Transparency as a Contested Fundamental in the Law of International Organizations

Brölmann, C.

DOI
10.1163/15723747-20010002

Publication date
2023

Document Version
Final published version

Published in
International Organizations Law Review

BRILL
NIJHOFF

INTERNATIONAL ORGANIZATIONS LAW REVIEW
20 (2023) 10–27

International Organizations Law Review
brill.com/iolr

Transparency as a Contested Fundamental in the Law of International Organizations

Catherine Brölmann
University of Amsterdam, Amsterdam, The Netherlands
c.m.brolmann@uva.nl

Abstract

Against the backdrop of a recent turn to theory in the field of international organizations law this short article, part of the Special Forum on Contested Fundamentals of the Law of International Organizations, brings to the fore a characteristic of the international organization that should not be missing in the canon of fundamentals in international organizations scholarship. This is the transparency of international organizations as a legal entity and as a legal actor. 'Transparency' here refers to the phenomenon that member states and other institutional components are to some extent legally visible. 'Legally visible' means that the component parts of an organization, notably the member states, are addressed from, and involved in, the general international plane – a condition which is dynamic and context-dependent. In the words of the ILA, organizations are layered creatures, 'conducting … multilevel operations'. The article sets out how the transparency of organizations is a fundamental in two ways: as a legal-ontological claim, and as an analytical lens. Moreover the transparency of international organizations is subject to systemic and political contestation, albeit often in an implicit manner. The article concludes by arguing that the lens of transparency has lasting relevance and analytical value, as it helps to lay bare an elusive and continual dynamic in the legal manifestation of international organizations.

Keywords

international organizations – institutional order – layeredness – member states – context-dependence – institutional veil – systemic contestation – political contestation

1 Introduction

The theme of this IOLR forum gives occasion to bring to the fore a characteristic of international organizations that should not be missing in the canon of fundamentals in the law of international organizations. Also, this fundamental is decidedly contested, albeit in an implicit manner. It is the transparency of international organizations as a legal entity and as a legal actor. 'Transparency' here refers to the phenomenon that member states and other institutional components are to some extent legally visible. 'Legally visible' means that the component parts of an organization, notably the member states, are addressed from, and involved in, the general international plane.[1] Put differently, organizations are layered creatures, 'conducting … multilevel operations'.[2] The transparency of organizations is a *fundamental* in the law of international organizations in two ways: it is a legal-ontological claim, and it is an analytical lens. Both are *contested*, as is pointed out in the following. In this account I first elaborate on the transparency of international organizations and its fundamental character (section 2); and subsequently on instances of contestation (section 3). I add the proposition that the lens of transparency has lasting value, even more than before (section 4), to end with some concluding observations (section 5).

2 Transparency as a Fundamental

This section elaborates on the transparency of international organizations. It sets out how transparency is part of the very essence of the international organization as a legal construct: it is an 'inherent condition.' The section then reflects on various factors that make it so. Subsequently it zooms in on two areas of international law where the process of embedding organizations as legal subjects brings out their transparency particularly clearly, to finally point out that the transparency of organizations is a dynamic and context-dependent condition.

2.1 *An Inherent Condition*

Organizations, at least since the United Nations era, have been attributed a separate legal identity of sorts. Seen through a positive law lens, this attribution has generally revolved around the institutional feature of autonomy or *volonté distincte* of organizations vis-à-vis member states. Structurally it entails

1 Or they are perceived as such, which in law may be to a considerable extent the same thing.

2 International Law Association, New Delhi Conference, Committee on Accountability of International Organisations, Third Report, (2002) 2.

an element of centralization, a notion used already by Kelsen in the context of organizations,[3] which distinguishes the institutional framework of an organization from general international law. It also is, among other things, a space of negotiation between the organization and the member states over power and control. The institutional design of the organization, then, lies in the hands of its founders, whose formal powers in this respect may be traced to the freedom of contract.

From their independent identity – in doctrine embodied by a separate 'legal personality' – follows the conception that organizations possess a separate institutional order. This is not a daring conclusion, and it seems undisputed in legal writing or in positive international law.[4] This is however where transparency comes in: an organization's legal order is not entirely closed-off from general international law, as a state would be in the classic legal imaginary. An organization's internal features, notably the member states, remain legally visible and legally relevant.

On another occasion the metaphor of the 'institutional veil' was introduced to conceptualise the legal shell that clothes the international organization as a legal entity, in the same way as the 'sovereign veil' of a state or the 'corporate veil' of a company.[5] That legal shell is the separation between the institutional legal order of the organization and general international law, but unlike the sovereign veil of states in its classic manifestation, it has a transparent quality.

The transparency of organizations is for example reflected in the view that "…the internal law of an international organisation cannot be sharply differentiated from international law…".[6] In the same vein, the well-known International Court of Justice dictum that "organizations *as subjects of international law* are bound by any obligations … under their constitutions", seemingly takes the view that the organization's institutional order is somehow part of the international law order (after all, the organization is not a party to its constituent treaty).[7] Some commentators have referred to the 'dual legal nature' of

3 Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (Frederick A. Praeger, New York, 1950) 329.

4 …which in various instances accords an autonomous status to the internal law of organizations. *See* Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations (VCLTIO), 25 ILM 543, 21 March 1986, (UN Doc. A/CONF.129/15 (not in force)), Art. 5.

5 Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart Publishing, Oxford, 2007), 29–33.

6 *Report of the International Law Commission on the Work of its Fifty-fifth Session*, (UN Doc A/58/10), Art. 3, cmt. 10, 48.

7 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt,* 20 December 1980, International Court of Justice, Advisory Opinion, I.C.J. Reports 1980, para. 37.

the law produced by organizations, which is international and internal at the same time.[8]

Transparency of international organizations offers an analytical lens for considering the engagement of the organization's institutional order[9] with general international law. It is especially helpful for a grasp of the position of member states and their relationship with the organization from the outside perspective of general international law (rather than from within the institutional order of the organization as would have been the traditional angle of the sub-discipline of 'the law of international organizations'). This perspective is increasingly relevant in view of the expanding role of organizations as global actors.

2.2 *Factors*

Several interrelated reasons exist for the transparency of organizations as legal entities, which are not shared by other international-legal actors. One factor is that organizations are established on a functional, rather than territorial basis, with specific (fields of) competence without a priori territorial boundaries, rather than a general competence within specific territorial boundaries.[10] Thus states and organizations do not overlap – witness for example the preoccupation with the (area of) competence of organizations, as expressed by the prominence of the 'implied powers doctrine' and the 'principle of speciality.' An (even regional) organization's legal sphere is sectoral, and its actual competences or functions limited to a particular area of human action – be it food, disarmament or the internet. It is thus less politically self-contained than a state,[11] and is consequently perceived as more legally permeable.

Another factor is the composition of international organizations and their originally subservient design. The component elements of organizations are eminent international-legal persons in their own right. Moreover, it is the

8 *See* Lorenzo Gasbarri, *The Concept of an International Organization in International Law* (Oxford University Press, Oxford, 2021), 9.

9 This article employs the term 'institutional (legal order)' precisely to avoid a binary rendition of internal/international; *see* the analysis of the legislative history of the Draft Articles on the Responsibility of International Organizations by Christiane Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (2011) 8 *International Organizations Law Review* 397–482.

10 *Cf.* the sociological analysis by Niklas Luhmann, *Das Recht der Gesellschaft*, (Suhrkamp Verlag AG, 1995), 577, who famously noted a shift from territoriality to functionality.

11 *Cf.* the distinction between the *finalité integrée* of states and the *finalité fonctionelle* of international organizations by Michel Virally in 'La notion de fonction dans la théorie de l'organisation internationale' in S. Bastid (ed.), *Mélanges offerts à Rousseau: la communauté internationale*, (A. Pedone, Paris, 1974), 288–290.

nineteenth-century state, conceived as an 'original' subject of law analogous to the individual in domestic law (rather than the eighteenth-century state, perceived as a corporate entity itself and still in need of legitimation), that is the basis of contemporary international organizations. Notwithstanding the scholarly repudiation of 'anthropomorphism' states have kept their *allure* of 'natural' actors. As has been pointed out, "[c]uriously, the collective and institutional structure of states has not been discussed by international law scholars …"[12] This perception of states has only added to their prominence also where they appear as organizations' building blocks.

Especially where state sovereignty has been taken as an organizing principle of modern international law, the membership of organizations creates a tension with the legal identity of organizations as such. Such may be visible in the institutional structure of an organization,[13] but also in the political conviction that organizations are vehicles for states, as expressed in the statement that "… IOs are not intended to be proto-states or governments in the making. They were and are established for limited purposes.…They are institutions of limited and delegated powers, lacking the plenary rights of sovereigns under international law…".[14]

Finally and not least, international organizations have a dual function in actuality, which strongly reinforces their legal transparency – they appear as an institutional space for states, and as an independent legal entity. This duality appears in the social reality of international life (organizations such as the UN *de facto* appear prominently in two roles, as fora for states and as independent actors); in the legal-institutional structure of organizations (for example, in the contrast between the functions and powers of an expert body and those of a state representatives' body); in institutional law and in international law doctrine (for one, because doctrine hinges on the tenet of state sovereignty); and in the minds of lawyers and policy-makers (who may have an interest in addressing member states directly, or, on the other hand, disregarding them). Doctrine is a powerful factor, as it is also a mind-set, and all the more complex because of the mixture of descriptive and normative arguments.

12 Samantha Besson, 'State Consent and Disagreement in International Law-Making. Dissolving the Paradox' in *Leiden Journal of International Law* (2016) 29(2) 289, at 295.

13 Viz. from the fact that also the newest international organizations are firmly state-based; *e.g.*, decision-making competence with regard to matters not strictly related to the internal functioning of the organization usually lies with the organ composed of state representatives, which often takes decisions by unanimity (*cf.* Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (Brill Nijhoff, Leiden, 2018), § 379.

14 José Alvarez, *International Organizations as Law-Makers*, (Oxford University Press, Oxford, 2005), 15; this is presented as an empirical finding, but it can be also taken as a normative statement.

That the transparency, among other things, stems from oscillation between two poles appears from statements in which the Commission emphasised the transparency of the institutional veil:

> …the internal law of an international organisation cannot be sharply differentiated from international law.[15]

But at the same time noted the separate or closed aspect of the institutional order:

> … the relations between international law and the internal law of an international organisation appear too complex to be expressed in a general principle.[16]

2.3 *International Organizations in International Law*

The unsettling effect of transparency can be seen clearly at work where organizations are incorporated in the two 'procedural' branches of international law.[17] The transparency of international organizations was first brought out by the codification process of the law of treaties, as confirmed by the drafting history of the two Vienna Conventions.[18] Nearly all issues under discussion during the drafting process of the second Vienna Convention on the Law of Treaties were related to an effort, inspired by the image of organizations as functional vehicles for state action, to connect the general law of treaties with the institutional order of organizations. But this is a difficult thing to do, as the transparency of an organization does not mean its institutional sphere is entirely open and accessible. Hence the preliminary obstacle to inclusion of international organizations in the scope of the first Vienna Convention – the aim to have

15 "… At least the constituent instrument of the international organization is a treaty or another instrument governed by international law; some further parts of the internal law of the organization may be viewed as belonging to international law." *Report of the International Law Commission on the Work of its Fifty-fifth Session*, (UN Doc. A/58/10), Art.3, cmt. 10, 48.

16 *Ibid.,* Art. 3, cmt. 10, 49.

17 This builds on Brölmann (n 5); Catherine Brölmann, 'Member States and International Legal Responsibility: Developments of the Institutional Veil' (2015) 12:2 *International Organizations Law Review*.

18 Vienna Convention on the Law of Treaties, 1155 United Nations Treaty Series 331, 23 May 1969; Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (VCLTIO), 25 ILM 543, 21 March 1986, (UN Doc. A/CONF.129/15 (not in force)); for an analysis of the VCLTIO on this point, see Brölmann(n 5).

treaty-making capacity determined by the organization's constituent treaty and at the same time by a general rule. And hence the predominantly cosmetic changes in the second Vienna Convention with respect to the provisions of the first Convention – some terminological distinctions; a reference to the institutional law of organizations that adds no normative content to the general rule; or a rule of reservation, withholding the operation of international law at the borders of the institutional order of organizations. A genuine link between the law of treaties and the institutional law of organizations, with reciprocal normative effect, can seem almost within reach, but in reality is not quite possible. This is epitomised by the tortuous story of draft Article 36*bis* in the codification of the second Vienna Convention.[19]

In legal practice the transparency of organizations, denoting a legal sphere less impermeable than that of states but not entirely open either, leads among other things to problems of accountability. Because of the different layers involved in the organization's 'external relations', the locus of accountability is not always clear. In a formal-legal framework this is visible in the field of legal responsibility, where the role and position of the member states next to the organization continue to be an uncertain factor. Even if the law of responsibility, unlike the law of treaties, poses no systemic obstacle to differentiation among legal participants, the challenge remains of formulating a rule of general international law regarding responsibility in relation to member states that holds valid for all international organizations regardless of their institutional architecture.

The transparency of organizations may be the object of a positive law provision (see for example Article 62 of ARIO)[20] but it is also a frame of reference for international lawyers and policy-makers whenever there is room for discretion, discussion, theorization or a normative agenda on the division of legal responsibility between organizations and their member states.

The legal picture of international organizations' responsibility and that of their member states is complex and occasionally fuzzy. It has been among the issues most intensely discussed in the drafting process of the Articles on the Responsibility of International Organizations (ARIO).[21] Four scenarios can be identified that play a role in theory, doctrine and practice: subsidiary responsibility, attribution of responsibility, attribution of conduct and separate responsibility. Each of these legal scenarios are material for separate analysis, which

19 Brölmann (n 5) 212–225; see infra note 38 and accompanying text.

20 International Law Commission, 'Draft Articles on the Responsibility of International Organizations,' (ARIO), UN Doc. A/66/10 (2011), Art. 62, see *infra* n. 30.

21 *Ibid.*

has been conducted elsewhere.[22] A common trait is that these scenarios all revolve around the transparency of the organization. In each of them – whether it concerns legal practice, a 'rule', or a normative agenda – either transparency is at issue (and the institutional veil may be 'pierced') or the organization is bypassed altogether through a focus on an entirely separate obligation on the part of an individual (member) state.

But the legal transparency of organizations also complicates the broader mechanisms of accountability and prerequisites thereto. It may be for instance uncertain whether and how member states are bound by the obligations of the organization (an intensely debated and unresolved question in the process of fine-tuning the *pacta tertiis* rule for organizations in the law of treaties); or whether the organization is bound by the obligations of the member states (a question in the classic 1999 *Matthews* case before the European Court of Human Rights, and answered in the negative by the European Court of Justice in the 2008 *Intertanko* case);[23] or whether an organ incurs legal obligations in its own right or on behalf of the organization (a recurring question in relation to UN organs such as the UN High Commissioner for Refugees); or whether stakeholders have to address the organization or the member states on the implementation of an agreement (which may be at issue for a host state regarding an organization's observer or peace-keeping mission) or on reparation (as was the question in the iconic Tin Council cases).[24] These examples have relatively formal settings, but the complex dynamic that comes with the involvement of a transparent legal actor essentially persists at any degree of (in)formality. Put differently, the institutional veil would be present also in 'informal law',[25] or when law is not taken as a set of 'rules' or past decisions, but as 'a continuous process of authoritative decision-making'.[26]

The condition of transparency then leaves a separation between the organization's institutional order and general international law, with an ensuing

22 A good overview in Jan Klabbers, *An Introduction to International Organizations Law* (Cambridge University Press, Cambridge, 2022), 314–339; *see also* Brölmann (n 17) 358–381.

23 *Matthews* v. *The United Kingdom*, 18 February 1999, European Court of Human Rights, no. 24833/94; *International Association of Independent Tanker Owners* (*Intertanko*) *et al.* v. *Secretary of State for Transport*, 3 June 2008, European Court of Justice, no. C-308/06.

24 See notably *Maclaine Watson & Co. Ltd* v. *International Tin Council*, 26 October 1989, United Kingdom House of Lords, 81 ILR 670.

25 Joost Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Research Questions' in J. Pauwelyn, R. Wessel, and J. Wouters (eds.), *Informal International Lawmaking* (Oxford University Press, Oxford, 2012), 13–34.

26 *Cf.* the perspective of the New Haven School as articulated by Rosalyn Higgins, *Problems & Process, International Law and How We Use It* (Clarendon Press, New York, 1994), 1–12.

need for interstitial norms to bridge the fault line. Examples such as the EU declarations of competence, and the proposed duty for member states to enable an organization to pay its dues[27] suggest that good faith-based rules are taking up that function.

2.4 *Context Dependency*

The 'transparency' of organizations refers to a legal sphere that is less closed off than that of a state, but is not entirely open either. Moreover, the resulting transparency is not static. Rather, the degree to which we are allowed to see through the institutional veil is dependent on the legal context in which an organization finds itself. The legal appearance of an international organization is by some authors presented as a matter of choice,[28] but arguably it is not that. There is ongoing oscillation, which reinforces the elusive legal image of organizations and which poses a challenge for positive international law, as is indicated below and in section 3 on 'contestation'.

When serving as a forum for treaty-making, such as the UN on its many occasions of hosting a treatymaking session, the organization – in a formal sense not the author of a legal act – presents a predominantly transparent structure, in which (member) states and their legalized relations are largely governed by general international law. The institutional framework of the organization, however, is not entirely open to general international law in the way of a classic inter-state diplomatic forum: the law of treaties is to some degree influenced by the institutional law of the organization, or is barred from application altogether.[29]

On the other hand, when it comes to subsidiary liability for member states following the wrongful act of an organization, the institutional veil is consistently opaque. Judges, drafters and scholars seem to have been in general agreement on this ever since the 1980s Tin Council cases.[30] In other scenarios, especially that of secondary attribution of wrongful conduct as such to the member states, the organization is *increasingly* challenged for transparency.[31] A likely factor for the intense exploration and discussion on this point

27 ARIO, Art. 40; see Higgins (n 26) and Paolo Palchetti, 'Responsibility of Members of an International Organization' in S. Besson (ed.), *Theories of International Responsibility Law* (Cambridge University Press, Paris, 2022).

28 Palchetti (n 27) 143–164.

29 Compare Articles 9(2) (a general rule for adoption of text which stems from UN institutional practice) and 5 (a no prejudice clause for inter alia 'treaties adopted within an international organisation') of the 1969 Vienna Convention.

30 Stipulated in ARIO, Art. 62.

31 *See* Klabbers (n 22) 327–329; Brölmann (n 17) 368–373.

is the forbidding combination of attribution of conduct to an international organization, on the one hand, and the organization's immunity from process before a domestic court, or lack of standing before an international court, on the other. The resulting lack of legal remedies for individuals has not yet been resolved, but it may have been a push factor for considering, as did the Dutch judiciary in the Mustafić-Nuhanović cases,[32] the possibility of dual attribution of wrongful conduct – which incidentally reinforces the transparent image of the organization.

When the constituent treaty of an organization is reviewed by international law, the institutional order of the organization appears as transparent but partly screened off by the institutional veil. In comparison to regular international agreements, a constituent treaty is less accessible to general international law,[33] or to the law of treaties in particular. When organizations then conclude treaties on their own accord, which is where they themselves become subjects of the law of treaties, they manifest as closed legal structures, and the law treats them as opaque. This is dictated by the formal treaty-making mechanism; as parties are equal without room for a substantive distinction, the 'internal' institutional order and the member states cannot play a formal role at the general level. This is confirmed by the fact that from a formal perspective the treaty-making practice of organizations turns out to be similar to that of states.

2.5 *A Fundamental Condition*

The transparency of organizations is a legal-ontological claim. Already in that sense it could be described as a 'fundamental'. Moreover, in international law as it is currently imagined and shaped, transparency is inherent in organizations, as is brought out by their organizations' fundamental unsuitability to the setup of positive international law. The same holds logically for transparency as an analytical lens.

3 Contestation

'Transparency of organizations' both as an ontological claim and as an analytical lens is subject to contestation. This has notably two forms which may be called systemic contestation and political contestation.

32 District Court The Hague, 10 September 2008, [*M. M.-M.*], [*D. M.*] *and* [*A. M.*] v. *The Netherlands*; Appeals Court The Hague, 5 July 2011; *N. et al* v. *The Netherlands*; Dutch Supreme Court, 6 September 2013, *N. et al* v. *The Netherlands*.

33 Brölmann (n 5) 113–124.

3.1 *Systemic Contestation*

'Systemic contestation' refers to the challenging of transparency, also when unarticulated, that is related to the traditional *systematique* of international law. This in general terms imposes a binary mould on stakeholders and participants: either they are unitary actors who act on their own accord ('legal persons') or they constitute entirely open structures for other legal actors. A middle way is not given. This in turn is one reason why the degree of an organization's transparency, as was pointed out, oscillates, and varies according to the legal context in which the organization finds itself.[34]

Of course it is perfectly possible for states (and organizations, if they are included in the norm-setting process) to agree on different substantive rules for different legal actors. Compare, for instance, the right of a state to waive the immunity of an agent[35] with the duty of the United Nations Secretary-General to do so.[36] However, the organizations' condition of legal transparency means that international law will not be able to claim full openness and to capture in a general rule the variety of institutional arrangements within the subject category of 'organizations'.

Certain foundational mechanisms of international law (such as a formal, consensual law-making process) or of branches of international law (such as the law of treaties) which are based on equality of subjects, are yet a different thing. Because these proceed from the idea of unitary, one-dimensional participants, contracting through 'express' or 'tacit consent', and from the fiction of a unitary subject 'bearing' rights and duties, the *Normadressat* of a primary norm must be either the organization or the member state. It cannot be half or both at the same time, unless both are bound independently (obviously an organization and a member state can both be addressee of a particular norm in their own right – as in the case of mixed agreements or in the application of customary law.) Thus, if a rule is addressed to the organization, it binds also the member states, but only in their quality of – and to the extent that they

34 See also, Richard Collins, 'Beyond Binary Oppositions? The Elusive Identity of the International Organization in Contemporary International Law' (2023) *International Organizations Law Review* 28-51.

35 Vienna Convention on Diplomatic Relations, opened for signature 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964) art 32.

36 Convention on the Privileges and Immunities of the United Nations, opened for signature 13 February 1946, 1 UNTS 15 (entered into force 17 September 1946) art V s 20.

are – organic parts of the contracting party. For states, this is traditionally construed in the same way.[37]

The inability of international law to accommodate a transparent subject was well-illustrated by the codification process of the law of treaties in the 1970s and 1980s and notably by the hapless fate of draft Article 36*bis*,[38] which had been aimed to somehow accord a special status to member states in treaty obligations incurred by their organization. This episode underscores the transparent and thus layered structure of international organizations as legal actors and goes to show how that structure ultimately has to give way to the one-dimensional and binary setup of the international-legal system. This fundamental tension is most strikingly brought out by the *systematique* of law of treaties: given the nature of the treaty as an instrument between legal equals, it is hard to make a substantive distinction between states and organizations as 'parties'. But also in international law generally the fundamental tension between a transparent international organization and a one-dimensional and binary legal system creates continuous systemic contestation. In the codification process of the law of treaties, such systemic contestation, combined with the drafters' aim to create a unified body of rules that would govern (by then widely used) treaties between states and organizations, made it inevitable that the *dispositifs* of the two Vienna Conventions on the law of treaties would end up as identical.[39]

3.2 *Political Contestation*

Next to instances of systemic contestation, political contestation is at work. I use the term here to refer to the challenging of international organizations' transparency, even when unarticulated, that is based on *often implicit* arguments of political economy, world view and power consolidation. Sometimes political and systemic contestation seem mixed, as in the lapidary statement by International Law Commission (ILC) Special Rapporteur Paul Reuter that

37 *Cf.* the statement in relation to states in the Blaskič case 'Each sovereign State has the right to issue instructions to its organs […] and also to provide for sanctions or other remedies in case of non-compliance with those instructions. The corollary of this exclusive power is that each State is entitled to claim that acts or transactions performed by one of its organs in its official capacity be attributed to the State, so that the individual organ may not be held accountable for those acts or transactions' Prosecutor v Blaskič (Judgement) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-AR108bis, 29 October 2006) [41].

38 Brölmann (n 5).

39 '*Mutatis mutandis* identical…'. Karl Zemanek, 'International Organisations, Treaty Making Power' in Rudolf Bernhardt (eds), *Encyclopedia of Public International Law* (1995) 1346.

international organizations 'are neither sovereign nor equal'.[40] Sometimes the political agenda can seem clear, as in the quotation above on organizations that 'were and are established for limited purposes.'[41] Political contestation is often linked first of all to the agency of organizations, a concept that for a long time has given rise to reticence and debate. It is arguable that the construction of the organization as a legal actor is closely connected to the role that organizations are *allowed* to play in international life. Whereas systemic contestation often pushes for *less* transparency of the organization in order to adjust to the legal context, political contestation often is seen to push for *more* transparency in order to safeguard participation and control of member states. That said, when it comes to legal responsibility, perhaps unsurprisingly, the reverse can be observed (for example, Article 62 of ARIO, which generally blocks secondary liability for member states, may be taken as an outcome of political contestation of organizations' transparency).

Both systemic and political contestation thus play a role in the degree of legal transparency of the organization. The 'solidity of the distinct personality of the organization'[42] is not the sole factor; the legal and political context is a strong determinant. The oscillation between different degrees of transparency has shaped legal doctrine on several points of debate regarding the law of international organizations: the attribution theory versus the implied powers theory with regard to the competences of international organizations; the sovereign 'will' of the member states versus general international law as the source of legal personality and capacity of international organizations; the constitutive instrument of an organization as a treaty versus the constitutive instrument as a constitution; and subjective legal personality versus objective legal personality for international organizations. Such contestation has also been a central, albeit unnamed, element in the process of conceptualising organizations as participants in public international law in general.

3.3 *Contestation of the Ontological Claim and the Analytical Lens*

In the wake of systemic and political contestation of the ontological claim of organizations' transparency also the analytical lens has been underused. In that regard it is illustrative that in an academic and simultaneously applied law-environment such as that of the ILC this perspective has not been articulated in relation to the law of treaties, whereas it was an obvious factor in the persisting obstacles, as was in fact implicitly recognized by the Special

40 Special Rapporteur Paul Reuter, (*1977*) 2(*1*) *Yearbook of the International Law Commission* 120, para 6.

41 Alvarez (n 14).

42 Palchetti (n 27) 162.

Rapporteur.[43] That said, it is perhaps not surprising that the transparency of organizations is contested also as an analytical fundamental. Not only is it as such elusive and not aligned with the *systematique* of international law, also its implications are not clear. 'Transparency' has strong explanatory power in empirical analysis, but it has weak doctrinal power and in that sense does not 'resolve' situations nor generate legal outcomes.

4 Continuing Relevance of the Transparency Lens

While the transparency of organizations may thus be contested, both as an ontological claim and as an analytical lens, it is arguably a fundamental to preserve, especially for its value as part of the analytical toolbox. This is so for more than one reason.

First, the transparency lens is most valuable in the *instrumentarium* for empirical analysis, for example in the context of historical end/or socio-legal research. The binary, one-dimensional view imposed by positive law is clearly not sufficient for the purpose of such research.[44] On the other hand, an effects-based (as opposed to pedigree-based) approach, or a radical 'soft law' approach to the-law-in-force is not satisfactory either, as it does not capture the tensions that arise within the positive law framework which for many is an ideational reality. It is necessary to factor in the 'transparency' of organizations and acknowledge the challenges and the riches it brings, even if positive international law in many quarters tends to flatten out the stratified nature of organizations.

Otherwise, for an external examination of the complex interplay between an organization and its member states, the transparency lens is more helpful than, for instance, the conceptual linchpin of the organization's 'international legal personality' – the latter legal category being a binary notion, essentially uncontested when it comes to regular international organizations,[45] and with little predictive power in its contemporary use of an *ex post* label.

Second, the transparency lens is valuable as it brings out the binary setup of positive international law as a 'system' and a mindset. A related proposition is that the law of treaties, as it is geared to equal and thus one-dimensional subjects, is not capable of accommodating transparent legal actors. Given the

43 See *Yearbook of the International Law Commission* (n 40).

44 See Golia and Peters who suggest that 'the legal conceptualization should proceed inductively and with sociological awareness' (Golia & Peters 2022), at 26.

45 See *e.g.* in *cf.* Schermers and Blokker (n 13) 44.

state of contemporary international life this is a clear doctrinal and theoretical weakness, but the uneasy union between the transparency of organizations and the contractual setup of international law is generally not articulated. While potentially a key analytical angle, it appears for example from the *travaux préparatoires* of the law of treaties codification conventions that this has not been an element in the conceptualization of organizations as international law actors.

Third, this amounts to an immanent critique on the positive international law framework, which, while providing a necessary foundation for further exploration, of course leaves several questions pending. What is the social dynamic behind the oscillation between the open and closed image of international organizations? How does the organization negotiate identity? What is the pull for lawyers and policy-makers to favour the open, functional view of organizations? What are the (geo)politics of the transparency? And what are its implications for non-state actors? These questions are opened up by the transparency lens and remain to be addressed. Critical approaches especially are rewarding, as in our time some pertinent questions about international organizations, including the relation with the member states, undoubtedly revolve around power. International organizations have an ambiguous role in international life: they are part of the international establishment in a way that is unlike any other non-state actor, but they are also separate sources of political power competing with states. Organizations may be considered to sustain contemporary liberal ideologies and particular postcolonial structures, but some will see them also as the best option for challenging these ideologies. Clearly an analysis of the multi-layered and elusive appearance of organizations and their bearing on international life must ultimately go beyond formal factors such as the state-based origin of organizations and realist accounts of the states' desire to remain 'masters of the treaty'. The transparency lens, including the sensibility to context-dependent degrees of transparency, brings to light the power relations between member states and organizations behind a one-dimensional image.

Fourth, the transparency lens opens up our thinking vis-à-vis other participants. In that respect the conceptualization of international organizations has general relevance because, as part of the trend of transnationalism or in an older metaphor 'New Medievalism,'[46] or any perspective that brings out the growing participation of non-state actors, international law is called upon to include ever more 'subjects'. Some of these will be legally transparent or

46 Jörg Friedrichs, 'The Meaning of New Medievalism', (2001) 7 *European Journal of International Relations*, 475–502.

layered in some way. This goes in particular for actors which are, in turn, component elements of another legal actor. Such a constellation already exists in the case of states that are both independent subjects and member states. At this point it also holds for individuals who are both independent actors and component parts of states, which in the context of international responsibility can give rise to concurring international obligations of states and individuals.[47]

When a legal 'system' lacks the capacity to accommodate new actors, this is problematic for more reasons than just theoretical comprehensiveness. Why is the particular legal setup of organizations an obstacle? Is not the state a composite entity as well?[48] Is not the state at the same time a self-contained entity and part of a larger whole, an organization? To be sure, the maximally transparent image and the minimally transparent image of the international organization can exist side by side, and have its appearance depend on the context. What complicates things is the oscillation between these two appearances, which itself emphasizes the organizations' legal transparency, and the difficulty for international law in accommodating the ensuing stratification.

This difficulty leads among other things to a problem that can be summarized as one of accountability. In the words of the ILA Committee on Accountability of International Organizations, organizations' 'multilevel operations' are in need of 'a comprehensive set of yardsticks leaving no loopholes at each individual legal level'.[49] It is telling that the Committee did not resort to a discourse of *lex lata* and *ferenda* but concluded its impressive study with 'recommended rules and practices'.

5 Conclusion

The transparency of international organizations makes for dynamic and layered legal creatures, but their particular nature does not have full play in positive international law, which tends to impose crude divisions on the legal landscape. Law is either municipal law or international law. Treaty-making subjects are unitary, one-dimensional legal actors or they are not subjects at all. These may seem mundane considerations – as if international law

47 *Cf.* André Nollkaemper, 'Concurrence between individual responsibility and state responsibility in international law' (2003), 52 *International and Comparative Law Quarterly*, 615.

48 *See* Benson (n 12) and accompanying text above.

49 *See* ILA Third Report (n 2) 2.

consisted only of technicalities, as if the view of law as an autonomous system of constraining rules had not come to be superseded, and as if the formalist, binary view of law-making had not come under pressure. But on a dramatic note one could say that where international law (thinking) cannot accommodate the transparency of international organizations, it also lacks the ability to accommodate developments of multilevel governance and the involvement of non-state actors in the international community at large, as well as the sensibility to power structures in and around international organizations.[50] In the same way in which "we need a legal concept of international organization that is both sufficiently specific to have an analytical value for legal examination and sufficiently broad for not missing out [relevant] entities…"[51] we need to be able to articulate and conceptualize transparency of organizations so as to be able to include them in a meaningful way in the discourse of international law.

In this account I use positive international law as a *contrasting* frame of reference. That choice is informed by the fact that the paradigm of positive, consent-based and state-based law – for instance, when it comes to the creation of legal rules and the creation of 'derived' legal subjects – is the ideational reality of many international lawyers. It is within this paradigm that most scholars, law-makers and practitioners move about, develop their thoughts and seek legally to capture their social reality. Paradigms moreover do not only have descriptive, but also normative force, as they tend to press experience into a pre-existing mould. The, in the words of Alvarez, 'continuing hold of legal positivism,'[52] including its bearing on legal practice, is precisely why it is worthwhile to examine from within the system obstacles and resistance to phenomena of social and political organization.

Finally and in the longer term, in order to legally involve and address in the words of the ILA Committee 'each individual legal level', the formal legal framework will ultimately need to be reconstituted. For this to be possible, a theoretical awareness of the transparent setup of organizations is indispensable. By examining the organizations' legal stratification and its role in processes which make use of international law, the transparency lens can make a

50 *Cf.* Bhupinder Chimni's classic account of the contemporary International Financial Institutions (B. S. Chimni, 'International Institutions Today: An Imperial Global State in the Making', 15 *European Journal of International Law* 2004, pp 1–37).

51 Angelo Golia Jr. & Anne Peters, The Concept of International Organization in Jan Klabbers (ed), *The Cambridge companion to international organizations law* (2022, Cambridge University Press), 25–49, at 26.

52 Alvarez (n 14) 586.

contribution to debates on the reconstitution of the international law system. The notion of 'dynamic transparency' allows us more sharply to conceptualize international organizations as legal entities and thereby as players in an increasingly multileveled international life.