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Supranational citizenship-building and the UN.
What can we learn from the European experience?

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The word "supranational citizenship" or "UN citizenship" is not yet part of the United Nations' usual vocabulary. The use of the "citizenship" concept in UN discourse is quasi-exclusively limited to the national context, a definition of citizenship bounded by state borders (Delcourt, 2006: 187). Must we therefore conclude that the UN is not "making citizenship" at all? Given that the notions of "supranational" or "UN citizenship" are absent from the United Nations' official discourse, the answer seems obviously to be YES. Yet, consideration of the European experience demonstrates that this response may be too hasty. The example of the EU, and some work on European citizenship, suggest another answer to this question. The aim of the present paper is to show that, just as the European Union was making citizenship well before the Maastricht Treaty mentioned European citizenship, the United Nations system is a supranational framework that is beginning to engage a process of citizenisation.

Based on a large and dynamic conception of citizenship, defined as a double relation - between citizens and between citizens and a political entity - characterized by rights, access to institutions and belonging to a community (Jenson and Phillips, 1996; Wiener 1998; Bellamy, 2005; Auvachez, 2006), this paper proceeds in two steps. First, it demonstrates how the European experience provides a significant precedent to deal with the issue of citizenisation in a supranational context, both empirically and theoretically. Then, it sheds light on the emergence of elements of a UN citizenship regime often neglected by mainstream theories of supranational citizenship.

Lessons from the European experience

Raising the question – what does the EU experience suggest?

The contemporary literature on the issue of supranational citizenship is dominated by a major concern: the *locus* of citizenship (Auvachez, 2006: 53), asserting it to be either national or supranational. Pleading for the progressive "de-nationalization"[1] of citizenship, the advocates of supranational citizenship often consider it in opposition to national citizenship, confining the debates to an endless circularity. Whether taking a legal perspective (works on international human rights regime, such as those of Yasemin Soysal and Rainer Bauböck for example), a global civil society point of view (Warren Magnusson, Michael Walzer, Richard Falk, Eunice Sahle) or a cosmopolitan solidarity perspective (Martha Nussbaum, Andrew Linklater), most of the recent work on supranational citizenship seeks to demonstrate that citizenship is, or should be, more and more supranational, and *consequently* less and less national. "Increasingly therefore normative debate is polarized between liberal nationalists and cosmopolitans. Cosmopolitans seek to understand the scope for rights, participation and belonging beyond the nation-state, whereas liberal nationalists defend the national model" (Tambini, 2001: 202). Such a polarization of the debates relies on the exclusive conception of citizenship that guides the arguments. It is not a very productive debate.

[1] The expression is borrowed from Linda Bosniak (2000)

A focus on the European case can provide a fruitful clue to go beyond the endless debate characterizing the recent literature about supranational citizenship. A significant number of theorists of European integration and European citizenship have been critical of this polarized perspective for many years and have long sought to move beyond it. In 1995, Maurice Roche, although quite critical regarding the development of European citizenship from a social inclusion perspective, stated: "The simple counterposing of the universal to the national is not likely to be as helpful for contemporary social research and analysis in this field as is attempting to grasp the ways in which the world of nation-states and their institutions is beginning, on the one hand, to generate an important transnational sphere and also, on the other hand, to give ground (legitimacy, aspects of sovereignty, etc.) to the world-regional and global regulatory and institution-building processes at work and accumulating in this sphere" (Roche, 1995: 727).

Rather than opposing the national and the supranational, a significant body of literature on the Union seeks to contextually grasp the institutional frameworks that organize citizenship and citizenship practices[2]. Rather than seeking to determine which locus expresses citizenship *the best*, it considers them as complementary and proposes to understand their articulation.

In an identity-focused perspective[3], Martin Kohli proposed the concept of "hybridity" to understand the articulation between European and national identities". Accordingly, European identity is not empirically opposed to national identity. It can and should be conceived as multi-level or multilayered, comprising global and national (and possibly regional and local attachments as well" (2000: 126). "European identity may be part of an identity mix linking it with national (and possibly other territorial) identities; or it may be part of a specifically hybrid pattern where contradictions remain virulent and situational switches occur" (2000: 131).

As early as 1993, Elizabeth Meehan proposed the notion of a "multiple citizenship" which considers national and European citizenships as complementary rather than exclusive: "My thesis is not that [Raymond] Aron's concept of national citizenship is being relocated to a new level. It is that a new kind of citizenship is emerging that is neither national nor cosmopolitan but that is multiple in the sense that the identities, rights and obligations, … are expressed through an increasing complex configuration of common Community institutions, states, national and transnational voluntary associations, regions and alliances of regions (…) What is certain is that the European Community now provides a framework that coexists with those of its Member States, through which nationals of those Member States can claim certain rights" (Meehan, 1993: 1; 2).

[2] It has to be mentioned that the literature on European citizenship can be divided into 2 main camps: those who doubt about the existence of an effective European citizenship and try to elaborate principles or scenarios that could make it possible (works of Weiler, Lehning or Føllesdal for example), and those who acknowledge the existence of European citizenship and seek to understand its practices. The analysis proposed in this paper principally refers to the latter.

[3] As the definition of citizenship mentioned in the introduction encompasses the belonging to a community, works on European identity can be helpful to grasp the issue of European citizenship.

Despite the absence of the term "European citizenship" in the European Community's institutional discourse prior to the Maastricht Treaty (1993), scholars now find signs of the construction of a European citizenship from the first years of the European construction. "As a policy, citizenship remained largely invisible until citizenship of the Union was spelled out and legally grounded in the 1993 Treaty of the Union. Nevertheless, the roots of citizenship policy and actual citizenship practice can be traced over a period of about two decades" (Wiener, 1998: 41). These practices had other names than citizenship, called for example education, culture, electoral policies, passport, movement, establishment, and so on. Yet, they "can be identified and put together in the same way one works on a jigsaw puzzle" (Wiener, 1998*:* 10).

In a more recent study, Willem Maas traces back the origins of European citizenship to the 1950s, and he says: "The origins of the rights of EU citizenship are to be found in the initial negotiations and treaties that established the foundations of European integration" (Maas, 2007: 13). Similarly, Isabelle Petit has shown that the European Community started to develop a European education policy to create a Euro-identity among citizens since the early years of the European integration. (Petit, 2005: 668-669). The idea that the origins of European citizenship are well anterior to its formalisation in the institutional discourse through the Maastricht Treaty is now widely acknowledged among Europeanist who seek to grasp European citizenship practices (see Shaw, 1998; Ferrera, 2005; Bellamy, Castiglione and Shaw, 2006 for example).

The European precedent demonstrates that citizenship-building initiatives can be undertaken by a political entity even if its institutional discourse or legal framework does not explicitly use the word. The European experience thus justifies examining the United Nations. The absence of any citizenship vocabulary in the UN discourse is not an indicator of the absence of any citizenship practices in the UN framework: it does not follow from the absence of words such as "supranational citizenship" or "UN citizenship" in the United Nations' institutional discourse that the UN is not "making citizenship". It remains an empirical question that needs to be further explored.

Theoretical lessons from the EU experience

Theories developed to analyse European citizenship also provide useful analytical tools to think about the possibility of citizenship building in the UN institutional context. Three theoretical lessons can be drawn from the EU experience: they concern the scope of citizenship, the link between citizenship and institution-building and the need to consider citizenship-building as a dynamic process.

The emergence of citizenship in a supranational entity such as the European Union has challenged the common understandings of citizenship and raised numerous debates about the scope of the concept (Schmitter, 1996; Shaw, 1998; Bellamy and Warleigh, 2001). "If such a political entity, which is best defined as a polity in-the-making offers citizenship rights despite the fact that a national state is not the final goal, then the questions at hand are What does union citizenship entail? How have union citizenship rights been established?" (Wiener, 1998: 5). As early as 1997, through her reconstruction of the "interrelated stories of citizenship policy and institution-building"

(1998: 14) in the European case, Antje Wiener pleaded for an enlarged understanding of citizenship: through the idea of "citizenship practice", she insisted on the necessity to move beyond the issue of rights and formal criteria to take into account informal criteria, intangible aspects of citizenship (1998: 23). This enlarged conception of citizenship has been retained by several authors since then (see for example Shaw, 1998; Bellamy, 2005; Bellamy, Castiglione and Shaw, 2006).

The "citizenship regime" developed by Jane Jenson and Susan Phillips in the Canadian context (1996) and applied by Jane Jenson to the European case (for example Jenson, 2007) provides an interesting analytical tool that corresponds to this enlarged conception of citizenship. Indeed, it considers citizenship through four dimensions (Jenson, 2007: 55-56):

- Citizenship establishes the conditions for *belonging* to a political community, in both the narrow sense of nationality and the larger notion of identity, thereby contributing to its definition;

- A citizenship regime then entails *rights and duties*, the recognition of which may also contribute to establish the boundaries of inclusion and exclusion of a political community;

- It also prescribes a specific *responsibility mix* that allocates the various citizenship-related responsibilities to different institutional actors[4].

- Finally, a citizenship regime specifies the democratic rules of the game for a political entity, i.e. the mechanisms giving *access* to the institutions, the modes of participation in civic life and public debates, and the legitimacy of specific types of claims making.

Studies on EU citizenship have then contributed to shed light on the mutually constitutive relationship between citizenship and institution-building; in that perspective, they made use of the works in historical sociology that have documented the place of citizenship in the formation and the consolidation of the institutions of the nation state and the link between citizenship and institutional design (Bendix, 1964; Tilly, 1990; Brubaker, 1992). "Understood in a socio-historical sense the process of institution building means making routine practices, norms, rules and procedures which contribute to establish a distinguishable practice of citizenship" (Wiener, 1998: 9). In a similar perspective, Jo Shaw pleads for "a recognition of citizenship as an integral part of the EU polity understood as a dynamic governance structure" (1998: 316). The construction of citizenship is thus always open to new, "nonpredetermined" developments (Balibar, 2004). Both constitutive of and constituted by the process of institution-building, citizenship presents a dynamic nature: as institutions are evolving, citizenship is given a different content. The changing conceptions that have been guiding the construction of European institutions have altered the citizenship model promoted by the EU, thereby attesting the dynamic character of EU citizenship (see notably Auvachez, forthcoming).

[4] This dimension of the citizenship regime was not present in the original concept proposed by Jane Jenson and Susan Phillips in 1996; it was added later on by Jane Jenson. The conception of the *responsibility mix* proposed here is larger than the one proposed by Jane Jenson; indeed, it goes further the social citizenship perspective adopted by Jenson (which leads her to consider the responsibility mix through a "welfare diamond" composed of the state, the market, the collectivity and the market) to include other actors such as regional and local collectivities, supranational entities, etc.

Finally, the European experience has led several Europeanist scholars to recall that citizenship is a dynamic construction, the building of which is a continuing process (Bellamy, Castiglione and Shaw, 2006; Maas, 2007). Individuals are not automatically citizens; they become citizens through one or several processes of creation of citizenship: "(…) questions of citizenship can only be posed in terms of process and access. We *are not* 'citizens,' but we can 'become citizens' " (Balibar, 2004: 199). It is through a process of creation of citizenship, i.e. a "citizenisation" process (Tully, 2001 and 2002), that individuals acquire citizenship; the citizenisation process corresponds to the progressive building of a relationship between citizens and the political entity considered, and among citizens themselves, characterized by rights, access to institutions and belonging to a political community.

Is the UN engaged in a citizenisation process?

The European experience, and the lessons which can be drawn from it in terms of scope and definition of citizenship, demonstrate that citizenship does not limit itself to the establishment of a legal status, although this element has to be taken into consideration; it takes form through various political initiatives and institutional innovations. The analysis of the emergence of elements of citizenship in the United Nations' system should therefore not be confined to the issue of international rights; the demonstration has to go beyond the usual analyses focusing only on the establishment of an international human rights regime as the cornerstone of a supranational citizenship (for example, Berkovitch, 1999; Soysal, 1994; Bauböck, 1993; Parry, 1991) to take into account other dimensions of citizenship, such as the access to institutions, the definition of belonging and the responsibility mix inherent to citizenship.

Then, the emergence of elements of citizenship in the UN framework has to be seen from a "citizenisation process" perspective, which considers the building of citizenship as a continuing process closely linked to the process of institution-building in the UN system. Thus, considering citizenisation and institution-building as two interrelated dynamic processes, the analysis takes into account the political development and institutional innovations affecting the UN system since its creation.

The question at hand is how the political developments and institutional innovations that have affected the UN system since its creation have contributed to the emergence of elements of a specific UN citizenship regime? From a perspective seeking to link citizenisation and institution-building, it seems that several institution-building issues, which have been of major concern within the UN arena during the last years, deserve to be analyzed. Whether in terms of decision-making or norms-enforcement, the UN institutional design has raised many debates since the construction of the Organization in 1945.

Citizenship encompasses three parts: a civil part, a political part and a social part (Marshall, 1963: 73-74). And each element is associated with specific institutions: courts

of justice, parliaments or decision-making institutions, the educational system and social services (Marshall, 1963: 74; Janoski and Gran, 2002: 16).

The active contribution of the court to the construction of citizenship has been clearly demonstrated in the European context. Political scientists as well as jurists have shown how the European Court of Justice's activities have contributed to the building of the Union citizenship (Shaw, 1998; Shaw and Fries, 1998; Toner, 2000; Maltese, 2004; Mather, 2005). Jo Shaw demonstrates that behind the Maastricht Treaty and the formalization of EU citizenship, "(…) there lay, in truth, a developing 'practice' of citizenship policy, extending over a period of twenty years, which was to be found principally in the activities of the Court of Justice and the European Commission. This has seen a gradual solidification of the resources of citizenship from 'mere' ideas into concrete policy outcomes withy legal force" (Shaw, 1998: 299).

Although foundational, because underlying other citizenship elements (Janoski and Gran, 2002: 15), the civil part of citizenship is quasi-ignored by theories about supranational citizenship. Except in Europeanists' works, the access to justice at a supranational level and the emergence of supranational courts are often neglected by mainstream theories about citizenship beyond the state. However, in a citizenisation perspective that seeks to link institution-building processes and construction of citizenship, the building of supranational criminal institutions in the United Nations context has to be taken into consideration.

The building of supranational criminal institutions

The exponential growth of an international human rights regime is often considered as the cornerstone of the emergence of a supranational citizenship (Berkovitch, 1999; Soysal, 1994; Bauböck, 1993; Parry, 1991). Yet, another facet of international law, fully studied by jurists but quasi-ignored by political scientists, and particularly those working on supranational citizenship[5], provides significant insights about citizenship-building in the UN context: the building of supranational criminal jurisdictions.

Elements of context: the emergence of supranational criminal jurisdictions

Since the end of the Second World War and the Nuremberg and Tokyo Trials, efforts have been made at the UN, and particularly within its International Law Commission, to draft a comprehensive international criminal code (Neff, 1999: 116; Greppi, 1999). This substantive-law effort has been complemented by several institution-building initiatives aiming at establishing supranational courts to conduct actual trials.

As early as in 1948, the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly (resolution 260 of 9 December 1948), called for acts of genocide to be tried "by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction" (Article 6). In the same resolution, the General Assembly invited the International Law Commission, a United Nations General assembly body, to

[5] A few exceptions can be mentioned , such as Stephen Neff (1999: 105-120)

study the possibility of establishing a permanent International Criminal Court. Following the Commission's conclusion that the establishment of an international court to try persons charged with genocide or other crimes of similar gravity was both desirable and possible, the General Assembly established a committee to prepare proposals relating to the establishment of such a court. The committee prepared a draft statute in 1951 and a revised draft statute in 1953. The prevailing international political climate during the 1960's, 1970's and 1980's, however, obliged the General Assembly to postpone consideration of the draft statute.

Since that time, the question of the establishment of a supranational criminal court has been reconsidered periodically within the UN. In December 1989, in response to a request by Trinidad and Tobago, the General Assembly asked the International Law Commission to resume work on an international criminal court with jurisdiction to include drug trafficking. Then the eruption of ethnic conflicts in Yugoslavia and Rwanda, and the war crimes, crimes against humanity and genocide committed in those contexts, once again drew international attention; the UN Security Council established two ad hoc ad hoc War Crimes Tribunals: the International Criminal Tribunal for the Former Yugoslavia (1993) and the International Criminal Tribunal for Rwanda (1994).

Shortly thereafter, the International Law Commission successfully completed its work on the draft statute for an international criminal court and in 1994 submitted the draft statute to the General Assembly. To consider major substantive issues arising from that draft statute, the General Assembly established the Ad Hoc Committee on the Establishment of an International Criminal Court, which met twice in 1995. After the General Assembly had considered the Committee's report, it created the Preparatory Committee on the Establishment of an International Criminal Court to prepare a widely acceptable consolidated draft text for submission to a diplomatic conference. The Preparatory Committee, which met from 1996 to 1998, held its final session in March and April of 1998 and completed the drafting of the text. This consolidated text served as a basis for the discussion the United Nations Diplomatic Conference of Plenipotentiaries held in Rome from 15 June to 17 July 1998, that led to the adoption of the Rome statute creating the first International Criminal Court[6].

The construction of supranational criminal institutions by the UN: indicators of change

As described above, from the first Drafts proposed by the ILC to the creation of the International Criminal Court, passing by the two had hoc Criminal Tribunals, the progressive building of supranational criminal jurisdictions comprised several steps. Some directions of change can be discerned in the institution-building process; they can be grasped through 3 major questions: Where?, Who?, And how?.

[6] As this paper focuses on the process of citizenisation in the UN institutional framework and as the ICC , although it has strong relations with the UN, is not formally a UN organ but an independent treaty-based international organization, the following analysis is based on the provisions of the ICC Statute that derive form the UNO's works (which represents most of the provisions); such provisions are notably contained in the draft statute proposed by the Preparatory Committee on the Establishment of an International Criminal Court created by the UN General Assembly.

Where: where is the international criminal law enforced?

As described above, the idea of an individual criminal responsibility has been in existence for a long time within the United Nations. But actual courts to enforce criminal international law have only come into existence recently.

In the absence of such courts, the enforcement of the international criminal law (which covers the crime of genocide, war crimes, crimes against humanity and the crime of aggression) has traditionally been the responsibility of the states only, in the name of their universal jurisdiction: "Universal jurisdiction is the principle that certain crimes are so heinous, and so universally recognized and abhorred, that a state is entitled or even obliged to undertake legal proceedings without regards to where the crime was omitted or the nationality of the perpetrator or the victims" (Macedo, 2006: 4).

It is in the name of this universal jurisdiction, and following the fact that most states failed to give their courts such jurisdiction under national law, that the UN Security Counsil has created the ad hoc Criminal Tribunals for Yugoslavia (1993) and Rwanda (1994). For the first time since the Nuremberg and Tokyo post-war trials, actual international – and not national – tribunals are established for the prosecution of individuals responsible for acts committed in the former Yugoslavia and in Rwanda. With the creation of such organs, the responsibility for arraigning individuals does not rely on States only; subsidiary organs of the United Nations have now the power to do so.

This power has however some limits. First, the jurisdiction of the two ad hoc tribunals is circumscribed both *ratione loci* and *ratione temporis*, i.e. geographically and temporally. According to its statute, the jurisdiction of the ICTY is restricted to crimes committed on the territory of former Yugoslavia since 1991 (article 1). And the ICTR "shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994" (article 1 of the ICTR statute). Then, the two international criminal tribunals are, by definition, temporary: "(…) *ad hoc* tribunals are limited to particular situations and once their work is done they are disbanded" (Harris, 1998: 1).

The works of the UN General Assembly (especially its International Law and then the preparatory committees established by the UN GA) for the establishment of the International Criminal Court mark a step further in this institution-building process. The draft statute presented by the Preparatory Committee for the Establishment of an International Criminal Court on the basis of the ILC's text proposes the creation of a both permanent and universal[7] international criminal court : "While the Tribunals are intended to deliver justice for crimes of a particular time and place in the aftermath of the tragedy, the permanent ICC is aimed to strengthen and expand the enforcement of International Humanitarian Law based on prior consent of its Member states, to act as an independent, impartial and effective court with jurisdiction over crimes committed after the entry into force of its Statute" (Mirceva, 2004: 3). For Patrick Daillier and Alain Pellet, the creation of the ICC assures a more systematic jurisdictional guaranty (2002: 726).

Who: who can be prosecuted?

[7] This element is further developed in the next section.

The State has for long been an "opaque screen" between the individual and the international legal order: the existence of the individual on the international legal scene was hidden behind the state screen (Daillier and Pellet, 2002: 649). The individual responsibility (of the national leaders for example) was confused with the state responsibility that could be contested in front of the International Court of Justice or other regional courts (such as the European Court of Human Rights or the Inter-American Court) (see the example given by David Harris, in Harris, 1998: 1). With the building of supranational criminal jurisdictions, one can observe the progressive dissociation of the personality of the state and of the individual. The individual acquires a judicial capacity no longer confused with the judicial capacity of its state of nationality. The progressive building of supranational criminal jurisdictions means the concretization of the "direct" or monist approach that treats all individuals as being directly subject to a single body of laws (Neff, 1999: 116)[8].

Although the international criminal law developed in the UN institutional context formally applies to each UN member states' citizen, it is only recently that the supranational criminal justice has made a step towards universal application. Indeed, in the absence of an effective exercise of their universal jurisdiction by the states and with ad hoc criminal tribunals temporally and geographically limited in their jurisdiction, international criminal justice could hardly been said to address to all individuals, even formally. The provisions contained in the draft statute transmitted by the UN preparatory committee and adopted by the UN diplomatic conference at Rome indicate a change towards a more universal criminal justice. Pursuant to article 12 of the ICC statute (art. 7, option 2 of the Draft statute of the Preparatory Committee), in the case of a situation deferred to the Prosecutor by a State Party or an investigation initiated by the Prosecutor, an individual can be tried by the Court if the state of which he is a national *or* the state on the territory of which he committed a crime within the jurisdiction of the court is party to the ICC Statute or has accepted the jurisdiction of the Court. Those preconditions are often referred to by the detractors of the ICC to justify their scepticism about its efficiency (considering in particular the US refusal to adopt the Statute); but it is seldom mentioned that these two preconditions are alternative, and not cumulative: "(…)The court will have jurisdiction over nationals of non-states parties when the state on whose territory the alleged atrocities have taken place is party to the Statute" (van Alebeek, 2000: 488). Each citizen thus becomes potentially prosecutable. This is reinforced by the fact that the preconditions to the exercise of the jurisdictions of the Court do not apply for the situations deferred to the Prosecutor by the UN Security Council: "Namely, if a matter that is referred to the ICC by the SC concerns not States parties and they have not accepted the jurisdiction of the Court, it is possible for the ICC to fully exercise it is possible for the ICC to fully exercise its jurisdiction" (Mirceva, 2004: 5). In the case of a situation deferred by the UN Security Council, any citizen can thus be arraigned in front of the ICC, without regards to his nationality.

[8] Such an evolution should not be misinterpreted, as it is often the case. It doesn't follow from the emergence of an international individual criminal responsibility that the legal existence of the individual on the supranational scene is completely disconnected from the state and that the link of nationality is not relevant anymore; as mentioned above and as demonstrated by the European experience, it is in terms of complementarity or articulation that the question must be raised (cf. below).

How: how can prosecutions be engaged?

The prosecution of international crimes has traditionally been a state monopoly. As mentioned above, in the absence of international jurisdictions, the prosecutions of the crimes defined in international law relied on the will of the states; only states had the possibility to initiate investigations and pursuits against individuals.

In that context, the two ad hoc international criminal tribunals distinguish themselves, with the creation of a Prosecutor with investigatory power: "(…) the Statutes of the two ad hoc Tribunals very simple and clearly gave the Prosecutor a power to decide to initiate investigation" (Mirceva, 2004: 4). The creation of the two ICT thus means the emergence of a new mechanism to initiate investigations against individuals with the establishment of a new actor in the institutional system of supranational criminal justice: the Prosecutor. The power of this new actor has however some limitations: as the UN Security Council has established the two ad hoc tribunals and defined their mandates, the ad hoc Tribunals' prosecutor is confined to initiate investigations only in the framework of the situations referred by the Security Council's Resolutions.

The position of the Prosecutor has been conserved in the works of the UN for the establishment of the ICC, and in the final Rome statute. Indeed, the investigation under ICC jurisdiction can be triggered by three different mechanisms: by referral from States, by reference to the Prosecutor by the UN Security Council[9], and by proprio motu decision of the Prosecutor. For several scholars, the last option – an independent prosecutorial initiation of the investigation of investigation –, albeit carefully circumscribed by the necessity for the Prosecutor to obtain an authorization of the Pre-Trial Chamber to conduct further investigation - is one of the most significant achievement of the ICC Statute : the possibility for the Prosecutor to decide to initiate investigation on the basis of communications received from various source (such as organs of the United Nations, NGOs, or individual persons for example) confirms the obsolescence of the state monopoly on supranational criminal justice (Daillier and Pellet, 2002: 726; Mirceva, 2004: 4).

Deciphering the building of supranational criminal institutions from a citizenisation perspective

Having described the emergence of supranational criminal jurisdictions and grasped the dynamics of change underpinning this institution-building process, the aim of the present section is to explore the link between institution-building and citizenisation; it thus seeks to decipher the building process of supranational criminal institutions from a citizenisation perspective to shed light on the emergence of elements of citizenship in the UN institutional framework.

Rights and duties

As mentioned above, most of the analyses dealing with the issue of supranational citizenship exclusively focus on the issue of *rights*; they rely on the establishment on an international human rights regime to demonstrate the emergence of a supranational citizenship. Analyzing the development of international criminal law sheds light on an

[9] Note that the UN Security Council can refer a situation to the Prosecutor, and not individual cases.

emerging element of supranational citizenship largely ignored by political scientists: the individual *responsibility*.

Founding the argument of a supranational citizenship on the development of international rights regimes seems quite incomplete. Rights can hardly be considered in isolation from their compensation, duties. "A claim imposes a corresponding duty on others to help respect and protect the right" (Janoski and Gran, 2002: 16). Like rights, duties and the corresponding notion of responsibility imply a relation: a citizenship relation between individuals, and between individuals and a political entity. One's rights confer a certain responsibility to the other; and such responsibility is be enforced by a political entity through a judiciary system.

Through the development by the UN of an international criminal law system and the construction of supranational criminal courts designed to prosecute individuals, an individual criminal responsibility, distinct from the state responsibility, is emerging. With the construction of supranational criminal jurisdictions, citizens are thus hold accountable of their acts in the national, but also in the supranational sphere (where they can be prosecuted for crime of genocide, war crimes or crimes against humanity). The rights conferred to the individual by the international human rights regime are compensated by an emerging responsibility defined in the international criminal law and becoming effective with the building of international criminal jurisdictions.

Moreover, the emergence of this individual responsibility sheds a new light on the issue of rights in the supranational sphere. The building by the UN of criminal jurisdiction is accompanied by the emergence of new rights, essentially civil rights of procedural nature. Among citizenship-rights are the rights that support or facilitate access to justice (Marshall, 1963: 74; Janoski and Gran, 2002: 229). The ICTY and the ICTR statutes, as well as the ICC statute (on the basis of the Draft statute written by the UN Preparatory Committee), contain provisions about the rights of the victims and the rights of the accused. Indeed, all 3 texts specify that the court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims (and witnesses) (art. 22 of the ICTY Statute, art. 21 of the ICTR Statute and art. 68 of the ICC Statute).The ICC statute, following the propositions of the UN Preparatory Committee, goes even further concerning the rights of the victims. For the first time in the history of international criminal justice, victims are conferred upon rights to participate in proceedings and to request reparations. Pursuant to article 68 of the ICC statute (art. 68 of the Draft statute presented by the UN Preparatory Committee), the Court shall permit the views and concerns of the victims to be presented during the proceedings, where the personal interests of the victims are affected. Moreover, according to article 75 of the ICC Statute, (art. 73 of the Draft Statute), "victims can request reparations for harm they have suffered as the result of a crime within the Court's jurisdiction. The Court may also decide to deal with reparations on its own initiative, even where victims have not submitted applications" (ICC, 2005: 2).

The creation of supranational criminal jurisdictions also means the definition of procedural rights for the accused. The ICTY, ICTR and ICC statutes all present a detailed list of the rights that any accused person shall enjoy, including the presumption of innocence, the right to a fair hearing conducted impartially, to be tried without undue delay, to be informed promptly and in detail of the charge, to have adequate time and facilities for the preparation of the defence, to have legal assistance without payment if

the accused lacks sufficient means to pay for such assistance, to present evidence (ICC Statute), and the right to have charges proved beyond a reasonable doubt.

With the building of supranational criminal jurisdictions, individuals, whether as victims or as accused, are thus conferred upon new civil rights in the supranational sphere..

Access

With the emergence of supranational criminal jurisdictions, citizens are given access to supranational justice. Supranational justice ceases to be an exclusively inter-state affair. Such an access relies on several mechanisms. First, individual citizens can testify before the courts if called as witnesses; furthermore, as mentioned before concerning the ICC, where their personal interest are affected, victims can present their views and concerns before the Court during the proceedings and request financial reparation.

Most importantly, the emergence of a new actor in supranational justice in the figure of the Prosecutor gives citizens a new mode of access to judicial institutions. Pursuant to the provision concerning the Prosecutor proposed in article 18 of the ICTY Statute, article 17 of the ICTR Statute and article 15 of the Rome Statute (article 12 of the UN Draft Statute), individuals or organizations may submit to the Prosecutor information on crimes within the jurisdiction of the courts. The Prosecutor shall assess the information received and decide whether there is sufficient basis to proceed. Citizens can thus contribute to the Prosecutor's investigation. In the case of the ICTY and ICTR, this contribution is yet circumscribed : the ad hoc Tribunals' Prosecutor is confined to initiate investigation only in the framework of the situations defined by the UN Security Council's resolutions (i.e. geographically and temporally limited situations). Citizens can submit information concerning those situations only. Such a limitation does not exist in the ICC framework, making the citizens' access to the Prosecutor's Office even more important to consider. Through non-governmental organizations or by themselves, citizens can send information to the Prosecutor asking him to initiate an investigation. On the basis of these "communications", the Prosecutor may decide to initiate investigations (after an authorization from the Pre-Trial Chamber). Citizens can thus not only participate in the proceedings, they can also contribute to trigger an investigation.

Belonging

Through the building of supranational criminal institutions, the United Nations Organization has concretized the rights and duties formally defined in international criminal law[10] and given citizens a new access to supranational institutions. Through this process, it has thus contributed to the building of a relationship of a certain kind between individuals and between supranational institutions and individuals.

Detractors of the emergence of a supranational citizenship often base their argument on the idea that citizenship entails inclusion and exclusion and thus cannot be conceived in isolation from the nation-states borders. The building of supranational criminal jurisdictions under the UN impulse provides a fruitful example of how borders

[10] As mentioned above, although the international criminal law has a long history in the UN system, its enforcement has been concretized with the creation of international criminal institutions.

and boundaries, as dynamic constructions, can emerge in the building of a supranational citizenship.

Such a question can be grasped through the immunity issue and can be analyzed along two axes: a functional axis (immunity derived from the function) and a geographical one (immunity derived from the nationality).

The principle of immunity has been strongly affirmed in the different steps of the building of supranational criminal jurisdictions - it can even been traced back to the judgment of the International Military Tribunal of Nuremberg (Jescheck, 2004 : 44). Pursuant to article 7 (2) of the ICTY Statute and article 6(2) of the ICTR Statute, "the official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment". This principle is reaffirmed in article 27 of the ICC Statute (art. 24 of the Draft Statute): "This Statute shall apply equally to all person without any distinction based on official capacity. In particular, official capacity as Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in nor case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. Immunities or special procedural rules which may attach the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person". According to those dispositions, the building of supranational criminal institutions thus implies the obsolescence of the immunities traditionally associated with the highest functions of the state in the international legal system. The basic idea is that whether officials, civil servants or particulars, the authors of a crime of genocide, war crimes or crimes against humanity should be tried (Daillier and Pellet, 2002: 715). No citizen can be excluded from the jurisdiction of the tribunals in virtue of his function[11].

On a functional axis, the building of supranational criminal jurisdictions, and particularly of the ICC, thus relies on a logic of inclusion. The immunity issue has yet to be seen along a geographical axis too. As mentioned above, the provisions contained in the UN Draft Statute and retained in the ICC Statute make each citizen potentially prosecutable, whatever his nationality is. No "national immunity", i.e. an immunity that would derive from one's nationality, exists in the absolute; no individual is in the absolute excluded from the ICC jurisdiction. Nevertheless, it does not follow from that that all citizens are equal in front of the ICC jurisdiction and that lines of exclusion cannot be discerned. If no citizen enjoys any absolute immunity in virtue of his nationality, the link of nationality contributes to draw lines of exclusion in the building of a supranational citizenship. Indeed, depending on their nationality, the probability to be judged by the ICC is not the same for states parties' citizens or citizens whose state has accepted the jurisdiction of the court and for non-states parties' citizens: contrary to the former, whose international criminal responsibility applies worldwide, the possibility that

[11] Concerning the immunity of the UN agents, the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, in its article 19, stipulates that: "(…) the United Nations undertakes to cooperate fully with the Court and to take all necessary measures to allow the Court to exercise its jurisdiction, in particular by waiving any such privileges and immunities".

the latter could be tried by the ICC is contingent : it is not universal but rather depends on the territory where they have committed crimes.

Therefore, through the building of supranational criminal jurisdictions by the UN, lines of inclusion and exclusion appear in the relationship between individuals and individuals and the UN community ; it is in the articulation of the national and supranational institutional frameworks that those lines are defined.

Responsibility mix

The *belonging* dimension of the citizenship regime and its construction in the building of elements of citizenship by the UN sheds light on how the national and supranational spheres, far from being opposed, must be considered in complementarity to understand the construction of a supranational citizenship today. It is the articulation of the national and supranational institutional responsibilities in the citizenship regime emerging within the UN that this section seeks to grasp.

The first institutional responsibility that can be considered is the responsibility to prosecute. Contrary to the two ad hoc International Criminal Tribunals for Yugoslavia and Rwanda, whose jurisdiction was primary over national courts, the ICC is complementary to national criminal justice systems for the prosecution of the crimes defined in international criminal law (Preamble and art. 1 of the Draft Statute proposed by the UN Preparatory Committee and the final Rome Statute). The Court exercises its jurisdiction when a State is not willing or not able to proceed with an effective prosecution. Such a provision could easily be interpreted through a prism opposing the national and supranational spheres to conclude to the supremacy of national justice, and consequently of a national conception of citizenship. It seems however fruitful to consider it more globally in a more constructivist perspective. “The complementary role of the ICC is intended to actively facilitate a climate that serves to encourage and expand the prosecution of international crimes in domestic courts whilst simultaneously strengthening national jurisdictions. (…) The ICC has the power to determine the competency of the national investigations and court proceedings and where appropriate bring a decision in order to achieve its goal of eliminating impunity for international criminals” (Mirceva, 2004 : 3) .

The procedures concerning the arrest or surrender of persons suspected are also characterized by an overlapping of supranational and national responsibilities. “The Court may transmit a request for the arrest and surrender of a person (…) to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall (…) comply with requests for arrest and surrender” (art. 89 of the ICC Statute and art. 87 of the Draft Statute). In light of this provision, States can be considered as executors of the Court’s decisions.

Through those two examples, it appears that the responsibility mix of the supranational citizenship regime emerging under the UN impulse is guided by a logic where supranational and national responsibilities overlap rather than really conflict.

Conclusion

The European experience thus provides a fruitful precedent to analyze the United Nations' system through the prism of citizenship. First, the practical experience of the EU demonstrates that the question of the emergence of elements of a supranational citizenship regime should not necessarily be conceived through a dichotomous perspective which opposes national and supranational but can rather be examined through a complementary prism which seeks to understand the articulation between the different institutional frameworks that organize citizenship. The history of European citizenship also reveals that the analyst must not automatically conclude from the absence of word "citizenship" in the UN official discourse that the UN is not building citizenship and has to consider the issue as an empirical matter.

Then, the academic literature about European citizenship offers clues to grasp the issue of citizenship-building in the UN context. It recalls the close relationship which links citizenisation and institution-building as interrelated dynamic processes and thus incites to grasp the issue of citizenisation at the UN level in light of the political development and institutional innovations that have affected the UN system since its creation.

The building of supranational criminal courts is one of these major innovations. The analysis has first shed light on the changes in the construction supranational criminal institutions under the UN impulse. It has then deciphered this institution-building process in terms of citizenisation through the prim of the citizenship regime.

Evaluating the possibility of a European citizenship and making a few pragmatic proposals to make it possible, J.H.H Weiler noted: "Typically, the human rights apparatus does not apply horizontally as among individuals. Rights conceived in this way give to, but do not take from, individual citizens (…). The proposal I am suggesting is for the Council to target some of these rights, and model them on article 119 by introducing legislation which would prohibit certain conduct among individuals (…). In this way, the right of the individual against public authority is converted into a duty towards other human beings. This would enrich the notion of a human right as part of citizenship" (1997: 495-519). The analysis presented in this paper has shown that with the concretization of an individual responsibility through the creation of supranational criminal institutions, a relationship has been emerging between citizens and supranational institutions, and among citizens themselves. A citizenisation process might thus be in progress in the United Nations' system, and the UN may have gone further than the EU on some points.

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