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International Organizations and the Dream of Universal Legal Systems

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Abstract:

This paper applies some of the analytical instrument developed in the debates on 'Law Without the State' to the nature of the legal systems developed by international organizations. It aims at analysing the nature of the law they produce in the context of universalism. First, it discusses the transparent nature of international organizations on the basis of two concepts of legal systems and how they affect the universal aspiration. Second, it considers the relevance of the point of view to move from one concept to the other, affecting how the law of organizations can be perceived either as universal or as particular. Third, it applies the concept of absolute legality to the law of international organizations to describe how these entities derive from international law, and, at the same time, they develop particular legal systems. Finally, it focuses on the concept of 'interlegality' in order to develop a theory on the interactions between international organizations and international law that is defined as 'dual legality'.

Keywords: International organizations, universality, legal theory, legal system, interlegality

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1. Introduction

This paper focuses on the concept of legal system in the context of the narratives that consider international organizations as a move towards "genuinely universal" international law.[1] It analyses whether international organizations are able to create universal orders applying some of the analytical instruments developed in the framework of the debate on 'Law Without the State'.[2] In particular, this paper focuses on the so-called 'problem of identity', analysing the criteria which determine the system to which a given law belongs.[3] As of today, the law of international organizations lacks an analytical study to assess the nature of their legal systems.[4] For instance, the debates on 'transnational legality' usually pivot around the characteristic of non-international legal orders, such as the opportunity to call *lex mercatoria* a legal system of its own right.[5] The discussions also focus on describing how a legal system communicates with its environment and

[1] This piece is written in response to the call for paper of the ESIL interest group on international organizations on "International organizations and the dream of universality". See https://igioesil.blog/2018/06/15/international-organisations-and-the-dream-of-universality/.

[2] This intuition developed in 2015 during the course of Professor Thomas Schultz at the Graduate Institute of International and Development Studies. This paper is a completely revised version of the final essay.

[3] Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (2 edn, Oxford University Press 1980) at 1.

[4] There are few exceptions on the legal systems of particular institutions. See, for instance, Julie Dickson, 'How many legal systems? Some puzzles regarding the identity conditions of, and relations between, legal systems in the European Union' (2008) 9 Problema: Annuario de Filosophia y Teoria del Derecho 9

[5] Gunther Teubner (ed), *Global law without a state* (Dartmouth 1997) at 8.

on the methods to analyze its degree of openness.[6] This paper seeks to apply their findings to international organizations.

The dream of universality is an aspiration towards the development of a Hartian global rule of recognition. Under Hart's legal positivism, the rule of recognition is at the foundation of every legal system and provides the authoritative criteria for identifying primary obligations and justifying their validity.[7] The law produced by international and transnational actors is the first suspect to create a global order through the development of a global rule of recognition. However, in 2009 Kingsbury contended that global governance law had not develop a rule of recognition yet.[8] He did not disregard this possibility, but at that time he only recognized the existence of specific rules of recognition in particular regimes, which increasingly overlap or mesh with one another. Indeed, universality can also be understood as global pluralism. Pluralism, as described by Nico Krisch, "is an order in which the relationships of the constituent parts are governed not by an overarching legal framework but primarily by politics, often judicial politics; where we find heterarchy, not hierarchy".[9] Under this conception of universality, global governance is constituted by an heterarchical interaction of various layers of law. The absence of a hierarchical relationship among legal systems is the common starting point to debate their relative interactions.[10] This paper contends that hierarchy is not the only formal way in which legal systems interplay.[11] The absence of hierarchy in the interactions between legal systems does not prevent the development of other forms of interconnections that characterize the capacity of international organizations to develop legal systems.

The first section revives an old theoretical debate on whether international organizations derive from international law or whether they develop legal systems that are separate from international law.[12] It contends that legal pluralism is based on the cohabitation of a plurality of systems with different qualities. Some are created by the law of pre-existent systems while others are 'original'. 'Original' systems possess a rule of recognition that does not belong to another legal system. The case law of the European Court of Human Rights will show how the two concepts of legal system affect the attribution of responsibility to international organizations and their member states. This section concludes that only 'original' systems possess the analytical characteristics to develop a global rule of recognition.

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[6] Michel van de Kerchove and François Ost, *De la pyramide au réseau?* (Publications des Facultés universitaires Saint-Louis 2002).

[7] Herbert Lionel Adolphus Hart, *The Concept of Law* (Third edn, Oxford University Press 2012) 100.

[8] B. Kingsbury, 'The Concept of 'Law' in Global Administrative Law' (2009) 20 European journal of international law 23

[9] Nico Krisch, *Beyond constitutionalism: the pluralist structure of postnational law* (Oxford University Press 2010) at 111.

[10] F Rigaux, 'La relativité général des ordres juridiques' in E Wyler and A Papaux (eds), *L'extranéité ou le dépassement de l'ordre juridique étatique* (Pedone 1999).

[11] Keith Culver and Michael Giudice, *Legality's borders: an essay in general jurisprudence* (Oxford University Press 2010) ch. 4 in general and p. 161 (discussing the European Union).

[12] For an overview of this debate see Philippe Cahier, 'L'ordre juridique interne des organisations internationales' in René-Jean Dupuy (ed), *Manuel sur les organisations internationales* (Martinus Nijhoff 1998).

The second section focuses on the importance of the point of view, which affects how organisations' legal systems can be seen either as derived from international law or as constituting 'original' orders. The concept of relative legality will be introduced to show how different perspectives modify the belonging of a norm to one or another legal system. For example, the United Nations legal system can be perceived either as a particular order that derives from international law, or as an 'original' legal system. The *Kadi* saga will show the relevance of the different perspectives of UN legality from the EU standpoint. In sum, this section contends that the adoption of one or another concept of international organization is due to argumentative interests, when the circumstances of the case privilege the application of a legal system that derives from international law or that is created by an instrument that does not belong to international law. Different perspectives of legality affect how international organizations are perceived as universal or as particular institutions.

The third section introduces the concept of absolute legality, which takes into consideration the existence of different perspectives of legality to assess the nature of a norm. The adoption of an absolute perspective means to recognize the limits of any point of view and limits the error of judgment made by adopting only one perspective. The absolute nature of a rule of an international organization does not change, independently of how it can be perceived. This section applies this concept to the legal system of international organizations, revealing how they derive from international law and, at the same time, they develop particular legal systems. In sum, this section contends that international organizations do not have the analytical characteristics to develop a global rule of recognition because they derive from a pre-existent legal system.

The final section focuses on the concept of 'interlegality' in order to develop a theory on the interactions between international organizations and international law that is defined as 'dual legality'.[13] It sustains that dual legality constitutes a non-hierarchical interaction among legal systems in which the law still has a role to play. It will focus on the example of the protection of international investments within the European Union to reveal the dual nature of EU law and discuss the "unavoidable interplays of legalities".[14]

The paper concludes that the role of law in the interplay of the different spheres of legality that constitute global legal pluralism requires a shift from issues of subjectivity to the formal interactions between layers of law.

2. The Concept of International Organizations' Legal System

During the 50s and 60s there was an active debate amongst scholars on whether international organizations derive from international law or whether they develop 'original' legal systems that

[13] Boaventura de Sousa Santos, 'Law: a map of misreading. Toward a postmodern conception of law' (1987) Journal of Law and Society 279, at 298.

[14] Gianluigi Palombella, 'Interlegality and Justice' (2017) Available at SSRN: https://ssrncom/abstract=3066001

are separate from international law.[15] Judicial decisions fostered this debate when the International Court of Justice claimed the existence of an "organized legal system of the United Nations" and the European Court of Justice affirmed that the European Economic Community constitutes "a new legal order of international law".[16] On the one hand, some considered organizations as original social entities, under which the efficacy of their internal norms is not subjected to international law.[17] On the other hand, other scholars considered organizations as entities derived from the pre-existent international system, under which the nature of the legal system comes from the will of member states seen as primary subjects of international law.[18] The main difference between the two thesis concerns the value attributed to the constitutive instrument, which can be considered either as a constitution or as a contract.[19] These two models reflect the development of two concepts of international organizations, based on their functional or constitutional nature.[20]

The complexity that arises from applying the concept of legal system to international organizations is the reason of the unclear relationship between organizations and their member states, which remains the unresolved problem of the institutional architecture of international organizations.[21] This is because international organizations are 'transparent' institutions, neither self-contained in the way in which states are, nor perfectly open to international law, as the conferences of the parties to a treaty.[22] Under derivation, the rules of the organization are international law and the transparent quality of its institutional veil makes members states appear as third entities. Under originality, the rules of the organization are internal law and the opaque quality of its institutional veil makes member states appear as organs.

The nature of the rules of international organizations is relevant to determine the concept of their legal systems. The starting point is that every rule must belong to a legal system,[23] otherwise institutional rules would not be law at all.[24] However, legal scholarship cannot agree on a definition

[15] However, the topic is considered as inadequately theorized, see Neil MacCormick, *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth* (Oxford University Press 1999) at 102, 105; Mattias Kumm, 'The jurisprudence of constitutional conflict: Constitutional supremacy in Europe before and after the constitutional treaty' (2005) 11 European Law Journal 262, at 267-268, 306.

[16] *Effect of Awards of Compensation made by the United Nations Administrative Tribunal* ICJ Rep 47 (International Court of Justice) at 55-56; *van Gend & Loosv Nederlandse Administratie der Belastingen* Case 26/62 (1963) (Court of Justice of the European Union) at 12.

[17] See e.g. A. P. Sereni, *Le organizzazioni internazionali* (1959) as an historical example. More recently, the notion of "auto-constitutional regimes" goes in the same direction. See Andreas Fischer-Lescano and Gunther Teubner, 'Regime-collisions: the vain search for legal unity in the fragmentation of global law' (2003) 25 Michigan Journal of International Law 999, at 1015.

[18] See e.g. Matteo Decleva, *Il diritto interno delle unioni internazionali* (1962). More recently, Alain Pellet, 'Les fondements juridiques internationaux du droit communautaire' (1994) 5 Collected Courses of the Academy of European Law 226.

[19] Cahier, 'L'ordre juridique interne des organisations internationales' (above n. 12).

[20] Jan Klabbers, 'Two concepts of international organization' (2005) 2 International Organizations Law Review 277.

[21] Jan Klabbers, *An Introduction to International Organizations Law* (Third edn, Cambridge University Press 2015) at the introduction.

[22] Catherine Brölmann, *The institutional veil in public international law : international organisations and the law of treaties* (Hart 2007) at 11.

[23] Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (above n. 3) at 16.

[24] In the plethora of scholarly opinions, this hypothesis is not missing. See Giorgio Balladore Pallieri, 'Le droit interne des organisations internationales' in Law The Hague Academy of International (ed), *Collected*

of the law these particular legal systems create.[25] For example, the International Law Commission identified four theories on the concept of "rules of international organizations": 1. All rules are international; 2. All rules are internal; 3. Only some administrative rules are internal while the rest are international; 4. Only some organizations develop internal rules.[26] The first two theories develop the 'derivative' and the 'original' concepts of legal system. On the one hand, the international belonging of the rules relates to functionalism. Under this mainstream paradigm, international organizations are founded by states using international law (treaties or other instruments) and, consequently, international obligations arise from the rules.[27] This is how 'derivation' was historically conceived. On the other hand, the process of constitutionalization transforms international institutional rules into internal institutional law, relying on an institutive act of constitution, creative of a new order that develops internal obligations.[28] This is how 'originality' was historically conceived. The second two theories referred by the ILC are based on a notion of 'hybrid' legal systems, under which the nature of the rules concerns the so-called informal international law making.[29] Under this perspective, international organizations do not develop comprehensive legal systems and the rules are divided among categories, some belonging to international law and others developing an internal system. Similarly, under this perspective the rules of international organizations are the main component of Global Administrative Law,[30] understood as a qualitative transversal description of norms arising from the legal systems of different international organizations.[31] The informality of this source of law comes from the lack of clarity on the applicable legal regime.

In the context of the aspiration for universality, functionalism was able to rely on the international system in order to show how the law produced by international organizations is universally applicable. This traditional narrative described international organizations as the "salvation of mankind", able to solve political issues raising them up to the global level.[32] However, the derivation from international law on which this theory is based is the analytical reason of its failure. How can a legal system achieve universality if it is founded on the law of a pre-existent legal system?

Courses of the Hague Academy of International Law, vol 127 (Publications of the Hague Academy of International Law, Brill 1967).

[25] Lorenzo Gasbarri, 'The Dual Legality of the Rules of International Organizations' (2017) 14 International Organizations Law Review 87.

[26] Draft articles on the responsibility of international organizations, with commentaries (Yearbook of the International Law Commission, 2011, vol. II, Part Two (A/66/10) 2011) at 63.

[27] On functionalism, see Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 European journal of international law 9.

[28] Finn Seyersted, *Common law of international organizations* (Martinus Nijhoff Publishers 2008).

[29] Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012).

[30] Benedict Kingsbury and others, 'Foreword: Global Governance as Administration — National and Transnational Approaches to Global Administrative Law' (2005) 68 Law and Contemporary Problems 1 at 4.

[31] Nico Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 European journal of international law 247 at 21.

[32] Nagendra Singh, *Termination of membership of international organisations* (London Stevens &Sons 1958) at vii, as debated in Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (above n. 27) at 29.

The academic discussions that relied only on the distinction between original and derivative legal systems did not last long, as they were limited by a strict voluntarist mind-set which failed to apply the hierarchical nature of the Kelsenian pyramid of norms to the relativist and network-centred systems of international organizations.[33] Indeed, this debate only focused on the subjects of a legal system. For instance, the derived nature of international organizations was justified by the fact that states pre-exist and create the new entity.

Despite the traditional complexities of legal scholarship, this issue is particularly actual, as demonstrated by the recent use by the European Court of Justice of the vocabulary of 'derivation'. Indeed, in March 2018 the ECJ claimed that EU law "must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States".[34] Thus, it is useful to actualize this debate looking at how the different concepts of international organization affect the contemporary difficulties in ascertaining their responsibility.

2.1 Al-Dulimi and the competing concepts of international organizations

This section will show how the European Court of Human Rights is obliged to shift from one concept of legal system to the other in order to decide on the responsibility of member states avoiding the role of the organization for lack of jurisdiction.[35] The relevance of the distinction between 'original' and 'derivative' legal systems is particularly evident in the two *Al-Dulimi* decisions.[36] The facts of the case concerned the sanction regime implemented by the UN Security Council against Iraq, but the legal issue at stake was rooted in the complex relation between the European Convention on Human Rights and international organizations.

At the level of admissibility of both decisions, the Court did not doubt that the conduct had to be attributed to UN member states even in the circumstance in which they are only implementing rules deriving from their obligations towards the organization. Relying on its previous jurisprudence, *Nada* and *Al-Jedda*, the Court considered member states as third entities, which is based on the openness of the legal system of international organizations and its derivation from international law.[37] Thus, the Court distinguished the facts from the *Behrami and Saramati* case, which

[33] On hierarchy and relativism, see Kerchove and Ost, *De la pyramide au réseau?* (above n. 6) at 13.
[34] *Slowakische Republik (Slovak Republic) v Achmea BV* Case C-284/16 (European Court of Justice) at para. 41. See Lorenzo Gasbarri, *Regime Interactions and the Dual Legality of EU Law: The case of Slovak Republic v. Achmea*, (The Global 2018) at https://theglobal.blog/2018/04/26/regime-interactions-and-the-dual-legality-of-eu-law-the-case-of-slovak-republic-v-achmea/.
[35] Lorenzo Gasbarri, 'Al-Dulimi and Competing Concepts of International Organizations' (2016) 1 European Papers 1117.
[36] *Al-Dulimi and Montana Management Inc. v. Switzerland, judgment of 26 November 2013, no. 5809/08* (European Court of Human Rights); *Al-Dulimi and Montana Management Inc. v. Switzerland [GC], judgment of 21 June 2016, no. 5809/08* (European Court of Human Rights).
[37] *Nada v. Switzerland [GC], decision of 12 September 2012, no. 10593/08* (European Court of Human Rights); *Al-Jedda v. the United Kingdom [GC], decision of 7 July 2011, no. 27021/08* (European Court of Human Rights).

considered member states as organs relying on the impermeability of the 'original' legal system developed by the organization and its separation from international law.[38]

At the level of the merits, the two *Al-Dulimi* decisions deemed Switzerland responsible, but they diverged on the legal reasoning. The Chamber relied on the presumption of equivalent protection, while the Grand Chamber relied on the presumption of harmonious interpretation.[39] The different treatment is caused by the way in which the legal systems of international organizations are perceived. The presumption of equivalent protection compares the standards of two separate legal systems (UN and Council of Europe) and, consequently, it is funded on a concept of international organization as an 'original' entity. The presumption of harmonic interpretation resolves a conflict of laws as it if would happen in the same legal system and it is founded on a concept of international organization as an entity derived from international law.

The Chamber claimed that the implementation of UN resolutions does not violate human rights obligations if the United Nations has a standard of protection equivalent to the convention. The equivalent protection can be upheld only if international organizations constitute a 'constitutional' system which has separated itself from international law. This concept of 'original' legal system is particularly useful to avoid a conflict with art. 103 of the UN Charter. Indeed, the primacy of UN obligations does not apply if the Council of Europe developed an 'original' legal system under which the obligations deriving from the membership are no longer international.

However, the Chamber contended that the United Nations does not have a mechanism of protection equivalent to the one of the Convention, it rebutted the presumption of equivalent protection and attributed the responsibility to Switzerland. Discarding the presumption means to pierce the institutional veil of the organization, applying the transparent concept of international organizations' legal system based on its derivation from international law. Indeed, when the presumption is rebutted, the Court sees through the institutional veil of the organization and inevitably applies a concept of legal system derived from international law, under which members' obligations are international in nature. In this circumstance, international institutional obligations conflict with the European human rights system of the Council of Europe in the same legal system. If the ECHR system is international as the UN system, the application of art. 103 of the UN Charter should guarantee the primacy of the international obligations that member states assume under the Charter. Conversely, if the ECHR system is not international, art. 103 cannot impose the primacy of UN obligations, because the organization itself is not a member of the United Nations.

In 2016, the Grand Chamber applied the presumption of harmonic interpretation to avoid the conflict between UN and ECHR obligations. The thesis that ECHR obligations and UN obligations can be harmonized by interpretation means that they belong to the same legal system, which is international law. The Grand Chamber founded its reasoning on this concept of international

[38] *Behrami v. France and Saramati v. France, Germany and Norway [GC], decision of 2 May 2007, nos 71412/01 and 78166/01* (European Court of Human Rights).

[39] *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Irelan, decision of 13 September 2001, n. 45036/98* (European Court of Human Rights); see Anne Peters, *The New Arbitrariness and Competing Constitutionalisms: Remarks on ECtHR Grand Chamber Al-Dulimi*, (EJIL: Talk! 2013) at https://www.ejiltalk.org/the-new-arbitrariness-and-competing-constitutionalisms-remarks-on-ecthr-grand-chamber-al-dulimi/.

organization in order to harmonize UN obligations and human rights standards. The two standards are founded on two different concepts of international organizations' legal system, which the vocabulary of originality and derivation perfectly describe.

The argumentative use of the two concepts shows that the point of view modifies the concept of international organizations' legal systems. A paradigmatic case is offered by the United Kingdom in *Al-Jedda*. While it claims the application of the *Behrami and Saramati*'s criteria for the attribution of conduct, it sustains the primacy of UN obligations over European Convention obligations in virtue of art. 103 of the UN Charter.[40] The first argument implies a concept of organization that has developed a separate legal system; the second implies that obligations pertaining to two different regimes coexist in the same legal system, as derivation requires.

In conclusion, the shift from originality to derivation, and vice versa, is key to the perception of international organizations as universal institutions. The protection of human rights can be seen as islands of separate legal systems each one with a different standard of protection or as a universal interest protected by a universal system within which interpretations can be harmonized. As it was developed in this first section, 'derivation' relates to functionalism and to the aspiration for a legal system that coincides with international law. Conversely, only 'original' legal systems can develop a global rule of recognition because they do not derive from a pre-existent legal system. The following section will develop that whether one conception or another of international organization is adopted depends on the perspective from which the rules of international organizations are applied.

3. Relative legality in the law of international organizations

The notion of relative legality explains why international organizations can be analytically described either as entities that derive from international law or separated from it. This section differentiates between perspectives of legality to reveal how the point of view modifies the belonging of a rule to one or another legal system.[41] The point of view has outstanding effects on the concept of international organizations' legal system and affects whether organizations are perceived either as universal or as particular legal orders.

Relative legality is an internal point of view and shapes the content of its own legal system.[42] It is what a legal system perceives through its rule of recognition.[43] It can consist in the recognition of a norm as its own law or as belonging to a different legal system. For instance, if the law-making mechanism of the international legal system affirms that a resolution of the Security Council is international law, it becomes law of this system under its perspective. Conversely, if the law-making mechanism of the organization's legal system affirms that the same resolution is internal UN law, it becomes law of this system under its perspective. When legal system 'A' recognizes a

[40] *Al-Jedda v. the United Kingdom [GC], decision of 7 July 2011, no. 27021/08*, para. 60.
[41] Thomas Schultz, *Transnational legality: stateless law and international arbitration* (Oxford University Press 2014) at 81.
[42] Hart, *The Concept of Law* (above n. 7) at 100.
[43] Schultz, *Transnational legality: stateless law and international arbitration* (above n. 41).

norm as its own law or as belonging to legal system 'B', it adopts an internal point of view. Indeed, the adoption of a point of view affects the relationship between legal systems: "order A may be relevant for B but not for C, while both B and C be irrelevant for A".[44]

When a legal system applies a norm recognizing it belongs to a different legal system, it reproduces the content of the norm within its system despite both the internal point of view of the system that created that norm and the absolute legality of that legal system. It is a consequence of the so-called "Midas principle":[45] on the one hand, what a legal system says is law becomes law belonging to that legal system; on the other hand, what legal system 'A' says is law that belongs to legal system 'B' becomes law of that system under the perspective of 'A': "The power to determine relative legality belongs to the official of the recognizing system".[46]

Under a perspective of relative legality, the legal system of international organizations can be perceived as deriving from international law and the criteria to ascertain the validity of its rules are international. Under a second perspective of relative legality, a particular legal system has the power to attribute the rules of international organizations to its internal legal system and eventually consider only internal criteria of validity.

3.1 Kadi, validity and relativism

The *Kadi* saga reveals the relevance of relative legality for determining the validity of the acts of international organizations.[47] The facts of the case do not require extensive description, and their frequent use to debate issues of so-called interlegality is also well known.[48]

The issue of validity is traditionally divided in three main categories: the parameters of validity (which is the legal system of reference?); the subjects that have the power to claim invalidity (who is the ultimate judge over the acts of the organization?); the consequences of invalidity (*ex tunc* or *ex nunc* effects).[49] This section will only focus on the system of reference from a classical positivist perspective under which the formal validity concerns hierarchy and the belonging to a legal system.[50]

The validity of United Nations sanctions (the discourse is applicable to any rule of any organization) assumes at least three points of views: the point of view of the organization issuing

[44] *Ibid*., at 86.
[45] Hans Kelsen, *Pure Theory of Law* (University of California Press 1967) 161.
[46] Schultz, *Transnational legality: stateless law and international arbitration* (above n. 41) at 84.
[47] *Kadi v. Council* T-315/01 (Court of First Instance (EC)); *Yassin Abdullah Kadi and Al Barakaat International Foundation* Joined Cases C-402-05 P and C-415/05 P (Court of Justice of the European Union); *Kadi II, European Commission and ors v Kadi, Judgment, Case C-584/10 P, Case C-593/10 P, Case C-595/10 P, ILEC 031 (CJEU 2013), 18th July 2013, Court of Justice of the European Union [CJEU]; European Court of Justice [ECJ]* (European Court of Justice (Grand Chamber)).
[48] Palombella, 'Interlegality and Justice' (above n. 14).
[49] Ebere Osieke, 'The legal validity of ultra vires decisions of international organizations' (1983) 77 American Journal of International Law 239.
[50] François Ost and Michel Van de Kerchove, *Jalons pour une théorie critique du droit* (Saint-Louis, Facultés Universitaires 1987) at 270.

the sanction, the point of view of the entity that transposes the sanction in its own order and the point of view of the international legal system. In the 2005 and the 2008 judgements on the *Kadi* case, the ECJ judges adopted an internal EU perspective and looked at Security Council resolutions as international law. They did not take into consideration the internal UN perspective, under which resolutions may well be internal UN law. Concerning the human rights obligations that bind international organizations in their interlegal activities, to adopt an internal perspective means to apply their own system of reference without taking into consideration the point of view of the system that created the rule.

In both judgments the ECJ adopted internal EU perspectives. In 2005, the ECJ relied on the international derivation of its legal system in order to claim that the international obligations concluded before the establishment of the communities prevailed over the European Community legal system. Indeed, the 'derivative' quality of the EC legal system is implied when the Court used treaty law to defuse the conflict between UN and EC obligations, explicitly stating that UN obligations "clearly prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the ECHR and, for those that are also members of the Community, their obligations under the EC Treaty."[51] Conversely, in 2008, the originality (and thus closed character) of EC legal system prevailed over the UN legal system. Indeed, the 'original' quality of EC legal system is implied when the Court stated that "the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement".[52]

Despite the different outcomes, in both cases judges did not pose the question of the UN perspective. Hypothetically, from the internal UN perspective, EU law would be considered as international law and the primacy of UN obligations enshrined in art. 103 would prevail. Likewise, from the perspective adopted by an observer of the international legal system (the third point of view exposed previously), sanctions are clearly international law and, consequently, subjected to international human rights standards. It can be contended that, eventually, the relationship between legal systems is heterarchical and dominated by the most powerful legal system that imposes its relative perspective.

In conclusion, the relative legality is the reason why the legal systems of international organizations can be either perceived as derived or original and, eventually, manipulated following argumentative necessities. Consequently, also the universal aspiration of international organizations is affected by the nature of their legal systems. The concept of absolute legality will show that international organizations do not have the analytical characteristics to develop universal law.

[51] *Kadi v. Council* (2005) (above n. 47) at para. 181.
[52] *Yassin Abdullah Kadi and Al Barakaat International Foundation* (2008) (above n. 47) at para. 316.

4. Absolute legality in the law of international organizations

The absolute legality of a norm is attributed by an observer that recognizes the existence of a plurality of points of view. Being external to the legal system under study means not being affected by its rule of recognition.[53] However, there are not observers that are external to any legal system. Indeed, the internal or external perspective is only a matter of points of view, which define how legal phenomena may be apprehended. Analytical jurisprudence contends that distinguishing between points of view is an epistemological orientation.[54] Kerchove and Ost considered the existence of an internal and an external point of view: The internal perspective means to adhere to the discourse that institutions use about themselves, while the external perspective supposes an epistemological break.[55] Both can be rendered absolute by the category of "*internalité*", which reflects the possibility that the point of view acknowledges the existence of a different point of view.[56]

An observer can adopt a radical external, moderate external, radical internal or moderate internal point of view. What is internal for one system is external for another one, and vice versa. These are radical points of view that do not take into account the existence of an alternative. Conversely, an observer adopts a moderate point of view when the external/internal point of view takes in account the existence of the correlative internal/external point of view.[57] For instance, a radical internal point of view is adopted when a subject of the international legal system considers the rules of international organizations as international law. Even if it recognizes the existence of a different legal system, the subject of international law defines the rule of the organization as international law, despite the internal point of view of the organization. This is what happens when a state (taking the role of a subject of the international legal system) looks at a resolution of the UN Security Council. The same radical internal point of view is adopted when a subject of the organization legal system defines a rule merely as internal law. This is what happens when a state (taking the role of a subject of the organization legal system) looks at a regulation of the European Union.

Absolute legality is the moderate point of view adopted when the existence of different perspectives of legality is taken into consideration. Indeed, an observer that is external to the system under study should not exclude what that legal system considers as its own law. While relative legality covers what a legal system perceives as its own law and what it perceives as law of a different system, absolute legality must take into consideration the internal point of view of each system and the different perspectives of relative legality.

Relative legality cannot define what a universal legal system is nor can determine if international organizations are able to become genuinely universal. Indeed, a universal legal system is one in which absolute legality defines the Hartian rule of recognition as universal. This perspective looks at the 'content' of a legal system and not to its membership. In order to define the absolute legality

[53] Hart, *The Concept of Law* (above n. 7) at 102.
[54] Michel van de Kerchove and François Ost, *The legal system between order and disorder* (Oxford University Press 1993).
[55] Ibid at 6, 7.
[56] Ost and Van de Kerchove, *Jalons pour une théorie critique du droit* (above n. 50) 28.
[57] Kerchove and Ost, *The legal system between order and disorder* (above n. 54) at 6 ss.

of the rules of international organizations, it is necessary to look at the interactions between legal systems.

4.1 International organizations derive from international law and create their own order

The dichotomy original/derivative was first developed by Santi Romano, who introduced various models to describe the relationships between legal systems.[58] Throughout the years, Santi Romano's institutionalism has served different purposes: from introducing the concept of legal system,[59] to recognizing a well-established foundation of arbitration as a legal system without the state.[60] For the purposes of this paper, Santi Romano's institutional pluralism is useful to describe how international organizations' legal systems can be perceived either as universal or as particular. Santi Romano drew a parallel between the concept of legal system and the concept of institution, defining the existence of orders that are independent for some aspects and overlapping for others.[61] For instance, states are entities among various internal, external, overlapping, presupposed or derived institutions. He explained the relationships between institutions with the concept of relevance, which, contrary to contemporary studies on legal pluralism, refuses the idea that legal systems only interact through a *de facto* balance of power.[62] Under his theory, relevance between institutions implies an entitlement that affects their existence, content and efficacy.[63]

He categorized five different entitlements that characterize the interaction between institutions: 1. Superiority/subordination, where system A comprehends system B (example used by Santi Romano: federal states); 2. Pre-existence, where A derives from B (example used by Santi Romano: international law derives from states); 3. Mutual independence, but shared subordination with respect to a third legal system (example used by Santi Romano: states among themselves); 4. Unilateral relevance granted spontaneously (example used by Santi Romano: private international law); 5. Succession of legal systems (example used by Santi Romano: succession of states).[64]

The dynamic of relevance based on existence is fundamental to discuss the concept of international organizations' legal systems. Under this category, Santi Romano distinguished between subordination and pre-existence.[65] Subordination relies on hierarchy and implies the complete subjugation of one order to another. Conversely, pre-existence describes the development of a legal

[58] Santi Romano, *L'ordinamento giuridico* (Mariotti 1917). The English translation only came after 100 years, see Santi Romano, *The Legal Order* (Taylor & Francis 2017).
[59] Georges Abi-Saab, 'Cours général de droit international public' in Law The Hague Academy of International (ed), *Collected Courses of the Hague Academy of International Law*, vol 207 (Publications of the Hague Academy of International Law, Brill).
[60] Emmanuel Gaillard and Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff 2010).
[61] Romano, *L'ordinamento giuridico* (above n. 58) at 95.
[62] Schultz, *Transnational legality: stateless law and international arbitration* (above n. 41) at 86.
[63] *Ibid.*, p. 109.
[64] Filippo Fontanelli, 'Santi Romano and L'ordinamento giuridico: The Relevance of a Forgotten Masterpiece for Contemporary International, Transnational and Global Legal Relations' (2011) 2 Transnational Legal Theory 67.
[65] Romano, *L'ordinamento giuridico* (above n. 58) at 130.

system over a preexistent legal system. For Santi Romano, the latter is the relation that connects states with international law, because states presuppose the international society. Indeed, Santi Romano's pre-existence is based on the founders of a legal system. States created the international community, and, consequently, international law presupposes states. This thesis is applied by the scholars that endorse the derived nature of international organizations, affirming that states created organizations too, and, thus, they create derived legal systems.[66] However, it is easily rebutted as an anachronistic reminder of voluntarism and of the traditional role of states in international law.[67] Following the focus on the founders, individuals would actually be the only subjects that create legal systems.

Likewise, the concept of universal legal systems cannot be based on membership. Even if this is counterintuitive, universal membership is not an element that defines a universal legal system. Indeed, universal membership does not exist, because it is always limited by the legal subjects that are accepted within a system. For instance, within the UN legal system states enjoy legal personality, while individuals do not.

Actualizing Santi Romano's theory, pre-existence cannot be based on the founder subjects, but on the formalistic creation of a system over sources of law belonging to a pre-existent order. International legal system is not founded over a source of national law. Similarly, national systems are not founded over sources of international law. Both international and national orders are 'original' legal systems that do not have a relation of relevance based on existence. The international legal system could exist even without states.[68] This theory rebuts the analytically necessary nexus between law and state.[69]

Focusing on the relationship of relevance based on existence, legal systems can be original or derivative. They are original when they emerge without a formal act of creation that uses law belonging to a different system; they are derivative when they are created by a source of law belonging to a pre-existent legal system. Only original legal systems can be truly universal, because they do not derive from a pre-existent order. This does not mean that an original legal system is automatically universal, as originality is a necessary but not sufficient condition.

The notion of pre-existence affects the legal systems of international organizations. They are created by individuals endowed with governmental powers to use a source of international law to create a new entity. The international organization and international law are not in a relation of equality/independence because one presupposes the other. Consequently, international

[66] Decleva, *Il diritto interno delle unioni internazionali* (above n. 18).
[67] On the relations between dualism and voluntarism, see Giorgio Gaja, 'Dualism: A Review' in J. Nijman and A Nolkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007) at 57.
[68] "which might reasonably be called international society, that is, a society of all societies, a society of all-humanity" in Philip Allott, 'The Emerging Universal Legal System' in Janne E Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007) at 69.
[69] MacCormick, *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth* (above n. 15) Ch. 1.

organizations cannot be universal, because the absolute legality of their norms is conditioned by the derivation of their legal systems from international law.

This model is able to describe the structure of global governance including transnational legal networks. For instance, multinational corporations are 'original' systems, because they are not funded by the law of any legal system.[70] As previously discussed, the difference between founder actors and founding instruments is fundamental. Multinational corporations are funded by subjects of national systems as *de facto* entities, without a relation of derivation to any legal system. Likewise, this model explains the development of exceptions in the theory of international organizations, as the European Union or the Organization for Security and Cooperation in Europe.[71] Indeed, the EU and the OSCE have opposite degrees of integration, but they are both similar in attempting the creation of an 'original' legal system disconnected from international law.[72]

After the description of how the dream of universality fails in the analytical impossibility to create universal international organizations, the last step is to visualize a map of the network-centred system of global governance.

5. The Horizon: Perspectives of Interlegality

The web of original, derived, overlapping and subordinate legal systems creates a structure for legal interactions that are not hierarchical but still formally interconnected. This section applies 'absolute legality' to the derived legal system of international organizations in an attempt to visualize the network-centred system of global governance.

On the one hand, if an observer emphasizes the creation of an original legal system, the rules are internal; on the other hand, if an observer emphasizes its derivation from international law, the rules are international. The issue has no solution in terms of relative legality, which is a radical point of view. Conversely, the adoption of a moderate point of view considers the existence of a plurality of points of view without adopting them. Two conclusions arise from the relativism of legal pluralism and the importance of the point of view: first, an observer must distinguish between relative legality and absolute legality and, second, the legal system of international organizations derives from international law in the way discussed above.

To sum up, the absolute legality of the rules of international organizations is a combination of the derivative nature of the legal system that produces them and the point of view of the legal system that deals with the rules. Consequently, under absolute legality, an actor of the international legal system or an actor of the organization legal system should acknowledge its derivation from international law. At the same time, the derivation from international law does not eliminate the

[70] Jean-Philippe Robé, 'Multinational enterprises: the constitution of a pluralistic legal order' in Gunther Teubner (ed), *Global Law Without A State Aldershot: Dartmouth Gower* (Dartmouth 1997).
[71] On exceptionalism, see Jan Wouters and Jed Odermatt, 'Are All International Organizations Created Equal?' (2012) 9 International Organizations Law Review 7.
[72] Lorenzo Gasbarri, 'The International Responsibility of the OSCE' in Anne Peters, Mateja Platise and Carolyn Moser (eds), *Revisiting the Legal Status of the OSCE* (Cambridge University Press 2018 forthcoming).

existence of the organization legal system. The conclusion is that the rules of international organizations are law of two different legal systems at the same time. Their nature is dual. As the International Court of Justice contended, the basic instrument of the World Health Organization is at the same time an international treaty and a constitution of an internal order.[73] Consequently, the rule of recognition developed by the WHO system is dual, as much as the nature of the law it produces. The ICJ also recognized the dual legality of the rules in the context of the UN territorial administration, contending that UNMIK constitutional framework is created by a Security Council resolution which is at the same time international and internal.[74]

Kelsen confutes dual legality with the famous quote 'no one can serve two masters'.[75] He excludes this possibility on the basis of territorial exclusiveness, according to which there cannot be two or more legal systems governing the same territory.[76] The theory has been widely criticized, recognizing that, under legal pluralism, non-comprehensive, non-exclusive and non-supreme legal systems are envisageable.[77] Moreover, the issue before Kelsen is partially different from affirming that the same rule belongs to two different legal systems. The dual nature does not mean that a rule produced by one system is recognized by a different legal system as legal. It means that the rule is created by a secondary rule of recognition of the derivative system that is created by a secondary rule of recognition of the pre-existent legal system. Consequently, the pre-existent legal system does not have to recognize the rule of the derivative legal system as its own in order to import it into its system. Under legal pluralism, there are no analytical reasons to reject the dual legality of the rules of international organizations.

The dual legality also affects the content of a legal system. The existence of a legal system is not the only relationship of relevance described by Santi Romano, who considered that legal orders affect each other also in terms of effects and content.[78] Under his view, a legal system is 'relevant' when it affects the existence, content or effects of another legal system on the basis of a legal title. The definition of the effects of a legal system concerns the internal norms that regulate its relationship with external systems, while the content concerns how internal norms are affected by an external order.[79]

Concerning the effects, it is again fundamental to distinguish between superiority/dependence and pre-existence.[80] Under the former, the superior system has the power to decide how its norms are imposed on the subordinate system and which degree of autonomy to confer. Conversely, the subordinate system has no decision on how to regulate its effects on the superior system. Santi Romano uses the example of private companies to explain how the effects of state law are regulated

[73] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) ICJ REP 66 (International Court of Justice) at 75.
[74] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) ICJ REP 403 (International Court of Justice) at 88, 89.
[75] Kelsen, *Pure Theory of Law* (above n. 45) 329.
[76] Schultz, *Transnational legality: stateless law and international arbitration* (above n. 41) at 87.
[77] Kerchove and Ost, *The legal system between order and disorder* (above n. 54) at 143.
[78] Romano, *L'ordinamento giuridico* (above n. 58) at 127.
[79] Fontanelli, 'Santi Romano and L'ordinamento giuridico: The Relevance of a Forgotten Masterpiece for Contemporary International, Transnational and Global Legal Relations' (above n. 64) at 77.
[80] *Ibid*, at 83.

within a particular subordinate system. Under the latter, pre-existence implies a mutual spillover. Under this category, when the relationship of relevance based on existence create a dynamic of pre-existence/derivation, the effects between the two legal systems are not hierarchical.[81] Santi Romano wrote his masterpiece in 1918, but its capacity to describe the relationship between international organizations and international law is striking. Indeed, reciprocity is due to the dual legality of the derivative system, under which its law belongs to the two legal systems at the same time. For instance, art. 103 of the UN Charter is a rule of coordination that determines the effects of the UN legal system on international law.

Concerning the content, the most obvious relationship is the one in which the superior order shapes the content of the inferior.[82] Again, this hierarchical relationship does not explain how different regimes of global governance interact, because there is not a legal title that confers supremacy. The dual legality is better fitted to describe how international organizations' legal systems interact among themselves and with international law. For instance, under functionalism the content of organizations' legal systems is dependent on the competences attributed by member states. The development of powers that go beyond the attribution can be interpreted as being implied in the conferment or inherent in the institution.[83] On the one hand, if organizations are considered original institutions, their powers are inherent to their existence and not functionally attributed by member states. On the other hand, the theory of implied power is based on the derivation from the international instrument that created the institution. The either/or paradigm of this traditional debate is affected by issues of relative legality, while the dual quality of international organizations describes how the 'content' of their legal systems is at the same time internal and international.

The complex relationship that international organizations have with the law of treaties will provide an example of dual legality.

5.1 Intra-EU Bilateral Investment Treaties and the Dual Legality of the Rules

The dual legality of the rules has been acknowledged in the context of investment claims involving EU member states. The perspective adopted by arbitral tribunals is particularly interesting because it is external to the EU legal system. The circumstances of the cases concern intra-EU Bilateral Investments Treaties, which are treaties signed by EU member states that create a bilateral international relation within the European Union.[84]

Intra-EU BITs conflict with the supremacy of EU law and the interpretative monopoly of the ECJ. The European Commission has opposed intra-EU BITs in many instances, demanding their

[81] *Ibid*., at 168.
[82] *Ibid*., at 143.
[83] Klabbers, *An Introduction to International Organizations Law* (above n. 21) at 46 – 69.
[84] J. Kleinheisterkamp, Investment Protection and EU Law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty, *Journal of International Economic Law* 15, no. 1 (2012)85; M. Wierzbowski, A. Gubrynowicz, *Conflicts of Norms Stemming from Intra-EU BITs and EU Legal Obligations: Some Remarks on Possible Solutions*, C. Binder, U. Kriebaum, A. Reinisch, S. Wittich, *International Investment Law for the 21st Century*, Oxford (2009) 544.

termination in *Eastern Sugar B.V. v. The Netherlands*,[85] and defining them as an "anomaly within the EU internal market" in *Eureko v. Czech Republic*.[86] From the EU perspective there are three main reasons to claim the incompatibility of intra-EU BITs with its legal system: 1. Potential differences between EU law and the treaty concerning substantive provisions; 2. Total incompatibility with the prohibition of state aids; 3. The exclusive jurisdiction of the Court of Justice on EU law.[87]

In *Eastern Sugar*, the Tribunal did not take in consideration the Commission's fears for the unity of the legal system and it affirmed that there are no incompatibilities between investment regimes and EU fundamental treaties.[88] Subsequently, arbitral tribunals have constantly upheld this finding. Evidently, a different outcome would have been catastrophic on the entire investment regime within Europe, which is unsurprisingly detestable from lawyers' and arbitrators' point of view.[89] In *Eureko*, the Tribunal recognized the dual legality of EU law stating that, on the one hand, EU law operates at the level of international law and, on the other hand, it is part of national law.[90] In *AES v. Hungary*, the Tribunal expressly stated: "Regarding the Community competition law regime, it has a dual nature: on the one hand, it is an international law regime, on the other hand, once introduced in the national legal orders, it is part of these legal orders".[91] Indeed, UE law is considered to be equivalent to national law for the purposes of the proceeding.[92]

Finally, in *Electrabel v. Hungary* the dual legality was again at the core of the decision on the applicable law.[93] At the outset, the Tribunal recalled its own international public law nature, nor internal or regional.[94] This implies the rejection of the considerations made by the EU Commission based on the hierarchy of EU law. Then, the Tribunal described four fundamental characteristics of EU law. First, its multiple nature: "EU law is a *sui generis* legal order, presenting different facets depending on the perspective from where it is analysed. It can be analysed from the perspectives of the international community, individual Member states and EU institutions", therefore, "EU law has a multiple nature: on the one hand, it is an international legal regime; but on the other hand, once introduced in the national legal orders of EU Member states, it becomes also part of these national legal orders".[95] Second, EU law is based on international treaties and, consequently, it is international in nature.[96] Third, all EU law is a legal system that belongs to international law,

[85] See EU Commission Letter of 13 January 2006, quoted in *Eastern Sugar BV (Netherlands) v Czech Republic*, SCC Case No 088/2004, Partial Award (27 March 2007) para 119.
[86] European Commission Observations, 7 July 2010, quoted in *Eureko BV v The Slovak Republic*, UNCITRAL, PCA Case No 2008-13 Award on Jurisdiction, Arbitrability and Suspension (26 October 2010) para 177.
[87] J. Kleinheisterkamp, European Policy Space in International Investment Law, *ICSID Review*, Vol. 27, No. 2 (2012) 416.
[88] *Eastern Sugar* (above n. 85), paras. 120-125.
[89] As noted by the claimant in *Eureko* (above n. 86), para. 62.
[90] *Ibid.*, para. 225.
[91] AES Summit Generation Limited v Hungary, ICSID Case No ARB/07/22, Award, para 7.3.1 (23 September 2010), para. 7.6.6.
[92] *Ibid.*, par. 7.3.4.
[93] *Electrabel SA v Hungary*, ICSID Case No ARB/07/19.
[94] *Ibid.*, para. 4.112.
[95] *Ibid*., para. 4.117 – 4.118.
[96] *Ibid*., para. 4.120.

without drawing distinction between the constitutive treaties and the other norms.[97] Fourth, "the fact that EU law is also applied within the national legal order of an EU Member State does not deprive it of its international legal nature".[98] In conclusion: "there is no fundamental difference in nature between international law and EU law that could justify treating EU law, unlike other international rules, differently in an international arbitration requiring the application of relevant rules and principles of international law".[99] The international nature allowed the Tribunal to consider EU law as applicable law and to disregard the incompatibilities between the two regimes applying an harmonious interpretation. Only in case this was not possible, EU law would prevail.[100] The lesson to take from the *Electrabel* decision is that a conflict of laws may only arise when EU law is considered as international. Indeed, when the ECJ had the chance to declare the incompatibility of EU law and BITs, it relied on the dual legality in order to reconcile the autonomy of its legal system and its derivation from international law.[101]

In a broader context, the transparent institutional veil affects the possibility to apply the mono-dimensional law of treaties to the layered structure of international organizations.[102] Depending on which concept of legal system we apply, questions such as the role of the organization in the treaty signed by its member states, and, conversely, the role of member states in the treaty signed by the organizations, have different answers.[103]

6. Conclusions

Issues of interlegality are often debated from various disciplinary perspectives among which law is a minor. In particular, it is a realm contended by studies on the concept of authority, with approaches that vary from international relations to sociology.[104] Indeed, the absence of hierarchical relations among regimes seems to blur any kind of certitude that law can provide. The role of law is challenged by the "liquefaction of authority", which transforms the way in which we can speak in terms of legal systems.[105] Consequently, law is seen as an instrument for "damage limitation", unable to rule the collisions between systems and provide compatibility.[106] The lawyers' reaction

[97] *Ibid*., para. 4.122.
[98] *Ibid*., para. 4.124.
[99] *Ibid*., para. 4.126.
[100] *Ibid*., para. 4.191.
[101] *Slowakische Republik (Slovak Republic) v Achmea BV* (above n. 34).
[102] Catherine Brölmann, 'The 1986 Vienna Convention on the Law of Treaties: the History of Draft Article 36 bis' in Jan Klabbers and René Lefeber (eds), *Essays on the Law of Treaties: a Collection of Essays in Honour of Bert Vierdag* (Brill Nijhoff 1998).
[103] Compare Neri Sybesma-Knol, 'The New Law of Treaties: The Codification of the Law of Treaties Concluded between States and International Organizations or between Two or More International Organizations' (1985) 15 Georgia Journal of International and Comparative Law 425 and Christian Tomuschat, 'International Organizations as Third Parties under the Law of International Treaties' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011).
[104] See, for instance, the OSAIC project (Overlapping Spheres of Authority and Interface Conflicts in the Global Order) at https://www.osaic.eu/.
[105] Nico Krisch, 'Liquid authority in global governance' (2017) 9 International Theory 237, at 252.
[106] Fischer-Lescano and Teubner, 'Regime-collisions: the vain search for legal unity in the fragmentation of global law' (above n. 17) at 1045.

has been to give a name to their fears and to fight it back with the traditional tools used to solve conflicts of norms.[107]

Conversely, the dual legality of the rules of international organizations opens a way through a non-hierarchical interaction among legal systems, in which the law still has a role to play. The emerging pluralist system accepts the existence of incoherencies and subsumes them under a universal network.[108] The need to "go global" in order to understand the dynamic of transnational legal normativity is frequently under the attention of scholars.[109] But, in order to visualize the map of the universal network, the focus needs to shift from issues of subjectivity to the formal interactions between layers of law. As Pauwelyn has contented, pluralism and the emergence of non-state actors go hand in hand, but the creation of a "universe of interconnected islands" cannot rely on the consent-based paradigm of international law which puts the subject at the centre of the system.[110] For instance, the approach this paper is fostering rebuts Pierre-Marie Dupuy's thesis that the creation of new entities is a sovereign prerogative of states, and, consequently, the new established subjects derive their existence from states' existence.[111] This is an example of the hierarchical relationship between systems that looks at the founder subjects. Conversely, the description of the existence of legal systems in terms of their originality or derivations opens new perspectives. The first consequence being that legal systems that derive from international law cannot be universal.

This paper focused on the concept of universal legal systems in order to actualize a dormant debate on the capacity of international organizations to create law which is 'universal' in nature. First, it discussed the original and derivative concepts of international organizations' legal systems, describing how they affect the international responsibility of member states. The ECHR *Al-Dulimi* decisions described the unbalance between the development of a legal system that derives from international law or that is separate from it. This was useful to realize that only 'original' legal system can be genuinely universal. Second, the paper debated the notion of relative legality, which describes how the interplay between legal systems diffracts the perception of the rules of international organizations. The *Kadi* case before the ECJ described how the validity of the rules of international organizations depends on different perceptions of legality. Third, the paper discussed absolute legality, to describe international organizations as entities that derive from international law and, at the same time, develop a particular legal system. It revealed that the absolute legality of these entities does not have the analytical characteristics to create universal legal systems. Finally, the paper concluded by analysing what remains of the dream of universality in the context of legal pluralism. The dual legality of international organizations' legal systems was

[107] International Law Commission, *Fragmentation of International Law: Difficulties Arising from the diversification and expansion of international law Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi*, 2006).
[108] William Burke-White, 'International legal pluralism' (2003) 25 Michigan Journal of International Law 963, at 977.
[109] Guilherme Vasconcelos Vilaça, 'Transnational Legal Normativity' (2017) Encyclopedia of the Philosophy of Law and Social Philosophy 1.
[110] Joost Pauwelyn, 'Bridging fragmentation and unity: International law as a universe of inter-connected islands' (2003) 25 Michigan Journal of International Law 903
[111] Pierre-Marie Dupuy, 'L'unité de l'ordre juridique international : cours général de droit international public' in Law The Hague Academy of International (ed), *Collected Courses of the Hague Academy of International Law*, vol 297 (Publications of the Hague Academy of International Law, Brill 2002) at 102.

presented as a non-hierarchical form of interlegality. The perspective of arbitral awards on EU law concluded the paper analysing how the interplay between legal systems affect their 'effects' and 'content'. The role of law in the interplay of the different spheres of legality that constitute legal pluralism requires a shift from issues of subjectivity to the formal interactions between layers of law.