
The Transformation of International Organizations Law: A Rejoinder

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In 1974, the renowned cultural historian Peter Gay published a lovely book under the title *Style in History*.¹ Dissecting the work of four famous historians, he contended that their writing style and their substantive thoughts go hand in hand or, more accurately perhaps, that style is not just ornamental but is itself part of the substance. Style and substance cannot be separated. It seems André Nollkaemper suggests something similar about ‘The EJIL Foreword: The Transformation of International Organizations Law’² but with a twist.³ In my case, it seems, style ‘serves as a method to prevent engagement with substance’, perhaps because I might think that all law is indeterminate and, thus, no cognizable substance can be found with which to begin. In my case, so Nollkaemper suggests, the substance is actually devoid of substance.

Put like this, the point is surely untenable. I actually say a lot about the law of international organizations, and while not always very certain, settled or precise, this body of law, nonetheless, is just as substantive as, say, international criminal law or the law of the sea.⁴ The fact that I treat much of the substantive law as relatively open-ended should not be mistaken for a radical dismissal of anything substantive.

What Nollkaemper correctly points out, though, is that I do not pay much attention to the output or effectiveness of the work of international organizations. Mine is a theoretical exercise, aiming to lay bare how functionalism is structured and where its weak spots are. More importantly perhaps, functionalism is itself predominantly a normative approach; in an important sense, the theory has little interest in whether international organizations actually do what they were set up to do or whether the ‘salvation of mankind’ will ever be achieved. Perhaps for this reason, Nollkaemper voices some doubts (as does Guy Fiti Sinclair) about whether functionalism is properly

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¹ P. Gay, *Style in History* (1988 [1974]).

² Klabbers, ‘The EJIL Foreword: The Transformation of International Organizations Law’, 26 *European Journal of International Law* (2015) 9.

³ Nollkaemper, ‘Saving the Scarecrow’, in this issue at 957.

⁴ Confusing point: I am actually not all that convinced that international organizations law should be regarded as a relatively independent discipline within international law, but I accept that it is often treated this way. For the counterclaim, see Klabbers, ‘The Paradox of International Institutional Law’, 5 *International Organizations Law Review* (2008) 151.

to be called theory. I share their doubts and would suggest that functionalism is best seen as normative theory, in much the same way as John Rawls' theory of justice is predominantly normative and not likely to be falsified empirically.

While Nollkaemper holds that the 'Foreword' contains too little substance, Fiti Sinclair contends that it contains too much.⁵ To his mind, I exaggerate the relevance of functionalism; there are, and have always been, other approaches to the law of international organizations and, by capturing everything under the heading of functionalism, I deprive the law of the resources to become more emancipatory and just. This is an important point of criticism in its inspiration, but it does not survive closer scrutiny, partly because its foundation lacks analytical rigour – and, to the extent that it survives closer scrutiny, it actually confirms my argument. Fiti Sinclair is surely correct in suggesting that functionalism was confronted with the interference of politics already in the 1920s (witness the struggles about the International Labour Organization's powers before the Permanent Court of International Justice), and I should have included this in addition to the example about the failed expulsion of Liberia from the League of Nations.

Where Fiti Sinclair's claim lacks rigour is in his underlying concept of what international organizations law represents. Not all writing about international organizations – their work, their activities and their functioning – counts as writing about the law of international organizations, in much the same way that not all writing about crime qualifies as writing on criminal law. More concretely, from what I have seen, authors such as Mohammed Bedjaoui, Georges Abi-Saab or Grigoriï Tunkin may have written quite a bit on international organizations but relatively little on international organizations law, and the same goes for someone like Antony Anghie, whose work teaches us a lot about the World Bank but not much about such topics as legal personality, implied powers, validity of decision making or immunity from suit.⁶ There is one major exception – Finn Seyersted has always depicted himself as a non-functionalism, but his has remained a rather lonely voice, which alone testifies to the dominance of functionalism.⁷

Things are different, as Fiti Sinclair rightly suggests, with Chittharanjan Amerasinghe and Wilfred Jenks, and it is indeed fair to say that, in particular, Jenks is less clearly a functionalist than someone like Henry Schermers. If Schermers represents the post-war centre of gravity of functionalism (and a decent argument to this effect can be made), then Jenks can be located somewhere near the periphery, bordering on a constitutionalist approach. However, such a claim assumes that functionalism is a uniform school, yet I doubt whether such an assumption would hold water. Part of my mission in *Transformation* was to try and flesh out some commonalities that, I felt, many authors had adopted in their own ways and with considerable variation. In short, I treat functionalism as a broad church, but a church devoted to the law of international organizations – not to the phenomenon of international organizations generally or to their role in global affairs. Still, it might be interesting, albeit perhaps in a somewhat 'Ivory Towerish' kind of way, to start a discussion on

⁵ Fiti Sinclair, 'The Original Sin (and Salvation) of Functionalism', in this issue at 965.

⁶ A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005).

⁷ F. Seyersted, *Common Law of International Organizations* (2008).

different strands of functionalism or whether different generations of functionalism can or should be identified.

Such a conversation should also come to terms with the rather pervasive conflation of the functionalism of international institutional lawyers and that of others in neighbouring disciplines. I fully accept, with Laurence Boisson de Chazournes,⁸ that institutional lawyers and political scientists have a lot in common, start from similar premises and employ similar axioms. However, I would nonetheless maintain that they differ in one vital aspect: they ask different research questions. The political scientists are interested in how cooperation can be stimulated; the lawyers focus instead on how cooperation can be organized or structured. Still, it is indeed highly visible that the two are often seen to go hand in hand, and one of the points I make in the 'Foreword' is that their conflation has obscured the weaker spots of the lawyers' functionalism for quite some time.

Whether the transformation of functionalism has been completed is a tricky question and one that depends a lot on one's view of social and political processes (including legal transformation). To my mind, such processes tend to be forever ongoing. We can take snapshots at different moments in time and sometimes conclude that one era has passed and been replaced by another (few, after all, would maintain that we still live in Antiquity), but rarely can this be done with great certainty or precision. Nonetheless, the more immediate reason why the transformation of international organizations law is still ongoing is that the law still has difficulties with controlling organizations, despite the emergence of all sorts of internal mechanisms (as Boisson de Chazournes and Nollkaemper both rightly point out), the possibility of member state control and varying approaches such as global administrative law. All of this suggests a system highly in flux, looking for ways to come to terms with the role of organizations as institutions that exercise public power.

One final thing, part way through the 'Foreword', the following sentence appears, at the beginning of a new paragraph: 'The only way out is to discard the functionalist approach altogether and adopt a radically different vocabulary' (at 72). Taken in isolation, I can understand that it looks as if I am advocating the discarding of functionalism, and this seems to be how both Nollkaemper and Fiti Sinclair interpret the sentence. Taken in context, however, such a reading is less plausible. The paragraph continues by describing various approaches that can be said to discard functionalism, and the same context also suggests that I am not all that convinced that these approaches will prove to be successful remedies. Be this as it may, the wonderful thing is that a piece on international organizations law, usually regarded as a dry and boring branch of international law, has spawned so many comments⁹ – and such spirited comments at that. If the 'Foreword' can help initiate a proper discussion on the role of international organizations in global governance, and the body of law that regulates these creatures, then so much the better.

⁸ Boisson de Chazournes, 'Functionalism! Functionalism! Do I Look Like Functionalism?', in this issue at 951.

⁹ The 'Foreword' has also been commented on by Alison Duxbury and Ian Johnstone on *EJILTalk!*, available at www.ejiltalk.org/is-international-institutional-law-transforming/ and <http://www.ejiltalk.org/reply-to-klabbers-article/>, respectively.