BUCHBESPRECHUNGEN / BOOK REVIEWS

Dimitri van den Meerssche, **The World Bank's Lawyers: The Life of International Law as Institutional Practice**, Oxford University Press, Oxford 2022, 336 pages, $ 105.00, ISBN 9780192846495

When I arrived at the World Bank in Washington D.C. in 2014, the Bank was in the process of incorporating a new agenda on security, conflict and fragility in its policies and operations. My first task as a short-term fellow in the Bank's legal department was thus to help rethink and update a "Legal Note on Bank Involvement in the Criminal Justice Sector"[1], published in 2012 by the Bank's chief lawyer, General Counsel Anne-Marie Leroy. Criminal justice had traditionally been considered to fall outside the Bank's mandate, but the 2012 Legal Note had paved the way for new projects financing prosecutors, prisons and criminal courts. The new legal framework had been "received well", but now there was "an increasing demand for World Bank support to security-related activities that go beyond criminal justice", the General Counsel noted in the legal department's 2014 annual report[2]. Hence, the department was now "extending the risk-based approach used in the Legal Note for interventions in the criminal justice sector to the security sector more broadly, including the military."

After completing my fellowship at the Bank, I returned to academia in Germany and continued my PhD project on the institutional law of international development institutions, struggling to make sense of what I had observed in terms of international law and legal scholarship. Eight years later, I find myself reading Dimitri Van Den Meerssche's book "The World Bank's Lawyers" with admiration, and one of my initial thoughts was indeed that this is the book that I would have wanted to write about the World Bank. On second thoughts, I am fine with having written a different book, but I will come to that.

Uncovering Legal Routines and Material Practices "under the Radar" of International Law

"The World Bank's Lawyers" is an important and original piece of interdisciplinary scholarship, as much for its methodological as for its substantive contributions to the literature on international institutional law in general and the World Bank in particular. Methodologically, Van Den Meerssche combines ethnographic and historiographic techniques –

1 *Anne-Marie Leroy*, Legal Note on Bank Involvement in the Criminal Justice Sector, https://documents1.worldbank.org/curated/en/138001468136794111/pdf/672310BR0REVIS0IC0disclosed03010120.pdf (last accessed on 06 December 2022).

2 The World Bank – Legal Vice Presidency, Annual Report FY 2014: Legal Aspects of the World Bank's Involvement in the Security Sector, http://web.worldbank.org/archive/website01535/WEB/IMAGES/916220-2.PDF (last accessed on 06 December 2022).

archival work, interviews, participant observation –, theoretically grounded in Latour's actor-network-theory, to trace the routines and material practices of the World Bank's legal department, especially its General Counsel's, over three decades. This approach uncovers a significant aspect of what is going on "under the radar" of international legal scholarship (as one interviewee put it), both in its doctrinal and critical strands.

This peek under the radar uncovers important substantive counternarratives to widely shared macro-accounts of international law's evolution since the end of the cold war. One standard account describes this evolution as a process of legalization, judicialization, and possibly even constitutionalization of international law in general and of international institutions in particular. Van den Meerssche complicates this account and tells a different, at times even inverse, story: his detailed observations of three successive General Counsel's – Ibrahim Shihata (1983-2000), Roberto Danino (2003-2006), and Anne-Marie Leroy (2009-2016) – suggest that international institutional law's role at the Bank has been precarious throughout the entire period studied. If anything, international institutional law has lost normative authority since Shihata left the Bank and his formalist approach withered away under the deformalizing influences of moralizing human rights reasoning and private sector risk management practices. As one interviewee from the legal department put it: "Legal thinking in the Bank has died" (p.29). "It is really not our role to decide how the Bank should deal with human rights or any issue" (p.199).

A second counternarrative that emerges from "The World Bank's Lawyers" complicates critical accounts of the World Bank, its law, and legal formalism as a hegemonic tool in North-South relations. A common criticism from a Southern perspective is that the World Bank's legal regime enshrines and operationalizes the dominance of Western industrialized nations – chiefly the US and Europe – over developing countries, through weighted voting rules, conditionalities and project agreements exporting Western values. Indeed, Shihata is often associated with, and criticized for, his legal opinion on good governance, which paved the way for the Bank to engage in projects reforming states, markets and legal systems in the South.

Seen from underneath the radar, Shihata appears in a different light: as a forceful ally of developing countries, mobilizing legal arguments and formal qualities of the law to impose normative constraints on zealous Western reformers in the Bank's political organs and bureaucracy. This is not to say that Shihata was an advocate of the subaltern and oppressed in the South – Van Den Meerssche is clear on Shihata's authoritarian leanings –, but the counternarrative clearly points to the geopolitical ambivalences of (a certain type of) "rule of law" practices inside the Bank. This becomes clear as subsequent General Counsels blur the legal boundaries of the Bank's mandate, culminating in involvement in core areas of state sovereignty like criminal justice, the security sector and the military.

Indeed, to Van Den Meerssche the Legal Note on criminal justice appears as a watershed moment for the new, risk-based approach to lawyering – a moment missed by more

conventional accounts[3] above the radar but whose significance I came to witness during my own time at the Bank: in less than three years, the Bank's lawyers had moved from a hands-off approach to criminal justice to enabling involvement with the entire array of security institutions, ranging from prosecutors and prisons to the police and armed forces – subject to, of course, safeguards and risk management procedures.

What Else is out There under the Radar? – Towards Multi-Sited Ethnographies of International Institutional Law

As other reviewers – and the author himself – point out, the methodological choices and consciously limited focus of the book imply some necessary limitations. The inward-looking focus on networks of actants within an international institution does not permit engagement with broader contextual influences on, and determinants of, the observed internal dynamics, be they wider trends in legal ideologies, political economy, or geopolitical configurations. Maybe more importantly, the focus on the General Counsel also takes out of view many other institutional settings, routines and practices that are equally relevant, or arguably at times more relevant, for how law is understood and performed in and by the Bank. In this regard, Van Den Meerssche pioneering work shares the typical limitations of ethnographic thick descriptions: they offer high-resolution images of individual points on the map, but cannot, and do not purport to, capture the legal topography of the entire organization, let alone other institutions.

There is reason to believe that this topography has changed considerably since the 1990s, if the extant legal literature on World Bank law is anything to go by. The period under examination in the book is also one of accelerated norm-setting and norm-hardening beyond the legal department. This is exemplified by the Operational Policies and Procedures, such as policies on fragile and conflict-affected states[4] and safeguard policies protecting project-affected populations, adopted by the Board and enforced by the Inspection Panel in a quasi-judicial complaints procedure (mentioned e.g. on pp. 218 et seq.). It may well be that the location of legality within the World Bank has evolved: if it has not migrated away entirely from the legal department, as suggested by Isobel Roele in her review of the book[5], the sites of legality certainly have multiplied within the institution – and "legalized" the Bank in that sense. But for now, we know too little about the legal routines and material practices in these other sites to generalize findings about the everyday life of law at the World Bank.

3 Cf. *Ronald Janse*, Entering the Forbidden Zone – The World Bank, Criminal Justice Reform and the political Prohibition Clause, https://research.ou.nl/ws/portalfiles/portal/7867114/IOLR_010_01_Janse.pdf (last accessed on 06 December 2022).

4 Cf. *Marie von Engelhardt*, International Development Organisations and Fragile States – Law and Disorder, London 2018, 259 p.

5 Isobel Roele, Unsettling the Place of Law in International Organizations, Völkerrechtsblog, 21.11.2022, doi: 10.17176/20221121-121444-0.

What is required, thus, is a collective effort in interdisciplinary scholarship that provides us with multi-sited ethnographies of international institutional law, comparable to anthropological research that has traced the practice of human rights from the halls of the UN in Geneva to their localization and vernacularization at the grassroots level. What are the legal routines and material practices of secondary lawmaking at the Bank's Board, of Inspection Panel fact finding, of safeguard specialists applying environmental and social standards, or of the "everyday operations" of World Bank law at country and project level? Are there similar stories to be told about the WHO's General Counsel, and the application of its secondary law in the International Health Regulations? After moving from the "courtroom" to the "boardroom" (p.14), there remain other rooms (and outdoor sites) to the explored next in order to generalize empirical patterns and to abstract from concrete cases for theory building about the everyday life of international institutional law.

Whose Radar, and Whose "Law", is It Anyway? – Towards Complementarity of External and Internal Approaches to International Institutional Law

"The World Bank's Lawyers" takes a self-consciously external perspective on international institutional law and explicitly distances itself from internal approaches that employ doctrinal, "instrumentalist" or constitutionalist legal reasoning (pp.3 and 28). After all, it is these internal approaches under whose radar much of the everyday life of international law plays out. Or is it?

In my own experience with, and work on, the Bank[6], I found a more dialectical relationship between external and internal approaches. Normative assumptions shape what is perceived as relevant institutional practice for external observation, but observed institutional practice also shapes what norms are considered relevant as "international institutional law". In that sense, external and internal approaches are complementary and condition each other, at least to some extent.

As Roele[7] points out in her review, even an ethnographic account of the everyday life of international institutional law can hardly avoid assumptions about what qualifies as the "law" whose everyday life is being studied. What is the point of reference of the observed routines, material practices, documents etc. that makes them "legal", as opposed to economic, or political etc.? Focusing on what top lawyers in the legal department do does not answer that question conclusively, over- and underinclusive as that focus may be.

6 *Philipp Dann*/ *Michael Riegner*, The World Bank's Environmental and Social Safeguards and the evolution of global order, Leiden Journal of International Law 32 (2019), pp. 537 – 559; *Michael Riegner*, Towards an International Law of Information, International Organizations Law Review 12 (2015), pp. 50 – 80; *Michael Riegner*, Informationsverwaltungsrecht internationaler Institutionen – Dargestellt am Entwicklungsverwaltungsrecht der Weltbank und Vereinten Nationen, Tübingen 2017, 540 p.

7 Isobel Roele, Unsettling the Place of Law in International Organizations, Völkerrechtsblog, 21.11.2022, doi: 10.17176/20221121-121444-0.

Judging by the occasional hint in the book's text, and by the literature it references in the footnotes, the notion of "international institutional law" underlying much of the study seems to be a fairly traditional one: it is the law of founding treaties, the Bank's Articles of Agreement, applicable norms of general international law, and other treaty norms, especially of human rights law. It is these primary law norms that the General Counsel's interpretative work, and thus the ethnographic study, focuses on. And it is these primary norms whose authority Van Den Meerssche repeatedly describes as "precarious" (p. 25, 33, 185, 279), dependent on a range of internal and external factors, including the General Counsel's own approach to law and his or her standing within the Bank.

My own observations at the World Bank drew my attention to a different set of norms, and prompted a slightly different framing of what Van Den Meerssche describes as precariousness. The book[8] I ultimately ended up writing myself relied heavily on the body of secondary norms enacted by the Bank's political organs – resolutions and decisions by the Governors and Executive Directors, Operational Policies and Procedures, the new Environmental and Social Framework, the Access to Information Policy, anti-corruption norms etc. Whether or not these norms were strictly "law" in doctrinal terms (arguably, they are[9] – *secondary* law), they clearly shaped everyday practice in many, if not most, departments of the Bank: they structured working routines, negotiations with member states, project designs, environmental impact assessments, engagement with project-affected populations, indigenous peoples and other stakeholders, compensation payments for resettlement and expropriation, procurement procedures, disclosure practices and the treatment of access to information requests etc.

What is more, these secondary norms were being enforced by quasi-judicial review mechanisms, chiefly the Inspection Panel and the Access to Information Board, whose authority was clearly shaping behaviour across the Bank's bureaucracy – to the dismay of General Counsel Leroy, who accused the Panel of "abusing its authority": "The staff was terrified. Every time there was an Inspection Panel case everyone panicked" (p. 219 in the book).

My own conclusion was that the locus and form of law at the Bank had diversified. There was now another layer of norms, similar in many ways to domestic administrative law, that governed much of everyday practice at the Bank, constraining administrative discretion. In the absence of systematic empirical observation, the content of these legal norms, it seemed to me, might be a second-best proxy for administrative routines and practices. In that sense, much of what I had observed at the Bank was not *under*, but

8 *Michael Riegner*, Informationsverwaltungsrecht internationaler Institutionen – Dargestellt am Entwicklungsverwaltungsrecht der Weltbank und Vereinten Nationen, Tübingen 2017, 540 p.

9 Cf. *Daniel D. Bradlow*/ *Andria Naudé Fourie*, The Operational Policies of the World Bank and the International Finance Corporation – Creating Law-Making and Law-Governed Institutions?, International Organizations Law Review 10 (2013), pp. 3 – 80.

very much *on* the radar of international institutional law as I and others[10] have come to understand it.

In this diversification of legality, international institutional law bas become both less and more precarious: Its enforcement has hardened and become less precarious, while its making has become more openly political. As with domestic administrative law, secondary norms have to remain within the boundaries of higher-ranking law (as interpreted and asserted, more or less intensely, by different General Counsels), but within these boundaries there is, and has always been, space for political choice, contestation, negotiation and compromise when political organs engage in secondary lawmaking. This law is not primarily made, or unmade, by General Counsels in a process of legal interpretation, but in a more openly political process involving member state representatives. And the more precarious the General Counsel's legal authority is, the more space this opens up for political processes of lawmaking. Whether this a regression in terms of rule of law, or a desirable (re)politicization of international lawmaking, depends, of course, on one's normative assumptions and critical intuitions that neither internal nor external scholarly approaches can fully avoid.

Conclusion: "In praise of description" and modes of critique

As Van Den Meerssche points out, his "turn to practice" has a critical orientation, "an interest in the politics of law" (p. 8), that aligns with some standard tropes of critical legal scholarship about the law, its indeterminacy, its depoliticizing effects, and its formal neutrality, which tend to obscure inevitable "moments of choice, decision and agency" (p. 9). Van Den Meerssche exposes these moments in the practice of the General Counsels in a skillful and original way that is exemplary for the power of description we should indeed praise.

What even the best description cannot avoid is implicit assumptions about what the law is, and different kinds of descriptions will emphasize distinct moments of choice, decision and agency. What no single description can thus answer conclusively is under what conditions the precarious evolution of international institutional law is ultimately a good or bad thing. Should the World Bank stay away from, or engage with, criminal justice systems, security forces, and the military because the General Counsel interprets the founding treaty to say so? Or should these questions be discussed and decided in a more openly political process of secondary lawmaking involving the political organs of the institution? But that is a different debate, for another day, and for another book.

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10 *Philipp Dann*, The Law of Development Cooperation – A Comparative Analysis of the World Bank, the EU and Germany, Cambridge 2013, 592 p.; *Benedict Kingsbury*/ *Lorenzo Casini*, Global Administrative Law Dimensions of International Organizations Law, International Organizations Law Review, 6 (2009), pp. 319 – 385.