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AND THE ART OF RECONCILIATION: FROM DICHOTOMIES TO
DIALECTICS

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The Law of International Organizations and the Art of Reconciliation:

From Dichotomies to Dialectics

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Abstract

After submitting that most scholarly and practical debates about the law of international organizations can be construed as a battle between arguments based on the idea of a contract and those based on the idea of a constitution, this article discusses international legal scholars' ability to turn the foundational dichotomies between contractualism and constitutionalism into a dynamic and dialectic framework. It makes the argument that international legal scholars, and especially legal academics, while unanimously acknowledging the existence of such paradigmatic tensions, are regularly tempted to iron them out through the promotion of a series of dialectical concepts or moves.

Key words

Law of international organizations — theory of the law of international organizations — contractualism — constitutionalism — dialectics — *dédoublement fonctionnel* — institutional veil — functionalism – autonomy

Can one build a whole discipline — and thus the techniques, methods, and narratives that go with it — on dichotomous grounds? The answer is affirmative as long as the professionals claiming membership to such a discipline excel in the art of reconciliation. The object of this article is to show that the law of international organizations epitomises such a possibility. After submitting that most scholarly and practical debates about the law of international organizations can be construed as a battle between

* This paper originates in a presentation delivered at the Graduate Institute for International and Development Studies on 22 November 2013.

arguments based on the idea of contract and those based on the idea of constitution, this article discusses international legal scholars' attempts to translate this tension into a dynamic and dialectic framework. It makes the argument that international legal scholars, and especially legal academics, while unanimously acknowledging the existence of such paradigmatic tensions, are regularly tempted to iron them out through the promotion of a series of dialectical concepts or moves. This is what will be called in this article 'the art of reconciliation' that is practiced by international legal scholars involved in the study of the law of international organizations. This article will simultaneously show that such reconciliatory moves are not without paradox, especially given the extent to which paradigmatic tensions have themselves always been constitutive of the field, as well as the identity of the whole discipline.

Before developing this argument, it must initially be highlighted that acknowledging paradigmatic tensions in the law of international organizations is, in itself, far from ground-breaking. Scholars like Klabbers have long unearthed some of the most fundamental antinomies of the subject and the consequences thereof.¹ It could even be claimed that speaking in antinomic terms of the law of international organizations has become the sign of mature scholarship and a healthy departure from an otherwise doctrinal and anti-theoretical literature.² Because confronting paradigmatic tensions is not new, embarking on a penultimate inquiry into their manifestations in the scholarly discourses about the law of international organizations is of no avail. These tensions are thus briefly recalled solely to show that they constitute a manifestation of a more general antinomy between *contractualist* and *constitutionalist* approaches to the subject (see Section 1 below). A table appended to Section 1 supplements these introductory remarks and allows them to be kept reasonably brief. After these brief reminders, this article develops the argument that scholarship on the law of international organizations is regularly infused by attempts to reconcile tensions between contractualism and constitutionalism. These reconciliatory moves, the article argues, are aimed at flattening the paradigmatic framework within which arguments about the law of international organizations are made and turning the fundamental antinomies between contractualism and constitutionalism into dialectical and dynamic con-

¹ See J. Klabbers, *An Introduction to International Institutional Law* (2nd ed.), (Cambridge University Press, Cambridge, 2009) ('An Introduction'), esp. pp. 1–6. See also J. Klabbers, 'Two Contending Approaches to the Law of International Organizations', in J. Klabbers & A. Wallendahl (eds.), *Research Handbook on International Organizations Law: Between Functionalism and Constitutionalism* (Edward Elgar, Cheltenham, 2010) pp. 3–30 ('Two Contending Approaches'); and J. Klabbers, 'Two Concepts of International Organization' (2005) 2 *International Organizations Law Review* pp. 277–293 ('Two Concepts').

² The focus on paradigmatic tensions sometimes comes at the expense of any attention being paid to the actual practice; one could make the same finding as the one Kratochwil and Ruggie made in relation international relations literature — according to them, the field of international organizations has ceased to be a field of practice and doctors have stopped seeing patients: see F. Kratochwil and J. Ruggie, 'International Organization: A State of the Art on an Art of the State' (1986) 40 *International Organization* p. 754.

structions (in Section 2 below). The article ends by arguing that many international legal scholars have yet to come to terms with the constitutive character of the tensions between contractualism and constitutionalism and accept that it constitutes the defining mould of the techniques, methods, and narratives that are deployed under the banner of a law of international organizations (see Section 3 below).

1. An Abiding and All-Embracing Dichotomy: *Contractualism v. Constitutionalism*

Despite scholarship on the law of international organizations being dominated by a descriptivist and analytical mindset,³ it would be incorrect to portray it as lacking any self-reflection. There is, indeed, much self-awareness, at least among legal academics, about the paucity of theoretical reflection on the law of international organizations.⁴ It is true that theoretical studies of the (foundations of) the law of international organizations are scarce.⁵ Yet, it does not take much theoretical grounding to realise the paradigmatic incongruence at play in the (practice of the) law of international organizations. In fact, international legal scholars engaged in the study of this field unanimously recognise the existence — and the complexity — of paradigmatic tensions around which the law of international organizations articulates itself.⁶ However, it is noteworthy that, irrespective of this unanimous acknowledgement,

³ For some examples of extremely refined and detailed work in this respect, see H. Schermers and N. Blokker, *International Institutional Law* (5th ed.) (Martinus Nijhoff, Leiden, 2011). See also P. Sands and P. Klein, *Bowett's Law of International Institutions* (6th ed.) (Sweet & Maxwell, London, 2009).

⁴ See Klabbers, *supra* note 1, p. 3 (arguing that law of international organizations is “immature” and that we lack of convincing theoretical framework regarding international organizations). See also N. White, *The Law of International Organizations* (2nd ed.) (Manchester University Press, Manchester, 2006) pp. 14–23. See also Schermers & Blokker, *supra* note 3, para. 13A: “It is true that theoretical reflection in the field of international organisations has been limited”.

⁵ For a few exceptions, see Klabbers, *supra* note 1; D. Bederman, ‘The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Sparte’ (1995–1996) 36 *Virginia Journal of International Law* p. 275; D. Kennedy, ‘The Move to Institutions’ (1987) 8 *Cardozo Law Review* p. 841, reprinted in J. Klabbers (ed.), *International Organization* (Ashgate Publishing Limited, Burlington, 2006); A. Rapisardi-Mirabelli, ‘Théorie générale des unions internationales’ (1925)(II) 7 *Recueil des Cours* pp. 341–394; J. Alvarez, *International Organizations as Law-Makers* (Oxford University Press, Oxford, 2005) pp. 17–63; Kratochwil & Ruggie, *supra* note 2.

⁶ V. Engstrom, ‘Powers of Organizations and the Many Faces of Autonomy’, in R. Collins and N. D. White (eds.), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge, Abingdon, 2011) p. 224; C. Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart Publishing, Oxford, 2007) (‘Institutional Veil’), p. 30; N. Blokker, ‘International Organizations and their Members’ (2004) 1(1) *International Organizations Law Review* pp. 139–161. For a more dated recognition of that tension, see M. Virally, ‘La notion de fonction dans la théorie de l’organisation internationales’, in *Mélanges offerts à Charles Rousseau: La Communauté internationale* (Pedone Paris, 1974) pp. 277–300. See also A. McNair, ‘Functions and Differing Legal Character of Treaties’ (1930) 11

the definition of these foundational tensions infusing the law of international organizations varies greatly, as they remain apprehended and cognized through a multitude of dichotomies.⁷ These dichotomies are defined in relation to the organization itself, its structure, its identity, its relations with other subjects, its powers, its 'embedding' in the international legal order, etc.

It suffices here to provide a few examples of how tensions in the law of international organizations are presented and described by experts. For instance, these tensions are often understood in terms of the diverging capacities in which States act in their relation with the organization: that is, as either a creator State or as a member State.⁸ The very same tension is captured by contrasting the internal role and the external role of member States.⁹ This discordance is also sometimes captured in architectural terms by opposing the openness of organizations to their transparency;¹⁰ or by contrasting functionalism and constitutionalism, the former being then construed as freedom and the latter as control.¹¹

Tensions in the law of international organizations are also witnessed in relation to the ambiguous nature of the constituent instrument of organizations.¹² Similar tensions are said to permeate the distinction between the external law and the internal law of organizations.¹³ In the same manner, the

British Yearbook of International Law p. 100, at p. 112; and Manuel Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations' (1970) 44 *British Year Book of International Law* pp. 111–155.

⁷ J. Klabbers claims that most legal issues in the law of international organizations are examined from three main perspectives: the relations between the organizations and its member states; the relations between the various organs *inter se* and the organization's internal functioning; and the relations between the organization and the world around it: see J. Klabbers, *Theorizing International Organizations* (copy on file with the author) ('Theorizing International Organizations').

⁸ Blokker, *supra* note 6; Collins & White (eds.), *supra* note 6.

⁹ Schermers & Blokker, *supra* note 3, para. 66; see also Blokker, *supra* note 6.

¹⁰ Brölmann, Institutional Veil, *supra* note 6, p. 32.

¹¹ Klabbers, Two Contending Approaches, *supra* note 1, pp. 3–30; see also Klabbers, Two Concepts, *supra* note 1. For an attempt to explain how this tension works in practice, see A. Guzman, 'International Organizations and the Frankenstein Problem' (2013) 24(4) *European Journal of International Law* pp. 999–1025. For a previous use of the Frankenstein analogy, see generally Alvarez, *supra* note 5.

¹² C. Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' (2011) 8(2) *International Organizations Law Review* pp. 397–482. See also McNair, *supra* note 6, p. 112. On this debate, see also Brölmann, Institutional Veil, *supra* note 6, p. 144; White, *supra* note 4, p. 14; or A. Peters, 'L'acte constitutif de l'organisation internationale', in E. Lagrange and J.M. Sorel (eds.), *Traité de droit des organisations internationales* (LGDJ, Paris, 2013) ('*Traité*') pp. 201–245, esp. p. 206.

¹³ For a recent and refined study of the question, see Ahlborn, *supra* note 12. For an older study of this debate, see R. Monaco, 'Le caractère constitutionnel des actes institutifs d'organisations internationales' in *Mélanges offerts à Charles Rousseau* (Pedone, Paris, 1994); see also the three-tiered construction of Seyersted, according

different faces of autonomy have also been seen as an expression of the paradigmatic antinomies of the subject.¹⁴ Other dichotomies are occasionally put forward to express the tensions at the heart of the law of international organizations. It suffices to mention the use of flexibility v. stability¹⁵, functionality v. centralisation¹⁶, politics v. management,¹⁷ and anarchy vs. legalism.¹⁸ Eventually, it could be argued that the paradigmatic tensions of the subject resurface in the various denominations given to the field. On the one hand, a 'law of international organizations' often refers to the idea of autonomous subjects which, albeit sharing those common architectural traits that are the object of the discipline, constitute independent sub-orders. On the other hand, the notion of 'international institutional law', more often than not, manifests the idea of a set of regulatory structures within which international organizations are somehow diluted.

The foregoing illustrates the variety of descriptions of the paradigmatic tensions at the heart of the law of international organizations and the many ways in which they are perceived and constructed by professionals. For the sake of this article, it is probably not necessary to dwell any further on the abovementioned, unanimously-recognised dichotomies and their various modes of expressions. Rather, this introductory section makes the argument that these tensions can be apprehended through a single and more all-embracing descriptive and conceptual framework, namely a framework that pits contractualism against constitutionalism.¹⁹ It is more specifically argued here that the dichotomy between contractualism and constitutionalism is one that captures with accuracy most of the abovementioned

to which all international organisations possess their own internal law governing the relations between their the organs, officials and member States in their capacity as members; they are subject to international law in their relations with States and other international organizations; and they also enter into relations of a private nature with both public and private entities: F. Seyersted, *Common Law of International Organizations* (Martinus Nijhoff, Leiden, 2008), esp. pp. 21–24. *See also* Schermers & Blokker, *supra* note 3, paras. 1142–1144, according to whom the separation between the organisation's internal law and general international law has never been settled).

¹⁴ See J. d'Aspremont, 'The Multifaceted Concept of Autonomy of International Organisations and International Legal Discourse' in Collins & White (eds.), *supra* note 6.

¹⁵ Klabbers, An Introduction, *supra* note 1, at p. 230.

¹⁶ Brölmann, Institutional Veil, *supra* note 6, at p. 30. For Brölmann, functionality corresponds to the sovereignty of States whilst centralisation reflects the independence of the organization.

¹⁷ J. Klabbers, 'International Institutions', in J. Crawford & M. Koskenniemi, *Cambridge Companion to International Law* (Cambridge University Press, Cambridge, 2012) p. 228 ('International Institutions').

¹⁸ M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Reissue with new Epilogue) (Cambridge University Press, Cambridge, 2005) p. 481, note 25.

¹⁹ The constitutional view is sometimes called the 'organic' approach; *see* J. H. Barton, 'Two Ideas of International Organization' (1984) 82 *Michigan Law Review* p. 1520.

tioned tensions found at the heart of the law of international organizations,²⁰ and does so at various levels (as noted by Klabbers).²¹ This all-embracing, descriptive and conceptual framework can certainly not claim any conceptual superiority.²² The choice for such a descriptive framework is primarily informed by some didactic preferences, such a framework allowing one to apprehend all the dissonances in the law of international organizations through one single lens.

According to this all-capturing dichotomy and the way it is understood here, the idea of a contract refers to dependence:²³ that is, *dependence* on both the contracting parties and the international legal order. A constitution, on the other hand, expresses the notion of *autonomy*: that is, the autonomy of the relevant organization from both the contracting parties and the international legal order.²⁴ Said differently, a contractualist approach to the law of international organizations posits that international organizations are conventional products of international law on which states keep a grip, whilst the constitutionalist approach advocates an understanding of international organizations as autonomous normative orders which can pursue their own political projects independently. It is submitted here that most scholarly and practical debates about the law of international organizations can be con-

²⁰ In the same vein, see White, *supra* note 4, pp. 14–23.

²¹ See *supra* note 7.

²² This distinction probably echoes the current distinction made between ‘globalist’ and ‘sovereignist’ approaches to the State. For some critical remarks on this distinction, see J. Alvarez, ‘State Sovereignty is Not Withering Away: A Few Lessons for the Future’, in A. Cassese (ed.), *Realizing Utopia* (Oxford University Press, Oxford, 2012) pp. 26–37. See also M. Koskenniemi, ‘The Wonderful Artificiality of States’ (1994) *ASIL Proceedings of the 88th Annual Meeting* p. 22.

²³ For a discussion of this question in connection with the European Union, see R. A. Wessel & S. Blockmans, ‘An Introduction’, in R.A. Wessel & S. Blockmans (eds.), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (TMC Asser Press/Springer, The Hague, 2013) pp. 1–9; R. A. Wessel, ‘Between the Authority of International Law and the Autonomy of EU Law’, in J. Díez-Hochleitner, C. Martínez Capdevila, I. Blázquez Navarro, and J. Frutos Miranda (eds.), *Últimas tendencias en la jurisprudencia del Tribunal de Justicia de la Unión Europea* (La Ley-Grupo Wolters Kluwer, Madrid, 2012) pp. 759–765.

²⁴ For a similar understanding of constitutionalism, see C. Brölmann, ‘International Organisations and Treaties: Contractual Freedom and Institutional Constraint’, in Klabbers & Wallendahl (eds.), *supra* note 1 (‘Freedom and Constraint’), p. 304. Klabbers uses the term in a different way, and equates it with control: see Klabbers, ‘Two Concepts’, *supra* note 1, pp. 278–289. While focusing on the former, Klabbers nonetheless acknowledges the two possible meanings of constitutionalism: international constitutionalism and organization constitutionalism: see Klabbers, ‘Two Contending Approaches’, *supra* note 1, p. 13. For a similar distinction, see F. Dopagne & J. d’Aspremont, ‘Two Constitutionalisms in Europe: Pursuing an Articulation of the European and International Legal Orders’ (2008) 68 *Heidelberg Journal of International Law* p. 939 (‘Two Constitutionalisms’), which distinguishes between substantive European constitutionalism (value, human rights, democracy, Rule of Law) and systemic European constitutionalism (direct effect, supremacy, no counter-measures and no external dispute settlement).

strued as a battle between arguments based on the idea of contract and those based on the idea of constitution, that is between a contractualist project and constitutionalist project. These two paradigmatic, conflicting standpoints are the primary poles from which the law of international organizations is constructed, cognized, denied, interpreted, criticised, evaluated, or legitimised by international legal scholars. They also generate most of the tensions observed in the theory and practice of the law of international organizations.

The table that follows provides a snapshot of how this central dichotomy between the contractualist and constitutionalist approaches to international organizations develops in theory and practice. These legal issues are presented around the three main stages in the life of an international organization, namely its creation, its operation and its termination. For each of these stages, a series of legal issues are identified. The following table shows that for each of them contractualist and constitutionalist approaches lead to radically opposed solutions. The table uses a series of examples to demonstrate more fundamentally that any legal argument grounded in contractualism will always be counterpointed by an equally valid argument grounded in constitutionalism (and vice-versa).²⁵ For instance, one can argue that, *from a contractualist standpoint*, an international organization is composed of contracting parties: its constituent instrument boils down to an interstate treaty; its normative activities generate secondary treaty law; its legal order is a legal order of an international nature permeable to international law; the international legal personality of the organization depends on the will of the contracting parties; the competences are attributed, the organization cannot create new subjects of international law either primary or secondary; the constituent treaty is subject to traditional rules of interpretation; the organization can be only terminated by the contracting parties when they terminate the treaty; questions of succession ought to be regarded as questions of successions of treaties; and so forth. On the contrary, *from a constitutionalist standpoint*, an international organization is rather understood as composed of member states (*membrum*):²⁶ its constituent instrument boils down to an act of a constitutional nature which cannot be reduced to an inter-state treaty; its normative activities generate rules which have the nature of internal law; its legal order is a separate and autonomous legal order impermeable to international law; the international legal personality of the organization hinges on the fulfilment of some criteria pre-defined by the international legal order itself; and the competences can be extended through the doctrine of implied powers, such expansion being inherent in the constitutional existence of the organization. From a similar constitutionalist vantage point, the organization can create new subjects of international law, including primary subjects; the constituent treaty — being of a different nature — is subject to special rules of interpretation; the organization possesses an inherent power to terminate itself; questions of succession ought to be approached as a question of succession of subjects; and so forth.

²⁵ For a similar finding but from a more restrictive angle, see Klabbers, 'An Introduction', *supra* note 1, p. 1.

²⁶ See generally Blokker, *supra* note 6, pp. 139–161.

Table — Dichotomy between contractualism and constitutionalism

Feature or element of organization	Contractualism	Constitutionalism	
Birth	<i>Components</i>	Contracting parties	Member States (<i>membrum</i> : part of)
	<i>Nature of constituent instrument</i>	Inter-State treaty	Constitution
	<i>Nature of normative activities (rules)</i>	Secondary treaty law	Internal law
	<i>Nature of legal order</i>	A legal order of international law (permeability)	Separate and autonomous legal order (impermeability)
	<i>Relation with constituent treaty</i>	Not bound by its constituent instrument	Bound by its constituent instrument
	<i>Determination of personality</i>	Voluntarist theory	Objective theory (ex-post)
	<i>Nature of personality</i>	Inter-subjective	Objective
	<i>Capacities</i>	Determined by constituent instrument	Inherent in personality and determined by the international legal order
	<i>Competences/powers</i>	Principle of attributed competences (an expression of consent)	Principle of implied powers (inherent in their constitutional existence)
	<i>Reproduction capacity</i>	None	Power to create of new primary and secondary subjects
	<i>Legitimacy</i>	Legitimacy of origin	Legitimacy of exercise
<i>Privileges and Immunities</i>	Absolute protection from States	Inherent and limited protection of acts <i>de iure imperii</i>	
Life	<i>Interpretation of the constituent instrument</i>	Traditional rules of interpretation of treaties	Special rules of interpretation
	<i>Decision-making (will)</i>	Aggregation of wills	' <i>Volonté distincte</i> '
	<i>Autonomy</i>	Political independence (from States)	Institutional independence (vis-à-vis the international legal order)
	<i>Practice of the organization</i>	Subsequent practice as an interpretive yardstick	Established practice as a source of normativity
	<i>Relation to other treaties concluded by Member States</i>	Automatic succession	Third party
	<i>Nature of special rules & practices</i>	Inter-State special rules (<i>lex specialis</i>)	<i>Lex specialis</i> is inapplicable

Feature or element of organization		Contractualism	Constitutionalism
	<i>Ultra vires activities</i>	External invalidity	Internal invalidity and external wrongfulness
	<i>Responsibility</i>	Primary responsibility of States	Primary responsibility of the organization
	<i>Contribution to the (definition of) general interest</i>	Only States contribute to the formation/determination of peremptory norms & faculty to take countermeasures as statute-dependent	Contribute to the formation / determination of jus cogens & faculty to take counter-measures in the general interest
Death	<i>Termination and dissolution</i>	Power of the States as contractual parties	Inherent power of the organization
	<i>Succession</i>	Succession of treaties	Succession of subjects

As was highlighted earlier, many of these opposite arguments are well known and have been amply discussed in the literature.²⁷ They have also been widely echoed in the practice of domestic and international courts.²⁸ This is why they do not need to be examined any further, for the foregoing sufficiently illustrates the central character of the dichotomy between contractualism and constitutionalism. Attention will now turn to the way in which many international legal scholars, however they apprehend this paradigmatic antinomy, have tried to iron it out through reconciliatory tactics.

2. The Quest for Reconciliation between Contractualism and Constitutionalism and the Turn to Dialectics

The previous section outlined the extent to which international legal scholars recognise the existence of tensions in the law of international organizations, and submitted that most of these tensions can be apprehended through the fundamental dichotomy between contractualist and constitutionalist visions. This section makes the argument that international legal scholars have often been tempted to reconcile contractualism and constitutionalism through dialectic and dynamic constructions. More

²⁷ For an overview of some of these issues, see C. Brölmann, 'A Flat Earth? International Organizations in the System of International Law' (2009) 70 *Nordic Journal of International Law* p. 319 ('A Flat Earth?'), pp. 320–321 (focusing on areas in which the dichotomy produces different results: in particular, personality, nature of the instrument, and legal personality). Some examples are also discussed in J. Alvarez, 'Constitutional Interpretation in International Organizations' in J.-M. Coicaud & V. Heiskanen (eds.), *The Legitimacy of International Organizations* (United Nations University Press, New York, 2001) pp. 104–154. See also Rama-Montaldo, *supra* note 6.

²⁸ For a useful compendium of the most important judicial decisions, see I. F. Dekker, C. Ryngaert, R. A. Wessel and J. Wouters (eds.), *Case Law on International Organizations: Text and Commentary* (Oxford University Press, Oxford, 2015 forthcoming).

specifically, it is argued here that international legal scholars are engaged in the creation of reconciliatory moves whereby the whole subject (theory, practice and discourses) is maintained in a state of flux: that is, in an oscillation between opposite poles that ends up neutralizing the dichotomy.²⁹ In making such an argument, the following observations — while recognizing that dialectic approaches constitute analytical tools in their own rights — understand the recourse to dialectical reconstruction as a way to play down paradigmatic dichotomies and water them down in a continuum.

It is important to note that the following account of the dichotomy-avoidance constructions found in the scholarship on the law of international organizations is not meant to be exhaustive.³⁰ This account starts by some general observations on the proclivity of many international legal scholars to reconcile contractualism and constitutionalism (in sub-section A below). It then elaborates on more specific strategies, like the mundane use of the idea of *dédoublement fonctionnel*³¹ and some other dialectical constructions found in the scholarship (sub-section B below). The resort to functionalism to justify both contractualist and constitutionalist approach, as well as the dialectical use of that concept, warrants some observations (sub-section C below). Mention is finally made of the escape sought in grand reconceptualization of the law of international organizations when dialectical moves fail to deliver their ironing-out effect (sub-section D below).

A. Reconciliatory Proclivity: Ironing-Out the Dichotomy between Contractualism and Constitutionalism

It has been recalled above that most international legal scholars acknowledge the existence of tensions in the law of international organizations. Yet, many of them, this section argues, are seeking to suppress or obfuscate such antinomies. Indeed, a great deal of the scholarship in the field — when not devoted to a comprehensive presentation of the rules, principles, and practices of international organizations — is geared towards the creation of images, narratives or concepts which allow a reconciliation between contractualism and constitutionalism. In other words, the discipline often witnesses some unparalleled argumentative engineering and conceptual creativity at the service of the overall paradigmatic coherence of the field. In the eyes of international legal scholars, the world of international

²⁹ As is well known, this is a finding made by Koskenniemi in relation to the international legal discourse as a whole: *see supra* note 18.

³⁰ For instance, it has also sometimes been claimed that these tensions could be overcome through “good governance”. This is not an aspect that is discussed here. On this debate, *see generally* D. Sarooshi, *International Organizations and their Exercise of Sovereign Power* (Oxford University Press, Oxford, 2005). The estrangement of concepts from one another has also sometimes been observed: *see e.g.* Rama-Montaldo, *supra* note 6 (seeking to estrange personality from powers).

³¹ G. Scelle, *Précis du droit du gens* (Vol. I) (Sirey, Paris, 1932) p. 298.

organizations, albeit of inevitable diversity, must seemingly be a flat one³², that is one that is paradigmatically coherent.

It is noteworthy that the coherence that is sought by international legal scholars in this specific case is not a formal one. It is not the absence of conflict between the sub-regimes of international organizations themselves or with other domestic, regional or international orders. Rather, the paradigmatic coherence that is sought here is of a systemic nature, for the objective is to smother the dichotomies with a view to ensuring that “the multitudinous rules of [their] developed legal system ‘make sense’ when taken together”.³³

It is against the backdrop of this quest for a flat and paradigmatically coherent field that international legal scholars have sought to solve the tensions which, as argued in the previous section, exacerbates a more fundamental antinomy between contractualism and constitutionalism. Allowing the techniques, methods, and narratives to constantly remain in flux between contractualist and constitutionalist poles has been the mainstream remedy found by many international legal scholars to ease their aversion to the paradigmatic incoherence of the field. It will not come as a surprise that this reconciliatory mindset has not translated itself homogeneously. The art of reconciliation has manifested itself in a great variety of theories, concepts or narratives. Despite this diversity, it is submitted here that most of the strategies designed by international legal scholars to flatten the field and ensure paradigmatic coherence manifest the seeking of refuge in a dialectical continuum. Indeed, those theories, concepts and narratives that are being relied on to ensure a reconciliation between opposite paradigms leave the capacity of actors, the nature of the rules and constituent instruments, and the relations between them — to name but a few examples — in a constant movement between the contractualist and the constitutionalist paradigms, without ever stabilizing on one side or the other. Said differently, according to such reconciliatory moves of international legal scholars, the whole subject is left in constant oscillation, thereby turning the contradiction into a seemingly coherent continuum. Providing a few examples is the object of the next section.

B. *Dédoublement Fonctionnel* and some Dialectical Variants

The following paragraphs focus on the most common of the abovementioned flattening moves, which probably is the use of the dialectical notion of ‘*dédoublement fonctionnel*’.³⁴ In the context of the law of international organizations, the resort to this notion of role splitting is meant to overcome the inextricable antinomy mentioned above by contending the existence of a permanent role-shifting (rather

³² The expression is from Brölmann, *A Flat Earth?*, *supra* note 27.

³³ N. MacCormick, ‘Coherence in Legal Justification’, in A. Peczenik et al. (eds.), *Theory of Legal Science* (D. Reidel Publishing, Dordrecht, 1984) p. 238.

³⁴ See Schermers & Blokker, *supra* note 3, para. 200, p. 151; para. 919, p. 606; para. 1886, p. 1211. See also Blokker, *supra* note 6; Brölmann, *Institutional Veil*, *supra* note 6, p. 32.

than role-splitting) by states and international organizations. Once imported in the theory of international organizations, the concept of *dédoublement fonctionnel* allows actors to act in several capacities. Paradigmatic anomalies can, in turn, always be bypassed by shifting to the capacity that has the greatest explanatory and justificatory force. As it is employed in the international legal scholarship, the idea of *dédoublement fonctionnel* thus brings about a dynamic image of the law of international organizations, whereby capacities never need to be fixed and are left oscillating between opposite poles.

Whilst the merits of this conceptual twist are incontestable, one can hardly disagree that such a resort to the idea of *dédoublement fonctionnel* **departs significantly from its original meaning**, at least as it was conceived by Georges Scelle. Indeed, it is well known that *dédoublement fonctionnel* (role splitting) as it was originally envisaged by Scelle was the very means by which the objective law (*droit objectif*) was to be translated into positive law (*droit positif*).³⁵ In that sense, such a *dédoublement fonctionnel* was an expression of solidarity between the components of an overarching and all-embracing order (and of the political project associated with it).³⁶ It is far from certain the role-shifting function that is nowadays ascribed to the notion of *dédoublement fonctionnel* — as it is construed in the law of international organizations — corresponds to the monist understanding (and the political project) that informed Scelle's original notion. It should be made clear that distorting the original notion of *dédoublement fonctionnelle* is not, in itself, problematic. Concepts have a life of their own, travel in time and across disciplines, evolve and are subject to different interpretations and uses. The point here, therefore, is not that international lawyers have misused the concept, but more simply that they have used it in a way that allows them to play down the fundamental tensions of the law of international organizations.

It will not come as a surprise that some authors have been very much aware of the limits of this dialectical and tension-abating use of the notion of *dédoublement fonctionnel*. This is why more refined and subtle — but equally dialectical — alternative notions have been put forward. The most refined of them is probably the concept of 'institutional veil' that has famously been proposed by Catherine Brölmann.³⁷ According to this idea, international organizations are neither open nor closed but transparent.³⁸ They constitute "open structures that are vehicles for states and, at the same time,

³⁵ See Scelle, *supra* note 31, p. 298.

³⁶ Thierry writes: "The law-making function, which in the international legal system is accomplished by means of a 'dédoublement fonctionnel', does not imply the settlement of conflicting or discordant interests in the international community, but is the expression of solidarity requirements within the international society": see H. Thierry, 'The European Tradition of International Law: Georges Scelle' (1990) 1 *European Journal International Law* p. 193, at pp. 199–200.

³⁷ See Brölmann, Institutional Veil, *supra* note 6.

³⁸ *Ibid.*, p. 32. Transparency is meant to be "an endemic condition of intergovernmental organisations in general international law, partly due to the other two features counteracting: it indicates that organisations are neither

closed structures that are independent legal actors".³⁹ It ensues, according to this construction, that there exists a dynamic relation between the entity and member States whereby member States continue to shine through the institutional veil of the organizations,⁴⁰ such veil being occasionally pierced to reveal the States behind it.⁴¹

Another illustration of the resort to dichotomy-avoidance dialectics is found in scholarly discussions about the relationship between the legal order of international organizations and the international legal order as a whole. Often the legal order of an international organization is said to be an autonomous sub-legal order which nonetheless remains permeable to international law and its rules, especially those deemed to be of a peremptory character.⁴² In that sense, the sub-legal order of the organization is said to be oscillating between some autonomy necessary for the realisation of the political project of the organization and some limited overture to the most important rules of the international legal order. Such a dialectical position came to be defended, for instance, by a majority of scholars on the occasion of the (in)famous controversy surrounding the review by European courts of the legality of sanctions taken against *Kadi* as a result of the United Nations Security Council's anti-terrorist measures.⁴³ This also constitutes a dialectical move that plays down the paradigmatic tensions at the heart of the law of international organizations.

The reconciliation through dialectics that is attempted by international legal scholars sometimes focuses on the way normativity is produced within (and by) international organizations: that is, how international organizations produce norms that are intended to restrict the freedom of international actors that are relevant for the realization of the *objet social* of the organization. One could indeed see international organizations as a scene of a dialectical relationship between legalism and managerialism. Such a dialectical oscillation could be used to reconcile opposite contractualism and

entirely closed-off to international law in the way of states, nor entirely open, as instances of non-institutionalized inter-state cooperation would be" (at p. 11). This transparency is also multi-layered (at p. 33).

³⁹ *Ibid.*, p. 1

⁴⁰ Brölmann, 'A Flat Earth?', *supra* note 27, p. 320.

⁴¹ In doing so, Brölmann seeks to nuance Weil's emphasis on the nudity of States behind the immaterial veil of organisations: see P. Weil, '*Le droit international en quête de son identité: cours général de droit international public*', (1992) 237 *Recueil des Cours*, p. 104. On this point, see Brölmann, Institutional Veil, *supra* note 6, p. 30.

⁴² Brölmann, Institutional Veil, *supra* note 6, p. 60; Klein & Sands, *supra* note 3, p. 16.

⁴³ On this question, see the special issue of this journal on issues arising from the decision in the *Kadi* case: (2008) 5(2) *International Organisation Law Review*. For a different, non-dialectical position, see J. d'Aspremont & F. Dopagne, '*Kadi*: The ECJ's Reminder of the Elementary Divide between Legal Orders' (2008) 5(2) *International Organizations Law Review* p. 371; see also d'Aspremont & Dopagne, 'Two Constitutionalisms', *supra* note 24.

constitutionalism.⁴⁴ Indeed, according to this construction, the exercise of power by international organizations is said to witness an inevitable oscillation between legalism (that is, the exercise of authority through rules) and managerialism (being the exercise of authority through groups of experts).⁴⁵ The oscillation is explained by the turn to managerialism as a result of the indeterminacy of rules. This turn to managerialism — the argument goes — itself generates problem of legitimacy, calling for a return to legalism. As a result, the production of normativity by the organization is constantly said to be moving between a rule-based mechanism, which inevitably needs to be anchored in the overarching system of the sources of international law, and managerial mechanisms, which leave the autonomy of the organization more or less intact and allows it to escape the constraining effects of the sources of international law.⁴⁶

The literature contains many more examples. Three additional examples can still be provided. These three examples involve the resort to the idea of hybridity or two-faceted-ness. They pertain respectively to the nature of the constitutive instrument, the law of the organization and the legal order of the organization. For each of them, scholars and experts of the law of international organizations, after acknowledging the possibility of viewing them from two radically opposite views,⁴⁷ promptly

⁴⁴ In this context, deformalisation refers to the “process whereby the law retreats solely to the provision of procedures or broadly formulated directives to expert and decision-makers for the purpose of administering international problems by means of functionally effective solutions and ‘balancing’ interests”: see M. Koskenniemi, ‘Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization’ (2006) 8(1) *Theoretical Inquiries in Law* p. 9, at p. 13. For a different meaning of deformalisation, see J. d’Aspremont, ‘The Politics of Deformalization in International Law’ (2012) 3(2) *Göttingen Journal of International Law* pp. 503–550.

⁴⁵ See generally J. Petman, ‘Deformalization of International Organisation’, in Klabbers & Wallendahl (eds.), *supra* note 1, pp. 398–429. It is important to note that, although the ambition of Petman is not to play down or iron-out the tensions, the construction of an oscillatory move between legalism and managerialism could be seen as performing such a function.

⁴⁶ For some critical remarks on the relativity of the theory of sources within the legal order of the organizations, see J. d’Aspremont, ‘*Le Processus Décisionnel de l’organisation internationale*’ in E. Lagrange and J-M. Sorel (eds.), *Droit des Organisations Internationales* (LGDJ, Paris, 2013) (‘*Droit des Organisations Internationales*’), pp. 402–403.

⁴⁷ There are numerous scholarly accounts of these irreconcilable differences. On the nature of the constitutive instrument, see e.g. S. Rosenne, ‘Is the Constitution of an International Organization an International Treaty’, (1966) 12 *Comunicazioni e Studi* pp. 21–89; White, *supra* note 4, p. 14. On the nature of the law of the international organizations, see e.g. L. Focsaneanu, ‘Le droit interne de l’Organisation des Nations Unies’ (1957) 3 *Annuaire Français de Droit International* pp. 315–349; R. St.J. Macdonald, ‘The United Nations Charter: Constitution or Contract?’, in Ronald St. J. Macdonald & D.M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (Martinus Nijhoff Publishers, Boston, 1983) pp. 889–912. For

embrace a dialectic posture. Indeed many of them postulate that the constitutive instrument⁴⁸, the law of the organization⁴⁹ and the legal order⁵⁰ of the organization are hybrid: that is, that they come with a dual nature. This duality is given a dialectic dimension as it is accompanied by the affirmation that, in some cases, the contractualist approach to the constitutive instrument, the law of the organization or the legal order will prevail, whereas in some other situations the constitutionalist approach will gain ascendancy. In that sense, they reproduce the same oscillation between two contradictory facets: that is, between the constitutive instrument as a constitution and the constitutive instrument as a contract; between the law of the international organization as internal law and the law of international organization as international law; and the legal order of the organization as an autonomous internal legal order and the legal order as an open international legal order.

Needless to say, these scholarly dialectical constructions are only a few of those observed in the international legal scholarship with a view to rationalizing the field at the level of its paradigms and reconciling contractualist and constitutionalist approaches. As was said above, the ambition here is not to provide an exhaustive account of the manifestations of this inclination of international lawyers to find refuge in dialectical constructions to obfuscate or play down the fundamental dichotomy between contractualism and constitutionalism. It is more simply to show that this is a dominant proclivity which has expressed itself in diverse manners. This section now turns to another type of dichotomy-avoidance strategy which has been relied on by international legal scholars and which extends beyond the refuge in dialectics.

C. Dialectical Uses of Functionalism

an overview, see W. Meng, *Das Recht der Internationalen Organisationen: Eine Entwicklungsstufe des Völkerrechts* (Nomos-Verlagsgesellschaft, Baden-Baden, 1979), esp. Ch. 5.

⁴⁸ A. Peters, 'L'Acte Constitutif de l'Organisation Internationale', in Lagrange & Sorel (eds.), *Droit des Organisations Internationales*, supra note 46, pp. 201–245, esp. pp. 206–207.

⁴⁹ Ahlborn, supra note 12; M. Forteau, 'Organisations Internationales et Sources du Droit', in Lagrange & Sorel (eds.), *Droit des Organisations Internationales*, supra note 46, pp. 257–285, esp. pp. 281–285; Brölmann, Institutional Veil, supra note 6, at p. 144.

⁵⁰ In this respect, an interesting shift is to be observed in the terminology of the European Court of Justice which, in its much celebrated 1963 decision in the case *Van Gend en Loos*, claimed that the European legal order was "a new legal order of international law": *NV Algemene Transport- en Expeditie Onderneming Van Gend & Loos v. Netherlands Inland Revenue Administration*, 5 February 1963, European Court of Justice, Case 26-62, [1963] ECR 1). It later dropped the reference to "international law": see, in particular, *Parti écologiste 'Les Verts' v. European Parliament*, 23 April 1986, European Court of Justice, Case 294/83, [1986] ECR 1339). See also the remarks of J. Allain, 'The European Court of Justice as an International Court', (1999) 68 *Nordic Journal of International Law*, at p. 255; and see also d'Aspremont & Dopagne, Two Constitutionalisms, supra note 24.

The proclivity of some international legal scholars to seek to flatten the otherwise contradictory paradigmatic framework of the field through dialectical constructions can also be illustrated by some specific uses and invocations of the concept of functionalism.

It is uncontested that functionalism plays a central role in the law of international organizations.⁵¹ According to the mainstream understanding of the term, functionalism is predominantly a theory about the relations between organizations and their member states.⁵² Functionalism refers to the idea that international organizations are geared towards the performance of some pre-defined functions (most of the time pertaining to the management of practical problems like peace and security and order)⁵³ and its corollary, namely that international organizations possess only those powers that enable them to exercise their given function.⁵⁴ Albeit that it is often held to be a creation of 20th century scholarship, the functionalist paradigm, as Klabbers has demonstrated, was already in place when the international organizations came to thrive after World War I.⁵⁵

For the sake of the arguments made here, it is not necessary to dwell on the origin of the idea of functionalism. It matters more to show that, in international legal scholarship, the idea of functionalism accompanies both contractualist and constitutionalist discourses on the law of international organizations. Indeed, whether one seeks to sustain the autonomous existence of an organization (and the expansion of its powers), or to subject it to its member States and the international legal order, one systematically relies on functionalist arguments. In that sense, it is not surprising that one of the main foundational texts of the discipline — the famous 1949 Advisory Opinion of the International Court of

⁵¹ For some critical remarks on the functionalist discourse, see Alvarez, *supra* note 5, pp. 17–28; R. Collins, 'Non-State Actors in International Institutional Law', in J. d'Aspremont (ed.) *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge, Abingdon, 2011) p. 313. See also Klabbers, *International Institutions*, *supra* note 17, *esp.* p. 232.

⁵² See Klabbers, *Theorizing International Organizations*, *supra* note 7.

⁵³ On the idea of functionalism and that according to which international institutions derive their 'raison d'être' from the promise of autonomous action, see J. Klabbers, 'Autonomy, Constitutionalism and Virtue in International Institutional Law' (2011) in Collins & White (eds.), *supra* note 6, pp. 120–140 ('Autonomy, Constitutionalism and Virtue'). See also G. Cahin, 'La variété des fonctions imparties aux organisations internationales' in Lagrange & Sorel (eds.), *Traité*, *supra* note 12, pp. 671–704. For an early application of this notion, see *Jurisdiction of the European Commission of the Danube Between Galatz and Braila*, 8 December 1927, Permanent Court of International Justice, Advisory Opinion, [1927] PCIJ (Series B) No. 14.

⁵⁴ J. Klabbers, 'International Institutional Law and the Emergence of Functionalism: Colonial Inspirations', (2015) 26 *European Journal of International Law*, p. 645-675 ('Colonial Inspirations').

⁵⁵ *Ibid.* Klabbers argues that the concept can be traced back to the influential work of Paul Reinsch, who produced serious and systematic studies on the institutional aspects of international organizations based on functionalist ideas as early as 1907. In doing so, he shows that the way the concept was first developed and systematized was informed by the cooperation between states in the colonial context.

Justice on the *Reparations for injuries suffered in the service of the United Nations*,⁵⁶ and its functionalist narrative — is interpreted as buttressing each of these very opposite dimensions of (the law of) international organizations.⁵⁷ In that sense, functionalism can be seen as underpinning both contractualism and constitutionalism.⁵⁸

The multifaceted character of functionalism, and its invocation to support both contractualist and constitutionalist approaches, are not entirely surprising. First, the concept remains rather indeterminate, for the functions of the organizations, as well as the causal link between the performance of its functions and the powers of the organizations, are both malleable notions. Second, functionalism can be the receptacle of various political projects.⁵⁹ Third, from a methodological perspective, functionalism calls for comparative modes of argumentation.⁶⁰ Yet comparativism is not a monolithic notion, and does not necessarily lead to one single methodological choice. Several types of comparative modes can be envisaged, each of them supporting a different approach to the law of international organizations.⁶¹

The argument here is not only that functionalism is invoked to support both contractualist and constitutionalist visions. It is also that functionalism is sometimes constructed in dialectical terms, thereby easing the tension between these two opposing approaches. This dialectical understanding of functionalism particularly infuses Michel Virally's famous understanding thereof. Indeed, for Virally, the idea of function is the very linchpin of the law of international organizations that allows it to be deployed as a coherent and unitary body of law.⁶² By virtue of his idea of function, the dichotomy be-

⁵⁶ 11 April 1949, [1949] ICJ Rep p. 174. On the revolution that is allegedly brought about the *Reparations* Advisory Opinion from the standpoint of international law as a whole, see Bederman, *supra* note 5, p. 279: the opinion “marks the triumph of a revolutionary idea in our discipline. It signalled the final days of the ‘law of nations’ and ushered in the era of ‘international Law’”.

⁵⁷ Bederman, *supra* note 5, p. 369; Collins, *supra* note 51, *esp.* pp. 314–315.

⁵⁸ Engstrom, *supra* note 6; Klabbers, ‘International Institutions’, *supra* note 17, p. 232; Klabbers, ‘Autonomy, Constitutionalism and Virtue in International Institutional Law’, *supra* note 53.

⁵⁹ On the idea that functionalism is not politically innocent and is a political project, see Klabbers, *Theorizing International Organizations*, *supra* note 7.

⁶⁰ Klabbers, *Colonial Inspirations*, *supra* note 54.

⁶¹ For examples of various comparative modes in the quest for common rules applicable to all international organizations, see Sands & Klein, *supra* note 3, p. 16; P. Reuter, *International Institutions* (Praeger, New York, 1961); Schermers & Blokker, *supra* note 3, para. 1339; Seyersted, *supra* note 13. For a critical discussion of that question, see J. Klabbers, ‘The Paradox of International Institutional Law’ (2008) 5(1) *International Organizations Law Review* pp. 151–173; Schermers & Blokker, *supra* note 3, para. 22.

⁶² Virally, *supra* note 6. For some critical remarks on the contemporary relevance of M. Virally's work, see also F. Dopagne, ‘Retour sur un “classique”: M. Virally, ‘La notion de fonction dans la théorie de l'organisation internationale’ (2011) *Revue Générale de Droit International Public* pp. 285–287.

tween contractualism and constitutionalism vanishes, and the law of international organizations is left pending between the autonomy and the dependency, as two necessary prerequisites for the fulfillment of the functions assigned to the organizations.⁶³ Functions come to underpin both the constitutional existence and autonomy of the organization as well as its contractual limitations and dependency. Functions, for Virally, explain as much as they iron-out the tensions between the contractualist and constitutionalist natures of organizations. Virally's functionalist approach can thus be seen as another dialectical move, for the functions become the channel of the oscillation between the two aforementioned divergent poles. It must be noted, however, that to dialectically operate as a channel between contractualist and constitutionalist arguments, the functions of the organizations must be kept floating.⁶⁴ It is only if the functions of the organization are kept indeterminate that both contractualist and constitutionalist projects can feed therein and that the rules, techniques, narratives and arguments of the law of international organizations can be left in flux between the two.

The previous paragraphs have shown that the idea of functionalism is not only invoked in support of both contractualist and constitutionalist approaches to the subject. Functionalism is also sometimes constructed in a way that leaves the law of international organizations permanently pending between contractual dependency and constitutionalist autonomy, thereby offering another illustration of the turn to dialectics embraced by some international legal scholars to play down the dichotomic foundations of the law of international organizations.

D. Beyond the dialectics: the search for grand reconceptualization

The embracing of dialectics can certainly not be generalized. International legal scholars have come to realize that the dichotomy between contractualism and constitutionalism — whatever its exact manifestation — cannot be entirely diluted in dialectics.⁶⁵ Yet, in the view of some of them, because of the irreconcilable character of the dichotomy between these two opposite poles in the present state of the law of international organizations, the only remaining viable option seems to lie with a reconceptualization of the field as a whole. This is what will be referred to here as the quest for a grand reinvention of the discipline that is occasionally envisaged — albeit never fully realised — in contemporary scholarship.⁶⁶ It is argued here that these calls for reconceptualization are manifestations of a similar reconciliatory proclivity to the one that informs the abovementioned dialectical notions of '*dédoublement fonctionnel*', the 'institutional veil' or 'functionalism'.

⁶³ For a non-conciliatory understanding of functionalism, see Klabbers, Two Contending Approaches, *supra* note 1.

⁶⁴ In this respect, see the remarks of Petman, *supra* note 45.

⁶⁵ Brölmann, Institutional Veil, *supra* note 6.

⁶⁶ Brölmann, A Flat Earth?, *supra* note 27, p. 340; Collins, *supra* note 51, p. 313.

Interestingly, this quest for reconceptualization — and the accompanying search for conceptual aesthetics — have been more pronounced in Europe than in the United States: while international legal scholars in the former have long been seeking to design paradigmatic, watertight systems, the thirst for systemic coherence in the latter has appeared more easily quenched.⁶⁷ It is noteworthy that, although such calls are heard at regular intervals in European scholarship, European scholars have balked at effectively putting forward new frameworks or paradigms meant to revolutionize the way we look at international organizations.⁶⁸ In that sense, such calls have remained rather ‘romantic’. Somewhat paradoxically, the only serious attempt to date to reconceptualize the way in which international organizations are construed is probably the New York University-inspired project on Global Administrative Law, which has sought to approach problems of global governance by international institutions from an entirely new perspective.⁶⁹ In doing so, it has moved away from mainstream international institutional law, which it considers unhelpful to solve questions of accountability, participation, and transparency arising in the context of global governance.⁷⁰ By virtue of its rupture with the basic formal techniques and discourses of mainstream law of international organizations — which could be construed as a paradigmatic revolution from the vantage point of the law of international organizations⁷¹ — it possibly creates space to address some of the problems of the field, as well as its inner tensions.⁷² Organizations no longer need to be, once and for all, classified as contractualist or constitutional creatures. It is similarly irrelevant if the relations between them and their members are external or internal, or whether the product of their normative activities is of a domestic or international nature. This being said, the reconceptualization attempted by Global Administrative Law should not be overvalued, as its primary aims have never been to salvage or reconceptualise the law of international organizations *per se* but rather to prescribe new forms of accountability, transparency and participation in the processes whereby international organizations organize power in the international arena. In that sense, its reconciliatory virtues are somewhat ‘accidental’, and should not be overblown.

⁶⁷ Bederman, *supra* note 5, p. 278.

⁶⁸ Note Klabbers’ attempt to give a more critical spin to the subject, although he neither claims nor seeks to ‘reconceptualize’ the law of international organizations: Klabbers, *An Introduction*, *supra* note 1.

⁶⁹ For some critical remarks on the dialectic moves between formalisation and deformalization made in Global Administrative Law, see J. d’Aspremont, ‘Droit Administratif Global et Droit International (Global Administrative Law and International Law)’ in C. Bories (ed.) *Un Droit Administratif Global?* (Pedone, Paris, 2012). See also Schermers & Blokker, *supra* note 3, para. 13A.

⁷⁰ See generally the special issue of the *International Organizations Law Review* on Global Administrative Law: (2009) 6(2) *International Organizations Law Review*.

⁷¹ On the notion of paradigm change, see T. Kuhn, *The Structure of Scientific Revolution*, 50th anniversary edition (The University of Chicago Press, Chicago, 2012).

⁷² See *supra* note 70.

3. Static Dichotomies, Dynamic Dialectics and the Perception of Fluid Coherence in the Law of International Organizations

The previous sections have tried to show that many international legal scholars have been caught in a search for conceptual flatness in the field, or have at least sought to play down the paradigmatic tensions at the heart of the law of international organizations. A few examples of the strategies and constructions they have resorted to, especially their refuge in dialectics, have been provided, albeit in a non-exhaustive manner. Whether such moves have been successful in smothering the paradigmatic incongruences of the law of international organizations has not been discussed. It is submitted here that such a question, however, remains unwarranted. As this last section argues, it is very questionable whether such a quest for ironing-out or playing down the fundamental tension between contractualism and constitutionalism is necessary in the first place. It is argued in this last section that the law of international organizations, like international law as a whole,⁷³ does not need to be saved from its inner and fundamental tensions. On the contrary, it is contended in these final observations that trying to salvage the law of international organizations from its internal paradigmatic dichotomy may well be counter-productive, for it threatens the distinctiveness as much as the identity⁷⁴ of this branch of international law.

The foregoing does certainly not seek to belittle the conceptual and aesthetical advantages of the dialectical constructions mentioned above. Indeed, producing an image of the subject as oscillating between opposite poles is certainly conducive to a perception of a dynamic and fluid coherence. Oscillatory moves allow one not to remain caught in a static contradiction. This is where their main appeal lies. Should this perception of dynamic coherence make international legal scholars prefer the ironing-out effect of the dialectical constructions discussed above? It is argued here that this question ought to be answered negatively.

First, it should be made clear that embracing the dialectical constructions mentioned above certainly does not make legal argumentation in the law of international organizations less indeterminate. On the contrary, it could be said that a dichotomic approach that sees an irreconcilable contradic-

⁷³ See Bederman, *supra* note 5; on the internal contradictions of international law as a whole, see generally Koskenniemi, *supra* note 18.

⁷⁴ It must be acknowledged that the foregoing is not entirely unheard of. Brölmann has contended that the tension between the contractualist and constitutive paradigms are constitutive of the identity of the law of international organisations: see Brölmann, *Institutional Veil*, *supra* note 6, p. 30. However, as this section seeks to demonstrate, this argument could even been pushed further. The dichotomy between contractualism and constitutionalism is not only constitutive of the identity of this area of law but also of this area of law itself.

tion between contractualism and constitutionalism leaves legal argumentation less indeterminate as soon as the (contractualist or constitutionalist) vantage point of the interpreter is disclosed.

There is a second and more fundamental argument supporting a dichotomic approach to the field which does not do away with the contradictions discussed in Section 1. It is submitted here that the dichotomy between the contractualist and the constitutionalist paradigms is performative, in that the tensions between those two approaches are constitutive of the discipline as a whole. This means, according to the point defended here, that the dichotomy between contractualism and constitutionalism is foundational of the whole subject. In the absence thereof, there would be no law of international organizations as an independent subject of legal studies, and the discourses, techniques, arguments and expertise at play in the framework of the law of international organizations would have no distinctiveness whatsoever. Should the law of international organizations, on the one hand, be exclusively constituted by a contractualist paradigm, questions pertaining to international organizations would eventually be diluted in questions concerning the law of treaties. Should the law of international organizations, on the other hand, be exclusively shaped around a constitutionalist paradigm, questions related to international organizations would raise issues of the articulation of legal orders of the same nature as those pertaining to the relation between domestic legal orders and the international legal order. In that sense, the contractualist and constitutionalist paradigms should be seen as working in a performative tandem that is constitutive of the law of international organizations as a whole.

It is known to all international lawyers that textual arguments are not only very unstable but also of limited relevance. However, for the sake of the argument made in this final section, it is difficult to turn a blind eye to the illustrations provided by the foundational texts of the discipline. Whilst the sources of international law are famously — albeit unconvincingly⁷⁵ — articulated around Article 38 of the Statute of the International Court of Justice,⁷⁶ and the so-called ‘law of statehood’ is built on the *1933 Montevideo Convention on the Rights and Duties of States*,⁷⁷ one of the authoritative texts around which the law of international organizations is built is the abovementioned 1949 Advisory Opinion in the *Reparations* case. This ‘foundational gospel’ of the law of international organizations provides a textual foundation to the performative character of the dichotomy between contractualism and constitutionalism. Indeed, as is widely recognised, this text is known for its paradigmatic incon-

⁷⁵ For some critical remarks, see J. d’Aspremont, ‘The Idea of “Rules” in the Sources of International Law’ (2014) 84 *British Yearbook of International Law* pp. 103–130.

⁷⁶ See generally A. Pellet, ‘Article 38’, in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm, *The Statute of the International Court of Justice: A Commentary* (2nd ed.) (Oxford University Press, Oxford, 2012) pp. 731–870.

⁷⁷ For some critical remarks on the law of statehood, see J. d’Aspremont, ‘The International Law of Statehood: Craftsmanship for the Elucidation and Regulation of Birth in the International Society’ (2014) 29 *Connecticut Journal of International Law* pp. 201–224.

clusiveness and gives foundations to both contractualist and constitutionalist projects, thereby confirming the foundational character of the tension between them.⁷⁸

The above textual support found in the 1949 foundational text of the discipline should certainly not be interpreted as meaning that the paradigmatic antinomy between contractualism and constitutionalism was born with the 1949 Advisory Opinion. The foundational character of the dichotomy dates back to the time of the inception of the law of international organizations. In fact, in the history of ideas about (the law of) international organizations, there was never a radical shift from one paradigm to the other, but rather a concomitant crystallization of each of them. When it was first conceptualised in the international legal scholarship in the 19th and 20th centuries,⁷⁹ the idea of international organization was certainly not new.⁸⁰ It is nonetheless contractualism that first gave the cognitive categories to apprehend the phenomenon. Said differently, it is contractualism that first offered fertile ground for the blossoming of the idea (and the practice) of a law of international organizations. However, this contractualism was, from the start, informed by a constitutionalist project, for constitutionalism was its main driving force.⁸¹ As has been shown by Klabbers, organizations were already treated as Janus-faced entities in the literature of the end of the 19th century and the beginning of the 20th century.⁸² At the same time, one could not have commenced a move towards constitutionalism from the outset: contractualism was the only possible gateway to constitutionalism.⁸³ It seems that little has

⁷⁸ Bederman, *supra* note 5, p. 369; Collins, *supra* note 51, *esp.* pp. 314–315.

⁷⁹ The term was coined by J. Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities Vol. 1* (W. Blackwood & Sons, Edinburgh and London, 1883) p. 11. For some critical remarks on the intellectual history about international organizations, see Alvarez, *supra* note 5, pp. 17–63.

⁸⁰ See generally B. Reinalda, *The Routledge History of International Organizations from 1815 to the Present Day* (Routledge, London, 2009); J. M. Sorel 'L'Institutionalisation des Relations Internationales', in Lagrange & Sorel (eds), *Traité*, *supra* note 12. See also A. Peters and S. Peter, 'International Organizations: Between Technocracy and Democracy', in B. Fassbender & A. Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford University Press, Oxford, 2012), pp. 170–197; D. Bederman, *International Law in Antiquity* (Cambridge University Press, Cambridge, 2001).

⁸¹ See e.g. the work of P. Kazansky, 'Les premiers éléments de l'organisation universelle', (1897) 29 *Revue de droit international et de législation comparée* p. 238 and 'Théorie de l'administration internationale', (1902) 9 *Revue générale de droit international public* p. 352.

⁸² Klabbers, *Colonial Inspirations*, *supra* note 54, in which he argues that international organizations were considered to be meeting platforms as well as offices capable of generating action.

⁸³ See A. McNair, *League of Nations as constitutional in substance but still located in inter-state framework*, cited by Collins, *supra* note 51, p. 314; A. McNair, 'The Functions of Differing Legal Character of Treaties', (1930) 11 *British Yearbook of International Law* p. 100, at p. 112. The primacy of the contractualist foundation of the law of international organizations seems to be underpinned by the functionalist approach found in the work of Paul Reinsch, as is discussed by Klabbers: see *supra* note 55.

changed since then, as contractualism remains the main narrative to salvage constitutionalism.⁸⁴ This original kinship explains why, until today, contractualism and constitutionalism are to be considered as the inseparable, albeit incongruent, linchpins of the discipline.

As was discussed in the previous paragraphs, there are thus many reasons for coming to terms with the irreconcilable tensions at the heart of the law of international organizations, and for shedding the dream of the fluid coherence that accompanies the dialectical constructions discussed in the previous section. It could even be added that such a renunciation, if generalized, could constitute a sign of maturity of the whole discipline organized around the law of international organizations.⁸⁵ Such a posture should, in the end, not be so difficult to embrace. After all, the law of international organizations is not alone in sharing this fate.⁸⁶

⁸⁴ The main changes rather pertain to how these two-faceted organizations are now perceived. It seems that the original dominant narrative — and the accompanying belief — that international organizations necessarily serve the public good, has been unravelling lately. For an early expression of the idea that organizations were described as serving the public good, see N. Singh, *Termination of Membership of International Organizations* (Stevens & Sons, London, 1958) p. vii, cited in Klabbers, *Theorizing International Organizations*, *supra* note 7. For a critical discussion of the move away from this idea witnessed in the last two decades, see Collins & White (eds.), *supra* note 6, *esp.* the introduction by R. Collins and N. White, which explains that H. Lauterpacht, H. Kelsen, G. Scelle, T. Franck and A. Cassese have all pinned their hope on autonomous organisations to secure the rule of law in international affairs (at p. 2). See also Seyersted, *supra* note 13; J. Klabbers 'The Changing Image of International Organizations', in Coicaud & Heiskanen (eds.), *supra* note 27. See also Klabbers, *Colonial Inspirations*, *supra* note 54; and Klabbers, *Theorizing International Organizations*, *supra* note 7. See also the remarks of Alvarez, *supra* note 27, pp. 104–154.

⁸⁵ For a similar argument in relation to international environmental law, see E Fischer, B. Lange, E. Scotford and C. Carlarne, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21 *Journal of Environmental Law* p. 22.

⁸⁶ See Koskenniemi, *supra* note 18.