendations pertaining to relevant policy areas (compare: RCC, 2011; RCC-ReSPA, 2017).

The above examples prove that, in the exercise of the conferred powers, the regional organisations in South East Europe are powered to use different secondary law instruments, and even some acts falling within the category of *soft law*. The secondary international law instruments are an unavoidable tool for enabling functioning and operations of the regional organisation.

4. Concluding remarks

International organisations are both products of international law instruments and creators of these instruments. International law offers necessary instruments that enable establishment of an international organisation and that provide the legal framework for its operations. Following the established theoretical framework on the creation and functioning of international organisations, this article has demonstrated how both primary and secondary rules of international organisations have been used with the aim of institutionalising the processes of regional cooperation in South East Europe. The institutionalisation was defined as the process of the creation of regional intergovernmental organisations. The constituent instruments in the form of treaties, headquarters arrangements, as well as different types of internal legal acts (secondary law) are present in the practice of these organisations. The author presented and analysed a number of relevant examples that are used in the practice and assessed their role in the process of institutionalisation of regional cooperation.

The article has concluded that the founding parties of the organisations and the organisations' bodies relied on the international law instruments, which are regularly used for the above purposes. In addition to the legal acts, the organisations have also enacted some documents defining policy and political commitments of the members of the regional organisations which may be qualified as *soft law* instruments. It is obvious that the examined regional organisations have developed a rich rules-making practice. Hence, the participants of the process of regional cooperation in South East Europe and the bodies of the established regional organisations did not diverge from the accepted international

practice to use already known and widely spread legal and political instruments with aim of institutionalising regional cooperation in a number of policy areas.

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**ULOGA MEĐUNARODNOPRAVNIH INSTRUMENATA U
INSTITUCIONALIZOVANJU REGIONALNE SARADNJE U JUGOISTOČNOJ
EVROPI**

Sažetak

Ovaj članak ispituje ulogu i upotrebu međunarodnopravnih instrumenata u procesu institucionalizacije regionalne saradnje u jugoistočnoj Evropi. Proces institucionalizacije

je određen kao proces stvaranja regionalnih međuvladinih organizacija koje čine države i drugi subjekti uključeni u proces regionalne saradnje u ovom regionu. Polazeći od teorijskih i praktičnih prednosti uspostavljanja međunarodnih regionalnih organizacija, članak ispituje način na koji su primarni i sekundarni međunarodnopravni akti upotrebljeni da bi se omogućilo uspostavljanje ovih organizacija i funkcionisanje njihovih institucionalnih okvira. Zaključeno je da su se osnivači posmatranih regionalnih organizacija oslonili na one instrumente međunarodnog prava koji se uobičajeno koriste u procesu osnivanja međunarodnih organizacija te da su tela ovih organizacija, polazeći od osnivačkih instrumenata, stvarala različite sekundarne međunarodnopravne akte koji im omogućavaju funkcionisanje i obavljanje njihovih poslova. U suštini, opšteprihvaćeni instrumenti međunarodnog prava su bili neizbežni u procesu institucionalizacije regionalne saradnje u jugoistočnoj Evropi i države iz regije su koristile one instrumenti koji su već od ranije ustaljeni u međunarodnoj pravnoj i političkoj praksi.

Ključne reči: regionalne organizacije, jugoistočna Evropa, regionalna saradnja, međunarodni ugovori, rezolucije.

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