# *Saving the Scarecrow*

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## Abstract

*This brief Comment responds to Jan Klabbers' recent article, 'The Transformation of International Organizations Law'. It focuses on three points: the polemical style and disengagement with substance in the article; the question of whether we can do without some form of functionalism; and the further question of what it means to speak of 'responsibility beyond functionalism'.*

In Chapter 3 of his delightful *The Wonderful Wizard of Oz*,[1] Frank Baum introduces the scarecrow, which has a head that is 'just a small sack stuffed with straw'. After we have learned that the scarecrow believes he lacks a brain, Dorothy takes him to the land of Oz, only to find out that he does have a brain after all and that he actually is 'the wisest man in all of Oz'. After reading Jan Klabbers' masterful 'The Transformation of International Organizations Law',[2] it is easy to make a comparison with the scarecrow. Functionalism is weak and an easy target of critique, ridicule and even disdain. However, after many twists and turns, the reader may conclude that functionalism does have merit after all. Even it is not the wisest idea 'in all of international law', there is something worth 'cherishing about international organizations generally ... and about a modest functionalism'.[3]

Klabbers' core argument is that while the law of international organizations (IOs) has been dominated by a functionalist perspective, which is based on the idea that member states transfer or delegate functions to IOs, the law is moving beyond functionalism towards a normative orientation that has a better fit with the outside world and brings a better sense of the responsibility of organizations *vis-à-vis* the multiple stakeholders. Klabbers' article needed to be written. The law of IOs is floundering. With striking regularity, IOs are unable to meet the demands for justice. The United Nations (UN) cholera

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1 L. Frank Baum, *The Wonderful Wizard of Oz* (2006).
2 Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law', 26(1) *European Journal of International Law (EJIL)* (2015) 9.
3 *Ibid.*, at 82.

episode, which figures prominently in Klabbers' article, is only the most visible of a large number of situations where IOs have allegedly acted in conflict with international law, and it is proving difficult, and often outright impossible, to arrive at an independent third party determination of responsibility. Uncertainties in terms of applicable law, scope of immunities and the allocation of responsibility leave would-be plaintiffs perplexed and almost invariably without the remedy that they are seeking. This article makes a persuasive suggestion that international law is implicated in such gaps[4] and that the dominance of functionalism has something to do with them. The critique on functionalism and the attempt to articulate ways beyond it is therefore timely. However, this excellent article does invite comments and some contestation, and I focus on three points: the article's polemical style and disengagement with substance, whether we can do without some form of functionalism and what it means to speak of 'responsibility beyond functionalism'.

## 1  The Scarecrow as an Argumentative Style

Like all of Klabbers' writings, this article flows seamlessly in a somewhat mesmerizing style that will convince most readers of his argument. The shortcomings of functionalism are set out clearly and boldly, and it will take courage for someone to try and prove Klabbers wrong. However, the persuasiveness of the argument depends in large part on its style. The polemical argument at times borders on an exaggeration of what may be a perfectly sensible idea (and here the analogy of the scarecrow, or strawman, is useful).[5] It would do injustice to the richness of Klabbers' argument to put it aside as a rhetorical shamble that succeeds only by taking down strawmen. Yet the references to functionalist concepts and ideas are exaggerated to such an extent that it makes it difficult to defend.[6]

At times, this polemical style involves anonymization. Thus, functionalism is transformed into an agent ('its blinds spots causes functionalism to adapt'),[7] and statements are attributed to unidentified persons[8] ('international organizations have *always* been viewed as benign creatures').[9] At other times, it attributes such bold statements to functionalism that any reader who may have felt sympathy for the theory will switch camps. Thus, we read that functionalists (rather than this or that author) trust that organizations will lead to 'eternal peace'[10] and to the 'salvation of mankind'.[11] We know that this will not happen, so we choose the side of Klabbers.

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[4]    *Ibid.*, at 74.

[5]    The use of polemical exaggeration has been noted before with respect to the work of Koskenniemi, who has influenced strongly the work of Klabbers in substance and in style. See, e.g., Jouannet, 'Koskenniemi: A Critical Introduction', in Martti Koskenniemi, *The Politics of International Law* (2011) 1, at 22.

[6]    For a discussion of the strawman argument, see William Safire, 'Straw-Man Issue', *New York Times* (2 June 2009), available at www.nytimes.com/2009/06/07/magazine/07wwln-safire-t.html (last visited 13 November 2015).

[7]    Klabbers, *supra* note 2, at 10.

[8]    Safire, *supra* note 6, noting that '[i]n strawmanese, you never specify who "those who" are. ... They are the hollow scarecrows you set up to knock down.'

[9]    Klabbers, *supra* note 2, at 29.

[10]   *Ibid.*, at 17.

[11]   *Ibid.* (attributing the statement to N. Singh, *Termination of Membership of International Organisations* (1958), at vii).

Klabbers has not chosen this argumentative style to win an argument. Rather, it serves as a means of preventing any engagement with substance. The lack of commitment to particularly substantive positions feeds on the exaggeration, thereby allowing us to put the argument aside before the question of commitment is even asked. The absence of substantive arguments in this wonderful essay gives it an esoteric quality. In asking ourselves the question whether it is still useful to think in terms of the functions of international organizations (IOs), can we entirely neglect the question whether organizations do what they were set up to do – whether they perform their (I hardly dare to speak the word) functions? Can we adopt a useful perspective on organizations that is entirely disconnected from the question whether the World Health Organization (WHO) delivers whenever there is an Ebola crisis; whether the International Civil Aviation Organization helps us to fly safely around conflict zones and whether the International Monetary Fund helps states to recover from monetary crisis Greek-style?

The lack of a substantive discussion of whether organizations help solve the type of problems that justifies their very existence is not an oversight. One explanation is that the article defines functionalism in a way that discards any thinking in terms of substance. Functionalism as a generic 'theory' has to be neutral and cannot hinge on any particular function since it is said to apply to all organizations. However, a more plausible explanation is that Klabbers' scholarly approach implies that it does not engage in questions of substance. This non-commitment seems to be a direct consequence of the scope of the indeterminacy of the law and inevitability of politics argument. In this sense, this scholarship confirms its own diagnosis of the fate of international law itself. Non-commitment in this sense is a necessary step to be able to deploy credibly the critique of politics.

I do not suggest that Klabbers does not care about the substance. Throughout his writing, he has shown a sincere concern with real life questions of responsibility. However, the argumentative style that protects his consistent scholarship on questions of indeterminacy, politics and law leaves someone who would like to inquire about the relevancy of such transformation for understanding how IOs can help solve real life problems rather empty-handed.

## 2 Can We Do Without (Some Form of) Functionalism?

While much of Klabbers' critique on functionalism is eminently sensible, at the end of the day the question is whether we can do without some form of functionalism. The question is not easily answered since the concept of 'functionalism' appears to be rather ambiguous. Part of the problem is that authors grouped under the heading 'functionalism' vary widely in terms of method and approach. Klabbers does a great job in constructing a theory out of very little, but then again the question is what it means to set aside a theory that is shared by few and attributable to no one. While Joel Trachtman and Andrew Guzman surely speak of the functions of IOs, just like Henry Schermers and Niels Blokker with whom they are grouped in the same camp,[12]

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12  *Ibid.*, at 15–16.

it seems doubtful that they share the underlying premises that this article attacks. Discarding a generic, ideal form of functionalism does not mean that the functionalist-type theories of different brands all have to be abandoned.

As a result of the non-committal style, it is not quite clear whether Klabbers himself, in the end, believes we can do without thinking in terms of functions or even of functionalism. Throughout the article, the argument seems either to share the viewpoint that it should be fully discarded or that perhaps it is there to be saved, only to pull back at the last moment and maintain a distance.[13] One example is that Klabbers acknowledges that thinking according to functions is not so bad after all, but he chooses the words in a way that the reader never knows whether or not he himself accepts this position (if organizations 'are working for the global common good, it would seem justifiable to try and facilitate their work and insulate them from outside pressures').[14] Whether Klabbers agrees never becomes clear, also since such sentences seem difficult to align with the preceding fundamental critique.

Nonetheless, Klabbers is quite explicit in arguing that functionalism as a normative perspective[15] cannot be maintained. The core of the normative theory is the idea that functionalism presents IOs as technical and a-political entities that do not have autonomous substantive policies but, rather, simply serve substantive functions decided by others.[16] Since IOs simply serve the beneficial aims defined by states, the law must facilitate the functioning of organizations – for instance, by protecting their immunities.[17] It is this normative angle, then, that is taken down, since the ideas of technicality, neutrality and a-political nature obviously cannot be maintained and, above all, since these normative premises do not help in relation to the outside world.

I largely agree with the latter point, but does it mean that we can do without some form of functionalism? A few comments are in order. First, an important reason for the attack on functionalism (presumably precisely in this normative variety) is that functionalism is a concept (I hesitate to call it a 'theory') with explanatory and even causal power. The suggestion is that functionalism has exercised actual influence on the development, content and application of the law. The claim is seductive. Given the many relevant factors, the suggestion that we can reduce the complexity of the subject by boiling it down to one single cause is attractive. However, it requires a tremendous faith in the power of concepts, particularly of a concept that hardly can be called a coherent theory (a point that Klabbers readily admits) of holding functionalism 'responsible' for all of the problems faced by IOs. It is implausible that an undeveloped and incoherent concept would have such a power to guide and even overrule what often will be political considerations. We can see that organizations fend off plaintiffs with functionalist arguments, but it may well be that these are simply arguments to

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13    Compare the critique on Koskenniemi's reading of Kant in Howse and Teitel, 'Does Humanity-Law Require (or Imply) a Progressive Theory of History? (And Other Questions for Martti Koskenniemi)', 27 *Temple International and Comparative Law Journal* (2013) 377, at 385, n. 37.

14    Klabbers, *supra* note 2, at 79.

15    He notes: 'The functionalism at the core of international organizations law aims to tell us how organizations should and may behave, not how they actually behave'. *Ibid.*, at 20, 29.

16    *Ibid.*, at 18.

17    *Ibid.*

protect particular political positions. At the end of the article, we are left somewhat in the dark as to what extent, and through what causal pathways, functionalism actually has had real world effects. Therefore, this basis for discarding functionalism altogether is somewhat shaky.

A second comment is that the critique on the descriptive power of functionalism is somewhat overstated. Put simply, the descriptive claim is that functionalism can help to describe and systematize how IOs work. Klabbers debunks the descriptive use of functionalism on the argument that the diversity of IOs is so large that any description can only cover an ideal type, which often has little to do with any organization in particular.[18] While there is merit in this point (understanding how the European Union (EU) works provides some idea of how the Association of Southeast Asian Nations works, but not much more), it seems unnecessary to reject functionalism for this reason altogether. It is surely not the most exciting stuff to read, let alone to write. But, yes, many IOs do carry out some functions and not others. Functionalism offers a lens as well as some analytical tools to describe and categorize functions so that they can be compared. A lawyer tasked with drafting proposals for a new IO who failed to look at other IOs surely would do a poor job. We would not be served well if, in giving up functionalism, we would give up a lens that would allow us to compare and to learn.

Third, in the attack on the normative strand of functionalism, the scarecrow looms large. It is easy to critique the notions of neutrality and the a-political nature of IOs as being overly naive. However, it is not immediately clear whether this is a fair depiction of the thoughts of 'functionalist' authors (would all authors who fall under the heading of functionalism believe that the UN Security Council's decision to do something in Mali, but not in Ukraine, is just a technical decision?). Clearly, it is not clear what this qualification hinges upon. Even if we discard the idea of neutrality as naive scholarship, does it necessarily imply that we need to take down functionalism altogether? I have not been persuaded by the proposition that thinking of IOs as institutions that are set up to carry out functions, and that this has certain implications for the way that they are organized, necessarily hinges on the idea that they are a-political. Acknowledging politics surely makes things (notably the relations with member states) more complex, but an adaption that makes a theory fit better with this complexity is a more plausible way forward then giving up thinking of functions altogether.

The fourth point is that while functionalism may not do the trick in relation to third parties, it does not mean that it cannot be useful in other respects, if only for some types of IOs. It escapes me why functionalism is set up in such binary all or nothing terms. We read that functionalists would all believe that functionalism would cover each and every aspect pertaining to an IO.[19] However, why would functionalism have to address every type of question that may arise in an IO? The fact that an IO is set up for certain aims (or functions) surely does not mean that those functions dictate every decision about staff, membership or relations with third parties. Thinking in

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[18]   *Ibid.*, at 24.
[19]   *Ibid.*, at 22.

functionalist terms can help explain, describe and prescribe certain things but not a lot of other things. The concept of functionalism can easily be de-bundled and reformulated in a way that helps us to understand and shape some aspects of IOs but not a lot of other aspects.

## 3  Implications for the Outside World

This then leads us to the crux of the matter: how are we to move from whatever is left of functionalism to a better sense of IOs and their responsibility in relation to the outside world – which is the very problem that drives the Klabbers' foreword? It is clear that while aspects of functionalism are useful and worth saving, it cannot stand on its own. IOs exercise public authority[20] with all of the related questions of legitimation and multiplicity of the interested parties. Once an IO is in the business of exercising functions such as vaccination, water sanitation and peacekeeping, it is performing these functions not only for the member states – but also for the individuals and communities that have a stake in the outcomes. How does discarding functionalism help us to address responsibility questions in these relations?

Despite the all-out attack on functionalism, the point should be made that functionalism (certainly if we de-bundle it in more realistic forms) is not altogether powerless. Klabbers' argument that relations between member states and IOs are at the heart of functionalism is helpful in identifying the useful modes of control. Klabbers does not pursue this notion, however, and sets aside the idea that if the agent misbehaves or does something wrong the principal can be blamed.[21] While we can agree with the argument that the principal-agent frame is not very useful for understanding IOs with collective membership, the reader is left to wonder why we cannot rely on member states at all. If functionalism is a normative perspective on the relations between member states and IOs, why could this perspective not entail a responsibility of the member states to align the organization with expectations that outside staff members may have? When organizations systematically fail to protect the rights of staff members, surely the member states can be expected to take appropriate action to ensure that they do. If the WHO does not act swiftly or effectively enough to handle an Ebola-type crisis, can it not be expected that member states will take action to improve this situation in the future. In this sense, Klabbers' statement that since functionalism concerns relations between IOs and member states, 'it does not (and cannot) address relations between the organization and the outside world'[22] is somewhat puzzling and certainly too absolute.

The role of member states is not just a matter of political responsibility. For want of a better solution, as a normative matter, there remains great merit in the position that when third party rights are affected, member states remain responsible as a matter

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[20]  A. Von Bogdandy, J. von Bernstorff and M. Goldmann (eds), *The Exercise of Public Authority by International Institutions* (2010).

[21]  Klabbers, *supra* note 2, at 25.

[22]  *Ibid.*, at 34.

of international law – even though the International Law Commission strongly curtailed this possibility.[23] Perhaps with the exception of EU-type organizations, theories of control and responsibility that push aside the role of member states entirely discard a potentially powerful mode of control (normatively as well).

Yet it is clear that we cannot rely on the control of member states alone, since this perspective does not solve the question of applicable law and the question of immunities and, more generally, is unsuited for dealing with the public nature of IOs. There is an obvious need to explore alternative public law-type forms of responsibility such as the global administrative law approach.[24] Klabbers adds tantalizing ideas to the discourse on these forms of responsibility, notably an idea of role responsibility and a related suggestion that we should opt for a responsibility without wrongfulness,[25] which deserves to be taken up and discussed more fully in a future publication.

Two dimensions of Klabbers' tentative ideas are worth noting here though. On the one hand, his suggestions seem to advance quintessentially public law-type ideas. On the other hand, his solutions move away from the law.[26] This move is consistent with Klabbers' earlier scholarship and perhaps inevitable, given his rejection of functionalism. Though not really articulated well in the bits and pieces we are handed in this functionalist theory, it would seem that the rejection of functionalism is eventually a rejection of the idea of primacy of law over politics. One reading of functionalism is the legal form of IOs, with their personality, powers and processes to deliver the goods and to keep out the politics. If this form is to be rejected, it is hardly to be expected that law (even if disconnected from functionalism) will solve the problems in external relations. In any case, this is not the direction where Klabbers wants to go. Noteworthy is an aside comment that there is 'little point' to exclude the Organization for Security and Co-operation in Europe from the circle of IOs.[27] While this may be based on an expansive reading of law, which connects to Klabbers' earlier work on soft law,[28] the agenda seems to be a different one – the law is simply not a relevant analytical or normative category in this case because it is also subject to politics.

In the end, an article that started as an attempt to address the legal questions that are now before us (such as the UN cholera episode) ends by taking us out of the legal domain altogether. Of course, this is perfectly legitimate, and it is quite obvious that there are many dimensions of control and accountability that are not really governed by international law, defined narrowly. At the same time, it does seem that by now we are playing a different game on a different board. The move towards a public law-type

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[23]   International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc A/56/83, 3 August 2001, Art. 62. See, e.g., Yee, 'Member Responsibility and the ILC Articles on the Responsibility of International Organizations: Some Observation', in M. Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013) 325.

[24]   Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Problems* (2005) 15.

[25]   Klabbers, *supra* note 2, at 76.

[26]   Compare the discussion of the concept of law in global administrative law by Kingsbury, 'The "Concept of Law" in Global Administrative Law', 20 *EJIL* (2009) 23.

[27]   Klabbers, *supra* note 2, at 30.

[28]   Klabbers, 'The Redundancy of Soft Law', 65 *Nordic Journal of International Law* (1996) 167.

of responsibility that is grounded in a broader concept of law (or that is outside law altogether) need not exclude the continuing role of private law-type forms of responsibility in relations between particular third parties and an IO.[29] The multiple roles of IOs may be better grasped by recognizing the various forms of responsibility as well as the need to find solutions on both fronts that may interact. Thus, it is arguable that recognition of the public nature (and 'functions') of IOs should impact on our understanding of where immunity applies and where it does not and of what law is applicable between an IO and private claimants.[30]

The approaches that Klabbers advances are intellectually fascinating but, at the same time, difficult to fit with the legal world in which a court has to decide on a claim for real plaintiffs with real life problems. Surely for solving problems, the questions whether an institution is or is not a legal person, whether or not there is legal responsibility, what law is applicable and whether or not there is immunity are questions that matter. Discarding solutions to these legal questions because of the problems that are caused by functionalism seems to be like throwing out the baby with the bathwater.

## 4 Conclusion

The ESIL foreword does a wonderful job in demonstrating that the relations between IOs and the outside world lead to questions that cannot be solved just by thinking in terms of functionalism. However, at the end of the day, the basis of functionalism as presented by Klabbers (the relations between the IO and the member states) cannot be totally discarded, if only for want of a better solution in law. While we can abandon the grand claims of functionalism as an all-encompassing theory that would explain the past, the future and the universe (if anyone ever claimed this) as a weak and somewhat silly theory, the idea that IOs are there because they carry out functions for member states and for the outside world matters. Just like the scarecrow in the land of Oz, it is saved after all – even if it cannot stand on its own feet.

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[29] Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' 34(2) *Melbourne Journal of International Law* (2013) 359, 398–408.

[30] For a useful discussion of ways around the limitations constructed in the UN cholera episode, see Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility', *Chicago Journal of International Law* (forthcoming 2015).