Beyond Binary Oppositions? The Elusive Identity of the International Organization in Contemporary International Law

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Abstract

Much of the conceptual work on international organizations situates the identity, nature or legal form of the institution between binary oppositions: ‘open’ vs ‘closed’, ‘agora’ vs ‘actor’, ‘contract’ vs ‘constitution’, etc. These oppositions are informative and revealing of tensions underpinning different aspects of international institutions: the extent to which they are vehicles for their member states versus autonomous actors in their own right; that they have limited, derivative and defined powers, but are also able to evolve and adapt to take on new competences and unforeseen powers, and so on. At the same time, insofar as many of the core doctrines of international institutional law, on e.g. personality, powers, responsibility, etc., rely most heavily on the European Union and the United Nations – arguably two of the most unique institutional structures – as evidence for these doctrinal developments, it is clear that there is something more special, unique, indeed *sui generis* that needs to be thrown into the conceptual mix in order to fully understand the nature and importance of international institutions in contemporary international law. In this way, I will argue, international institutions have a more complex identity and relationship with international law in which they not only exist within (closed) and as part of (open) contemporary international law, but also aim to overcome its limitations, to transform it in some way. For this reason, rather than being competing understandings of international institutions, the interplay between these kinds of binary oppositions actually only reflect back broader

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theoretical tensions ingrained within international law as a decentralised legal system – a condition which makes it impossible to definitely ‘pin down’ the seemingly elusive identity of the international organization. However, it is also a condition which allows for the construction of tentative hierarchies and forms of more centralised governance within international law, whilst always leaving scope (through legal form) to challenge any such pretentions to authority. This article is part of the IOLR Special Forum on ‘Contested Fundamentals of the Law of International Organizations’.

Keywords

concept – identity – definition – binary oppositions

1 Introduction

The law of international organizations (or international institutional law) is a (sub)discipline with a somewhat fuzzy point of focus: the more one tries to clarify this focus, the more it seems to slip out of view: either dissolving into a comparative analysis of discrete institutions, or otherwise existing as a somewhat loose assortment of principles that may be more or less relevant dependent on the institution in question.1 Indeed, one of the striking aspects of teaching the law of international organizations is the effort required to present a coherent body of doctrine, principles, and rules, all the while “without a clear object of application”.2 This problem is apparent the moment one attempts to define precisely what an international organization is, or otherwise to make sense of their myriad forms and functions. Textbooks tend either to note the absence of a satisfactory definition of an international organization, or else offer one whilst noting certain limitations: such definitions appearing either under or over-inclusive in adequately capturing the whole field of study.3 Although the International Law Commission (“ILC”) was able to fix on a relatively concise (though not necessarily precise) definition in its work on the responsibility of

3 A good example is Nigel D. White, The Law of International Organizations, 3rd Ed. (Manchester University Press, Manchester, 2016) 8–9.
international organizations, this was only because the target (legal responsibility) implied a fixed criterion (legal personality), which might otherwise be disputed in more encompassing or capacious attempts at definition.

As such, unless one fixes on the problem or issue one wants to bring to light, it is hard to say more than what one ordinarily finds by way of an international institution: members, agreement, purpose (perhaps), organs, and possible other indicators of "organizationhood". Nevertheless, as Klabbers has noted, these indicators are, at best, "regularly recurring elements, without prejudice to possible exceptions". We might just accept this conceptual frustration, of course, and attempt to approach the subject in a more pragmatic and practical way. In my own teaching, after illustrating the problem of definition, I move to the task of trying to classify or categorise different institutions. Nevertheless, whilst this is perhaps more illuminating in demonstrating the different things that international organizations do, or how they are variously constituted or structured, this exercise ends up with a familiar sense of fuzziness as to the object of study: revealing how different institutions straddle different categorisations, how no category captures the identity or nature of an international organization absolutely, and, in fact, how different organs within a single institution might be capable of diverse categorisation.

Self-reflexively, then, the best that one can do is to embrace this uncertain disciplinary focus as a pedagogical tool, with the curriculum unfolding as an inevitably-frustrated search for coherence and cohesiveness out of the multiplicities of institutional form. The process of attempting (yet failing at) a satisfactory definition, of showing the inexhaustibility of categorisations, reveals

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4 Report of the International Law Commission on the work of its Sixty-Third Session, UN Doc A/66/10, Art. 2(a). The article provides that: “international organization’ means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.” [hereinafter “ARIO Commentaries”]

5 In the commentary to Article 2, the ILC notes that the definition given is “considered as appropriate for the purposes of the present draft articles and is not intended as a definition for all purposes.” Ibid., 49.


7 For instance, contrast the more intergovernmental (UNGA or Council of Ministers) and the more supranational (UNSC or EU Commission) organs of the United Nations and European Union in this respect, despite the former being referred to as essentially intergovernmental, and the latter supranational.

8 In fact, one of the canonical texts of the field is framed and executed as an endeavour to locate unity from within institutional diversity: Henry G. Schermers and Niels M. Blokker, International Institutional Law: Unity within Diversity, 5th Rev. Ed. (Martinus Nijhoff, Leiden and Boston, 2011).
precisely the tensions which carry over to and structure key aspects of international institutional law – legal personality, powers, responsibility, and so on – all of which again only bring the problem of conceptualisation back to the fore. As Klabbers concludes, it may well be that the “[c]urrently accepted concept of international organization may be too broad a church”, not only “for purposes of description and discussion...[but also] for purposes of legal treatment.”

It is hardly surprising then that legal-theoretical or conceptual work on the nature and functioning of international institutions has struggled to provide anything other than broadly pragmatic, functionalist responses. In fact, it is probably true to say that there has been an evident “under-theorization of international organizations law”. In the absence of conceptual clarity, what appears most often is an offering of various dichotomous tensions or binary oppositions: that constituent instruments are neither entirely “contractual” nor “constitutional” in nature; that the organization itself can be thought of both as independent “actor” and as meeting place, or “agora” for its member states; that the rules of the organization are neither entirely “closed” off from, nor entirely “open” to general international law, and so on. Others, more reflexively perhaps, have sought to show how these dichotomies are symptomatic of, indeed intrinsic to the “dual” or “janus-faced” character of international institutions, which only reflect back the broader tensions within international law as a whole – which is, of course, possessed of its own irresolvable binary.

These kinds of binary oppositions are insightful and revealing, showing – as Brölmann has suggested – the difficulties of flattening the multidimensionality of institutions into the somewhat one-dimensional legal form of international law. At the same time, it is clear that a formal analysis will only reveal a partial picture. Take, for example, two institutions – the European Union (“EU”) and the

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9 Klabbers (n 6) 162
14 To a certain extent, ibid. See the more extended conceptualisation in this respect in Gasbarri (n 2). For discussion, also, see Jean d’Aspremont, ‘The Law of International Organizations and the Art of Reconciliation: From Dichotomies to Dialectics’ (2014) 11:2 International Organizations Law Review 428–453.
16 See Brölmann (n 13)
United Nations ("UN") – which are perhaps most often referenced in terms of demonstrating constitutional developments in the law of international organizations. As Klabbers and Sinclair have noted, both are quite unusual points of focus considering the prevalence of seemingly *sui generis* features peculiar to the organizations concerned:

...the two international organizations that most people will immediately think of when they hear the term [international organization] mentioned – the European Union (EU) and the United Nations (UN) – 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.¹⁷

What is perhaps most interesting, however, is that in both cases this kind of centralised authority plays out in starkly different ways in terms of legal effect. Both institutions possess a large degree of autonomy and both have come to be recognised as international legal persons as a result. In practice, however, the centralised architecture of the EU means that it has largely – though not completely – closed itself off from general international law, embracing its “separateness” or *sui generis* character more than any other institution.¹⁸ At the same time, the UN is perhaps *sui generis* in an entirely different way. One cannot comprehend the workings of key aspects of international law now, whether that be the recognition of states, the use of force, or other key principles, without reference to UN law – the internal and the international are fundamentally blended in a way that is incomparable to other institutions. In both cases, it is not the legal form – either their legal source, the constituent treaty, or their actorness, expressed in international legal personality – which reveals anything particularly insightful about what either organization actually is, or does. The legal form is at best incidental to, or at least only partially informative in assessing, the discrete constitutional impacts of both institutions, whether felt at the international or local levels.

If anything, one might more usefully claim that the defining characteristic of both institutions is an attempt to escape, or otherwise overcome the limitations of the international legal form. In this contribution, I will argue that to

¹⁷ Klabbers and Sinclair (n 10) 494.
the extent that international organizations may be both open to and closed off from international law – in the interplay between the binary images of the institution – a functional space opens up which allows an institution to take on an autonomous existence of its own, including the creation of institutionalised hierarchies that would otherwise be excluded by international law. In addition, however – and especially in the case of universal organizations such as the UN – this nature also allows organizations to alter the workings of international law itself: the institutionalised hierarchies seemingly effecting functional (rather than formal) hierarchisation or verticalization of the traditionally “horizontal” or one-dimensional international legal form. In this way, I contend, international institutions add dimensionality to the flat surface of the international legal order, but this functional (or informal) dimensionality is always contested, contingent, and in form at least, always also revisable. Accordingly, efforts to transcend the tension inherent in the binaries outlined above only enact a further, albeit useful tension between function and legal form.

I will say more about this tension towards the end of the paper, in Section 4. Before doing so, however, I first (Section 2) outline the prevalence and embrace of dichotomous reasoning in theorising the law of international organizations, before seeking to understand (in Section 3) the ways in which international lawyers and international adjudicators have had to embrace functional rather than formal logic to reason beyond the binary. As I further argue (in Section 4) and briefly conclude (in Section 5), the binaries of legal form outlined in the paper – the janus-faced character or “dual legality” of international institutions – should still be viewed as important in opening up a pragmatic space for moving beyond the inefficiencies and inadequacies of the interstate legal form, whilst still leaving that form seemingly unaffected, and remaining as an important means for securing accountability and control at the international level.

2 Of Dichotomies and Dialectics: The Resort to Binary Construction in Conceptualising International Organizations

It is by now quite trite to say that much of the theory surrounding the identity and role of international organizations in international law has tended to construct or otherwise rely upon dichotomous reasoning expressed through seemingly irresolvable binary oppositions.19 From the beginning of the

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19 See especially d’Aspremont (n 14).
twentieth century, with the “move to institutions” witnessed in the wake of the First World War,\textsuperscript{20} early debates on the nature of the constituent instrument underlying institutions like the League of Nations tended to position the agreement as somewhere between a “contract” between the member states and a “constitution” giving rise to a more autonomous entity.\textsuperscript{21} And still today, international law scholarship continues to grapple with the question of the nature of constituent instruments, and therefore how such treaties ought to be interpreted in practice,\textsuperscript{22} often observing how international courts have over the years since the interbellum period progressively moved from one image (the contractual) to another (the constitutional) in their approach to interpretation.\textsuperscript{23}

This kind of binary reasoning carries over into the life of the institution itself, considering the extent to which the organization has taken on an autonomous life separate from its member states. This autonomy problem – or phrased negatively, the “Frankenstein problem”\textsuperscript{24} – came to largely define conceptual thinking about international organizations over the decades that


\textsuperscript{21} Indeed, most famously in Zimmern’s assessment of the Covenant of the League of Nations he claimed, drawing on the work of Max Huber, that it was neither entirely contractual, nor constitutional. See Alfred Zimmern, The League of Nations and the Rule of Law, 1918–1935 (MacMillan and Co., 1936) 284–285. See also White(n 3) 14. One can see similar oscillation in discussions of “law-making treaties” by authors such as McNair, who differentiated the League Covenant from other treaties, whilst still assuming the formal intergovernmentalism underpinning the instrument. See Arnold D. McNair, ‘The Functions and Differing Legal Character of Treaties’ (1930) 11 British Yearbook of International Law 101. Similarly, Lauterpacht sought to highlight the formal intergovernmental or ‘contractual’ nature of treaties but recognised that member states’ freedom of contract allowed them to enact the kind of organic constitutional law that he located in the League Covenant. See Hersch Lauterpacht, ‘The Covenant as the Higher Law’ (1936) 17 British Yearbook of International Law 54, 64–65. For a discussion of such binary opposition in the law of treaties generally, see Catherine Brölmann, ‘Law-Making Treaties: Form and Function in International Law’ (2005) 74 Nordic Journal of International Law 383–404.


\textsuperscript{23} See discussion in Clark (n 11).

\textsuperscript{24} As noted by Guzman, the binary lies in the “direct trade-off between the need to give the IO enough authority to be effective and the desire to guard against the risk that it will become a monster”. Andrew Guzman, ‘International Organizations and the Frankenstein Problem’ (2013) 24 European Journal of International Law 999 p. 1000.
followed.25 The problem has structured much discourse about the nature of institutions, as to whether they are better considered as e.g. open “agorae” (meeting places through which states participate in international relations), or as legally autonomous “actors” in their own right, or whether the legal order created is open to and forms part of international law, or subsists as a separate and purely internal legal regime.26

Unsurprisingly, then, much of the substantive law of international organizations tends to be understood (or problematised) by reference to a similar binary dynamic.27 Most obviously, debates surrounding international legal personality extend not only to the source of such personality – whether this status is a result of member state intent (the “subjective” or “will” theory), or whether it is a status “objectively” determined by international law on the basis of certain institutional facts28 – but also carry over to its effects in international law broadly, i.e. whether personality has any consequence beyond mere formal (but substantively empty) entitlements, or whether it materially results in certain defined competences in international law.29 Similarly, debates surrounding the extent of an organization’s powers can also be understood by reference to the binary, contrasting those stressing the attributed and/or strictly “implied” powers of an organization with those stressing “wider” conceptions of implied powers, or even “inherent” powers.30

25 See, inter alia, Niels M. Blokker, ‘International Organizations and their Members’ (2004) 1 International Organizations Law Review 139. This tension traces the problem of institutional autonomy clearly articulated by David Bederman, as to “how... an international organization “made” by states which have no superiors in international law, [can] be independent of the will of its members”. David J. Bederman ‘The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel’ (1996) 36:2 Virginia Journal of International Law 357.

26 This is best captured by the idea of the transparency of the “institutional veil”: see Brölmann (n 13); though see also more recently, the idea of “dual legality” propounded by Gasbarri (n 2).

27 See, extensively, discussion in d’Aspremont (n 14).


29 For an excellent discussion of these somewhat interminable discussions or debates, see Brölmann (n 13).

30 On the “inherent powers” theory, see in particular Chapter 5 of White (n 3). For a discussion of the merits of both approaches, see Jan Klabbers, An Introduction to International Organizations Law, 3rd Ed. (Cambridge University Press, Cambridge, 2016) 65–66.
More recently, the binary has manifest in debates around the legal responsibility of international organizations in international law. This is particularly the case in relation to the way in which the so-called “rules of the organization” – the terms of the constituent instrument and rules adopted by the organization itself – have been understood in this context. Are these, in effect, rules of international law or are they internal in the way that domestic law is closed off from the purview of international law? As has been widely described, and subjected to critique, in its work on the responsibility of international organizations the International Law Commission (ILC) does not take a fixed position on the status of the rules, and treats them somewhat differently in different contexts, including in relation to e.g. attribution, breach, obligations of reparation, or countermeasures. From one side, the ILC could be critiqued

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31 As defined under Article 2(b) of the International Law Commission’s Articles on the Responsibility of International Organizations, “rules of the organization” means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization.” This provision is not entirely novel for the ILC, which adopted a similar (though not quite as expansive definition) in the not-yet-in-force Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986).


33 Contrast Article 6 here, according to which the rules of the organization may be relevant, but are not definitive, as to the status of an organ or agent of the organization with regard to attribution of conduct, and thereby the member state can become an organ (or not) determined by rules internal to the organization, and Article 7, which suggests that states or the organizations may be determined as responsible on the factual criterion of “effective control”, and thereby the rules of the organization are treated essentially as international law. See further, Lorenzo Gasbarri, ‘The Dual Legality of the Rules of International Organizations’ (2017) 14 International Organizations Law Review 87–109, 112–113.

34 Under Article 11, a breach of the rules of an organization may sometimes constitute a breach of international law, though as noted explicitly in the commentary to the Article, the ILC explicitly do not take a “clear-cut” view on which rules form just internal versus international law in this regard. See ILC, Commentaries (n 4) 63, para 7.

35 Under Article 32 of the ARIO, stressing the “internal” nature of the rules of the organization, and mirroring the rules on the responsibility of states to some degree, an organization may not rely on compliance with its rules as a justification for a breach of rules of international law.

36 Under Article 52(2) of the ARIO, a member state can in theory take countermeasures against an organization for breach of an internal rule, which not only suggests that internal rules also constitute international law, but as Ahlborn suggests, is a “position that is not at all supported by practice.” See Ahlborn (n 32) 474.
for inconsistency, and therefore muddying the waters in an ongoing area of institutional uncertainty. However, from another, the ILC has been pragmatic in its approach, recognising that in some circumstances the rules of the organization are treated in one way, i.e. as internal law, underscoring the autonomy of the institution, whilst in other circumstances, they are treated as forming part of international law, thereby underscoring the transparency of the “institutional veil”.37

To utilise these kinds of examples to show how the conceptualisation of international organizations oscillates between irreconcilable binary oppositions is not, of course, particularly novel. In fact, much recent work in this area has sought to take a more “meta” perspective to highlight the intrinsic character of such binary thinking to the conceptual identity of international organizations in international law. For example, in the introductory chapter to the Research Handbook on the Law of International Organizations, Jan Klabbers explains how the field is essentially structured by two contending theoretical approaches, without being able to move entirely in either direction: functionalism, stressing the derived, open architecture of international institutions, versus constitutionalism, which stresses the autonomous will of the organization thus created as a separate actor in international law.38

More recently, Jean d'Aspremont has gone further, arguing that all of the many conceptual oppositions that have been deployed in the literature can be broadly classified together under an overarching contractual-v-constitutional dichotomy.39 As the law of international organizations, like the broader system of international law in which it sits, is in his view constituted by an apparent tension between these distinct images, he argues that any attempt to flatten out this tension one way or another will inevitably be counter-productive. On d'Aspremont’s terms – following reasoning familiar from critical approaches to international law – rather than resulting in contradiction, the oscillation between perspectives is what gives the field argumentative coherence.40

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37 For discussion see Gasbarri (n 33) 90–91.
39 D’Aspremont (n 14) 433–438. To a more limited extent, Clark relies on a similar overarching opposition, though more instrumentally, in Clark (n 11) 540–541. From a slightly different perspective, Gasbarri also argues that the ambiguous nature, or ‘dual legality’, of the rules of organizations, oscillating between internal law and international law, lies at the heart of the other dichotomies present in the law of international organizations. See Gasbarri (n 33) 91.
40 Ibid., 440.
These kinds of meta-theorisations might seem somewhat nihilistic, suggesting an unending oscillation or irresolvable tension that undermines any effort to speak of a coherent “law” of international organizations at all. However, the arguments are compelling. It seems impossible to move fully in either direction without also undermining an important aspect of institutional identity. As another recent commentator has claimed, the dual character of the institution is conceptually ingrained in the very identity of international organizations: the “inter-national” suggesting the primacy of the treaty agreement; “organization” suggesting the birth of a new, autonomous entity – but the terms of recognition of this autonomy are inevitably still dictated at the interstate level.41

Looked at another way, however, we might instead embrace this tension in an effort to better conceptualise what international organizations are – or at least how they operate – at a legal level. In this light, recent work by Lorenzo Gasbarri has sought to articulate exactly this kind of conceptual reconciliation. Reflecting the frustrations of definition and categorisation revealed in the introduction, rather than trying to fix on certain institutional elements, purposes, or other features to define international organizations or to conceptualise their legal nature, Gasbarri suggests that organizations are better defined by the nature of the legal order that they bring into existence. This order is characterised by its “dual legality”, wherein the rules of international organizations can be thought of both as internal law and international law at the same time, revealing their identity one way or the other depending on the particular issue at stake and/or perspective one takes – that is, when looking from within or outside the institution concerned.42 Whilst arguably the most thought-through attempt to conceptualise international organizations in this way, in developing his approach Gasbarri builds upon Catherine Brölmann’s earlier work which recognises the “transparency” of international institutions in this respect. For Brölmann, the “multi-dimensional” character of international organizations – being both open to yet closed off from international law – is difficult to reconcile with the seemingly “one-dimensional” character of the international legal order, which will formally seek to position these rules one way or the other. As she argues, “[T]he oscillation between the open [read: functional/contractual] and closed [read: autonomous/constitutional] image of international organizations, and the tension between the transparent nature of organizations and the one-dimensional set up of international law amount to a systemic condition.”43

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41 Clark (n 11) 537.
42 See generally, Gasbarri (n 2); Gasbarri (n 33).
43 Brölmann (n 13) 5–6.
By situating the tension in international law itself rather than anything particular to the form of international institutions, Brölmann’s core point is particularly compelling. It is the one-dimensionality of the international legal form which “flattens out” institutions one way or the other: either as open, treaty agreements between their constituent member states (which seems to threaten their autonomous existence as separate actors), or as separate legal persons, positioning them on the same conceptual plain as states (which still ignores the visibility and continued control of member states underneath the transparent institutional veil). Both alternatives reflect distinct legal realities, but both are incomplete pictures in coming to terms with the actual functioning and importance of international institutions in international law. Accordingly, if we remain on the plain of legal formality, Gasbarri’s characterisation of “dual legality” based on the relativity of perspective is convincing and informative. At the same time, however, the same logic forces us to look beyond legal form to better understand what institutions actually do, and with this – importantly – how they might also, in turn, impact the very structure and functioning of international law itself. I will deal with both points in turn in the two remaining sections. My purpose in doing so is not to contest the importance of legal form per se – a point to which I will return in Section 4 – but rather to suggest that moving beyond the binary sets up another, more ingrained tension between the progressive possibilities of functional ambition and the structuring restraints of legal form.

3 Escaping the Binary: Function over Legal Form in the Constitutional Development of International Institutions

In the previous section I have sought to show how attempts to come to terms with both the legal nature and functioning of international institutions have tended to result in the construction of irreconcilable binary oppositions: broadly, between contractual-functionalist and autonomous-constitutionalist images of international institutions. As we saw, international lawyers have become increasingly (self-)aware of the inescapability of this binary in theorising international institutions and the importance of either perspective in the construction of persuasive legal reasoning on their functioning in practice. Indeed, as I intimated towards the end of the section, if one attempts to definitively position international institutions on the one-dimensional plain of international legal form then such oscillation between opposing images – between open treaty structure and autonomous legal person – seems inescapable.
At the same time, however, it is clear that much of the constitutional development of international organizations has occurred with a certain disregard for the strictures of legal form, following a more functional – or better, pragmatic – rather than purely formal logic. Klabbers is right to suggest in this respect that functionalism has dominated as a theory of international institutions since their emergence, but rather than offering a theoretically coherent grounding in the treaty agreement between member states, this position has tended to offer more pragmatic, consequentialist logic to square the circle of the binary tensions outlined above.\textsuperscript{44} It is true of course that early reflections on institutions – for instance, the Public International Unions (PIUs), river commissions, and other kinds of bureaucratic structures emerging in the nineteenth century – struggled to look beyond the treaty form to understand what was created in practice,\textsuperscript{45} but for those who sought to take a more systemic perspective on these developments, it was argued that these institutions represented in effect the development of an “international administrative law”, seemingly with the potential to transform the international system itself.\textsuperscript{46}

By the interbellum period the inadequacy of explaining international institutions through the treaty form alone was increasingly apparent. On one level, of course, scholarly opinion began to fix on the question of whether their apparent autonomy amounted to the formal status of international legal personhood.\textsuperscript{47} However, much of the argument that the League could be thought of as a legal person stemmed less from its formal legal source as such, or indeed a broader consideration of the nature of international institutions \textit{per se}, and more from the specific and special – indeed, \textit{sui generis} – functions and powers ascribed to that institution.\textsuperscript{48} Some interbellum jurists did speculate, more

\begin{thebibliography}{9}
\bibitem{45} In general, see discussion Brölmann (n 13) 44–48. See also the debate between Fusinato and Anzilotti from 1914 recounted in Gasbarri (n 2) as well as the opinions of Marchegiano on the Cape Spartel Lighthouse Commission from 1931 discussed extensively in Bederman (n 25) 341 \textit{et seq}. Whilst some scholars were willing to identify a degree of institutional autonomy such that it was possible to talk of the discrete personhood of certain institutions, this was a derivative personality that arose from the intention of the founding states.
\bibitem{46} See e.g., Pierre Kazansky, ‘Théorie de l’administration internationale’ (1902) IX Revue Générale de Droit International Public p. 366, and particularly Paul S. Reinsch, ‘International Administrative Law and National Sovereignty’ (1909) 31 The American Journal of International Law p. 18, who described such administrative developments as contributing to a ‘the feeling of a common humanity’ which through further integration would necessarily lead to more peaceful relations between states.
\bibitem{47} See generally, Brölmann (n 13) 56–64.
\bibitem{48} Bederman (n 25) 348–349.
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broadly, that there was something intrinsically different about the constituent instruments of international organizations, but this difference stemmed from what these treaties did, nor what they were in legal form. Consider, for instance, the remarks of James Brierly in one of the leading texts of the time, who is quite explicit in this respect:

[T]here is something artificial in saying, even if it strictly true in theory, that such important institutions of international life as the Postal and Telegraphic Unions... or the Permanent Court of International Justice, or the League of Nations with its multifarious activities, are nothing but contractual arrangements between states. It is right that we should look behind the form of these treaties to their substantial effect.49

Only by distinguishing function from legal form, was Brierly able to support his more “constitutional” reading of these institutions. This was a common move amongst interbellum jurists, particularly in reflections on the League Covenant, with many stressing its *sui generis* character compared to other multilateral treaties.50 Such distinctions highlighted the difficulties many jurists faced in reconciling the apparent constitutional ambition underlying the creation of organizations with the treaty form embedded within the decentralised institutional architecture of international law overall.51 For instance, in his pioneering work on the law of treaties, Arnold McNair argued that the treaty was “the only instrument available for doing many of the things which an individual state would do by means of its legislature”.52 Accordingly, if the international community wished to “enact a fundamental, organic, constitutional law, such as the Covenant of the League of Nations was intended to be and in large measure is in fact, it employs the treaty”.53 McNair’s former pupil, Hersch Lauterpacht sought to take this argument further, reconciling that the

51 For an excellent discussion of the difficulties of coming to terms with the independent identity of international organizations from the interwar years onwards – particularly contrasting more formalist continental readings with the pragmatism of Anglo-American approaches – see Bederman (n 25) 333–349.
53 McNair (n 21) 101.
“contractual” form of the League Covenant was overshadowed by what it created in practice.\textsuperscript{54} This was a point made tentatively already in 1920 by Lassa Oppenheim in what was to become one of the standard international law texts in the Anglo-American world:\textsuperscript{55}

“[T]he League [of Nations] appears to be a league absolutely \textit{sui generis}, a union of a kind which has never before been in existence; and its constitutional organs as well as its functions are likewise of an unprecedented kind. \textit{The Covenant of the League is an attempt to organise the hitherto unorganised community of states by a written constitution.”}\textsuperscript{56}

At the same time, of course, it is true that in the few cases in which it was called upon to resolve “constitutional” issues impacting international organizations, the Permanent Court of International Justice (PCIJ) tended to resist this kind of \textit{sui generis} reasoning throughout the interbellum period. To the extent that the Court sought to resolve questions in favour of organizations’ constitutional development, especially in its consideration of the International Labour Organization (ILO), for which it recognised certain implied powers,\textsuperscript{57} it tended to do so strictly by reference to state agreement as reflected in the treaty text.\textsuperscript{58} It was not until the postwar period, where the PCIJ’s successor, the International Court of Justice (ICJ), had chance to consider the nature of the the United Nations (UN) that the international judiciary began to take more seriously the idea that there was something “special” about the treaties which create international organizations. In this respect, the significance of the 1949 \textit{Reparations} Advisory Opinion cannot be underestimated,\textsuperscript{59} both for the development of the law of international organizations and the recognition

\textsuperscript{54} See Lauterpacht (n 21) 54–65.
\textsuperscript{55} In fact, McNair (third and fourth editions) and later Lauterpacht (fifth to eighth editions) took over the editorship of a number of posthumous editions of Oppenheim’s text.
\textsuperscript{57} \textit{Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer}, 23 July 1926, Permanent Court of International Justice, Advisory Opinion, 1926 PCIJ Rep. Series B No. 13, 23. Though, the Court considered constitutional problems for a number of other institutions also, including e.g., the European Commission of the Danube, in \textit{Jurisdiction of the European Commission of the Danube Between Galatz and Braila}, 8 December 1928, Permanent Court of International Justice, Advisory Opinion, 1927 PCIJ Rep. Series B No 14, 64.
\textsuperscript{58} See e.g., discussion in Klabbers (n 44) 294–298; or more recently and briefly in Clark (n 11) 542–544.
of the possibility of a discrete legal personality for non-state actors in international law.60 Not only did the ICJ recognise the UN’s legal personality, but in doing to it also built upon and further concretised the principle of implied powers that was first recognised by the PCIJ (above).61 What is most striking about the case, however, is the rather pragmatic, indeed quite eclectic way in which the Court buttresses this view.62

On one level, the reasoning of the ICJ seems broadly consonant with the earlier cases of the PCIJ, rooted in the terms of the treaty agreement itself and member state intent – stressing that the members have “clothed” the organization with the requisite competences and capacities, making it feasible to suggest that it was intended to possess international legal personality.63 At the same time, the Court stressed that this personality was “objective”, in the sense of being opposable to non-member states (including Israel in this case), and seemed to support this view by acknowledging the special nature of the UN in international relations, before again seeking to further reinforce this special character by reference to what was intentionally enacted through legal form:

In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its members by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.64

What is clear, then, is that in moving from subjective intent to objective personality in international law generally, the ICJ needed to move away from the formal plain of treaty law and rely on the much looser sense of the needs of

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60 See Bederman (n 25) 279.
61 Reparations (n 59) 182−183, referencing the Competence of the ILO Advisory Opinion, (n 57).
63 Reparations (n 59) 178−179.
64 Ibid., 179 (emphasis added).
the international community overall, which was seemingly represented by the special – indeed, “supreme” – nature of the UN at the time. Due to this special character, the UN’s personality is thus deemed to be objectively bestowed and valid *erga omnes*, suggesting that the founding states were not only providing for internal rules of the organization valid between its members, but somehow acting in a quasi-legislative capacity to enact a fundamental change to the international system overall. As it concluded, “fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims.”

It was only by introducing these less tangible elements of community need and the special status of the institution that the Court was able to make the move from member intent (within the treaty framework) to objective personality valid *erga omnes*. From a formal point of view, this is of course extremely question begging: if member states can subjectively enact an objective legal personality in this way, what are the criteria under international law for the emergence of an organization with objective personality? What might – on the ICJ’s own terms – be the “majority” threshold by which third states are obliged to recognise the objective existence of the United Nations as a legal person in international law?

I do not pose these questions to offer up answers, of course, but more to show how from a formal perspective the case is inconclusive and question-begging. It seems to support, at least in part, both “subjective” (will-based) and “objective” (criteria-based) theories of international legal personality, whilst showing the difficulties of adequately reconciling each view, thus returning us to the binary countenanced in the last section. Each perspective seems to offer equally plausible rebuttals to the other: that international legal personality can only really be a legal status determined by criteria of general international law, rather than the intent of certain states; yet, within the international legal system there are no clear-cut criteria, but at best rather loose indicators of autonomy and the practices of recognition of states and other institutions in accepting or not the existence of an autonomous legal person.

It is no surprise that the best authors have been able to do is to suggest that these theories can be combined or circumvented through largely pragmatic reconciliation. Indeed, since *Reparations* it seems that international law has

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65 Ibid., 185 (emphasis added).
66 See White (n 59) 44–45; Gazzini (n 28) 197. See also Klabbers’s take on “presumptive personality” in Klabbers (n 30) 49.
embraced the possibility of international legal personality for a range of non-state actors, but at the same time has done so through an *increasingly functional rather than formal* process of designation.\textsuperscript{67} This form-function distinction, or better *dislocation*, remains central to efforts to secure the constitutional development and autonomous existence of international organizations. In fact, it has been explicitly acknowledged by the ICJ in its 1996 *WHO Advisory Opinion*:

> From a formal standpoint, the constituent instruments of international organizations are multilateral treaties, to which the well-established rules of treaty interpretation apply... But the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals.\textsuperscript{68}

On this basis, then, legal form becomes less relevant than institutional intent and purpose. As Bederman notes, whilst the functional autonomy of institutions like the UN can find formal expression solely in terms of legal personality, the pragmatic reconciliation of the Court in this respect recognises the reality that for the states that use these institutions they exist more as ‘communities’ of interest.\textsuperscript{69} This subordination of legal form to presumed function or constitutional ambition has a number of impacts. The first of these impacts, as the analysis in the introduction revealed, is that the clearer the unique or special circumstances of the institution the more difficult it becomes to sustain generalised conclusions to support objective determinations of e.g. personality, powers, and so on. The irony, in this respect, as the examples of the EU and the UN revealed, is that the stress on unique institutional features ends up sustaining starkly opposed legal images of the institutions concerned: in the EU’s case, closing it off from international law almost entirely; in the UN’s case, making its unique institutional features difficult to disentangle from the broader international legal order.

\textsuperscript{67} Bederman (n 25) 279. This functional approach seems to have won out as the dominant approach to legal personality for non-state actors. This is the approach adopted explicitly by the International Law Association in its work on the topic. See ILA, First Report of the Committee on Non State Actors in International Law, Hague Conference 2010, 4–5, <https://www.ila-hq.org/en_GB/documents/conference-report-rio-de-janeiro-2008–14>, 20 December 2022; and see further, Math Noortmann, ‘The International Law Association and non-state actors: Professional network, public interest group or epistemic community?’ in D’Aspremont (n 62) 233–247.

\textsuperscript{68} *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 8 July 1996, International Court of Justice, Advisory Opinion, para. 19.

\textsuperscript{69} Bederman (n 25) 371.
The example of the UN, however, suggests a second impact or consequence of this trend. The preceding remarks have sought to show how the multi-dimensionality of international institutions can be accommodated within international law’s one-dimensional legal form only by dislocating function from legal form. However, whilst in the case of the EU this dislocation can be used to close off the institution and distinguish it from the international level order, in the case of the UN, such dislocation seemingly allows the institution to impact, even fundamentally transform the workings of the broader international system. As I will show in the following section, it is precisely the transparency of the “institutional veil” which allows the dimensionality effected through the institutional framework to spill-over to and transform contemporary practices of international law – albeit in a starkly informal (or deformalised) way. However, this transformative potential also reveals a further consequence of this form-function dislocation, as any such expressions of institutionalised hierarchy remain always contingent, revisable and contestable, providing – as I will also show – an important curtailing or controlling factor over purported expressions of institutionalised authority.

4 Form over Function? International Organizations and the (Tentative) Transformation of International Law

The previous section has sought to show that the only way out of the seemingly intractable oscillation between opposing images of international institutions is to stress function over legal form. Utilising the example of legal personality, to move outside of the sanctity of the treaty agreement (from one legal form... into the objective fact of personhood valid *erga omnes* (... to another), required the introduction of purely functional as opposed to formal considerations. This squaring of the circle as an argumentative trend is, of course, familiar in international legal argument, as Koskenniemi’s binary oscillation between “apology” and “utopia” has shown. In fact, that the somewhat arid, frustrating debate between subjective and objective views of international legal personality traces to some degree the dynamics of the equally interminable opposition between so-called “declaratory” and “constitutive” theories of state recognition is precisely because the duality upon which it is structured is not something intrinsic to organizations’ particular institutional form, but rather the nature of the international legal system in which such form is situated and takes on meaning. As with debates on legal personality, the only meaningful way out of the

70 Koskenniemi (n 15).
oscillation between equally plausible views on state recognition seems to be a functional, pragmatic reconciliation.\footnote{See e.g., discussion in Matthew Craven and Rose Parfitt, ‘Statehood, Self-Determination, and Recognition’ in M. Evans (ed.), International Law, 5th Ed. (Oxford University Press, Oxford, 2018) 204–208.}

I mention both of these by-now-somewhat-sterile debates not, of course, to offer a reconciliation of either but to: first, recognise – as is by now evident – that the dichotomous tension between institutional images is an irresolvable condition that manifests from the attempt to reconcile international organizations against the one-dimensional legal form of international law; and second, to suggest, more crucially for current purposes, that the formal perspective only provides a partial picture of the workings of international institutions in international law. In fact, the example of state recognition is particularly pertinent in this light, because it is precisely the increasingly institutionalised frameworks of international governance that seem to play a decisive role now in determining the recognition of states in practice. In his recent and impressive study on the topic, Guy Fiti Sinclair has provided a compelling account of the intrinsic interrelation between the practices of global institutions such as the UN and the broader workings of the international legal system in this regard.\footnote{See generally Guy Fiti Sinclair, To Reform the World: International Organizations and the Making of Modern States (Oxford University Press, Oxford, 2017).}

This transformative, yet deeply functional, image of international institutions provides a counterpoint to the oscillation that comes from fixation on legal forms. Indeed, the “dual” character of international institutions is often traced to the coming together of two institutional trends from the nineteenth century: the emergence of recurring multilateral conference diplomacy across Europe (the \textit{internationalisation} of what was previously thought of as the “law of nations”), and the emergence of an administrative bureaucracy through the creation of the \textit{pius} (the move to institutions). However, there is a third shift in international organization that is often overlooked in this neat binary: the efforts of European “great powers” at the time to effect hierarchy in international governance through a kind of hegemonic alliance between them.\footnote{See, \textit{inter alia}, Claude Jr. (n 50) 38–39; Klabbers (n 44) 291–292; Brölmann (n 13) 14–17.} From the time of the emergence of the nineteenth century administrative unions, with contemporaneous reflections on the emergence of a tentative “international administrative law”, international lawyers saw the transformative potential of international organizations in reshaping the workings of the decentralised international legal order.\footnote{See e.g., Kazansky (n 46); Reinsch (n 46).} As noted by Bederman, some of the more fantastical readings of these developments saw the rudiments of a federal organization of
the international system, or emergence of a proto-world government, an idea that was also extended to the work of the Hague Conferences of 1899 and 1907. Even an avowed legal positivist such as Oppenheim read these developments as instigating a transformation in the character of international law-making, with his tentative recognition of the phenomenon of ‘international legislation’ brought about through institutional innovation.

As we also saw in the previous section, these kinds of readings carried over into interbellum discussions of the League of Nations and associated institutions. It was only by looking behind the legal form of the institution to its overall impact on the workings of international law – to stress the *sui generis* character of the League Covenant, or indeed of constituent instruments generally compared to other treaties – that jurists were able to sustain this federalising, or constitutional imagery. Indeed, the form-function dislocation highlighted the difficulties many jurists faced in reconciling the somewhat revolutionary ambition of organizations like the League with the treaty form, as well as the decentralised institutional architecture of international law in which that form takes on binding effect.

Although the outbreak of the Second World War may have dented some of the more ambitious perceptions of the League and its revolutionary potential, and although explicit constitutional imagery (at least in the sense of world government) has been less visible in reflections on the UN, it is undeniable that the more ambitious post-war institutions have fundamentally transformed

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76 Bederman (n 25) 337–340.
79 *See e.g.*, Klabbers (n 44) 291–294; Bröllmann, (n 13) 56–57; White (n 50) 14–15.
80 For an excellent discussion of the difficulties of coming to terms with the independent identity of international organizations from the interwar years onwards – particularly contrasting more formalist continental readings with the pragmatism of Anglo-American approaches – *see* Bederman (n 25) 333–349.
81 Though such a reading certainly has not been absent. *See* especially Alfred Verdross and Bruno Simma, *Universelles Völkerrecht: Theorie und Praxis*, 3rd Ed. (Duncker & Humblot, Berlin, 1984); Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* Vol. 51 (Martinus Nijhoff, Leiden, 2009), especially the works he surveys at pp. 27–51.
the workings of modern international law at a quite profound level. For the UN in particular, the institution and its organs, including the ICJ positioned as the “World Court”, are seen to fulfil functions not just at the institutional, but global level: witness especially claims that the Security Council acts in an executive (as well as quasi-legislative) capacity, or consider the contributions of the General Assembly to the international “legislative” process, especially around the creation of customary international law.82

Of course, from a purely formal view, as critics such as Gaetano Arangio-Ruiz have pointed out, these kinds of readings make little sense, being fundamentally at odds with the nature of the international system as a horizontal or decentralised legal order.83 However, this has not stopped generations of jurists prioritising constitutional ambition over legal form to understand the complex workings of an increasingly institutionalised international system. As I have had cause to note at length elsewhere, at times, this functionalist-internationalist agenda has been quite subtle in influence – for example, in the post-war direction of Lauterpacht’s work84 – but others, especially disciplinary giants such as Jessup,85 or Jenks,86 – have more readily embraced this kind of pragmatic internationalist agenda at the expense of legal formalism.87


83 See Gaetano Arangio-Ruiz, The UN Declaration on Friendly Relations and the System of the Sources of International Law (Sijthoff & Noordhoff, Alphen aan den Rijn, 1979), especially the ‘Appendix on the Concept of International Law and the Theory of International Organization’ 199–301.

84 Contrast the tone and tenor of Hersch Lauterpacht, The Development of International Law by the International Court (Stevens & Sons, London, 1958), with his earlier more theoretical works (canvassed above in Chapter Two), for example. For discussion, see Martti Koskenniemi, ‘Lauterpacht: The Victorian Tradition in International Law’ (1997) 8 European Journal of International Law 255–263.


86 See especially the functional orientation of Wilfred C. Jenks, ‘Craftsmanship in International Law’ (1956) 50:1 The American Journal of International Law 32–60, https://doi.org/10.2307/2194584, and developed at length in Wilfred, V. Jenks, The Common Law of Mankind (Stevens & Sons, London, 1958). Whilst in the latter Jenks claims that international law now possessed formal universality as a result of the creation of the UN (at 77–79), he constantly stresses that a more pragmatic, functionalist method is required of the international lawyer, particularly in perceiving the effects of international organization on the law (e.g., 173–207).

To the extent that this image of international institutions prevails, then, it is difficult to see international organizations’ autonomy as adequately expressed in either image of the binary: that the United Nations is both an international legal person (actor) and a meeting place for the conduct of international relations (agora) tells us very little about the extent of its powers or what it actually does in practice. At the same time, recognising that the institution takes on the “dual” legal form of being both a legal person, acting on the same formal plain as states, and a creature of treaty, thereby subordinated to those states, does reveal an important tension which allows us to better come to terms with the nature of the transformation of the international system brought about by the turn to institutions. In this sense, legal form may be subordinated to function in facilitating the constitutional development of the international organization (and with it, in some cases at least, the potential transformation of international law), but to the extent that one wants to secure some measure of accountability or institutional responsibility one can see the continued relevance of legal form as a check on constitutional ambition in a decentralised legal order.

This point works at the highest level of principle – to recognise the contingency of claims to authority and thereby to challenge assertions, acts or claims made by particular institutions on behalf of the international community as a whole – but it also has more practical ramifications too. To explain more clearly, to recognise the independent legal personality of an international organization is also to recognise, at least in principle, that the organization is not above states but sits alongside them as one actor amongst many in the flat plain of the international legal system. It thereby also recognises that such institutions can commit internationally wrongful acts and, as such, be held legally responsible for their actions or omissions. At the same time, one cannot deny the practical difficulties of holding international organizations legally responsible as independent legal persons. Not only are the absence of available international courts or other judicial fora with jurisdiction and the impact of institutional privileges and immunities distinct limitations to direct legal accountability, but so also, often, is the paucity or inadequacy of internal mechanisms of institutional restraint or accountability, especially to the wider global public. In such circumstances, it is precisely the continued visibility of states through the institutional veil that offers up an alternative means of securing accountability for wrongful acts and seeking redress in practice. The tenacious, indeed forensic efforts by families of victims of the Srebrenica massacre to secure legal redress before the Dutch judiciary bears stark witness to
this conclusion. In this regard, the duality or binary that, as we have seen, has frustrated our formal analyses of international institutions, that is, our failure to fully make sense of the institutional form within international law, might well be one of the most critical features of international institutions, especially in coming to terms with their seemingly contingent and questionable authority claims in an era of global governance.

5 Conclusion

The foregoing remarks have sought to highlight not just the prevalence and inevitability of binary oppositions in theorising international organizations in international law, but also how the efforts to push beyond conceptual frustration has necessitated a certain dislocation of function from legal form. In this way, one might conclude that to move past the resulting binary oscillations – that institutions are neither fully contractual nor constitutional, neither entirely open to nor closed off from international law, and so on – comes at the price of effecting another tension between legal form and functional ambition. At the same time, I have sought to show how this form-function dislocation (and resulting tension) has two important effects in coming to terms with the impact of international institutions on international law more broadly, which often go overlooked: on the one hand, it has facilitated the transformation of the international legal order such that it is impossible to disentangle the workings of international law from the practices of contemporary global institutions; on the other, it stresses the contingency, revisability, and contestability of institutional actions on behalf of global interests and thereby offers up a limited, but still meaningful form of accountability in checking purported exercises of institutional authority in practice.

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