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On Theorizing International Organizations Law: Editors' Introduction

Jan Klabbers[1] and Guy Fiti Sinclair[2]

I. Introduction

For many decades now, the classic treatise on international organizations law written by Henry Schermers and Niels Blokker has made the observation that 'there is no strongly established tradition of developing theories on international organizations in the land of legal science'.[3] And for many decades now, those words have rung true: international organizations law is one of those fields of international law where theorization by lawyers has been kept to a minimum.

In contrast, political scientists have contributed many of the leading theoretical insights concerning the creation and existence of international organizations. Most students of international organizations accept the proposition that in one way or another, international organizations can be studied in terms of principal/agent theory, albeit perhaps with a few twists: the principal is by definition collective, and usually represented with the agent in the form of a plenary organ.[4] Most also accept the proposition that international organizations do not so much represent an abdication of sovereignty, but may actually be of assistance in furthering member state interests.[5] Many students of international organizations accept the proposition that once cooperation is established, it might beget further cooperation – a point made, in this general form, by functionalist and neo-functionalist integration scholars. The role of international organizations in world politics in intensively studied by political scientists, especially, though not exclusively, in the rationalist tradition.[6] And recent scholarship in international relations suggests that contrary to popular thought – popular amongst some international relations scholars, that is – international organizations may lead a life of their own, distinct from that of their member states, and may even be instrumental in forging new organizations.[7]

Much can also be learned from other disciplines. The work of organization sociologists, for example, suggests that there might be merit in studying international organizations as consisting not of unitary members but of other organizations (i.e. their member states),[8] or that international organizations, like other organizations,

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[1] University of Helsinki.
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[3] H.G. Schermers and N. Blokker, *International Institutional Law: Unity within Diversity*, 6th edn. (2018), at 18.
[4] D. Hawkins, D. Lake, D. Nielson and M. Tierney (eds.), *Delegation and Agency in International Organizations* (2006). The twists were identified by Klabbers, 'The EJIL Foreword: The Transformation of International Law', (2015) 26 *European Journal of International Law* 9.
[5] R.O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (1984).
[6] A recent example is K. Abbott, Ph. Genschel, D. Snidal and B. Zangl (eds.), *International Organizations as Orchestrators* (2015). An outstanding example in the neo-Gramscian tradition is C. Murphy, *International Organizations and Industrial Change: Global Governance since 1850* (1994).
[7] T. Johnson, *Organizational Progeny: Why Governments are Losing Control over the Proliferating Structure of Global Governance* (2014); L. Andonova, *Governance Entrepeneurs: International Organizations and the Rise of Global Public-Private Partnerships* (2017).
[8] G. Ahrne and N. Brunsson, *Meta-organizations* (2008).

consist of bureaucracies whose internal dynamics may come to affect the ways in which organizations work.[9] Historians have contributed to our understanding as well recently, for instance by elucidating the work of an entity such as the League of Nations Permanent Mandates Commission[10] or, more generally, by providing narratives on the emergence of international organizations or by incorporating international organizations in their conceptions of world history[11] – even if the latter is still surprisingly rare.[12] Anthropologists and sociologists deploying ethnographic methods have illuminated the internal dynamics and structural relations of particular organizations.[13] And even philosophers of action have contributed insights in recent years that may help us understand international organizations,[14] indeed sometimes with international organizations specifically in mind.[15]

Still, it is fair to say that international lawyers have not contributed too much on the theoretically interesting and important questions. And yet, there is quite a bit to reflect on. International organizations have become fixed elements of the international legal landscape, in that much law-making takes place by them or under their auspices, and much monitoring of international law takes place by international organizations.[16] International organizations can interfere directly in the lives of individuals, whether through sanctions ordained by the United Nations[17] or in the migration processing centers run by the International Organization for Migration.[18] They exercise certain powers, some attributed, some implied, and some perhaps even (think of the power to conclude headquarters agreements) inherent in 'organization-hood'.[19] They can boast privileges and immunities, at least for their 'official acts', but how and where to draw the line with unofficial acts remains unclear. They can set standards through all sorts of instruments, but the legal effects thereof remain unclear. They engage in operational activities, but through mechanisms and legal institutions that remain opaque. And their accountability remains a constant source of concern.[20] It is not that international lawyers have completely bypassed the theoretical questions: over the last decade or so, theoretical interventions have been made and further avenues explored involving such topics as the role of international organizations in state-making,[21] their

[9] M. Barnett and M. Finnemore, *Rules for the World: International Organizations in Global Politics* (2004).
[10] S. Pedersen, *The Guardians* (2015). See also P. Clavin, *Securing the World Economy* (2013).
[11] M. Herren, *Internationale Organisationen seit 1865: Eine Globalgeschichte der internationalen Ordnung* (2009); M. Mazower, *Governing the World* (2012).
[12] Mainstream historians can write huge books on twentieth century history without paying any serious attention to international organizations. An example: in the 650 or so pages of N. Ferguson, *The War of the World* (2006), the United Nations is referred to only a few times, and then mainly as a source of information (as in: according to statistics produced by the UN). The EU is mentioned only a few times as well, mostly as a geographical denomination (e.g. when discussing migration into the EU, or terrorism taking place in the EU).
[13] See, e.g., R. Niezen and M. Spagnoli (eds), *Palaces of Hope: The Anthropology of Global Organizations* (2017); A. Perry-Kessaris (ed), *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (2013); J. Conti, *Between Law and Diplomacy: The Social Contexts of Disputing at the World Trade Organization* (2010); G. A. Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (2012); R. H. R. Harper, *Inside the IMF: An Ethnography of Documents, Technology and Organisational Action* (1998).
[14] S. Miller, *The Moral Foundations of Social Institutions: A Philosophical Study* (2010).
[15] C. Pavel, *Divided Sovereignty: International Institutions and the Limits of State Authority* (2015).
[16] M. Ruffert and C. Walter, *Institutionalised International Law* (2015); J.E. Alvarez, *The Impact of International Organizations on International Law* (2016).
[17] J. Farrall, *United Nations Sanctions and the Rule of Law* (2007).
[18] Klabbers, 'Notes on the Ideology of International Organizations Law: The International Organization for Migration, State-making, and the Market for Migration', (2019) 32 *Leiden Journal of International Law* 383.
[19] V. Engström, *Constructing the Powers of International Organizations* (2012).
[20] C. Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (2017).
[21] G.F. Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (2017).

role as platforms for deliberative decision-making,[22] their role as sites where expert governance is crafted and exercised,[23] or how their public authority should be seen and evaluated.[24]

Much of the theoretical interest in international organizations law can be traced to the puzzle thrown up by the realization that organizations increasingly play an important role in the lives of peoples, whether the citizens of their member states or third parties, or even the people actually working for them. In both cases, developments over the last four decades or so have revealed a serious accountability deficit – the UN's involvement in the Haitian cholera outbreak and the environmental impacts of World Bank dam projects come immediately to mind – and it is slowly dawning on the discipline that coming to terms with the accountability of international organizations may well presuppose a proper understanding of how organizations are legally structured and how the law allows them to operate.[25]

Against this background, we thought it might be worthwhile to devote a symposium issue of this Journal to theorizing about international organizations law. We have chosen to do so by examining the intellectual history of the field. In this symposium, six scholars reflect on the contributions of six other individuals who were, in one way or another, key figures in the development of international legal thought – if not necessarily *theory* – about international organizations. Our conceit was that, through a closer interrogation of the writings of these individuals, we might gain a greater insight into the evolution of thinking about international organizations, and thereby a sense of the range of theoretical approaches that have been and remain possible within the discipline.

Of course, any such selection of individuals can only be incomplete, and to a certain extent arbitrary. Schermers and Jenks represent in certain respects the two leading approaches to international organizations law as a general project: functionalism (by Schermers) and cosmopolitan constitutionalism (for want of a better term to describe Jenks' approach).[26] Paul Reuter is included as an important French voice,[27] and because he was actively present at the creation of what is today the European Union. Louis Sohn was, in all likelihood, the most seriously international organization oriented legal scholar of his generation in the US. The works of Georges Abi-Saab sound a different voice on the role and impact of international organizations, combining his Egyptian background with a wealth of experience as a member of a variety of international tribunals, and having long been on the faculty of the traditional training institution for the international civil service, the Graduate Institute of International and Development Studies in Geneva. And then Kelsen because – well, he was Kelsen, and although he never wrote much on the law of international organizations as such, his writings on the United Nations offer much material for discussion.

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[22] I. Johnstone, *The Power of Deliberation: International Law, Politics and Organization* (2011).
[23] S.E. Merry, *The Seduction of Quantification* (2016); K. Davis, A. Fisher, B. Kingsbury, S.E. Merry (eds.), *Governance by Indicators* (2012).
[24] A. von Bogdandy et al. (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (2010); M. Goldmann, *Internationale öffentliche Gewalt* (2015).
[25] Klabbers, 'Theorising International Organisations', in A. Orford and F. Hoffmann (eds.), *Oxford Handbook of the Theory of International Law* (2016) 618.
[26] The dichotomy underlies J. Klabbers and Å. Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (2011). As Sinclair argues in his article in this symposium, Jenks' writings encompassed a mix of ideas which are today associated with functionalist, constitutionalist, and governance-type approaches to international organizations.
[27] In addition, the other strong Francophone voice of Michel Virally has been discussed in the pages of this Journal earlier: see Viñuales, 'The Secret of Tomorrow: International Organizations through the Eyes of Michel Virally', (2012) 23 *European Journal of International Law* 543.

II. Conceptualizing International Organizations Law

The latter point is actually of some relevance: what does it mean to be writing on the law of international organizations? There are many scholars who have addressed the workings of a particular organization (say, Jackson on GATT[28], or Franck on the UN[29]), but does that make them international organizations lawyers? Or those who address in their long careers one or two isolated aspects of international organizations law, but never get round to synthesis and generalization?[30]

What complicates matters further is that theorizing about international organizations has largely been left implicit, even by those whom we singled out for further treatment. It is clear that someone like Schermers had strong ideas (sometimes very strong ideas) about what international organizations are for and how they should be approached legally, but it also seems that his approach was mostly based on intuition and an underlying ethical conviction. His axioms and postulates and his epistemological assumptions were rarely, if ever, spelled out, and most assuredly not in systematic and self-reflective theoretical terms. It is no coincidence that Schermers struggled considerably with the problem of reconciling his other strong intuition and ethical conviction that human rights were worthy of protection – as Klabbers suggests in his contribution, Schermers never managed to reconcile the two in coherent manner. To the extent that more recent work is critical of existing approaches, it has had to reconstruct such approaches, as a clear and authoritative theoretical statement on the law of international organizations is lacking. This, in turn, creates the curious spectacle of an important field of international law without, it seems, a core.[31]

There are no doubt solid reasons for the under-theorization of international organizations law. One reason is that it is by no means clear what the object of theorization would be, given the difficulty of producing a consistent and coherent definition of what an international organization is. This manifests itself in several distinct but interrelated ways. First, while there is a widespread consensus that the World Bank, the World Health Organization, and the International Olive Council all qualify as international organizations, there is considerable uncertainty at the margins. It is by no means a given, for instance, that the Organization for Security and Cooperation in Europe, extra-legal as it often claims to be, should be seen as an international organization, even if it has the required organs (including an inactive Court) and politically distinct persona.[32] Likewise, there is uncertainty whether the Conferences of the Parties or Meetings of the Parties set up under many multilateral environmental agreements qualify as international organizations, for they seem to have been intentionally created as something else. For different reasons, it is not clear (although often assumed) that international courts and tribunals qualify: on the one hand, they are typically based on a treaty between states, having an organ and enjoying privileges and immunities, but one shudders to think of courts exercising delegated powers – such would be difficult to reconcile with the independence of the judiciary. And what to

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[28] J. Jackson, *World Trade and the Law of GATT* (1969).
[29] Th. Franck, *Nation against Nation* (1985); Th. Franck, *Fairness in International Law and Institutions* (1995).
[30] Here perhaps the best example is Hungdah Chiu, who authored a seminal article and a seminal monograph but never, as far as we are aware, wrote a general work on international organizations law. See, respectively, 'Succession in International Organisations', (1965) 14 *International and Comparative Law Quarterly* 83, and *The Capacity of International Organizations to Conclude Treaties, and the Special Legal Aspects of the Treaties So Concluded* (1966).
[31] Klabbers, 'The Paradox of International Institutional Law', (2008) 5 *International Organizations Law Review* 151.
[32] M. Steinbrück Platise, C. Moser and A. Peters (eds), *The Legal Framework of the OSCE* (2019).

make of the erstwhile General Agreement on Tariffs and Trade, set up as an organ-free trade arrangement but acquiring some organs along the way?

Second, international organizations, even those falling within the consensus conception, display a wide variety. The notion may include public purpose organizations (the classic public international unions) such as the World Health Organization or the Universal Postal Union. It may include military alliances such as the North Atlantic Treaty Organization (NATO) and earlier Warsaw Pact, although not everybody was convinced the latter would qualify, seeing as it was dominated by a single member states[33] (one might say much the same about NATO, incidentally). It may include the financial institutions, which stand out in many respects, for instance on issues of legal personality and member state liability. And it may include some organizations which are little more than lobbying clubs for member states from a particular region of the world (think European Union), ideologies (think Organization of Islamic Countries), or interests (think Organization of Petroleum Exporting Countries). All these may share some formal characteristics, but otherwise have fairly little in common.

Third, the two international organizations that most people will immediately think of when they hear the term mentioned, the European Union and the United Nations, are not at all representative of the phenomenon. Both have an extremely broad jurisdiction and have, at least to some extent, the power to tell member states what to do. Neither of those two qualities are very prevalent even when taken in isolation, and the combination is well-nigh limited to, precisely, the EU and the UN.

To put it simply, all this means that a theory relating to international organizations would have to be general enough to cover all possible entities, ranging from the European University Institute (also set up as an international organization) via the World Meteorological Organization to the Asian Infrastructure Investment Bank, and that alone is a nigh-on impossible task. But in addition, it is not even clear what a theory of international organizations law would be a theory of. Would it address the role of international organizations in their political or social or economic environment (their 'ecology')? If so, what would this environment consist of: the member states, or also third parties? If member states, would it also cover their citizens? If third parties, also third parties other than states? The question is not merely an academic conceit, but can be pivotal on the ground, for instance on assessing accountability. There can be no doubt that the World Bank (for instance) is accountable to its member states, but its accountability is not limited to those member states alone. It would seem sensible simultaneously to claim that the Bank is also accountable to those affected by its actions – the poor and dispossessed in the countries where it operates.[34]

All this suggests that theorizing about the law of international organizations can and should take a diversity of forms and aim to answer a number of different questions, ranging from grand expectations about the role of international organizations in global affairs and their impact on domestic policies to more detailed questions as to how organs within the same organization stand in relation to each other, or the minutiae of what it means for an international organization official to be acting in his or her 'official capacity'.

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[33] Schwartz and Leven, 'International Organizations: What Makes them Work? (1992) 30 *Canadian Yearbook of International Law* 165.

[34] Grant and Keohane, 'Accountability and Abuses of Power in World Politics', (2005) 99 *American Political Science Review* 29.

III. To Conclude

The articles assembled in this Symposium reflect this wealth of different approaches. Perhaps the most self-consciously aimed at trying to understand the workings of international organizations law in general are the contributions by Klabbers (on Schermers) and Sinclair (on Jenks). In her contribution on Reuter, Evelyne Lagrange brings the international organizations lawyer to legal practice, in this case the practice of helping to set up what became the European Union. Ian Johnstone finds elements of both functionalism and constitutionalism in the work of Louis Sohn, and argues that deliberative decision-making is the closest Sohn comes to providing for accountability in the institutional edifice of 'world peace through world law' that he seeks to construct. Umut Özsu's contribution is best characterized as reflexive intellectual history, commenting on and drawing inspiration from Abi-Saab's writings on the workings of the UN in a particular situation of crisis. Jochen von Bernstorff studies Kelsen's work on the UN more generally, and in doing so provides a glimpse into what legal theorizing on international organizations could look like, although it is by no means certain that Kelsenian insights on the UN could easily be applied to other international organizations. And that, in a nutshell, confirms one of the great challenges for any theory of international organizations law: how to harmonize such a wide and wild variety of different creatures – how to achieve 'unity within diversity'.

Diversity in approaches notwithstanding, readers of this Symposium will immediately notice a distinct lack of diversity in both subjects and contributors. In particular, none of the individuals on which these articles focus are women. Nevertheless, as Editors of the Symposium we have struggled with the lack of diversity from the start. In part, the subject-matter of the Symposium can be explained by the regrettable fact that international legal thought about international organizations – like many other fields in international law, as well as other disciplines – was for a long time dominated by men. To be sure, there have been important voices on aspects of international organizations: one thinks immediately, for example, of Rosalyn Higgins' well-known work on the United Nations, although that work is arguably more concerned with how states have formed general international law within the political organs of the UN than the development of international organizations law specifically.[35] There were also other, less well known, women who wrote more directly on international organizations law in the early years of the field, but the fact remains that they were less influential on the development of the field, much to the detriment of the field. There is probably no better illustration than the work of Felice Morgenstern, whose mid-1980s study of international organizations in their environment anticipated current discussions by at least three decades. And yet, her work is rarely cited in recent work on the relations between organizations and the world around them – her influence on the discipline has been marginal, at best.[36] Morgenstern ended her book with a telling analogy: "In some ways the position of international organizations in international law is reminiscent of the status of women in national law", and explaining that "[i]nertia, far more than active resistance, is an obstacle to adaption of the law…".[37] Surely, she would not have been surprised that in scholarship too, inertia plays its role.

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[35] See also Klabbers, 'The Days of Wine and Roses', elsewhere in this issue.

[36] F. Morgenstern, *Legal Problems of International Organizations* (1986). The book is extremely difficult to find, for no obvious reason: the book is the written version of her Lauterpacht lectures at Cambridge, and was published by Grotius Publishing which has since become part of Cambridge University Press – this is hardly an obscure work obscurely published.

[37] Ibid., 135.