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Regional Organizations in International Law: Exploring the Function-Territory Divide

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Abstract

Regional international organizations have a problematic image among international lawyers (in contrast to IR scholars and international practitioners generally). In this paper I argue how this is due not to a systemic problem but rather to an ideological tension in international law. While according to received knowledge states are based on 'territory' and organizations are based on 'function,' it is true that the legal identity of regional organizations appears to have an uneasy combination of both. Yet, the contrasting notions of 'territory' and 'function' relate especially to the legal origin of states and organizations. The contrast does not as such ruffle the general mechanisms of international law. What is difficult, on the other hand, is to square the territorial (in truth geographical) dimension of regional organizations with the universalist aspirations of international law and with the claims of functionalist, a-political neutrality projected onto international organizations. Regional organizations challenge the vision of a universally applicable body of law as well as the vision of a world without territorial boundaries, where authority is segmented by specific issues or 'functions.' This ideological challenge is arguably a prime reason for the limited presence of regional organizations in international law narratives and in international (institutional) law scholarship.

Keywords

International organizations – regional organizations – regionalism – states – geography – territory – function – universalism – United Nations

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1 Introduction

"In Times of Global Crises, Collaboration between Regional Organizations [and] United Nations Has Grown Exponentially," UN Secretary-General Guterres was quoted as saying in 2021.[1] Regional International Organizations ('regional organizations' or 'RIOs') undeniably hold a significant presence in global affairs. They are also a longtime object of study within the field of international relations ('IR').[2] In contrast, for international lawyers, RIOs appear to have a problematic dimension. Arguably, this is reflected in the modest role of RIOs both in international law narratives and in international (institutional) law scholarship.[3]

A plausible factor for this reserve, as was put forth elsewhere,[4] is the uneasy combination of a 'functional' and a 'territorial' dimension to regional organizations. This brief article aims further to unpack that proposition. While 'function' and 'territory' as defining principles are clearly in contrast – as is frequently put forth in 'political-science integration theories'[5] – it is not quite clear in what way RIOs stand apart from other organizations in international legal affairs.

The following sections address (1) the role of 'function' for the operation of (regional) international organizations in positive international law, (2) the

1 UN Security Council, 'In Times of Global Crises, Collaboration between Regional Organizations [and] United Nations Has Grown Exponentially' (Media Release UN Doc Sc/14498, 19 April 2021).

2 See, eg, Kenneth W. Abbott and Duncan Snidal, 'Why States Act through Formal International Organizations' (1998) 42 *The Journal of Conflict Resolution* 3–32; a fine example of contemporary empirical research on RIOs can be found in Mette Eilstrup-Sangiovanni, 'Death of International Organizations: The Organizational Ecology of Intergovernmental Organizations 1815–2015' (2020) 15 *Review of International Organizations* 339–370, 354: "Starting with the impact of Region, I find that IGOs with global membership have significantly lower hazard-rates than regional organizations".

3 A notable exception is Laurence Boisson de Chazournes, *Interactions Between Regional and Universal Organizations: A Legal Perspective* (Brill | Nijhoff, Leiden, 2017), which offers a rich overview of regionalism in law and among international organizations, as well as its interaction with universalism.

4 Catherine Brölmann, 'Review of Interactions between regional and universal organizations: a legal perspective by Laurence Boisson de Chazournes (2018)', in (2020) 114 *American Journal of International Law* 335–340.

5 Anne Peters and Simone Peter, 'International Organizations: Between Technocracy and Democracy' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 170–197, 182: "Current political-science integration theories typically contrast the territorial with the functional logic of integration" (referring to the classic David Mitrany, 'The Prospect of Integration: Federal or Functional' (1965) 4 *Journal of Common Market Studies* 119–149).

different spatial concepts used in relation to regional international organizations, (3) the place of international organizations' 'functional' nature in the ideology of international law, and (4) the conclusions. A key conclusion is that the troubled image of RIOs among international lawyers is due not to a systemic problem but rather to an ideological tension in international law.

2 *Function* in the Doctrine of International Law

It is a received view that 'function' is the foundation of international organizations.[6] However, this can mean different things. When it comes to organizations, 'function/al/ism' is a conceptual linchpin used among others to argue a rationale, to set out an explanatory model for empirical analysis, or to set a legal standard.[7] This makes for an unwieldy analytical tool in that its tenor may change depending on the argument of which it is part.

That said, in international-legal narratives the 'functional basis' of organizations is frequently contrasted with the 'territorial basis' of states,[8] as in the poetic image of international organizations as "the invisible continent."[9] Indeed it is easy to see how international organizations would be organised on the basis of specific functions (linked to specific objectives) without a priori territorial boundaries rather than on the basis of an all-encompassing set of functions (linked to a comprehensive set of objectives) within territorial boundaries, in the way of states. At first blush it appears this contraposition is challenged by RIOs due their territorial dimension.

Function is thus intricately connected to the legal phenomenon of international organizations. More precisely, in the context of our enquiry it appears as an organising principle. At this point it is worth noting that this is not a principle imposed by international law. Seen through a positive law lens, international organizations are ultimately creatures of treaty, that is, they are construed as consent-based regimes created by a process which as such is

6 Extensive work on functionalism as a theory of international organizations law has been done by Jan Klabbers in 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 *European Journal of International Law* 9–82.

7 For example, implied powers as a doctrine of 'functionalist inspiration'; a functional/ist explanation of 'the rise of IOs'; and the principle of 'functional necessity' for determining the scope of an IO's immunities, respectively.

8 Frequently with a reference to Niklas Luhmann, *Das Recht der Gesellschaft* (Suhrkamp, paperback edn, 1995) 577, on a general shift from territoriality to functionality.

9 Johan Galtung, 'Non-territorial Actors: The Invisible Continent; Towards a Typology of International Organizations' in Georges Abi-Saab (ed), *The Concept of international organization* (UNESCO, Paris, 1981) 67–75.

ruled by the freedom of contract.[10] Once created, such regimes are construed as to some extent 'self-contained', or: fitted with a separate 'institutional order' producing 'internal rules,' to mention a few familiar legal tropes. This is then accommodated by international law's one-dimensional bias, and its partiality for impermeable, unitary subjects (of which states, as the proverbial 'billiard balls' exerting influence over each other only through external pressure, are the prototypes).

Here, our point of interest is that internal features, including a significant variation in autonomy and institutional density among organizations,[11] thus do not have an 'external' effect in international law. It follows that the conceptual contrast between function and territory would not create normative ripples in international law, nor would this be the case for an organization's *regional* character as such.

This was acknowledged also by the International Law Commission in its 2006 *Fragmentation* report, which held that generally regional organizations "[i]nstead of illustrating the independently normative power of regional linkages … come under the discussion of lex specialis."[12] The -arguably not unproblematic- approach to screen the institutional sphere of an international organization from general law by using the legal category of *lex specialis*, was also chosen in the 2011 *Draft Articles on the Responsibility of International Organizations.*[13] A distinction between universal and regional organizations was not made. Incidentally, this is not different when it comes to regional international law without an institutional dimension. It appears that no general legal implications are attached to the regional characteristic: "nowadays the

10 Jan Klabbers, 'Book review of Jens Steffek, International Organization as Technocratic Utopia (2021)' in (2022) 33 *European Journal of International Law* 700: "International lawyers […] tend to think of international organizations as more or less self-contained entities, establishing their own legal order, with each and every one of them being, in essence, a 'thing between the parties' (res inter alios acta)."

11 Cf. Angelo Golia and Anne Peters, 'The Concept of International Organization' in Jan Klabbers (ed), *The Cambridge companion to international organizations law* (Cambridge University Press, 2022) 25–49, who propose a concept of international organization that runs along ie a spectrum between 'weak' and 'strong' autonomy.

12 International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission. Finalized by Martti Koskenniemi.* 13 April 2006. UN Doc A/CN.4/L.682 [212], with a link to RIOs in fn 269.

13 International Law Commission, 'Draft Articles on the Responsibility of International Organizations' (2011) 2(II) *Yearbook of the International Law Commission*, UN Doc. A/66/10, art 64 (*Lex specialis*): "… Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members".

fact that an international rule is regional in nature is deprived, as such, of any autonomous legal consequences."[14]

In summary, the notions of territory and function in connection to legal actors do not constitute a formal factor in international legal affairs. Rather, territory and function describe the *origins* of different legal creatures. In fact, this is a key role of the function concept: it gives regard to an organization's 'constitutional limit', that is, to the boundaries of its existence. For a state these boundaries are the territorial borders of its 'sovereign authority'. For an international organization, these are the margins of its proverbial 'area of competence' and 'field of operation' – the building blocks of what came to be articulated as the 'principle of speciality.'[15]

3 Territory, Geography, Region and Space

In international law different terms are used to signify a relationship with land. 'Territory' is generally taken as "that defined portion of the globe which is subjected to the sovereignty of a state."[16] Thus it refers to a specific area of land typically under the control or jurisdiction of a particular political entity. The concept of 'geography,' on the other hand, is connected to physical and human aspects of land. In a legal argument, geography cannot be readily deconstructed through notions of authority or property. Whereas geography and territory clearly are different parameters, 'region/al/ism' as it is used in international law appears to have connotations of both. A RIO is geographically defined by the common physical, cultural, or historical features of an area of land, while it is territorially defined by the legal and political boundaries and jurisdictions of its limited set of member states.

The regional dimension attained by RIOs[17] through their membership can have different forms, notably along two vectors. 'Geographical' may refer to the quality of being localisable or physically situated in a particular area on the globe, but it may also refer to a geo-political connection of states who

14 Mathias Forteau, 'Regional International Law' (2006), in *Max Planck Encyclopedia of Public International Law* (OUP, Oxford Public International Law online), [24], who has related this to an expanding interpretation of the term 'regional'.

15 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* [WHO], 8 July 1996, International Court of Justice, Advisory Opinion, ICJ Reports 1996, 66, quoted terms in [19]–[25].

16 Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (Oxford University Press, 9th ed, 2008) 563.

17 See Bordin and Ordermatt, in this issue, for references to a number of RIOs.

align themselves with an organization based on geographic as well as political, strategic, cultural or economic considerations. While geo-political alliances have always existed, their number has been on the rise, in line with "the decline of geographic factors as a guiding element for group identifications" that was pointed to already in the 1990s.[18]

These geo-political organizations -still mostly called 'regional'-[19] can be resistant to classification; such for reasons of juridico-political identity (see below) or in some contexts the wish to avoid particular legal implications. The latter is exemplified by the reluctance of NATO to self-identify as a 'regional Organization', chiefly because this could tie the Organization to Article 53 of the *UN Charter*, which prescribes UN Security Council authorization for the use of military enforcement action by "regional arrangements or agencies",[20] rather than to Article 51, which sets out a framework for (collective) self-defence where the functions and competences of NATO are fully aligned.[21]

This highlights the relevance of political will on the part of the members as a factor in the classification of RIOs, which is not subject to a binding template (in practice, UN statements generally leave room for "regional, subregional *and other international organizations*"[22] without reference to the 'global'). The *Alliance of Small Island States* ('AOSIS') founded in 1990,[23] and the *Commission of Small Island States on Climate Change and International Law* ('COSIS') created in 2021[24] for the request of an advisory opinion to the ITLOS tribunal,[25]

18 See on the waning link between "common interests … [and] … geographic proximity" Christoph Schreuer, 'Regionalism v. Universalism', (1995) 6 *European Journal of International Law* 477–499, 498.

19 E.g., "The notion of regional international law has stretched so that it is now considered as embracing not only geographical, but also political agreements and unions" – Mathias Forteau, 'Regional International Law' (2006), in *Max Planck Encyclopedia of Public International Law* (OUP, Oxford Public International Law online), [11].

20 *Charter of the United Nations* art 53.

21 Rosalyn Higgins Dbe Qc, 'Some Thoughts on the Evolving Relationship between the Security Council and NATO' in *Themes and Theories* (Oxford University Press, 2009) 151–166.

22 See e.g., https://peacemaker.un.org/ (emphasis added).

23 See 'Bureau of the Alliance of Small States' (Web Page) <https://www.un.org/ohrlls/content/bureau-aosis>. The AOSIS site states: "to represent the interests of 39 small island and low-lying coastal developing states." Member states are spread across many global regions, united by the common factor of particular vulnerability to climate change.

24 *Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law*, 56940 UNTS 3447 (signed and entered into force 31 October 2021) <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002805c2ace>.

25 *Request for Advisory Opinion by the Commission of Small Island States on Climate Change and International Law* (Advisory Opinion) (12 December 2022) [2]: "On 31 October 2021, the Agreement established the Commission as an international organization with Antigua

for example have a strong territorial dimension (ie expressed in the emphasis on sovereign state interests), but without being co-located in a geographical sense. AOSIS and COSIS have been addressed as 'regional organizations', but have consistently presented themselves as 'international organizations.' Apart from classification challenges, in terms of juridico-political identity this would also seem better suited to the cause that these organizations defend.

The recently created *Alliance of Sahel States* ('ASS') between Mali, Burkina Faso and Niger in defiance of the *Economic Community of West African States* ('ECOWAS'), is a mutual defense pact,[26] but could well be (seen as) on its way to become a NATO-style (sub)regional organization. Likewise, developments in this respect will *inter alia* depend on the juridico-political identity which the members will choose to create.

A second distinction among RIOs runs between organizations that derive their regional characteristic from the membership as it has formed in practice, on the one hand, and organizations that have the 'regional' characteristic included in their constitutive instrument,[27] on the other. In the latter case, the regional element would co-define the constitutional limit of the regional organization, and in international law doctrine would be protected by the 'principle of speciality'. Still then, the reference to a particular region is often (fortunately) fuzzy,[28] and as such, international law in any event seldom engages with the constitutional limit of organizations. In light of this and given the separate institutional sphere of the organization generally, it is not evident how either type of RIO would be different from 'open' organizations that simply do not have universal membership.[29]

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and Barbuda and Tuvalu as the original signatories. … Membership in the Commission is open to all Members of the Alliance of Small Island States. Thus far, instruments of accession have been deposited by the Republic of Palau, Niue, the Republic of Vanuatu, and Saint Lucia."

26 Or, *l'Alliance des États du Sahel* ('AES'); the treaty ('Pact') was signed on 16 September 2023. *Charter of Liptako-Gourma Establishing the Alliance of Sahel States,* signed 16 September 2023 <https://maliembassy.us/wp-content/uploads/2023/09/LIPTAKO-GOURMA-Engl___-2.pdf>.

27 As in Article 4 of the *Charter Of The Organization Of American States* (referring to 'all American states') <https://www.oas.org/dil/1948%20charter%20of%20the%20organization%20of%20american%20states.pdf>.

28 E.g., Article 49 of the *Treaty on the European Union* (referring to 'any European state'), even if this is hardly a clear geographical delineation, especially in the case of 'Europe' <https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF>.

29 This is the way in which 'regional organizations' appear in Henry Schermers and Niels Blokker, *International Institutional Law* (Brill/Martinus Nijhoff, Leiden, 6th ed, 2018), viz. in the context of 'classification' alongside other 'closed organizations' in the sub-section on 'Universal versus closed organizations' [54].

To turn once more to the ILC Fragmentation study,[30] a regional membership does not necessarily mean that regional organizations as such express "independently normative power of regional linkages." In international legal relations, their 'regional' character then does not distinguish them from other organizations, while in practice "not all of the States of a particular region always participate in such regional organizations."

It appears from the foregoing that in describing *regional* organizations from a general perspective, the geographical rather than the territorial aspect prevails. RIOs combine facets of function and – some form of – geographical specification, rather than function and territorial authority. This being said, we must return to the notion of territory to address three more points.

First, the function-territory contrast is usually taken as a binary opposition. Meanwhile it has been pointed out that not even in all cases it is clear whether a particular legal creature has a territorial or a functional basis.[31] This suggests function and territory can be seen as the ends of a continuum. Along that same continuum we would find instances where some form of organization appears to reach a tipping point -logically associated with powers or, in EU idiom, '(exclusive) competences' – and to move to a 'constitutional' manifestation which can rely on, as the term goes among EU lawyers, the 'principle of autonomy.' Incidentally, in parallel we find a general development in international organizations *law* as a sub-disciplinary field, in which 'constitutionalism' has emerged as an alternative to 'functionalism.'[32]

Second, as has been argued by Lythgoe, drawing on the work of Levebvre, "the reproduction of a physicalized and stato-centric notion of territory informs the idea that international organizations are functional entities without territories."[33] The argument is convincingly made and leaves no doubt that if we shift the lens of our examination "we might … think of the spaces of international organisations as their territories, constituted through their social practices exercising control"[34]- and we might think of states' spaces in the same way.

30 International Law Commission (n 12) [212] nn 269.

31 See examples in Anne Peters and Simone Peter, 'International Organizations: Between Technocracy and Democracy' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 170–197, 182.

32 See e.g. Anne Peters, 'Constitutional Theories of International Organisations: Beyond the West', (2021) 20 *Chinese Journal of International Law* 649–698.

33 Gail Lythgoe, 'Distinct Persons; Distinct Territories: Rethinking the Spaces of International Organizations', (2022) 19 *International Organizations Law Review* 365–390.

34 *Ibid.*

However, for our current examination of the difference between organizations and states as actors in positive international law, including a possibly special position of RIOs, this lens would not provide clear insights. In the legal imaginary of our time, the state as a form of political organization has a comprehensive range of functions to perform with concomitant authority to do so, while other forms of political organization such as RIOs have only specific functions and accompanying powers. Also when we take the state's comprehensive powers or 'control' as a starting point rather than as a consequence, and we consider these to be constitutive of the 'territory' rather than the other way around, the relevant contrast remains. This contrast lies in the state's comprehensive powers and control (conventionally connected to an area of land) as opposed to the specific and limited powers of international organizations. In the case of the state, 'territory' in the physicalised sense serves as the basis for powers, even if as such this basis is conventional. Incidentally, if the wish of Tuvalu to maintain in the future its statehood fully and exclusively in digital form[35] were to be implemented at some point, this will perhaps bring new perspectives.

Third, conceptualising the 'mismatch' between states and organizations as a difference in the constellation of powers -connected to a difference in the functions or objectives that come with their respective models of political organization- recalls the well-known distinction proposed by Virally, between the *finalité integrée* of states and the *finalité fonctionelle* of international organizations.[36] The powers vested in a particular legal actor are defined by these objectives or functions.

Finally, in the present account the role of 'territory' as a legal category is to some extent revisited and, similar to geographical indications of 'regionality,' counted as a feature without normative effect in positive international law. Clearly this is part of the specific perspective of this paper and does not prejudge the value of the concept of *territory* (and in different ways also *region* and *geography*) as it refers to a physical(ised) space on the earth and to a

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35 See 'What Makes a Digital Nation', *Republic of Estonia E-Residency* (Blog Post, 3 October 2023) <https://www.e-resident.gov.ee/blog/posts/what-makes-a-digital-nation/>. The initiative was launched at UNFCCC COP27 (6–20 November 2022 in Sharm El Sheikh, Egypt), with a recorded address from Tuvaluan Minister Simon Kofe to world leaders. See also 'Facing extinction, Tuvalu considers the digital clone of a country', *The Guardian* (online, 27 June 2023) <https://www.theguardian.com/world/2023/jun/27/tuvalu-climate-crisis-rising-sea-levels-pacific-island-nation-country-digital-clone>.

36 Michel Virally, 'La notion de fonction dans la theorie de l'organisation internationale', in Susanne Bastid et al. (eds), *Mélanges offerts à Rousseau: La communauté internationale* (Pedone, Paris, 1974) 277.

connection with 'land' and 'soil', which after all is the prime connection for human individuals. While international law is to some extent agnostic about the origin of its subjects once these are accepted to participate (with varying qualifications), in itself such origin is deeply important. This is especially clear when we consider (albeit not appreciate) all 'public international law' as engaging ultimately with human individuals rather than states.

4 *Function* in the Ideology of International Law

While the doctrine of international law does not have a problem accommodating regional international organizations, this is different for what might be loosely called 'the ideology of international law', here pointing in particular to ideas on the universality of law and notions of 'neutrality' of international organizations.'[37]

The universality of international law[38] is a powerful idea, witness also the lasting concerns about the law's fragmentation. The idea works not only as an explanatory model but also as an aspirational agenda, as appears for instance from the fact that "many concepts that international lawyers celebrate rest on universalist ideologies, such as human rights and the rule of law".[39] The strong pull of the vision of universal application of law and legal structures may be explained among other things by a powerful image of order against chaos in the background.[40] Other relevant factors have been put forth, such as that 'formation of a universalising legality was crucial to the transition from the colonial imperialism of the nineteenth century to the postcolonial imperialism of the twentieth century.'[41]

Given the prevalence of universalist thought in international law it is unsurprising that the appeal of international organizations has been consistently linked to an idea of universal membership. This is visible for example

37 Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 *European Journal of International Law* 9–82.

38 '… the first and essential general principle of public international law is its quality of universality …' in Sir Robert Jennings, 'Universal International Law in a Multicultural World' in Maarten Bos and Ian Brownlie (eds), *Liber Amicorum for the Rt. Hon. Lord Wilberforce* (Clarendon Press, Oxford, 1987) 40; for theoretical context of the idea, see M.N.S. Sellers, 'Universalism', in Jean d'Aspremont and John Haskell (eds), *Tipping Points in International Law Commitment and Critique* (Cambridge University Press, 2021) 362–372.

39 Anthea Roberts, *Is International Law International?* (Oxford University Press, 2017).

40 David Kennedy, 'The Move to Institutions', (1987) 8 *Cardozo Law Review* 841–988, 984.

41 Sundya Pahuja, *Decolonising International Law* (Cambridge University Press, Cambridge, 2011), 98.

in the narrative of a coherent 'international superstructure' of international organizations hovering over classic inter-state law.[42] The 'superstructure' in turn is envisioned as supporting and protecting a universal body of law.

Another foundational narrative in international law draws on the functional/ist foundation -with a legal and an ideological dimension- of international organizations, in opposition to the sovereign foundation of states. This depicts organizations as 'neutral' and less receptive to the snares of unilateral interest and political conflict than states.[43] Next to the motif of 'neutrality' of international organizations we find frequent references to organizations 'technical' functions[44] and 'a-political' nature, contrasted with the political interests of states. For their sheer multilateralism, organizations can be seen as "pooling sovereign interests"[45] or as "neutral appliers of the real interests of all states."[46] The picture of organizations as the embodiment of the a-political and the neutral[47] has been fitting in the UN era, in which international law and multilateralism is pitted against individual sovereign interests. In that framework international law would thrive the more as international power and authority would be organised more along 'functional' lines and transcend sovereign-territorial ones.[48] Understandably, the idea of function/ality (or the normative variant 'functionalism') has often been connected with the vision of universality (or the normative variant 'universalism').

RIOs could appear to challenge both the vision of a universally applicable body of law and the vision of a world without territorial boundaries, where authority is segmented by specific issues or 'functions'.[49] As argued above, generally RIOs do not have 'territorial authority', and apart from function

42 The "super-structure next to and above the society of states" was coined in Hermann Mosler, 'The International Society as a Legal Community' (Part 3: Institutionalised International Co-operation), (1974) 140 (1) *Recueil des Cours*, 11, 189.

43 An idealist outlook on IOs along these lines is visible in the work of Ignaz Seidl-Hohenfeldern and the early work of Henry Schermers.

44 José E. Alvarez, 'International Organizations: Then and Now', (2006) 100 *The American Journal of International Law* 324–347, 342.

45 Ibid.

46 Ibid.

47 Eg Anne Peters and Simone Peter, 'International Organizations: Between Technocracy and Democracy' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 170–197.

48 Cf "[f]or [Lauterpacht and his generation], sovereignty had become the problem" in Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics,' (2007) 70 *Modern Law Review* 1–30, 3.

49 Catherine Brölmann, 'Review of Interactions between regional and universal organizations: a legal perspective by Laurence Boisson de Chazournes (2018)', in (2020) 114 *American Journal of International Law* 335–340.

they are in reality defined by geographical delineation (whether centralised or spread across different areas). Still, with that delineation it is clear how the phenomenon of RIOs is an essential challenge to the universalist aspirations of international law and to a neutral and a-political image of organizations. It is notable that Inis Claude in his classic work on international organizations spoke squarely of "the problem of regionalism".[50] The ILC Fragmentation report states that "[i]f regionalism itself thus is not automatically of normative import, its [general] significance is highlighted as it mixes with functional differentiation."[51]

Due to the added geographical dimension regional organizations at a conceptual level elude the territory-function dichotomy which legal scholarship has adopted to describe states and organizations as legal creatures. The additional regional feature also challenges the image of organisations as neutral, impartial, technical and 'functional' actors, which is an integral part of the ideology of classic international law.

5 Conclusion

A central claim of this article is that the troubled image of RIOs among international lawyers (in contrast to political scientists and international practitioners) is not due to a systemic problem but to an ideological tension. It is true that regional organizations have a combined 'functional' and 'territorial'-in truth geographical – identity, but this does not pose a systemic problem for international law. Notions of territory and function relate to the *origins* of states and organizations and the conceptual contrast does not as such ruffle the general mechanisms of international law. The regional factor in international law and in international organizations is essentially without 'autonomous legal consequences'.

When we look at the origins of states and international organizations as they have been studied first in the social sciences, territory – with its aspect of (legally vested) authority that translates into a comprehensive set of political functions and concomitant powers – is a convincing concept in relation to the state. However, when regional organizations are considered from a general perspective, it appears the geographical aspect is dominant: RIOs combine

50 Inis L. Claude, *Swords into Ploughshares: The Problems and Progress of International Organization* (New York: Random House, 4th ed, 1971) 102–113 nn 12.

51 International Law Commission (n 12) [204].

function with (some form of) geographical delineation, rather than with territorial power.

In the way of other organizations, RIOs are established on a functional rather than territorial basis. States and RIOs do not overlap, that is, there is not a 'federal phenomenon' as identified by Scelle,[52] as borne out by the persistent relevance of the 'implied powers doctrine' and the 'principle of speciality'. It means a RIO's legal sphere is sectoral, and its actual functions are not comprehensive but limited to a particular area of human action. So far only the EU is showing possible signs of a shift towards some genuine 'territorial power'.

Moving away from the formal system towards the ideological context of international law, it is, on the other hand, not difficult to see how the regional dimension of RIOs constitutes an opposing force to the universalist ambitions associated with international law and 'institutionalization'. Regional organizations by their very existence challenge certain ideological underpinnings of international law, notably those connected to the universality of law and to the 'neutrality' of organizations.

In a concluding section it is warranted to put findings in perspective. From a positive law perspective one may correctly conclude that the *regional* level "is considered nowadays … as nothing more than an intermediate and undefined level between national and universal levels"[53] It is also true that much thinking about international law and international institutions is based on ideas of universalism with which the phenomenon of regional organizations does not have an easy match. However, it is good to recall that in the (discursive) practice of multilateral environments such as the Unied Nations regional legal cooperation is a prominent theme.

'National, regional and global levels', and 'bilateral, regional and multilateral initiatives' are routinely mentioned in UN statements and reports when the Organization sets out plans and ambitions. The text of the *2005 World Summit Outcome* is a well-known example,[54] and a look at statements of the UN and other organizations in the last two decades shows that the theme has only grown stronger since. For instance, the regional dimensions of the 2030 agenda for sustainable development receive considerable emphasis,[55] and the

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52 Georges Scelle, *Cours de droit international public* (Les Cours de droit, Paris, 1948) 253, mentioned also in International Law Commission (n 12) [207].

53 Mathias Forteau, 'Regional International Law' (2006), in *Max Planck Encyclopedia of Public International Law* (OUP, Oxford Public International Law online) [16].

54 UN General Assembly, '*2005 World Summit Outcome*', 24 October 2005, UN Doc A/RES/60/1, e.g. [54], [71], [82] and [127].

55 UN General Assembly, '*Transforming our world: the 2030 Agenda for Sustainable Development*,' 25 September 2015, UN Doc A/RES/70/1.

'networked and inclusive multilateralism' advocated by the United Nations under UNSG Guterres explicitly engages with a variety of 'stakeholders' among whom 'regional governments', which in UN idiom includes regional organizations.[56]

There are several good reasons for the existence of RIOs. There is the tension "between the centripetal search for unity and universality and the centrifugal pull of national and regional differences"[57] as a general condition. Moreover, as has been pointed out, "when State consent is put into practice through a mechanism of majority rule, the world can, and normally does, divide into regional or transregional coalitions or groups of interests."[58] Otherwise, as underscored by the International Law Commission (in its *Fragmentation* report), the regional context offers special advantages, ie in lawmaking processes: "[t]he presence of a thick cultural community better ensures the legitimacy of the regulations and that they are understood and applied in a coherent way". The Commission goes on to point out that human rights frameworks and free trade arrangements have consistently originated within regional settings, "despite the universalist claims of ideas about human rights or commodity markets."[59]

So it is the case that in the doctrine of international law RIOs do not exist, while in the ideology of international law RIOs do not fit. But a bird's eye view of practice confirms that regional organizations are key actors in international affairs. Many civil movements and policy makers will hold that RIOs with their functional setup and regional anchoring have the best of two worlds. RIOs have been said to emerge in the interstices as the contractors -if not architects- of 'international governance'.[60] The UN itself has frequently referred to this

56 'A more "networked" UN for stronger multilateralism: how would it work?', *Inter-Parlamentary Union*, (Blog Post, 21 June 2023) <https://www.ipu.org/event/more-networked-un-stronger-multilateralism-how-would-it-work>.

57 Anthea Roberts (n 30) 3.

58 Samantha Besson and José Luis Martí, 'From Equal State Consent to Equal Public Participation in International Organizations – Institutionalizing Multiple International Representation', in Samantha Besson (ed), *Consenting to International Law* (Cambridge University Press – ASIL International Legal Theory Series, 2023) 314–346, 328.

59 International Law Commission (n 12) [205].

60 Cf the overview in Laurence Boisson de Chazournes, *Interactions Between Regional and Universal Organizations: A Legal Perspective* (Brill | Nijhoff, Leiden, 2017) 324; see also overview in Christoph Schreuer, 'Regionalism v. Universalism', (1995) 6 *European Journal of International Law* 477–499.

fact and has mentioned a commitment 'to … further … cooperation [with (sub) regional organizations] through deepened partnerships.'[61]

All this may explain why 'regional organizations' are a concern for some international lawyers and policymakers, but not for all. And why in general 'regionalism' does not emerge as a dangerous force (in the way of 'nationalism'), but rather as the disruption of an ideal. The findings in this article do not seek to resolve the inherent tension between universal and particular legal frameworks, but to give direction to our gaze.

61 UN Secretary General, *Cooperation Between the United Nations and Regional and Other Organizations*, 19 January 2017, UN Doc. A/71/160, [145]; see also the article by Kirsten Schmalenbach in this issue.