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Towards a Political Economy of International Organizations Law

*Jan Klabbers**
Professor of International Law, University of Helsinki, Helsinki, Finland
jan.klabbers@helsinki.fi

Abstract

This article is part of the Special Forum on Contested Fundamentals of the Law of International Organizations. It endorses a possible political economy of international organizations law, and explains why such would be desirable. The dominant approach to international organizations is unable to explain much of what is going on, and thus needs to be replaced by an approach more sensitive to the economic and organizational aspects of international organizations.

Keywords

International organizations – political economy – law – re-distribution – re-allocation – private sector

1 Introduction*

International organizations have always been conceived and portrayed as representing the best of both worlds. These creatures represent cooperation between states (a good thing by its very nature, so the argument goes) but without costing much, whether in financial terms or in terms of loss of sovereignty—and this too is always seen as a good thing, helping to seduce states

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into creating international organizations or joining them. The *pater familias* of the discipline, Paul Reinsch, made this perfectly clear in a lecture to the Milwaukee Banker's Club at the start of the twentieth century.[1] When explaining the benefits of US participation in the Pan American Union, he suggested this would deliver much the same benefits to the US as military occupation of Latin America would deliver, but at far lower costs. And the win-win argument functions much like a general theme in his later book *Public International Unions*: international organizations deliver goods at little or no cost.[2] Hence, it should be obvious to anyone concerned that joining them would only be beneficial.

Alas, if only things were that simple. The way Reinsch conceived of international organizations and international organizations law has proved hugely influential—today's standard treatise, Schermers and Blokker's *International Institutional Law*, has its intellectual roots firmly in the Reinschian tradition, and the same applies to two other leading treatises in English: the classic by Bowett, also in its updated editions, and the treatise by Amerasinghe.[3]

And yet, international organizations habitually attract a lot of flak, which would be inexplicable if they really represented the best of both worlds: achieving the common good at little cost. There are often complaints, albeit usually grossly exaggerated, about international organizations intervening in domestic affairs—but even if those claims are exaggerated, it seems international organizations do not always make everyone happy. There are complaints about 'abdicating sovereignty', again grossly exaggerated[4] and often done by politicians looking for a scapegoat; former UN Secretary-General Kofi Annan once quipped that the abbreviation of his function (SG) was short for 'scapegoat', and it is easy to see he had a point.[5] There are complaints, Reinsch notwithstanding, about the costs of membership and the low levels of efficiency,

1 See also Jan Klabbers, 'The Emergence of Functionalism in International Institutional Law: Colonial Inspirations' (2014) 25 *European Journal of International Law* 645—675.

2 Paul Reinsch, *Public International Unions, their Work and Organization: A Study in International Administrative Law* (Ginn & Co., 1911).

3 Henry G Schermers and Niels M Blokker, *International Institutional Law: Unity Within Diversity* (Brill Nijhoff, 6th ed, 2018); Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (Sweet & Maxwell, 5th ed, 2001); CF Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press, 2nd ed, 2005).

4 Sometimes, however, given pride of place in theorising about international organizations. Hooghe, Lenz and Marks, e.g., conceptualise international organizations as embedded in a tension between function and community, the latter signifying something like the idea of sovereignty and its possible abdication. See Liesbeth Hooghe, Tobias Lenz and Gary Marks, *A Theory of International Organization* (Oxford University Press, 2019).

5 Kofi Annan with Nader Mousavizadeh, *Interventions: A Life in War and Peace* (Penguin Press, 2012) 139.

never mind the contradiction involved with the gripe about intervention (after all, an inefficient organization cannot be expected to intervene to any serious extent).[6] And there are complaints about international organizations doing too little, sometimes justified (Rwanda provides a grim reminder),[7] but often also overblown, so much so that some international organizations feel the need publicly to spell out that not too much should be expected of them.[8]

The upshot is, or should be, that if a set of propositions about something in the world clearly does not correspond to anything observable in the world, no matter which observational tools are used, then perhaps it is time to wonder whether those propositions are tenable. I have argued elsewhere that this is not the case as far as international organizations law is concerned: its underlying framework, often referred to as functionalism, has little explanatory value, and is much better understood as ideology.[9] Functionalism, developed around the idea that no world exists outside the relation between the organization and its member states, cannot explain why relations between organs of international organizations are what they are; it cannot account for public/private partnerships, or even for co-financing by private companies; it has nothing to contribute to discussions on the accountability of international organizations towards third parties. And it cannot answer to any kind of critique of international organizations.

In what follows, I will suggest that a different way is needed to look at international organizations law, in order to do justice to the circumstance that international organizations are, to some extent, autonomous operators in global governance—independent from their member states, and interacting with actors other than their member states. I will argue in favour of an approach that is rooted in a political economy of international organizations law, and will provide a preliminary exploration of what this entails. International

6 Things are a bit more complicated, in that observers are prone to change their perspectives on organizations as they see fit: there is a constant oscillation between the organization as debating club (I have elsewhere called this the *agora* function of international organizations) and as goal-oriented agency (the managerial approach). See Jan Klabbers, 'Two Concepts of International Organizations' (2005) 2 *International Organizations Law Review* 277–293.

7 Jan Klabbers, 'Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act' (2017) 28 *European Journal of International Law* 1133–1161.

8 The website of the International Civil Aviation Organization (ICAO) aims to dispel any doubts by pointing out ICAO is not a global regulator. (Web Page, 5 November 2022) <https://www.icao.int/about-icao/Pages/default.aspx>.

9 See, e.g., Jan Klabbers, 'What Role for International Organizations in the Promotion of Community Interests? Reflections on the Ideology of Functionalism' in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press, 2018) 86–100.

organizations engage in political decision-making, and therewith help to reallocate values, financial and otherwise not just amongst their member states, but more broadly. Section II will provide some examples of this re-distributive role. Section III will sketch the beginnings of a political economy of international organizations law, while Section IV will discuss in greater detail what this entails for the law of international organizations in more concrete terms. Section V concludes.

2 Examples

In 2018, US President Trump shocked the world of international law (not for the first time) by announcing that the US was going to withdraw from the classic, venerable Universal Postal Union (UPU). Those who noted this were initially surprised: why on earth would anyone wish to withdraw from the UPU, which does nothing more spectacular than regulate postal relations? This serves a nice purpose and is generally helpful to commerce, in that it prevents postal routes and rates from being hugely diversified, but hardly seems the stuff of great political drama.[10] One can imagine, perhaps, that a state may wish to escape from the possibility of control exercised by an entity such as the International Atomic Energy Agency or the Organization for the Prohibition of Chemical Weapons, but UPU? Really? Yes, really. The US administration had realised that the postal rates set by UPU, the so-called 'terminal dues', worked more to the advantage of operators in China than in the US. Colloquially put: it seemed more expensive to ship a parcel from Seattle to San Francisco than to ship the same parcel from Shanghai to San Francisco; and this was not good for US business. The dues were based not so much on real costs as on political considerations, with rich states treated less favourably than poorer states, and US operators clearly suffered from this differentiated treatment. Hence the American announcement to withdraw. In response, the UPU organised an extraordinary conference in late 2019, where the terminal dues were renegotiated along the lines of American desires, and the Trump administration could subsequently announce that it was not going to withdraw after all.

The episode is suggestive of a few important things. First, it would be analytically unhelpful to cast this merely as an episode affecting the interests of

10 Hobsbawm may have gotten the name (International Postal Union) and the year of creation (1869) wrong, but he did grasp UPU's relevance, highlighting the commercial relevance of speedy postal communication. For the record, UPU was established in 1874, originally as General Postal Union. See Eric Hobsbawm, *The Age of Capital 1848–1875* (Abacus, 1975) 239.

the US as a state, in its own right. Admittedly, it was fought out between states, but clearly, those states were acting on behalf of local operators: delivery companies, online companies depending on parcels being shipped at low costs, *et cetera*. Clearly also, at the end of the day some won, some lost. The episode had, moreover, nothing whatsoever to do with ensuring the global good, bringing universal peace, or anything of the sort. This was an economic struggle for financial gain, which happened to be fought out within the arena of an international organization, but while the organizational arena was important and the organization's rules helped shape the outcome, this owed nothing to traditional ideas of international organizations as harbingers of universal peace, or turning swords into plowshares.[11]

Far from being exceptional, the UPU episode is what usually happens: international organizations are arenas in which economic and political battles are conducted, usually via or through the representative media of member states, but without being reducible in any plausible manner to disputes between states. Behind the member states, so to speak, there lurk other interests. This is visible wherever one starts to look for it. It is visible for instance in the decisions taken by the United Nations Educational, Scientific and Cultural Organization (UNESCO) concerning placement on the World Heritage list: this form of recognition ignites tourism, and thus affects someone's economic interests. Project developers, hotels and resorts, tour operators and others are keen to get certain items on the list, and a decision not to include a site on the list can have serious financial consequences. It is likewise visible in the International Telecommunications Union's decisions on distributing bandwidths: there is much money at stake in telecommunications, and bandwidths are scarce goods, for which demand outstrips supply. In addition, the ITU develops all sorts of policies which engender distributive effects, as many international organizations do. On a smaller scale, it is visible in as unorthodox an organization as the European University Institute: it hires some individuals as professors but not others, and it accepts doctoral students through competitive processes: some get in, others do not—and those who are accepted can be seen as winners, as they embark *ex hypothesi* on a fine professional career. It is pointless, and downright silly, to claim that a decision to accept a German PhD student over a French candidate somehow pits Germany and France against each other, or that appointing a Dutch professor over a Danish colleague somehow means that Holland wins and Denmark loses. Instead, those individuals win and lose, in a very, very real sense. And the distributive effect

11 This refers to the classic college textbook by Inis L Claude, *Swords into Plowshares: The Problems and Progress of International Organizations* (Random House, 2nd ed, 1959).

of decisions became hugely visible on the outbreak of COVID-19: the entire global economy suffered, although some industries (food delivery services, e.g.) blossomed, while others (restaurants e.g., some airlines) ended up in deep financial troubles.

In other words, whatever international organizations do or do not do, it tends to come with costs and benefits, and those are usually—and naturally—unevenly distributed. The decision by the World Health Organization (WHO) to adopt a formal recommendation against the use of breastmilk substitutes in the early 1980s proved problematic: it threatened to harm the interests of producers of such substitutes, none more vocally perhaps than Nestlé,[12] even in watered-down form as a non-binding recommendation. And its decision to try and regulate tobacco advertising in the form of a Framework Convention two decades later met with great resistance and intense lobbying efforts from the tobacco industry.

Often, as in the examples listed above, the costs and benefits are immediately recognisable as economic in nature. Sometimes, however, they are more intangible. One of the reasons why states, whenever they gain independence, wish to join the United Nations resides in the circumstance that joining the UN comes as close as possible to being recognised by the global community—and recognition too is a scarce good.[13] By the same token, entities whose statehood is not universally recognised wish to join other organizations whenever possible: Palestine joining UNESCO was seen as a political victory for Palestine, and thus something the US and Israel felt the need to respond to: they withdrew from UNESCO in 2017. Kosovo too has been actively joining some organizations, ranging from the International Monetary Fund and World Bank to the Permanent Court of Arbitration (PCA) and the World Customs Organization (WCO). The benefits here are, again, recognition, standing, and prestige, quite apart from the economic benefits that may also follow: joining the PCA is expected to stimulate foreign direct investment, signaling to investors that any possible disputes may be settled by arbitration. And joining the WCO provides for participation in at least part of the global trading order, with all the economic benefits this is expected to bring.

Either way, the point to recognise is that states establish international organizations or join them not so much out of idealism or because the organization is supposed to achieve a worthwhile goal (although this will sometimes also happen), let alone a particular public good, but mostly simply because international organizations are venues for politics where costs and benefits

12 Yves Beigbeder, *The World Health Organization* (Martinus Nijhoff Publishers, 1998).

13 John Dugard, *Recognition and the United Nations* (Grotius, 1987).

get allocated and re-allocated. States may act this way in response to domestic pressure groups, or because the leadership understands that access to a political arena may well turn out to be beneficial. It is worth remembering that the first moves to achieve international copyright protection, something nowadays associated mostly with the World Intellectual Property Organization (WIPO), were initiated by authors like Victor Hugo, who realised that his work was reproduced in various ways (including translation) without him receiving a penny for it. Hugo, President of the *Association Littéraire et Artistique Internationale* (ALAI), was typically paid a single fee for any piece of writing, after which other authors, publishers and translators could copy, publish, and exploit it, with pirated copies circulating widely. The same with musical compositions: the composer would receive a single fee, after which others (ranging from those who transcribed it to publishing houses) would make profits.[14] It was this sentiment that resulted in the 1886 Berne Convention, pushed just a little by Victor Hugo's ALAI.[15] The Berne Convention is now subsumed within WIPO.

And to round off this illustrative *tour d'horizon*, even the Trump administration, with Trump typically characterised as the 'gravedigger of international law' for his perceived anti-internationalism and anti-multilateralist outlook,[16] nonetheless saw fit to join one international organization, and made overtures to joining another one. The latter was the UN World Tourism Organization, which the US in the end did not join but the economic relevance of which is much more obvious than any other merits it may have (global tourism is less obviously a global public good than, say, global health, or disarmament). The one international organization the US did actually join during Trump's reign was the *Bureau International des Expositions* (BIE), a Paris-based international organization responsible for organising the ostensibly non-commercial global expositions.[17] The global expos are, nonetheless, thought to be of great economic relevance, putting the organising city in the global spotlight and in their wake boosting the local hospitality industry. The US rejoined (it had earlier been a member between 1968 and 2001) in 2017, with a view to securing

14 See generally Orlando Figes, *The Europeans: Three Lives and the Making of a Cosmopolitan Culture* (Penguin Books, 2019).

15 Catherine Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (Cambridge University Press, 2006) 56–65.

16 Stefan Talmon, 'The United States under President Trump: Gravedigger of International Law' (2019) 18 *Chinese Journal of International Law* 645–668.

17 See Steve Charnovitz, 'Why the International Exhibitions Bureau Should Choose Minneapolis for Global Expo 2023' (2017) 82 *George Washington University Legal Studies Research Paper*.

Minneapolis as the site of the 2023 global expo. The BIE did not fall for the US advances, though, and awarded the 2023 event to Buenos Aires, it seems.[18]

3 Prolegomena

If the dominant functionalist approach[19] to international organizations law is hampered by its state-centric approach, its exclusive focus on the relations between organizations and their member states, any new thinking about international organizations should take into account the fact that international organizations also interact with others. They interact with states other than their member states, if only because they often need to in order to get things done. The drafters of the UN Charter realised as much, when they inserted Article 2(6) into the Charter, holding that the UN may call upon non-member states to ensure their cooperation. Organizations also interact with each other: they compete for scarce resources, and sometimes collaborate, either ad hoc or in more permanent fashion, as the existence of entities such as the *Codex Alimentarius* Commission, the World Food Programme (WFP) or the Intergovernmental Panel on Climate Change attests. The former is a joint venture of the World Health Organization and the Food and Agricultural Organization (FAO); the WFP was created by the same FAO together with the UN General Assembly, and the General Assembly set up the latter together with the World Meteorological Organization. International organizations interact with the individuals who work for them, something left out of the purview of functionalist thought. And they interact with the private sector: they are partly funded by the private sector or form public-private partnerships,[20] procure goods and services,[21] they are themselves selling their services,[22] and

18 The website of the BIE is not entirely clear, and seems to indicate that the Expo 2025 has been awarded to Osaka. (Web Page, 6 November 2022) <https://bie-paris.org/site/en/2025-osaka>. That said, it also contains reports suggesting an expo will take place in 2023 in Buenos Aires: (Web Page, 6 November 2022) <https://www.bie-paris.org/site/en/news>.

19 I have sketched the *Werdegang* of functionalism in Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 *European Journal of International Law* 9–82.

20 Liliana Andonova, *Governance Entrepeneurs: International Organizations and the Rise of Global Public-Private Partnerships* (Cambridge University Press, 2017).

21 Elisabetta Morlino, *Procurement by International Organizations: A Global Administrative Law Perspective* (Cambridge University Press, 2019).

22 Jan 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* 383–400.

their decisions tend to have distributive effects[23]—as will be further demonstrated below.

All this entails that a state-centric focus is, at best, incomplete. International organizations are, admittedly, usually set up by states, and count states as their members, but that is not to say that the state-centric focus has much traction. Things have to be channeled through states, so to speak, because this is how the international legal order is set up—if private parties themselves could act directly under international law, things would perhaps be different. But it is usually inaccurate or even meaningless to claim that a certain decision favours Belgium at the expense of Brazil, or benefits Belize but at Bulgaria's cost. Sometimes this is obvious to see: surely, the fact that the Bill and Melinda Gates Foundation is the second largest contributor to the WHO budget does not translate into any direct influence for the US *qua* US—here, the directions of influence can be kept separate. But equally surely, a decision by the WHO that favours, say, medications produced by Bayer, should not be seen as somehow favouring Bayer's home state (i.e., Germany). German delegates may have lobbied for this particular decision, but it makes little sense to portray this as a victory for Germany—it is, instead, a victory for Bayer. Bayer will be better off; its shareholders will be better off; its CEO will receive a bigger Christmas bonus. To view this as a victory for Germany without taking Bayer into account is inadequate, and hugely misleading.

States, put simply, act most of all as conduits for other interests: the economic interests of companies, but also the interests of others, such as the normative interests of civil society movements and churches, the material interests of workers perhaps, or the interests of politicians in gaining or maintaining popularity. States have few interests of their own, and when it is said they have their own interests, these are usually described under the hopelessly circular and impoverished label of *raison d'état*: the interests of states consist of, well, the interests of states. The classic mistake that generations of students of international affairs have made is to view representation as the real thing, as if Dutch domestic politics would be exhausted by only looking at the 20 or so political parties in the Netherlands and ignoring what it is these represent, i.e., the 17 million or so inhabitants of the country. The medium has become the

23 Jan Klabbers, 'Rules, Institutions and Decisions: Taking Distribution Seriously' in Gunther Hellmann and Jens Steffek (eds), *Praxis as a Perspective on International Politics* (Bristol University Press, 2022) 127–142.

message, one might say: the abstraction of the state has become an actor in its own right, and that is plain wrong.[24]

Instead of this focus on the state and its non-existing interests, it will be more conducive to develop what may loosely be called a political economy of international organizations law.[25] The label 'political economy' may, however, raise some concerns, predominantly because it is often associated with two different, almost opposed, ways of thinking. On the one hand, political economy is often associated with some kind of Marxism,[26] often not very helpful, and sometimes dominated by ideology at the expense of insight and understanding. The exegesis of Marx's work may have its merits, but will not, in and by itself, illuminate how the International Bureau of Weights and Measures works, or how the World Intellectual Property Organization affects global distribution.

The term political economy also often comes in from a different direction, more closely related to classical economics and the political mainstream. Here, it is often said to borrow techniques and methods from classical economics in order to illuminate political processes. Like its Marxist counterpart this can, and sometimes does, generate useful insights also with respect to international organizations law, but in the end it has little to do with how law, politics and the economy are intertwined. What is more, this approach is still, even in the best hands, highly state-centric,[27] and therewith reproduces the fatal flaw of much thinking about international organizations. In some versions there is a realisation that relevant actors, in addition to states, may include state politicians, eager to gain votes or deflect responsibility, but this does little, eventually, to lift the state-centric focus—at best it adds a nuance but suggesting that the state is not a monolith.[28]

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24 International organizations are meta-organizations, in the language of organizational sociology: organizations consisting of other organizations (states), in much the same way as UEFA is a union of Europe's national football associations. See also Göran Ahrne and Nils Brunsson, *Meta-organizations* (Edward Elgar Publishing, 2008).

25 A useful overview of various strands of international political economy is Benjamin J Cohen, *Advanced Introduction to International Political Economy* (Edward Elgar Publishing, 2014).

26 Marxism has a hold on several contributions in Ugo Mattei and John D Haskell (eds), *Research Handbook on Political Economy and Law* (Edward Elgar Publishing, 2015).

27 See, e.g., Bruno Frey, 'The Public Choice View of International Political Economy' in Roland Vaubel and Thomas Willett (eds), *The Political Economy of International Organizations: A Public Choice Approach* (Westview Press, 1991) 7–26.

28 See, e.g., Roland Vaubel, 'A Public Choice View of International Organization' in Roland Vaubel and Thomas Willett (eds), *The Political Economy of International Organizations: A Public Choice Approach* (Westview Press, 1991) 27–45.

In other words, both uses of the term are best avoided. Likewise, to speak of the political economy is not to train the focus on economic organizations alone. The category is difficult to delimit at the best of times but, more importantly, it hides from view that most, perhaps all, international organizations are economic actors, whose existence and activities generate economic effects and benefit some at the expense of others. A commonplace conception of international economic organizations would concentrate on the International Monetary Fund, The World Bank, the World Trade Organization, and perhaps the multilateral development banks—none of this would be surprising or controversial.[29] But doing so ignores the huge economic effects that may stem from the World Health Organization's decision to declare a pandemic—the COVID-19 crisis has taught as much. It would ignore the economic role of UNESCO World Heritage list, or how the International Telecommunications Union regulates the global telecommunications industry with obvious winners and losers—indeed, global telecommunications regulation by international organization has been said to be at the heart of several pivotal economic developments since the 1850s,[30] when it first became feasible to utilise the telegraph over longer distances.[31]

The starting point for a political economy of international organizations law should therefore not be a focus on economic law or economic organizations *simpliciter*, and should neither operate on Marxist nor on rationalist principles, although both traditions may offer valuable insights on specific points. Instead, the political economy should start from the realisation that economics and politics are inextricably related, in that political decision-making inevitably has economic effects, and there are no economic decisions conceivable which somehow remain apolitical.[32] Surely, whenever distribution is at issue

29 See, e.g., Randall Stone, *Controlling Institutions: International Organizations and the Global Economy* (Cambridge University Press, 2011).

30 See Ben Wilson, *Heyday: The 1850s and the Dawn of the Golden Age* (Weidenfeld & Nicolson, 2016).

31 Seminal is Craig N Murphy, *International Organization and Industrial Change: Global Governance Since 1850* (Polity, 1994). See also Jill Hills, *Telecommunications and Empire* (University of Illinois Press, 2007).

32 My conception of political economy comes close to that of Albert Hirschman. See, e.g., Albert Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press, 1970); Albert Hirschman, *The Passions and the Interests: Political Arguments for Capitalism Before its Triumph* (Princeton University Press, 2013). An excellent intellectual biography is Jeremy Adelman, *Worldly Philosopher: The Odyssey of Albert O. Hirschman* (Princeton University Press, 2013). Likewise, it has affinities with what has been termed 'institutional political economy', such as, e.g., Ha-joon Chang, 'Breaking the Mould: An Institutionalist Political Economy Alternative to the Neoliberal Theory of the Market and the State' (2002) 26 *Cambridge Journal of Economics* 539–559.

(as is by definition the case in economic affairs), politics is involved. Economics is not an exact science, and by definition involves what the systems theorists of the 1960s referred to as the 'authoritative allocation of values'.[33] Not all politics need be about economics, and politics is more than Lasswell's somewhat crude definition of being about 'who gets what, when and how'.[34] But politics is about that too. Not all politics is about economics, but much is, and economics is by definition political.

What is further relevant is that any political (and thus also economic) decision-making is underpinned by legal rules and legal institutions. To some extent this is obvious, so obvious perhaps that it has largely been forgotten. Contracts of any kind require contract law; any deal beyond the classic barter requires money (a social institution backed by law), and even then, the handshake represents a legal commitment of sorts.[35] Property rights serve to limit possibilities for political action and, from a different angle, human rights law aspires to do much the same.[36] Moreover, even policy domains not usually associated with law (such as military activity, often characterised by the maxim *inter arma silent leges*) are actually embedded in all sorts of legal rules, as David Kennedy has pointed out. Soldiers have contracts or appointments and orders; logistics need to be arranged; weaponry and catering need to be procured, usually from third parties, *et cetera*.[37]

It is, additionally, nigh on impossible properly to understand political processes, including those taking place within international organizations, without taking existing legal frameworks into account: decision-making is typically dependent on existing procedures and thus on legal rules and the framework in which those rules are embedded. Those rules are manifold, and will determine such things as who can participate in decision-making, who has access to the decision-makers, how are decisions made, are they within the scope of the organization, what is their legal effect, who is responsible for implementation. And those rules, in turn, are further embedded in all sorts of rules or doctrines

33 David Easton, *A Systems Analysis of Political Life* (Wiley, 1965).

34 A brief version of Lasswell's famous essay is reproduced in Dwaine Marvick (ed), *Harold D. Lasswell on Political Sociology* (University of Chicago Press, 1977) 108–113.

35 Emile Durkheim, *Professional Ethics and Civil Morals*, tr Cornelia Brookfield (Routledge, 1992).

36 The relevance of substantive legal regimes is hinted at, though not fully explored, in Stephen Gill and Claire Cutler (eds), *New Constitutionalism and World Order* (Cambridge University Press, 2014). Much the same applies to Tim Di Muzio, *The 1 % and the Rest of Us: A Political Economy of Dominant Ownership* (Zed Books, 2015).

37 David Kennedy, *Of War and Law* (Princeton University Press, 2006).

(mostly doctrines)[38] of general international institutional law: the implied powers doctrine, the functional necessity doctrine, the ultra vires doctrine perhaps. And the reach thereof is further determined by assumptions and *topoi*, such as that international organization involves cooperation between states, that cooperation is a good thing, that some form of international action is better than no action whatsoever, that the end justifies the means, *et cetera*. A decision by the WHO's Director-General to declare a public health emergency of international concern, e.g., cannot be understood in isolation from all those surrounding frameworks, and needs to be assessed in light also of its actual and potential effects—something that is actually provided for in Article 2 of the WHO's International Health Regulations.[39] And a decision by the Director-General of the OPCW to facilitate surprise inspections needs to be understood in light of the existing legal framework and its potential effects. Clearly, the ousting of such a Director-General, as has happened, cannot be understood on a functionalist basis, precisely because the individual concerned was functioning pretty much as the OPCW's constituent instrument envisaged.[40]

And markets too are constituted by law. As Chang underlines, legal (and other) rules help determine what can be subject to market transactions to begin with: whether arms can be bought and sold, or sex, or slaves, or publications of a lewd nature: all of this tends to be regulated by law. Some of those rules are so widely accepted that few would think of challenging them, but that does nothing to undermine the point. Likewise, law helps determine who can act on markets, e.g. by outlawing child labour or the labour of asylum seekers or migrants generally (thus restricting access to labour markets); by specifying that some transactions can only be engaged in by people who have reached a certain age (no alcohol to those under 18 or 21). Likewise, legal rules may determine that products can be marketed only if they meet with certain production process requirements—e.g. with respect to sustainability.[41]

A political economy of international organizations law therewith should concentrate on the foundational role played by legal rules, concepts and processes in the design of organizations and the decisions these take, as well

38 There may actually not be much positive, general international organizations law in the form of rules—what there is mostly takes the looser form of legal doctrines. See Jan Klabbers, 'The Paradox of International Institutional Law' (2008) 5 *International Organizations Law Review* 151–173.

39 Jan Klabbers, 'The Second Most Difficult Job in the World: Reflections on COVID-19' (2020) 11 *Journal of International Humanitarian Legal Studies* 270–281.

40 Jan Klabbers, 'The *Bustani* Case before the ILOAT: Constitutionalism in Disguise?' (2004) 53 *International and Comparative Law Quarterly* 455–464.

41 Chang (n 32).

as the underlying assumptions and *topoi*.[42] The relevant actors are not (not solely) member states, as is so often assumed without giving it further thought; instead, the relevant actors comprise, in addition to member states, also individuals, the private sector, civil society organizations *et cetera*. Typically though, these are all but ignored: international organizations law has been developed for more than a century on the assumption that international organizations and their member states co-inhabit a vacuum, a world where their relations are the only relations that matter, without realising that international organizations are also connected to others, to the world around them.

Historically, it is probably arguable that the vacuum assumption made some sense at the time international organizations were first set up. They were established as administrative agencies writ large of their member states; they were not expected to interact with others than their own member states. This helps explain why early international organizations were never granted international legal personality: they did not need it. And it helps explain why they were not endowed with treaty-making powers either—again, there was no need for it, on the basis of the dominant idea of what international organizations were created for. But if this made some sense around the turn of the 19th century, it has stopped being a plausible assumption a long time ago.[43] It stopped being plausible at the latest when the new United Nations discovered it might want to engage in diplomatic protection of officials in states that were not members of the organization, resulting in the classic *Reparation for Injuries* opinion of the International Court of Justice.[44] And it stopped when the same UN realised it needed to conclude all sorts of agreements with, at the time, mostly outsiders.[45]

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42 The foundational role of law is highlighted by some writings in IR constructivism, but seems difficult for IR scholars generally to implement—the classic habit to view law as epiphenomenal proves difficult to kick. The one scholar who has done most to integrate the role of law is Kratochwil. See, e.g., Friedrich Kratochwil, *Rules, Norms, and Decisions* (Cambridge University Press, 1989); Friedrich Kratochwil, *Praxis: On Acting and Knowing* (Cambridge University Press, 2018). In philosophy, social ontology broadly accepts that social facts can be 'anchored' (though not grounded) in norms, including legal norms and legally relevant practices. See Brian Epstein, 'A Framework for Social Ontology' (2016) 46 *Philosophy of the Social Sciences* 147–167.

43 Possibly with the establishment of the ILO, geared towards offering protection to individuals (or keeping them complacent) and thus constantly aware of a universe beyond its member states. See Jan Klabbers, 'An Accidental Revolution: The ILO and the Opening Up of International Law' in Tarja Halonen and Ulla Liukkunen (eds), *International Labour Organization and Global Social Governance* (Springer, 2020) 123–140.

44 *Reparation for Injuries Suffered in the Service of the United Nations* (*Advisory Opinion*) [1949] ICJ Rep 174, 178 ('*Reparation for Injuries*').

45 Shabtai Rosenne, 'United Nations Treaty Practice' (1954) II(86) *Recueil des Cours* 281–443.

4 Supra-Functionalism

International organizations have always been regarded as agencies set up by their member states to perform tasks for those member states, and that is still an important part of their job description. Strikingly however, the term 'international organization' has come to be limited to the adjective: international organizations are typically regarded as manifestations of 'the international', as vehicles for international cooperation, but without much reflection on the term 'organization'. And yet, international organizations are not only 'international', they are 'organizations' too, which raises the question, rarely asked,[46] why exactly the organizational form was chosen. After all, there are alternatives available: not so much the 'soft' or 'informal' organizations sometimes heralded in the literature—these, after all, do exactly what organizations proper do. A soft organization may or may not really be soft, but is still an organization.[47] Instead, more plausible alternatives to the organizational form include such possibilities as concluding individual treaties or adopting ad hoc resolutions to foster cooperation, or agree to meet regularly without creating also an institutional structure. The latter proves difficult incidentally: where cooperation regularises, institutions usually follow—it could hardly be otherwise.

The organizational form offers, by and large, two possibilities that set it apart from single treaty regimes, or regular summit meetings. The first, and most relevant, of these is that it offers possibilities for longer term regulation and management, and for some topics this is considered useful. Put differently, a topic such as diplomatic relations between states, or extradition, can be arranged on the basis of a single set of rules. States can themselves apply these and, when well-drafted, few problems are expected. Diplomatic relations, or extradition, are not topics that require day-to-day management. It is different, however, with other topics: air traffic, e.g., may require constant monitoring and management, as does river navigation, or disarmament, or the achievement of public health. The borderline is porous of course, and itself subject to political negotiation and debate: there are few topics which inherently do or do not require constant management, in much the same was as there are few topics which are inherently public or private in nature.[48] There are disarmament treaties without institutional back-up, such as the 1975 Biological

46 A rare exception is Joel Trachtman, *The Economic Structure of International Law* (Harvard University Press, 2008) 150.

47 Jan Klabbers, 'Institutional Ambivalence by Design: Soft Organizations in International Law' (2001) 70 *Nordic Journal of International Law* 403–421.

48 John Dewey, *The Public and Its Problems* (Swallow Press, 1954).

Weapons Convention, and there are institutionalised regimes on issues where establishment of a strong norm would have sufficed: perhaps the Framework Convention on Tobacco Control serves as an example. That takes nothing away from the general point though: the organizational form is suitable when a more or less permanent regime is envisaged.

The second possibility offered by the organization form derives from this: it may be easier to socialise outsiders into a regime when the organizational form is chosen. While single treaties too may be open to accession, there is no administration to talk to and advertise the merits of the regime; there is no institutional learning; and there may be less of an incentive to join. The organizational form is, to some extent, better equipped to overcome the 'privity problem' inherent in international law: each and every treaty or organization is *res inter alios acta*, is a thing between the parties. The difference between the treaty form and organization form is not one of kind, but rather of degree: joining an organization may be more appropriate and appealing than merely acceding to a single treaty, especially if the policy domain is perceived as relatively dynamic.[49]

Generally speaking, organizations (local or universal, commercial or otherwise) tend to do three things, in varying levels of intensity and priority.[50] First, organizations *regulate*. The local fire department may set rules about when to get moving, when to use the sirens, how many staff should be present at any given moment, *et cetera*. The ensuing rules may be hard or soft, but that is of little relevance—the point is that the fire department will regulate those things, and will have to do so. The WHO, by contrast, will regulate how much their member states shall pay, what the best way of approaching public medicine is, how best to protect against contagious diseases, *et cetera*. Again, the resulting regulation may be hard or soft, but again, that is of little relevance: the point is that the organization regulates within its assigned sphere of action.

Second, organizations *monitor and manage*, not just whether internal regulation is complied with (do the members pay their fees on time?), but also, and especially, whether the organization and its members perform decently. Harvard Law School monitors whether its professors publish, meet the teaching requirements, and sit on a sufficient number of faculty committees, and monitors the results of its students with a view to handing them their law degree at the end of a particular trajectory. The Organization for the Prohibition of

49 See Jan Klabbers, 'International organizations and the Problem of Privity: Towards a Supra-Functionalist Approach' in Georges Politakis et al. (eds), *ILO 100: Law for Social Justice* (International Labour Office, 2019) 629–646.

50 See further Klabbers, 'Rules, Institutions and Decisions' (note 23).

Chemical Weapons monitors whether its member states do not engage in activities that can be seen to circumvent the prohibition on the development stockpiling or use of chemical weapons.

Third, and inevitably, organizations *distribute or re-distribute* costs and benefits. The local hospital may have to decide which patient should be first in line to receive a kidney transplant: in the absence of an endless supply of suitable kidneys, this involves making choices and 'the authoritative allocation of values'. The WHO may have to decide whether the appearance of a new variant of the COVID virus constitutes a 'public health emergency of international concern', a decision which will be followed closely by pharmaceutical companies, hotel operators, airlines, and others. As the example suggests, and as noted above (but it cannot be emphasized enough): the costs and benefits will often be distributed not so much—or not only—across member states, but rather across private actors: pharmaceutical companies, hotel operators, airlines and others.

The realisation that international organizations are organizations potentially opens up the discipline—and the law—for insights from other quarters, from disciplines other than those focusing on 'the international', such as International Relations. It has become clear that international organizations law as it currently stands has great troubles saying anything sensible about relations between organs of international organizations or such phenomena as delegation of powers. To the limited extent these issues are addressed in the literature, they are addressed in terms of constitutional theory, in terms of separation of powers or checks and balances, and such is perfectly understandable. Viewing international organizations merely as manifestations of 'the international' offers no intellectual resources for thinking about relations between the plenary and executive bodies of international organizations, or for thinking about delegation to subsidiary organs, or thinking about judicial review. Instead, inspiration has to be found in political philosophy or constitutional theory, but these are difficult to reconcile with a strong concentration on 'the international'. Likewise, viewing international organizations as emanations of 'the international' has made it difficult to say much that is sensible on the international civil service. International organizations, like organizations generally, are employers too; their staff are civil servants, subject to various demands and pressures that the international focus is ill-equipped to address. There are, admittedly, many cases emanating from international administrative tribunals and these can nicely be organized and systematised in hefty treatises and practically useful works, but little systematic thought has been devoted to the employer—employee relationship or, more appropriately perhaps, the public institution—civil servant relationship. This is something public

administration scholars and organizational sociologists have addressed,[51] but which, again, hardly enters the picture when international organizations are not seen as organizations.

And much the same applies to relations between international organizations and the world around them: other international organizations, non-member states, the private sector, individuals, civil society organizations, *et cetera*. This too has dropped out of sight because of the exclusive focus on international organizations as manifestations of 'the international', but is strongly in need of reflection as well as regulation of one sort or another. Again, the realisation that international organizations also should be seen as organizations can offer solace, allowing for borrowing insights from private law, from institutional economics and international political economy, from social philosophy and social ontology, from sociology, from public administration.

Every organization has a function, whether it is winning competitions (the local bowling club), serving food to the poor (the local soup kitchen), monopolising the use of violence (the state) or securing global health (the World Health Organization). Without a goal, a *telos*, assemblies of people remain random collections, like shoppers in a mall. There can probably be random groups with a temporary *telos* (spectators at a football match, e.g.), but an organization without a *telos* borders on the unthinkable.[52]

It follows, that the notion of function remains important for international organizations and international organizations law: the baby should not be thrown out with the bathwater of functionalist theory. In fact, its label notwithstanding, this is exactly what functionalism has done: by concentrating on 'the international', it has lost sight of the respective functions of international organizations. There is little difference here between a public entity such as the United Nations Children's Fund (UNICEF) and the oil cartel knows as Organization of the Petroleum Exporting Countries (OPEC), or between the financial institutions and the military alliance of the North Atlantic Treaty Organization (NATO): these have radically different functions, but have all come to stand for 'the international', representing cooperation between states and thus inherently benign. Function has been treated as the endpoint of the analysis; it should have been as the starting point. This is why supra-functionalism provides an appropriate label: it makes clear that function remains important, but should be further interrogated, and theorisation should start here.

51 Classic is Judith Gruber, *Controlling Bureaucracies: Dilemmas in Democratic Governance* (University of California Press, 1987).

52 Seamas Miller, *The Moral Foundations of Social Institutions: A Philosophical Study* (Cambridge University Press, 2010).

5 Finally

Rob Walker once pointed out that more interesting than the various theories of international affairs in circulation is the question why some theories are formulated and assume prominence.[53] Functionalism in international organizations law was formulated in the early 20th century and has served largely to legitimise international organizations but therewith also, more importantly, served to legitimise the state. International organizations were portrayed as the creatures of states but also generally considered to keep those states in check, and manifesting state authority across boundaries. The modern state, lest it be forgotten, is a relatively young creature, born and formally christened in 1648 perhaps but only coming of age in the mid-19th century, in interactions with each other and when confronted with the possibility of veritable globalisation—a threat to the state also back then. Under the slogan 'if you can't beat them, join them', states joined hands and created international organizations. This did not go in a nicely linear process, and it took a scramble for Africa and two world wars, but eventually a global empire, dominated by a single state was largely prevented, and the state has been able to survive, strengthened, in part, by its external outgrowths: international organizations. Those had to be pictured, accordingly, as benign creatures, avoiding the nasty beast of politics while striving for the ultimate political goal: peace on earth.

In the meantime though, those creatures (those international organizations) also became autonomous actors in their own right, intervening in global distributive and re-distributive processes. Hence, a new theory is needed: the assumptions and *topoi* underlying the old theory are no longer tenable or even plausible; the increased autonomy of international organizations makes that these actors, once the creatures of states, must come to complement international theorising. It has been observed that international law is largely made within and monitored by international organizations,[54] suggesting that international organizations play a significant role in international affairs. It has likewise been observed that the secretariats of international organizations play a significant role in shaping the organization's policy preferences, its practices, and the meaning to be given to the relevant norms, again suggesting an

53 RBJ Walker, *Inside/Outside: International Relations as Political Theory* (Cambridge University Press, 1993) 6.

54 Matthias Ruffert and Christian Walter, *Institutionalisiertes Völkerrecht* (Beck, 2009).

independent role in international affairs.[55] On such premises, it will be necessary to view international organizations neither as epiphenomenal nor as benign manifestations of dreams of global harmony, but as actors in their own right, implicated in global governance in all its dimensions. And this, in turn, will require a political economy of international organizations law.

55 Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press, 2004); Annabelle Littoz-Monnet (ed), *The Politics of Expertise in International Organizations: How International Bureaucracies Produce and Mobilize Knowledge* (Routledge, 2017); Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press, 2012).