

Re-theorizing International Organizations Law: An Epilogue

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Some three and a half years ago, EJIL published half a dozen contributions on influential theorists in international organizations law. The underlying idea was to see if the dominant theory of functionalism in international organizations law had ever had serious competition, and whether it could have utilized alternative, non-functionalist intellectual resources in order to overcome or mitigate some of its most glaring defects, none more so than the problem of accountability. Under functionalism, it is reasonably clear, it is nigh-on impossible to think of ways to hold international organizations accountable towards third parties. This is not just because of privileges and immunities (although that too), but more fundamentally because in the functionalist picture, third parties have no presence: functionalism has always been all about relations between the organization and its member states. After all, the member states endow their organizations with functions, so when it comes to damage to third parties (whether it concerns the non-performance of a contract, the transmission of infectious diseases, sexual abuse of civilians or mistreatment of staff), the law has no response. These things fall outside the purview of functionalism. And so the question arose whether there ever had been serious theoretical alternatives, offering possibilities to think of accountability and other matters in different ways.

Our original symposium, edited by Jan Klabbers and Guy Fiti Sinclair, covered six thinkers of some influence (as writers, through practice or in the classroom) and concluded, in a nutshell, that most theorizing could be demonstrated to be a variation on the functionalist theme – albeit with some on the edges of functionalist thought.¹ Our protagonists (Georges Abi-Saab, C. Wilfred Jenks, Hans Kelsen, Paul Reuter, Henry Schermers, Louis Sohn) all had intelligent things to say about international organizations law in general, but none had offered an alternative mode of thinking.

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¹ See 'Symposium: Theorizing International Organizations Law', (2020) 31 *European Journal of International Law*, 489.

But since international organizations law by and large continues along the same functionalist path as before, and accountability issues remain as difficult to handle as before (notwithstanding Global Administrative Law, or the International Law Association's work, or the International Law Commission's articles on responsibility of international organizations), we thought we should perhaps cast the net a little wider. Expanding the editorial team with Devika Hovell, we went looking not so much for 'general influencers', but also for potential 'specific influencers', by opening a call with a view to identifying possible alternative approaches. The results, after several screenings and feedback sessions, have been published in a number of installments over the last year, with discussions thus far of Anne-Marie Leroy, former legal counsel of the World Bank (by Dimitri van den Meerssche);² Norwegian Foreign Office lawyer and professor Finn Seyersted, who always offered alternatives but never was very influential (by Fernando Lusa Bordin);³ Samuel Asante, a Ghanaian lawyer and thinker involved with the UN's work on transnational corporations (by Kehinde Folake Olaoye);⁴ and Jorge Castañeda, a Mexican diplomat/lawyer making a strong case for recognition of regional and national positions in international organizations (by Francisco José Quintana).⁵ The current issue of EJIL contains the two final contributions in our series. Chen Yifeng (Peking Law School) offers a sensitive portrait of Rao Geping, one of China's pioneers in international organizations law. Kristina Daugirdas (Michigan Law School), in turn, discusses the work of one of the leading international lawyers of the last few decades, Dame Rosalyn Higgins. Altogether then, the two symposia have provided 12 articles which look at international organizations law through a focus on individual scholars and their thought. The result is a hugely worthwhile collection of portraits, contributing to an understanding of the sub-discipline of international organizations law, its development, its blind spots and its sensibilities.

And yet, accountability remains intractable. Valuable as the 12 articles are, they have done little to suggest that international organizations law had a 'sliding doors' moment and took the wrong exit; they have done little to suggest that the sub-discipline fruitfully could have opted for other avenues. Several of the final group of thinkers portrayed (Higgins, Rao, Assante, Castañeda) view international organizations mostly as groupings of and vehicles for states, discussing them in terms of member state preferences. And while this is certainly defensible, it does not offer viable alternatives to functionalism – it arguably even strengthens the functionalist approach, including its well-known merits and limits. Leroy, in turn, views the task of the law mostly as risk management: intriguing and innovative, but in so doing she circumvents the problems of functionalism rather than responding to them. This entails that

² van den Meerssche, 'Deformalizing International Organizations Law: The Risk Appetite of Anne-Marie Leroy', 34 *Eur. J. Int'l Law* (2023) 141.

³ Bordin, 'The Quest for International Legal Status: On Finn Seyersted and the Challenges of Theorizing International Organizations Law', 34 *Eur. J. Int'l Law* (2023) 169.

⁴ Olaoye, 'Samuel Kwadwo Boateng Asante and the United Nations Centre for Transnational Corporations (1075–1992)', 34 *Eur. J. Int'l Law* (2023) 291.

⁵ Quintana, 'Small Powers, International Organizations and the Role of Law: Jorge Castañeda's Views from Mexico', 34 *Eur. J. Int'l Law* (2023) 319.

the most plausible alternative is the philosophy offered by Seyersted, and while this is well worth keeping alive, it has thus far not quite been able to gain much of a following – although one might agree with Bordin that Seyersted should perhaps be awarded more attention than is usually the case.

Still, the final conclusion presents itself (with some force, really) that the picture of international organizations law developed over a century ago has by and large remained dominant, and that individual thinkers have not been in a position to provide much by way of an alternative. Most views tend to be variations on functionalist themes – one may perhaps speak of a plurality of functionalisms, with for instance the functionalism of Jenks, different as it is from that of Schermers, foreshadowing some later versions of constitutionalism as well as Global Administrative Law. The picture emerges of a discipline whose protagonists largely share a basic set of assumptions about international organizations, their place in the world and the role of member states. International organizations law, so the two symposia together suggest, is based on thin theoretical foundations, with this very thinness allowing for multiple versions, and therewith allowing for relatively easy adaptation to changing circumstances, changing normative agendas and changing configurations. It seems fair to say that the discipline has yet to offer plausible alternatives to functionalism; but equally, the symposia indicate that it should be possible, given functionalism's adaptability, to develop a more robust version.