



Introduction: Contested Fundamentals of the Law of International Organizations: Repositioning Legal Theory

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1 Introduction

In 2020, Jan Klabbers and Guy Fiti Sinclair opened a Symposium of the European Journal of International Law by claiming that “international organizations law is one of those fields of international law where theorization by lawyers has been kept to a minimum”.¹ Judging by the reactions of legal academics, especially early career researchers, their call was not left unanswered. In just two years, international organizations have been the object of several interdisciplinary studies adopting different perspectives and tools to discuss the uses of legal expertise. Socio-legal, historical, and ethnographic studies are redefining the ways in which to look at international organizations.² International organizations appear to be the ideal arena in which to perform archival research, interviews, textual analysis, or have a direct working experience to study the ‘law in action’ under intriguing and enriching perspectives.

By contrast, it appears that doctrinal research on the law of international organizations is not keeping the pace with this renewed interest and is getting marginalized by both academia and practitioners. For the former, it is

1 Jan Klabbers and Guy Fiti Sinclair, ‘On Theorizing International Organizations Law: Editors’ Introduction’ (2020) 31:2 *The European Journal of International Law* 489, doi: 10.1093/ejil/chaa043.

2 To mention a few: Dimitri van den Meerssche, *The World Bank’s Lawyers: The Life of International Law as Institutional Practice* (Oxford University Press, Oxford, 2022); Tommaso Soave, *The Everyday Makers of International Law* (Cambridge University Press 2022), doi: <https://doi.org/10.1017/9781009248013>; Isobel Roele, *Articulating Security: The United Nations and Its Infra-Law* (Cambridge University Press 2022),

often the case that scholars, especially early career researchers, feel the need to justify their innovative approaches by claiming that doctrinal research on international organizations is exhausted and lost its attraction.³ Klabbers and Fiti Sinclair stress that much can be learned from other disciplines, from sociology to anthropology, but, in their symposium, engage in legal theory only by proposing an intellectual history of the field.⁴ It seems that doctrinal approaches should be left to practitioners, those who employ the language of law to solve the problem at hand, and do not have time to reflect on the theoretical implications of the grammar they use. However, concerning practitioners, the distance between academic doctrinal debates on the law of international organizations and the problems faced by legal officers is growing exponentially. The times of Schermers, Jenks, Reuter (and several more authors discussed in the EJIL Symposium) seems to belong to a distant past in which one could wear multiple hats as a law scholar and a practitioner. The projects of the International Law Commission on international organizations evidence this trend, in which its doctrinal work is often contested and marginalized by legal advisors.⁵

This special forum aims at counteracting this trend by claiming that there is a lot of theoretical work to do for renewing an interest of studying the legal grammar of international organizations, both for practitioners and academics. On the one hand, repositioning legal theory means to find out how it can be relevant from an academic perspective, and on which issues to focus to regain the interest of practitioners. The idea of focusing on 'contested fundamentals' is based on the intuition that before providing a legal analysis of the contemporary practice of international organizations and attempting to solve outstanding legal issues is necessary to take a step back and analyse certain theoretical pillars that inform doctrinal research. This special forum wishes to contribute to doctrinal research on the law of international organizations with a claim that it should take advantage of the positive move towards a more pluralistic legal academia and embrace theoretical thinking. Instead of only focusing on solving the legal issue at stake in the most current crisis, it should

doi: <https://doi.org/10.1017/9781316856468>. Also see the conference 'Alternative Approaches To International Organizations In International Law' convened by Negar Mansouri and Daniel Ricardo Quiroga-Villamarín at the Graduate Institute in Geneva, available here: <https://www.graduateinstitute.ch/communications/news/alternative-approaches-international-organizations-international-law> (last accessed 12.02.2023).

3 For instance van den Meerssche (n 2) 10.

4 Klabbers and Sinclair (n 1) 490.

5 See, for instance, International Law Commission, *Comments and Observations Received from International Organizations* (UN Doc A/CN.4/637 2011).

also focus on the root causes and self-reflect on the characteristics of legal analytical thinking as applied to international organizations. Let's imagine that a political cataclysm opens the way to major institutional reforms, what are the theoretical legal bases on which the system can be rebuilt? What are the contested fundamentals that need theoretical reflection? Which of the current legal notions should be saved and which should be reinvented?

Around these questions, a workshop was convened by Bocconi University and the Interest Group on International Organizations of the European Society of International Law in October 2020, on which this special forum is based. Thanks to the inestimable support of Professor Roger O'Keefe and the tireless work of Monia Morello and Federica Trioschi from Bocconi Department of Legal Studies, the COVID-19 pandemic did not disrupt our efforts and we gathered online an unexpected number of people (in the early months of the zoom era, we received 191 registrations – not all attended, of course).

2 What Does It Mean to Do Legal Theory of International Organizations? The Idea of Contested Fundamentals

To kick off this forum, in this section I will briefly introduce the idea of contested fundamentals and the idea of repositioning legal theory, after which I will engage with the core themes of each article.

As Samantha Besson recently put in the context of international responsibility, 'the dearth of theorizing on international responsibility law should actually worry us about the state of international law and of its institutions, especially about the state of the State and IOs.'⁶ The same can be said about international organizations. They have existed since the nineteenth century, but some essential legal tools used to explain their workings are still disputed. It is striking that certain fundamental legal notions such as legal personality, autonomy, transparent veil, sanctions, are as controversial today as they were when the League of Nations was created. This intuition prompts questions on whether the analytical concepts employed by international lawyers are effective and meaningful. Contested fundamentals prompt a general reflection on the status and purpose of the law of international organizations. If the pandemic and the Russian invasion of Ukraine are causing a turning point in international relations, is the law of international organizations ready to sustain its

6 Samantha Besson, 'Theorizing International Responsibility Law, an Introduction', in S. Besson (ed.), *Theories of International Responsibility Law* (Cambridge University Press, Paris, 2022) 1, p. 3.

changes? Do law scholars possess the appropriate analytical tools? Should we still rely on the same concepts developed one hundred years ago?

These questions prompt preliminary reflections on the relationship between academia and practitioners. The law of international organizations has traditionally been considered as a field dominated by crises and by the capacity of international civil servants to dominate contingencies. One could claim that in the night between the 30th and the 31st of October 1956, Dag Hammarskjöld did not have much time to reflect on the concept of inherent competences while preparing for the speech before the UN Security Council that would lead to UNEF I recommended by the General Assembly, and, later, on the institution of peacekeeping missions.⁷ Or, for what it is worth, any legal advisor does not have too much time to dedicate to theoretical reflections on the languages they use to craft an opinion in a couple of hours. They must be pragmatic and find the best solution to the problem at hand, without the need to discuss it in the context of a theoretical structure on the purposes and the nature of the language used.

To counteract this simplistic and fallacious narrative it is necessary to repositioning legal theory based on its objects and purposes. As different approaches to international law are applied to the study of international organizations, it is important to situate legal theory in the light of new developments. Against this backdrop and gaining insights from existing scholarship on non-legal approaches to international organizations, the purpose of the Special Forum is to revisit the contested fundamentals of the law of international organizations and to situate them in the context of current issues faced by the international community. The main idea is not to provide alternative conceptualizations, but to discuss the meaning of the fundamental legal concepts on which the law of international organizations developed. The aim is to initiate a dialogue and a reciprocal influence among different approaches, from which the law of international organizations has a lot to gain.

We will focus on four contested fundamentals: Catherine Brölmann tackles 'Transparency' by considering the multilevel legal identity and shades of agency that characterize international organizations; Richard Collins focuses on the limits of framing our thinking in terms of 'Binary Oppositions' ('open' vs 'closed', 'agora' vs 'actor', 'contract' vs 'constitution', etc.); Martina Buscemi deals with 'functionalism' and issue of sanctions against member states, and, finally, Jan Klabbers moves the debate further by asking whether 'political economy'

⁷ UN Doc. S_PV.751-EN; Manuel Fröhlich, *Political Ethics and the United Nations: Dag Hammarskjöld as Secretary-General* (Routledge, London, 2007) doi: <https://doi.org/10.4324/9780203933916>.

could not be an appropriate prism to help reposition the law of international organizations.

2.1 *Transparency*

Catherine Brölmann revisits the contested fundamental of the transparency of the institutional veil.⁸ Being at the core of all legal controversies concerning international organizations, transparency means that international organizations possess a peculiar legal system, under which member states are 'legally visible'. As she wrote in her 2007 book, international organizations constitute "open structures that are vehicles for states and at the same time closed structures that are independent legal actors".⁹ It is contested because this quality clashes against the state centric international legal system. International law seems unable to deal with layered institutions and provide effective solutions to outstanding controversies. This was the case in the 70s and 80s, when the International Law Commission attempted to develop rules concerning the law of treaties, as much as in the 2000s, working on the different project on international responsibility.

Brölmann claims that transparency has a descriptive function to express the position of member states and explain the difficulties against which doctrinal legal studies are repeating their mistakes. She finds its origin and justification in the nature of international organizations as functional and not sovereign entities, connected with the unclear quality of the law they produce, oscillating between international and internal law. However, this binary opposition is contrasted by the dynamic quality of transparency as a matter of degree, rather than a yes or no question. For her, the degree to which the legal observer is able to see through the institutional veil depends on the context in which the organization finds itself. When she moves to contestations, she criticizes the rigidity of international law, which is unable to accommodate a transparent actor. International law imposes a binary mould, either considering organizations as vehicles for states or independent subjects and developing rules that do not take into account their peculiar nature. This systemic contestation goes hand in hand with the more political convenience of keeping the application of the law unclear and treating organizations as vehicle or subject depending on opportunism.

8 Catherine Brölmann, *Transparency as a Contested Fundamental in the Law of International Organizations* (2023) *International Organizations Law Review* 10–27.

9 Catherine Brölmann, *The Institutional Veil in Public International Law: International Organizations and the Law of Treaties* (Hart Publishing, Oxford, 2007), 17.

In conclusion, Brölmann reaffirms the importance of transparency as an analytical tool that should be recognized and further implemented in doctrinal studies dedicated to the law of international organizations. Transparency bypasses binary notions such as ‘international legal personality’, as it allows us to take into account a multilevel legal identity and shades of agency.

2.2 *Binary Oppositions*

Richard Collins moves the debate further by focusing on the contested fundamental of binary oppositions.¹⁰ Similarly to Bröllman, he also wishes to contest the doctrinal application of the concept of an international organization as an either/or phenomenon: ‘open’ vs ‘closed’, ‘agora’ vs ‘actor’, ‘contract’ vs ‘constitution’, etc.

He starts by reflecting on the elusive object of application of the law of international organizations, lost between a comparative analysis of institutions and the identification of common principles. The lack of definition caused by the lack of conceptualization caused pragmatic responses for limited purposes that only caused more contestation, such as in the case of the International Law Commission project on international responsibility. In his opinion, binary oppositions are generated from this lack of theorization, as an attempt to escape the limitations of international law.

After reviewing the major dichotomies employed to describe international organizations, Collins describes how they end up supporting a classical distinction between functionalism and constitutionalism, which also permeates other fields of international law. When one attempts to define international organizations’ rules on the one-dimensional plane of international law, the oscillations between the opposing images makes the effort vain. Therefore, the development of the law of international organizations occurred with a disregard for legal form, following a pragmatic, rather than formal, logic.

Pragmatism represents the outcome of the various attempts of dealing with the oscillation between the opposing images, by privileging the function performed rather than the legal form. Thinking in binaries seems the inevitable outcomes of international legal argumentation, and there is no way out except going beyond the legal form as incapable of providing a solution. However, once pragmatism absolves its role of serving a political vision, the continued relevance of the legal form resurfaces each time one wants to achieve some measures of accountability.

¹⁰ Richard Collins, ‘Beyond Binary Oppositions? The Elusive Identity of the International Organization in Contemporary International Law’ (2023) *International Organizations Law Review* 28–51.

2.3 *Functionalism*

Martina Buscemi tackles the contested fundamental of functionalism by looking at the relationship between pragmatism and legal form in the emblematic case of sanctions against member states, revealing the so-called Frankenstein paradox and the theoretical flaws of this tool in the hands of international organizations.¹¹ In particular, she dwells into the recent practice of ‘exorbitant’ sanctions, adopted to contrast a breach of international law not strictly linked with the functions of the organization. Thanks to a detailed description of the practice concerning the war in Ukraine and in Syria, she discusses the contested fundamentals of implied and inherent powers, and defines the legal theoretical problems connected with autonomy. Both functionalism and constitutionalism are not good enough to provide a description of the phenomenon, and they reveal the disequilibrium on which international organizations are created.

Buscemi looks at the role of the law of international organizations as the medium between political aspirations and the limits imposed by the constitutive instruments. Describing the doubtful institutional basis for the imposition of sanctions, she discusses the possible backlashes against the legitimacy of the institution. For instance, the imposition of sanctions against Russia in organizations such as the International Labour Organization, in the absence of legal basis, is causing legitimacy backlashes, raising valid arguments routed on selectivity and ‘whataboutism’.¹² She identifies all possible legal reasonings behind the adoption of ‘exorbitant’ sanctions, including the ‘collapse’ of the institutional regime into general international law and the adoption of countermeasures in the relationship between the international organizations and its member states. This is another example of the relevance of the transparency metaphor to explain the law of international organizations.

All in all, Buscemi reveals the strategic uses of international organizations and the helpless status of international law. She concludes by criticizing functionalism for being unable to explain a crisis between a member state and the organization, but, at the same time, maintaining its centrality in the vocabulary of the law of international organizations.

11 Martina Buscemi, ‘Institutional Sanctions and Functionalism: Insights from the most recent practice’ (2023) *International Organizations Law Review* 52–81.

12 Patryk I. Labuda, *On Eastern Europe, ‘Whataboutism’ and ‘West(s)plaining’: Some Thoughts on International Lawyers’ Responses to Ukraine*, EJIL:Talk!, 12 April 2022, <<https://www.ejiltalk.org/on-eastern-europe-whataboutism-and-westsplaining-some-thoughts-on-international-lawyers-responses-to-ukraine/>>.

2.4 *Political Economy*

Finally, Jan Klabbers closes the Special Forum with a claim on going beyond functionalism by reflecting on the ‘costs and benefits’ embedded within the law of international organizations.¹³ His attempt to find new theoretical foundations to the law of international organizations starts by framing the success of international organizations as institutions allowing cooperation between states without costing too much, both in financial and political terms. At the same time, they constitute the perfect object of criticism, against doing too little (Rwanda, for instance) or too much (interfering in domestic affairs). Functionalism, by focusing only on the relationship between an organization and its member states, has no explicatory value because it sets aside the relevant balance of interests performed by international organizations. Consequently, Klabbers proposes to look at political economy.

International organizations ‘re-allocate values’.¹⁴ Whatever they do comes with costs and benefits, that are unequally distributed. He makes the example of the interests behind the proposed United States withdrawal from the Universal Postal Union under the Trump administration, as involving an economic balance of costs and benefits. In short, states’ involvement with international organizations is linked with what they can obtain from them, rather than idealism towards some form of common public good. In his opinion, functionalism is able to explain states’ interests, but it does not take into account that international organizations costs and benefits are distributed over third parties: non-members, other international organizations, and private actors. The balance of costs and benefits is way more complex than what functionalist lenses let us see.

Consequently, the current state-centric focus of the law of international organizations should be dismissed and replaced by a theoretical framework able to include the interests of all the subjects involved, beyond their creators. Klabbers contend that political economy might be a better theoretical basis for developing an effective normative regime. All international organizations are economic actors because they unequally distribute costs and benefits. It could be the declaration of the pandemic by the World Health Organization, or the recognition of Kosovo as a State, but in all cases, international organizations provide an authoritative allocation of values. The law of international organizations should focus on the foundational role played by legal rules to constitute the framework in which costs and benefits are allocated beyond the

13 Jan Klabbers, ‘Towards a Political Economy of International Organizations Law’ (2023) *International Organizations Law Review* 82–100.

14 *Ibid.*, 84.

state. Wrapping up, he does not claim that attributed functions do not matter. Quite the opposite: he advocates for a form of 'supra-functionalism' that takes the function not as the end of any legal analysis, but as its starting point to further enquiry how different actors benefits or not from the system of rules put in place to perform the function.

3 To Conclude

This Special Forum is nothing but a small attempt to revive the interest for the legal theory of the law of international organizations. Next to fruitful and increasingly diversified approaches to the study of international organizations, legal theory has an important role for renovating the interest of academics and practitioners. We started with the idea that doctrinal debates on the most classical and important issues, either concerning the law of treaties, responsibility, or attribution of competences, are based on contested fundamentals that are well suited to support the legal architectures built upon them. We only focused on very few examples, trying to direct the attention towards certain conscious or unconscious frameworks that shape doctrinal thought.