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What's in a name?

International Organizations in Search of an Identity

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Abstract

This review essay discusses Lorenzo Gasbarri's book which purports to examine an "existential" issue – the concept of an International Organization – with a theoretical approach that makes use of tools of analysis pertaining not only to the field of international law, but also to legal philosophy. After a cursory overview of existing legal research on the subject, the essay dwells on the author's thesis – namely, the dual nature of International Organizations, based on the dual legal character of their legal systems – and highlights merits and possible drawbacks underlying the attempt to conceptualize International Organizations.

Keywords

international organizations – international institutional law – legal theory – derived law – duality – legal systems

1 Back to Basics: the Concept of an International Organization

It is a truism that, notwithstanding the fact that International Organizations ("IOs") first appeared on the international scene more than two centuries ago and are today indisputably considered subjects of international law, their field of investigation remains scattered with doubts and shadows. When it comes to IOs, scholars are especially puzzled with questions relating to "fundamentals" of international law: are IOs bound by customary law? Do they have inherent rights under general international law? Does customary law grant them

immunities? And so on. In his recent book (*The concept of an International Organization in International Law*, Oxford, 2021), Lorenzo Gasbarri deals with one "big question" which lies upstream: from a conceptual point of view, what is that identifies an IO as such? If the title brings to mind a well-known piece of scholarship,[1] the choice of subject matter is certainly original and, to a certain extent, audacious. The book takes on the challenge of grasping an "existential" issue – the concept of an IO – with a theoretical approach that makes use of tools of analysis pertaining not only to the field of international law, but also to legal philosophy. This kind of approach is often lacking in the mainstream doctrinal studies on IOs. Traditionally, in fact, international legal scholars have favoured a more practice-oriented view aimed at solving the everyday problems of the life of IOs, which often revolve around the complex relationship between the IO and its members.

It is possible to identify several "waves" of doctrinal endeavours in understanding the phenomenon of IOs.[2] The first doctrinal approach, commonly labelled as functionalism, focused on making IOs operate as efficiently as possible and appraised the relationship between IOs and their members as being pure contractual in nature. Constitutionalism, conversely, changed the angle through which IOs are conceived, by emphasizing their dimension as entities separate and autonomous from its members. The perception of IOs has changed significantly over the last few decades, especially since the 60s onwards where "organizations had started to lose some of their halo",[3] as a result of multiple claims filed before national courts for damage caused by IOs through operational activities, as well as for labour disputes with their staff. Thus, attention shifted from the functioning of IOs to the control of their activities, both from the (external) perspective of international responsibility and from the (internal) perspective of accountability. The adoption of the Draft Articles on the Responsibility of International Organizations by the International Law Commission ("ILC") in 2011 fuelled the debate on the ways in which IOs are called to account for their actions. The matter has become of particular urgency in cases where individuals have found no remedy and reparation for the damage caused by IOs, which has prompted scholars to

1 KLABBERS, *The concept of a treaty in international law*, Leiden, 1996.

2 For an overview of the legal research on IOs see, among many, SCHERMERS, BLOKKER, *International Institutional Law. Unity within diversity*, Leiden, 2018, p. 9 ff.; KLABBERS, "The EJIL Foreword: The Transformation of International Organizations Law", *European Journal of International Law*, 2015, p. 9; ALVAREZ, *International Organizations as Law-makers*, Oxford, 2005, p. 17 ff.

3 KLABBERS, *Advanced Introduction to the Law of International Organizations*, Cheltenham, 2015, p. 84.

devise different solutions to fill the "accountability gap" with IOs.[4] The debate on the responsibility and remedies for wrongful acts has been combined with a reflection, already underway, on the need to reform IOs, particularly financial institutions, in order to correct the lack of democracy and transparency. Overall, these discussions have contributed to producing an evident paradigm shift in the perception of IOs that today "are no longer seen as the good guys of global governance which produce global public goods".[5] From a methodological point of view, IOs have been studied not only with traditional international law lenses, but also with comparative methods of analysis, typical of the disciplines of public, constitutional and administrative law, which led to the emergence of some "in vogue" theories (labelled as global administrative law, international public authority, global constitutional law, etc.). Likewise, the approaches of social and political sciences, interested in unveiling the dynamics of power and influence inside and outside IOs, have enriched the debate even further. The focus on the concept of the "reputation", and how it influences IOs' behaviour, exemplifies this latest outlook.[6]

Against this vast landscape of positions and methods of analysis, Gasbarri's book returns to "basics", by delving into the theorization or conceptualization of what an IO is. The research purpose, which is clearly postulated at the beginning of the work, is "[…] not to define international organizations and describe their essential characteristics, but to identify the concept of an international organization in international law […] on the basis of the legal nature of the legal systems [IOs] develop[ed]".[7] Put in other words, the book purports to conceptualize IOs based on the nature of law produced by them, with the ultimate – and ambitious – goal to "agree on a unified conceptualization of an international organization".[8]

The book is structured in two parts. The first part includes four chapters, which critically review the origins and the characteristics of the four mainstream concepts of an IO, and a further chapter where the interim conclusions reached thereby are confronted with the special issue of the international responsibility. The purpose of the first part is to dismantle the four existing

4 FERSTMAN, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap*, Oxford, 2017.

5 PETERS, "International Organizations and International Law", in COGAN, HURD, JOHNSTON (eds.), *The Oxford Handbook of International Organizations*, Oxford, 2016, p. 41.

6 DAUGIRDAS, "Reputation as a Disciplinarian of International Organizations", *American Journal of International Law*, 2019, pp. 221–271.

7 GASBARRI, *The concept of an International Organization in International Law*, Oxford, 2021, p. 6.

8 *Ibid.*

conceptualizations of IOs, showing their limits and inconsistencies on the basis of selected examples taken from different scenarios. In the second part of the book, which also consists of five chapters, the author engages in a theoretical discussion, firstly by building his own conception of an IO, based on the dual legal nature of the law they produce (Chapter 7), and subsequently by discussing this conception against the normative category of the rules of IOs, which include the definition of rules of IOs given by the ILC, together with other sources of law, such as agreements with third parties, judicial decisions, general principles and customary law (Chapter 8). The remaining Chapters (9, 10, 11) are intended to put the conception of IO crafted by the author to the test of three "fundamentals" of international law: the law of treaties, the validity of acts, and international responsibility.

Once the purpose and structure of the book are clearly presented in the introductory Chapter, the reader is left, at the outset, with some buzzing questions: what are the practical implications of this analysis? Does there really need to be one? Wouldn't a definition of IOs, which clarifies elements of their legal personality, rather than a pure conceptualization, be more helpful in understanding what an IO actually is?[9] The reader's initial eagerness to find answers is partially assuaged in the following pages of the book. At this point, a caveat to readers may be useful, especially for international lawyers accustomed to a more traditional method of analysis, which builds on the examination of existing "practice" to then reconstruct the applicable rules: take off the lenses of the positivism (if worn), and allow yourself to look at this issue from a different viewpoint, where one starts from a theoretical assumption in order to draw certain conclusions.

2 International Organizations as a Dual Entity Producing Dual Law

One of the most puzzling issue surrounding IOs relates to the nature of the law they produce (also referred to as "international institutional law"). As "law-making" actors, or "standard-settings" entities, IOs enact rules that are relevant to their functions and to pursue the cooperation for which they have been created. Yet, the nature of these rules has always been particularly controversial, if for no other reason than their wide heterogeneity. Some rules have binding effects, while others do not; some are general and abstract and are the direct product of members, where others are specific and are developed by the organs of the Secretariat; some address member States, whereas others

9 On the difference between definition and conceptualization (*ibid.*, p. 5).

regulate internal and administrative aspects of the life of the IO, thus addressing its organs, civil servants, and, in some situations, even private entities and individuals. The variety of rules enacted by IO s is reflected both in the multiplicity of denominations used (resolutions, decisions, regulations, bulletins, recommendations, declarations, guidelines, directives, standards, etc.), and in the wide set of subjects covered, which ranges from household matters (e.g., employment relations, approval of the organization's budget and the apportionment of expenses between members), to more substantial issues of international cooperation (the establishment of an economic embargo or measures recommended in case of a public health emergency of international concern, etc.).[10]

In Gasbarri's view, the unclear nature of the law of IO s is precisely the reason why, still today, there are several concurrent conceptions of IO s, each based on a particular understanding of the law they produce. In this regard, the author singles out four mainstream theories on IO s – functionalism, constitutionalism, informalism, and exceptionalism – showing their divergent positions on international institutional law. For instance, under the functionalism perspective, the law created by IO s is considered purely "international", IO s are seen as entities derived from States and the veil covering their personality is completely transparent, so it is always possible to unearth members acting beneath. Conversely, under constitutionalism, rules created by IO s are considered to be "internal institutional law", IO s are seen as autonomous entities, and the institutional veil is impermeably opaque. It follows that both the first two theories interpret the relationship between IO s and members in a master-servant logic, although reaching diametrically opposed conclusions: while for functionalism, IO s are agents of their member States (a State-centric perspective), for constitutionalism, the latter are agents of the former, when they act in the fulfilment of their purposes (an organization-centric perspective). A third different position is held by informalist theories which frame the law produced by IO s in "shades of normativity", thus giving rise to a hybrid legal system where only some norms belong to international law. Lastly, exceptionalism differs from the foregoing conceptualizations, as it is based on the existence of a different degree of "organizationhood" depending on the grade of integration. According to this view, IO s each develop differently to one another to the point that it is not possible to apply a common framework: hence, rules of IO s are international or internal depending on the IO at stake.

10 AHLBORN, "The Rules of International Organizations and the Law of International Responsibility", *International Organizations Law Review*, 2011, p. 397.

Now, according to Gasbarri, the four conceptions abovementioned – which should correspond to the four concepts of the law of IOs discussed by the ILC[11] – postulate incorrect tenets and serve different analytical interests to explain (certain aspects of) the institutional life of an IO. In the author's view, all are based on a "false dichotomy", namely the "either/or" paradigm, whereby the law produced by an IO is either international *or* internal.[12] In this regard, the author takes the well-known case of *Al-Dulimi v. Switzerland* decided by the European Court of Human Rights to show how the four concepts of the (law of) IOs can be applied depending on the argumentative strategy.[13] In order to overcome the legal fallacy (or "straw man arguments") underpinning the four theories, Gasbarri puts forward his own take on the matter:[14] according to him, the rules of IOs are international, in so far as the legal system that produces them derives from States, *and* at the same time internal, thus recognizing the institutional dimension of the legal system in which the rules are produced.[15] The two sides of international institutional law are visible depending on the angle from which one looks at it: in that sense, rules of IOs act like a "chameleon", changing their colour depending on the perspective taken.[16] Therefore, Gasbarri proposes his own conception of an IO, based on the dual legal character of its legal systems, in the following terms: "[a]n international organization means an institution established by a treaty or other instrument governed by international law and capable of creating a legal system which derives from international law and that produces law which is at the same time internal and international".[17]

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11 See ILC, Draft articles on the responsibility of international organizations, with commentaries, UN Doc A/66/10, YILC 2011, vol. II, Part Two, p. 63. Yet, the author's attempt to retrace the four concepts of IOs, based on the four theories on the law they produce, seems on occasions to be overstretched: for instance, constitutionalism does not consider that all the rules of IOs are necessarily internal, exceptionalism believes that some IOs are more "special" than others, but it does not necessary deny the existence of the legal system created.

12 GASBARRI, *supra* note 7 p. 80.

13 *Ibid.*, Chapter 6.

14 *Ibid.*, Chapter 7.

15 "[T]he rules of international organizations are law of two different legal systems at the same time: their nature is dual" (*ibid.*, p. 104).

16 *Ibid.*, p. 177.

17 *Ibid.*, p. 106.

3 Conceptualizing International Organizations: Opportunity, Risk and Utility

An undoubted merit of the book is to show how different conceptions of IOs affect the ways in which their rules are perceived. Gasbarri convincingly demonstrates how divergent standpoints on IOs have coexisted, and still coexist today, leading generations of scholars to come up with different answers to same legal problems. The "unmasking" operation conducted by the author is fascinating and reveals a sophisticated knowledge of international law studies on IOs, as well as legal theory's tools and literature.[18] This feature is rather uncommon in the legal research on IOs, and even more infrequent in the early works of young scholars.[19]

The author's proposed conception of an IO – namely, a dual entity producing law that is at the same time international and internal – is, to a certain extent, convincing. There is no doubt that IOs are "dual entities", or "Janus-faced" institutions:[20] a subject derived from member States, but capable of expressing an autonomous will. One and multiple. And, there is no doubt that the problematic nature of the rules of IOs lies in the tension inherent in the "layered" essence of IOs.[21] To put it simply, international institutional law, while forming part of an autonomous legal order, is not completely disconnected from international law, if only because it originates in that legal order, due to the contractual basis of its foundation.

Having said this, it can be questioned whether *every* piece of law of IOs preserves this dual nature: while it is true that a Constitution of the WHO can be both an international treaty and a "constitution" for the internal order, the conclusion can be different for an international civil servant contract, or a code of conduct for public procurement and suppliers of IOs, or other administrative issuances.[22] In other words, the dual nature of IOs may not automatically imply that the duality is evidenced in each single rule produced; in particular, the "international face" is more difficult to identify when the rules do not create

18 See in particular *ibid.*, Chapter 7.

19 This comes as always with notable – and really outstanding – exceptions (see, recently, BORDIN, *The Analogy between States and International Organizations*, Cambridge, 2018).

20 WESSEL, DEKKER, "Identities of States in International Organizations", *International Organization Law Review*, 2015, p. 317.

21 KLABBERS, *supra* note 3, p. 11.

22 In one of the first studies on the subject, Balladore Pallieri already questioned the international legal nature of regulations concerning, for example, the legal status of the IOs' officials (BALLADORE PALLIERI, "Le droit interne des organisations internationales", RCADI, Vol. 127, 1969-II, p. 1 ff., p. 20).

obligations for members but concern internal aspect of the IO's functioning. One the other hand, drawing a line between purely internal institutional law and international law, or between rules that have only internal effect and those having external ones, has proved to be an extremely difficult, if not impossible, task in earlier scholarly works.[23] From this perspective, the thesis put forward by the author – which pivots on the impossibility of distinguishing the two sides – represents a smart way, or a shortcut, to solve this conundrum. To use the author's words, "simplification is probably the most important effect of this approach".[24]

One may wonder about the ultimate end of embracing such conception, and what the legal implications of the dual nature of IO s (law) are. A first consequence could be that *each* piece of law produced by IO s would (also) be part of international law and would stay in relation with it: hence the international rules on interpretation would apply to any rule of an IO, as well as the ordinary criterions of coordination among norms, in case of contrast. At the same time, the violation of each rule, regardless of its recipients, would integrate the objective element of an international wrongful act, thus hypothetically entailing international responsibility. From the viewpoint of secondary norms of international law, every piece of law produced by an IO – even the rules adopted by the Secretariats – would, in principle, trump the customary rules on international responsibility, insofar as it constitutes *lex specialis*. Yet, these implications do not seem to be comprehensively unpacked in the second part of the book.

At times, the impression is that the theoretical framework for identifying an IO developed by the author is applied, lock, stock and barrel, to draw some conclusions. Likewise, the selection of only certain examples or scenarios, in order to test the drafted concept of an IO, seems justified mainly inasmuch as it serves, and is instrumental for, the sake of the arguments defended in the book. From this angle, adopting a deductive method of analysis, whereby conclusions are inferred by an initial theoretical assumption may reveal some limits: the risk could be that of forcing certain deductions, in order to accommodate the logical premise, whereas States and IO s practice does not necessarily fit into these schemes. For instance, when it comes to the question of international responsibility, the position maintained is that the dual nature of IO s entails, deductively, the dual attribution of conduct. Yet, there might

23 For instance, while Schermers and Blokker distinguish between internal and external rules, singling out the internal having external effects (*supra* note 2, p. 755 ss.), Alvarez shows the limits of this distinction (*supra* note 2, p. 143 ff.).

24 Gasbarri, *supra* note 7, p. 177.

be scenarios that do not square perfectly with the dogmatic position on dual attribution: for instance, when wrongful acts are attributable only to IO s, without calling into question the role of its members,[25] or vice versa when acts are imputable only to member States acting within the framework of an IO,[26] based on legal and factual grounds, depending on particular circumstances and context.

That said, there is no doubt that Gasbarri's book constitutes the first structured attempt to systematize, from a theoretical point of view, an intricate issue that has been left on the side lines of the academic debate. The book reminds us the importance of taking IO s seriously, by deepening the theorization and conceptualization of a key actor of the international community which, despite being with us for at least two hundred years, still lives in penumbra. Ultimately, the book will undoubtedly contribute to stimulating the current theoretical discourse on IO s and represents a valuable source of inspiration for those who look for understanding their complex and elusive essence, using lenses and approaches different from the more traditional ones.

25 Take the well-known case of the spread of cholera in Haiti, which has been the result of structural deficiencies and specific omissions attributable to the UN. The application of the dual attribution criterion in such cases would result in imputing to each member State the wrongful conduct of the IO *qua* member, thus annihilating the very essence of an IO, i.e., its separate legal subjectivity. In this respect, the author acknowledges that there could be situations where the act is attributable only to an IO but argues that "the vast majority of cases can be resolved by reverting to the dual attribution" (*ibid.*, p. 207).

26 For instance, see ILC *supra* note 11, p. 59.