

---

# The Emergence of Functionalism in International Institutional Law: Colonial Inspirations

Jan Klabbers\*

## Abstract

*The theory of functionalism dominates the law of international organizations, explaining why organizations have the powers they possess, why they can claim privileges and immunities, and often how they are designed as well. Yet, the theory of functionalism is rarely spelt out in any detail, and its origins have remained under-explored. The purpose of the present article is to outline how functionalism came about by focusing on the 'pre-history' of international institutional law. To that end, the article studies the work of a number of late 19th, early 20th century authors on the law of international organizations, paying particular attention to the writings of Paul Reinsch. It turns out that functionalism, as developed by Reinsch, was inspired by his familiarity with colonial administration: colonialism and international organization both manifested cooperation between states. While this is no reason to discard functionalism, it does provide an argument for viewing international organizations more critically than functionalism habitually does.*

## 1 Introduction

The law of international organizations is dominated by the theory of functionalism. For well over a century now, international institutional lawyers have understood international organizations as entities created to execute functions through specifically conferred powers, delegated to them by their member states. It follows that international organizations are supposed to possess those powers – and only those powers – that enable them to exercise their given functions; it follows, likewise, that international organizations can make a strong claim to be granted privileges and immunities in order to facilitate their functioning, and that somehow the validity (*vel non*) of their decisions, recommendations, and activities depends on whether these are connected to their functions. Moreover, functionalism may help to explain why the executive body of the World Meteorological Organization is composed of meteorologists, or why

\* Academy Professor (Martti Ahtisaari Chair) University of Helsinki. Email: [jan.klabbers@helsinki.fi](mailto:jan.klabbers@helsinki.fi).

the International Labour Organization has its tripartite structure, or even why the Security Council has five permanent members.<sup>1</sup>

While functionalism pervades well-nigh the entire corpus of international institutional law, many of the doctrines that make up the law of international institutions are, in one way or another, accessible through the pivotal notion of the organization's powers. This applies, quite obviously, to treaty-making by international organizations, but may also apply to such issues as whether the organization can terminate its own existence, raise the mandatory contributions of member states, create subsidiary organs, decide on the admission of new members or the expulsion of current ones, whether and how it can adopt legally binding documents, settle disputes between member states, etc. All these are usually construed in terms of the organization's powers, and therewith ultimately governed by functionalist thought. This need not necessarily be the case: it might be possible to think of financing of international organizations, or the creation of subsidiary organs, in terms that are not ultimately dependent on functionalism. The claim here is not that functionalism necessarily pervades international institutional law, but only – more modestly – that it does so as a matter of fact. There is but one major doctrinal exception, as we shall see, and that is the issue of control of the acts and omissions of international organizations.<sup>2</sup>

As a theory, functionalism in international institutional law rests on two key assumptions, one substantive, and one methodological. Substantively, functionalism and international organizations are typically depicted as a-political or, more accurately, as a force for good and therewith a-political – after all, organizations are expected to contribute to the 'salvation of mankind', in Nagendra Singh's words,<sup>3</sup> and who could object to that? Therewith, international organizations can do no wrong. Since in real life organizations can and do wrong, this assumption is ultimately derived from the highly abstract proposition that international organizations embody cooperation between states. Since cooperation is a good thing, so too, and by definition, are international organizations – all of them. Functionalist thought does not distinguish between entities such as the highly technical Universal Postal Union and the far more 'political' United Nations, the global World Health Organization or the regional Organization of American States, at least not in ways that have legal relevance.<sup>4</sup> Functionalism works on a one-size-fits-all paradigm: all international organizations are treated alike for the purposes of applying functionalist thought. There is but one acknowledged borderline case, and that is the European Union. The EU, with its vast legal powers and the far-reaching effects of its law within its member states, is often treated as *sui generis*: an indication that it is difficult to reconcile with functionalist thought.

<sup>1</sup> The leading functionalist treatises include H.G. Schermers and N.M. Blokker, *International Institutional Law* (5th edn, 2011), and C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, 2005).

<sup>2</sup> Some recent scholarship, however, distances itself from functionalism. See V. Engström, *Constructing the Powers of International Institutions* (2012); I. Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (2011).

<sup>3</sup> See N. Singh, *Termination of Membership of International Organisations* (1958), at vii.

<sup>4</sup> See generally, e.g., Schermers and Blokker, *supra* note 1.

Methodologically, functionalism thrives on comparativism. Since the one feature all organizations have in common is that they are based on some function, it follows that there is merit in studying them comparatively. Indeed, since there are so many of them, and since they are widely diverging in design, comparativism presents itself as the most obvious method. It is scarcely a coincidence that the leading functionalist studies conducted once international institutional law came to be regarded as a self-standing branch of international law, from the 1950s onwards, all are, to a greater or lesser extent, comparative in nature.<sup>5</sup>

Yet, surprisingly perhaps, it remains unclear how functionalism came about. The functionalist theory is rarely set out in any detail, and its emergence is usually taken for granted.<sup>6</sup> While serious academic work has been done on aspects of international institutional law going back to the late 19th century<sup>7</sup> and serious academic work has been done on the emergence of organizations generally for the period after World War I,<sup>8</sup> none of this aspires to lay bare the origins of functionalism. Moreover, by the 1920s, functionalism was already, by and large, in place. In this light, it may prove instructive to study the works of those who have been influential in shaping and moulding international institutional law and created the legal theory to accompany the emergence of international organizations, and did so prior to the creation of the League of Nations and the International Labour Organization. This may yield valuable insights into how international institutional law functions, how it is structured, and what its strengths and blind spots are.

The purpose of the present article is to analyse the emergence of functionalism as the dominant theory of the law of international organizations. This functionalism must be distinguished from two other approaches sometimes labelled 'functionalist'. Loughlin has drawn attention to what he calls the 'functionalist style' in public law. This emerged in the early 20th century in response to the dominance of analytical positivism,<sup>9</sup> and was consequently overtly political.<sup>10</sup> While the functionalist style in public law and functionalism in the law of international organizations share the fundamental idea that public institutions should serve the common good, functionalism in international institutional law holds this to be axiomatic rather than something to strive for: the idea of international organizations not serving the common good is unthinkable: quite literally so. Therewith, functionalism in the law of international

<sup>5</sup> This applies most obviously to H.G. Schermers, *De gespecialiseerde organisaties: hun bouw en inrichting* (1957), as well as to many studies of specific issues, such as R. Zacklin, *The Amendment of the Constitutive Instruments of the United Nations and Specialized Organizations* (1968) or, to a lesser extent, J. Alvarez, *International Organizations as Law-makers* (2005).

<sup>6</sup> Arguably the closest to a manifesto is Virally, 'La notion de fonction dans la théorie de l'organisation internationale', in S. Bastid et al. (eds), *Mélanges offerts à Charles Rousseau: La communauté internationale* (1974), at 277.

<sup>7</sup> See Bederman, 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Sparte', 36 *Virginia J Int'l L* (1996) 275.

<sup>8</sup> See Kennedy, 'The Move to Institutions', 8 *Cardozo L Rev* (1987) 841.

<sup>9</sup> See Loughlin, 'The Functionalist Style in Public Law', 55 *U Toronto LJ* (2005) 361.

<sup>10</sup> I. Jennings, *The Law and the Constitution* (3rd edn, 1943), at xv is emblematic: 'I would assert that no lawyer understands any part of the law until he knows the social conditions that produce it and its consequences for the people who are governed by it.'

organizations presents itself as a-political. The functionalist approach in international institutional law is closely related to functionalism in international relations scholarship, so much so that it has been suggested that the work of Reinsch, the main protagonist of this article, is a ‘precursor’ to the theory of functionalist political integration developed by David Mitrany and others.<sup>11</sup> Yet, quite naturally, the two approaches ask different questions: Mitrany and other (neo-)functionalist political scientists are mainly interested in how and under what conditions cooperation between states begets further cooperation and perhaps even integration,<sup>12</sup> whereas institutional law functionalism is mainly concerned with how the functions of international organizations help to structure their powers, rights, and privileges.

The central argument of this article will be that functionalism in international institutional law was already by and large in place when the ‘move to institutions’ took off in earnest after World War I, and was born out of an encounter with colonial administration. This article is not about specific institutions having been influenced by the colonial experience or imperial designs,<sup>13</sup> or how specific activities or programmes of international organizations owe much to colonialism and the ‘civilizing mission’.<sup>14</sup> Instead, it aims to track the development of a comprehensive and coherent set of rules and doctrines: international institutional law. In doing so, it may also contribute to the recognition of the circumstance that in the late 19th and early 20th centuries, US international legal thinking was not free from colonialist sentiments. If European international law owes much to colonialism,<sup>15</sup> the internationalism of US international lawyers is usually portrayed as benign, with an uncritical focus on the ‘promise’ of international law.<sup>16</sup>

This is not to suggest that international institutional law therewith became an American discipline – quite the opposite. Throughout its history, many of the leading scholars have been Europeans, and relatively few US-based scholars systematically work on the law of international organizations. It is to say, though, that Reinsch’s non-US contemporaries, such as Nippold or Schücking, devoted their attentions either to the study of individual international organizations or to the exploration of broader, perhaps more philosophical ideas about world government or both, often finding inspiration in the Hague Peace Conferences.<sup>17</sup> Rarely though did they venture into

<sup>11</sup> See Schmidt, ‘Paul S. Reinsch and the Study of Imperialism and Internationalism’, in D. Long and B.C. Schmidt (eds), *Imperialism and Internationalism in the Study of International Relations* (2005), at 43, 67.

<sup>12</sup> See, e.g., Mitrany, ‘The Functional Approach to World Organization’, 24 *Int’l Affairs* (1948) 350; Mitrany, ‘The Prospect of Integration: Federal or Functional’, 4 *JCMS* (1965) 119.

<sup>13</sup> See, e.g., A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), and M. Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (2009).

<sup>14</sup> See, e.g., R. Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (2008); A. Orford, *International Authority and the Responsibility to Protect* (2011), and S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2012).

<sup>15</sup> See in particular M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002).

<sup>16</sup> See, e.g., M.W. Janis, *The American Tradition of International Law: Great Expectations 1789–1914* (2004).

<sup>17</sup> Nippold, e.g., devoted a hefty tome to the institutionalization of dispute settlement inaugurated by the First Hague Conference, while Schücking co-authored a leading commentary on the Covenant of the League of Nations, doing so from a cosmopolitan angle. See O. Nippold, *Die Fortbildung des Verfahrens in völkerrechtlichen Streitigkeiten* (1907), and W. Schücking and H. Wehberg, *Die Satzung des Völkerbundes* (1921).

an analysis of how a multitude of organizations was set up and organized, and rarely did they analyse the general legal infrastructure that was being created; yet, this is precisely what Reinsch did. And in doing so, he could not help but respond to what preoccupied the US in his days: its beginning role as an imperial force.

In section 2 of this article I will explain why this entails going back in time to the late 19th century; section 3 will discuss late 19th century theorizing, before section 4 zooms in on the main *auctor intellectualis* of functionalism: Paul Reinsch. Section 5 discusses how Reinsch's conception of functionalism was inspired by his familiarity with colonialism and colonial administration, while section 6 concludes.

## 2 An Intellectual Hiatus

When it comes to international institutional law, several influential pathfinders vie for prominence. To the extent that international institutional law is a self-standing discipline or sub-discipline to begin with (which is debated<sup>18</sup>), its paternity is contested. While European scholars and practitioners such as C. Wilfred Jenks, Henry G. Schermers, Ignaz Seidl-Hohenveldern, Michel Virally, and Derek W. Bowett have all been – and still are – tremendously influential in the period after World War II, they are often presented as having come out of the blue. And while it is generally acknowledged that the Permanent Court of International Justice played a leading role in developing the law of international organizations through its advisory opinions on the competences of the International Labour Organization,<sup>19</sup> the Greco-Turkish Mixed Commission,<sup>20</sup> or those of the European Danube Commission,<sup>21</sup> it somehow always seems as if academics discovered this only after World War II. While the interbellum saw many writings on specific international organizations, and quite a few covering the substantive work of some of those organizations, attempts to systematize, and especially theorize, remained rare,<sup>22</sup> despite occasional protestations to the contrary.<sup>23</sup>

In short, the discipline suffers from an intellectual hiatus, arguably strengthened by the idea that the 'move to institutions' only seriously took place after 1919 with the creation of the League of Nations and the International Labour Organization.<sup>24</sup> For

<sup>18</sup> See Klabbers, 'The Paradox of International Institutional Law', 5 *Int'l Orgs L Rev* (2008) 151.

<sup>19</sup> The most relevant of these is *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer*, advisory opinion [1926] Publ. PCIJ, Series B, No. 13.

<sup>20</sup> See *Interpretation of the Greco-Turkish Agreement of December 1st, 1926*, advisory opinion [1928] Publ. PCIJ, Series B, No. 16.

<sup>21</sup> See *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, advisory opinion [1926] Publ. PCIJ, Series B, No. 14.

<sup>22</sup> Rare exceptions include Rapisardi-Mirabelli, 'Théorie générale des unions internationales', 7 *Recueil des Cours* (1925) 341 and, perhaps, P.B. Potter, *An Introduction to the Study of International Organization* (1922). Potter's relevance is briefly discussed in Schmidt, 'Lessons from the Past: Reassessing the Interwar Disciplinary History of International Relations', 42 *Int'l Studies Q* (1998) 433.

<sup>23</sup> See Rochester, 'The Rise and Fall of International Organization as a Field of Study', 40 *Int'l Org* (1986) 777, at 779. In the same vein see Yalem, 'The Study of International Organization, 1920–1965: A Survey of the Literature', 10 *Background* (1966) 1.

<sup>24</sup> This would be the nutshell rendition of Kennedy's infinitely more subtle thesis. See Kennedy, *supra* note 8.

this proposition too seems to suggest something of a ‘big bang’ theory: first there was nothing, and then all of a sudden enlightened visionaries created international organizations. And then nothing happened for quite a while until in the 1950s the likes of Schermers, Jenks, Bowett, and others started to do some serious work.

This particular thesis defies plausibility, for two main reasons. First, the first international organizations taking forms that we would recognize today date back to the middle or late 19th century, and thus antedate the year 1919, never mind World War II.<sup>25</sup> Secondly, international lawyers did try to come to terms with these newly minted creatures. The years just after 1919 saw a lively debate on the legal nature of the League of Nations,<sup>26</sup> and even earlier the late 19th century witnessed a steady stream of writings among in particular francophone writers about international organizations, their advantages, their disadvantages, and their future promise.<sup>27</sup> Moreover, the months just before the creation of the League of Nations saw a steady stream of proposals and plans, or speculative analyses about what a league to enforce peace should look like.<sup>28</sup> While these hardly added up to a coherent body of theory, they nonetheless contained some of the seeds which would later grow into international institutional law.

The emergence of international organizations during the 19th century culminated, in the first decade of the 20th century, in the writings of Paul Reinsch, who started to publish the results of serious, methodical, and systematic research on the institutional aspects of international organizations as early as 1907: this work is eminently recognizable to today’s audiences as research into international institutional law. Reinsch was a political science professor from Wisconsin and sometime ambassador of the United States. If Reinsch’s contribution thus far has mainly been unheralded, it is for two reasons. First, international institutional lawyers are not prone to excavating the intellectual history of international institutional law.<sup>29</sup> While it is not the case that Reinsch’s work has gone unnoticed (he is often enough mentioned as a pioneer or a

<sup>25</sup> The river commissions have a longer ancestry still, with the International Rhine Commission going back to 1804.

<sup>26</sup> See, e.g., Corbett, ‘What is the League of Nations?’, 5 *British Yrbk Int’l L* (1924) 119; Oppenheim, ‘Le caractère essentiel de la Société des Nations’, 26 *RGDIP* (1919) 234; Butler, ‘Sovereignty and the League of Nations’, 1 *British Yrbk Int’l L* (1920–1921) 35, and Williams, ‘The Status of the League of Nations in International Law’, in J.F. Williams, *Chapters on Current International Law and the League of Nations* (1929), at 477.

<sup>27</sup> See, e.g., G. Moynier, *Les bureaux internationaux des unions universelles* (1892); E. Baron Descamps, *Les offices internationaux et leur avenir* (1894); Renault, ‘Les unions internationales: leurs avantages et leurs inconvénients’, 3 *RGDIP* (1896) 14; Kazansky, ‘Les premiers éléments de l’organisation universelle’, 29 *Revue de Droit International et de Législation Comparée* (1897) 238, and Kazansky, ‘Théorie de l’administration internationale’, 9 *RGDIP* (1902) 352.

<sup>28</sup> The legally most lasting of these is perhaps E.B. Sayre, *Experiments in International Administration* (1919). See also Baldwin, ‘The Vesting of Sovereignty in a League of Nations’, 28 *Yale LJ* (1918–1919) 209, and Randall, ‘The Legal Antecedents of a League of Nations’, 28 *Yale LJ* (1918–1919) 301.

<sup>29</sup> Mangone’s history is one of international organizations rather than their legal framework, while Mazower’s recent work is to a large extent a discussion of the fate of international organizations as influenced by power politics. See G. Mangone, *A Short History of International Organizations* (1954), and M. Mazower, *Governing the World: The History of an Idea* (2012). Note that one of the themes underlying Mazower’s book is how internationalism and imperialism are variations on the same theme.

forerunner<sup>30</sup>), it is nonetheless true that the era in which he wrote is usually regarded not as part of the history of international institutional law but as its pre-history,<sup>31</sup> and is thus rarely discussed in any depth.<sup>32</sup>

Secondly, and arguably more importantly, Reinsch's contribution (and those of his forerunners) has remained under-illuminated because, not unlike Molière's *bourgeois gentilhomme*, lawyers and others working in or with international organizations have all been speaking the language of functionalism without realizing it. Functionalism may well have been one of the few true paradigms (in Thomas Kuhn's fairly restricted meaning of the term<sup>33</sup>) in the non-natural sciences, in that until, roughly, the mid-1980s, all those who worked in or with the law of international organizations did so from the same vantage point, applying the same ideas and methods to resolve similar issues across a multitude of organizations. It was only from the mid-1980s onwards (with the failure of the International Tin Council and anecdotal evidence on the malfunctioning of organizations coming to the fore<sup>34</sup>) that slowly but surely the functionalist paradigm came to be accompanied by a new set of concerns related to control over the acts of international organizations which seemed difficult to reconcile with functionalism.<sup>35</sup> Since then, the discipline has been highly active in trying to devise control mechanisms ranging from more or less traditional responsibility or accountability regimes<sup>36</sup> to more ambitious schemes involving the use of administrative law techniques and concepts,<sup>37</sup> or even by applying the vocabulary of constitutionalism

<sup>30</sup> Thus, Yalem, *supra* note 23, at 2, lists him as one of three pioneers writing before 1920, the others being Leonard Woolf and Francis Sayre. See also B. Reinalda, *Routledge History of International Organizations: From 1815 to the Present Day* (2009), e.g., at 91 (referring to Reinsch when discussing early international organizations) and H. Shinohara, *US International Lawyers in the Interwar Years: A Forgotten Crusade* (2012), e.g., at 17 (briefly discussing Reinsch's work).

<sup>31</sup> Kennedy refers to the late 19th century as 'precursors', experimenting with techniques that would only come to fruition with the creation of the League of Nations. See Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', 65 *Nordic J Int'l L* (1996) 385, at 392. Something of an exception (although not overly explicit) is Klabbers, 'The Life and Times of the Law of International Organizations', 70 *Nordic J Int'l L* (2001) 287.

<sup>32</sup> Reinsch's relevance for the historiography of the discipline of international relations has recently met with some recognition, especially in the work of Brian C. Schmidt. See, e.g., Schmidt, *supra* note 11.

<sup>33</sup> See T.S. Kuhn, *The Structure of Scientific Revolutions* (2nd edn, 1970).

<sup>34</sup> See, e.g., G. Hancock, *Lords of Poverty* (1989). For a useful overview of the Tin Council crisis see Sands, 'The Tin Council Litigation in the English Courts', 34 *Netherlands Int'l L Rev* (1987) 367.

<sup>35</sup> See Klabbers, 'Contending Approaches to International Organizations: Between Functionalism and Constitutionalism', in J. Klabbers and A. Wallendahl (eds), *Research Handbook on the Law of International Organizations* (2011), at 3.

<sup>36</sup> In addition to the work of learned bodies such as the Institut de Droit International, the International Law Association, and the International Law Commission see M. Hartwig, *Die Haftung der Mitgliedstaaten für internationale Organisationen* (1993); M. Hirsch, *The Responsibility of International Organizations toward Third Parties: Some Basic Principles* (1995); P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (1998); K. Wellens, *Remedies against International Organizations* (2002). A lone forerunner was K. Ginther, *Die völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten* (1969).

<sup>37</sup> See, amongst others, Kingsbury, Krisch, and Stewart, 'The Emergence of Global Administrative Law', 68 *Law & Contemp Probs* (2005) 15; Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law', 115 *Yale LJ* (2006) 1490; A. von Bogdandy et al. (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (2010); Kingsbury and Casini, 'Global Administrative Law Dimensions of International Organizations Law', 6 *Int'l Orgs L Rev* (2009) 319.

to international organizations.<sup>38</sup> Some of those organizations themselves, moreover, engage in self-control by creating or upgrading internal oversight departments or appointing compliance officers.<sup>39</sup>

There are a couple of reasons why Reinsch, despite not being the first to write about international institutional law, is of pivotal importance. Reinsch has sometimes been credited with having popularized the term ‘international organization’ (a term possibly first coined by the Scottish jurist James Lorimer<sup>40</sup>), but also stands out among his contemporaries and his predecessors by the systematic, methodical nature of his work, as well as its comprehensiveness.<sup>41</sup> Moreover, he was among the first to be acutely aware of the dynamic, institutional component of international organizations, and would establish something of a theory and methodology, however rudimentary, about the law of international organizations. Still, Reinsch too did not come out of the blue; it is to the work of his forerunners that I will now turn.

### 3 International Institutional Law at the Turn of the 19th Century

When international organizations were first created in the form we can still recognize nowadays (leaving aside whether, for example, such entities as the Greek Amphycion Council, or the Hanseatic League many centuries later, can be regarded as true predecessors<sup>42</sup>), their special characteristics were still to be discovered. Writings from the later 19th and early 20th century tend to equate international organizations with their constituent treaties. A fine example is the work of leading Dutch international lawyer Van Eysinga, who would later become a judge at the Permanent Court of International Justice. Addressing Dutch treaty relations, the many river commissions which had just been created were simply treated under the heading of water treaties – there is no recognition in Van Eysinga’s work of the institutional features of these river commissions, or that somehow institutional elements would set them apart from ordinary, non-institutional treaties.<sup>43</sup> Van Eysinga’s writings did not focus on international institutions and he could thus, possibly, simply never have given much thought

<sup>38</sup> See, amongst many others, Stein, ‘Lawyers, Judges, and the Making of a Transnational Constitution’, 75 *AJIL* (1981) 1; J.H.H. Weiler, *The Constitution of Europe* (1999); J.H.H. Weiler and M. Wind (eds), *European Constitutionalism beyond the State* (2003); D.Z. Cass, *The Constitutionalization of the WTO: Legitimacy, Democracy, and Community in the World Trading System* (2005); and B. Fassbender, *The United Nations Charter as the Constitution of the International Community* (2009).

<sup>39</sup> See Klabbers, ‘Self-control: International Organisations and the Quest for Accountability’, in M. Evans and P. Koutrakos (eds), *The International Responsibility of the European Union* (2013), at 75.

<sup>40</sup> See Potter, ‘Origin of the Term International Organization’, 39 *AJIL* (1945) 803.

<sup>41</sup> In a similar vein see Bederman, *supra* note 7, at 339 (singling out Reinsch because of the systematic nature of his work).

<sup>42</sup> See, e.g., Boak, ‘Greek Interstate Associations and the League of Nations’, 15 *AJIL* (1921) 375.

<sup>43</sup> See J.W.M. van Eysinga, *Ontwikkeling en inhoud der Nederlandsche tractaten sedert 1813* (1916), at 6, 13.

to their special features,<sup>44</sup> and something similar applies to other early writers on international organizations: often the awareness that these new creatures were not just sequential treaties but also had an institutional component was lacking.<sup>45</sup>

This absence of an institutional focus should come as no surprise. It is not simply the case that the late 19th century authors did not come to think of those unions as institutions – those unions themselves showed few institutional features to begin with. Thus, writing in 1894, Descamps' overview of the various unions existing at the time suggests that many of them were headquartered in the foreign ministry or some other authority (for example, the Swiss postal service, in the case of the Universal Postal Union) of their host state, and staffed predominantly by nationals of the host state or those sent by their home governments<sup>46</sup> – as opposed to being appointed in their own right as qualified professionals to international positions. Not untypical, the 'international bureau' (usually the only recognizable institutional element) would assist in the preparation of periodical conferences, but these conferences would eventually come to be organized and convoked by the host state.<sup>47</sup> In short: in those formative years, it would not have been all that obvious that the institutions were actually developing as institutions.

Like van Eysinga's work, a late 19th century article by Louis Renault suggests a view of organizations as solidified treaty regimes – more solid because of the repetitive nature of strings of related treaties, rather than possessing any organizational features *per se*.<sup>48</sup> Perhaps as a result, Renault is mostly interested in sketching the advantages and disadvantages of participation in international unions from the point of view of member states, instead of positing a general theory or discussing features of internal institutional design.<sup>49</sup> Thus, he mentions that one of the drawbacks of participating in a union is that it may be all that much harder to terminate a treaty embedded in an organizational framework, because by its very nature such termination will affect treaty relations with all member states.<sup>50</sup> This belies a predominant conception of organizational treaties as bundles of bilateral rights and obligations, therewith still denying them a specific organic character.<sup>51</sup> And while Renault wisely remarks that

<sup>44</sup> Note that his later writings, including those as a judge, pay far more attention to the various forms international cooperation can take, and one could seriously claim that his use of constitutional terminology in the *Oscar Chinn case* was far ahead of its time. See *The Oscar Chinn Case (United Kingdom v. Belgium)* [1934] Publ. PCIJ, Series A/B, No. 63.

<sup>45</sup> Indeed, it would be a while still before international lawyers started to distinguish between various types of treaties. The *locus classicus* is A.D. McNair, *The Law of Treaties* (2nd edn, 1961), first published in 1930.

<sup>46</sup> Thus, Moynier remarks that while most of the staff of the customs tariffs union, hosted by neutral Belgium ('*un foyer de paix*') is appointed by the host state, translators 1st class are sent by their national governments. See Moynier, *supra* note 27, at 128, 135.

<sup>47</sup> See Descamps, *supra* note 27, e.g., at 20 (discussing the role of the bureau of the Union internationale pour la protection de la propriété industrielle).

<sup>48</sup> See Renault, *supra* note 27.

<sup>49</sup> This was in line with his general approach to international law as a professional technique for statesmen. See generally Koskeniemi, *supra* note 15, at 274–277.

<sup>50</sup> See Renault, *supra* note 27, at 21.

<sup>51</sup> Another disadvantage, *dixit* Renault, is that bilateral treaties can be precisely calibrated between the two contracting parties. Such is not possible with unions: *ibid.*, at 22–23.

a certain amount of concord is desirable for the organization to be successful,<sup>52</sup> at no point does he address such issues as decision-making procedures, or the creation of organs, or financing, or other organizational matters. And to the extent that he discusses, hypothetically, law-making powers, he quickly reaches the conclusion that anything of this kind would amount to ‘*une abdication de souveraineté*’.<sup>53</sup> In short, for Renault, unions are collections of treaties between states: the very idea of an international organization with an identity separate from its member states and an independent institutional existence is still anathema.<sup>54</sup>

Much the same applies to other authors writing around the turn of the century. Thus, Moynier, writing in 1892, notes that the Universal Postal Union has the unique characteristic that it allows for different treaty regimes involving different member states, without inquiring whether this complicates membership issues – it is merely a matter of different parties accepting different sets of rights and obligations.<sup>55</sup> Likewise, Meili’s 1889 study is largely concerned with the effects of membership of international unions on the substance of German private law, for instance relating to railways or to telephone messages.<sup>56</sup>

In sum, those writing at the turn of century paid far greater attention to issues of substance than to institutional design. Moynier devotes lengthy passages to the work of the telegraphic union, the postal union, etc., as does (somewhat more briefly) Descamps. On occasion an institutional concern may slip in, as when Moynier notes that the postal union has appropriated a power (‘*une compétence accrue*’) to organize conferences of member states<sup>57</sup> or that its law-making function makes it almost parliamentary in nature (‘*parlement au petit pied*’),<sup>58</sup> but most of Moynier’s study, and those of his contemporaries, is devoted to a list of the activities of organizations in their fields of action. Meili, while anticipating the possible self-executing nature of decisions of international unions,<sup>59</sup> is also far more intrigued by substance than by organizational design.

A rare exception<sup>60</sup> resides in two short pieces by Pierre Kazansky, published in 1897 and 1902.<sup>61</sup> Kazansky, sometimes also referred to as Kasansky or Kazanskii, was a law

<sup>52</sup> *Ibid.*, at 24.

<sup>53</sup> *Ibid.*, at 25 (emphasis omitted).

<sup>54</sup> Much the same still applies to what is arguably the most sophisticated discussion published at the turn of century, the 1902 contribution by Kazansky, ‘Théorie’, *supra* note 27.

<sup>55</sup> See Moynier, *supra* note 27, at 40.

<sup>56</sup> See F. Meili, *Die internationalen Unionen über das Recht der Weltverkehrsanstalten und des geistigen Eigentums* (1889).

<sup>57</sup> *Ibid.*, at 48.

<sup>58</sup> *Ibid.*, at 41.

<sup>59</sup> *Ibid.*, at 73.

<sup>60</sup> Sometimes Pasquale Fiore is also mentioned as an early functionalist representative. See, e.g., Bederman, *supra* note 7, at 344–345, and C.M. Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (2007), at 46. Still, the relevant passage in Fiore’s monograph sometimes referred to (first published in Italian in 1890) has lost much in the English translation, based on the 5th edn of the Italian original. Here, Fiore limits himself to comments about the international legal personality of legal entities, which derives from a mixture of a ‘well-defined purpose of international interest’ and recognition by third parties. Importantly though, this personality is limited to the entity’s tasks: see P. Fiore, *International Law Codified and its Legal Sanction or the Legal Organization of the Society of States* (trans. Borchard, 1918), at 116 (paras 81 and 82).

<sup>61</sup> See Kazansky, ‘Les premiers éléments’, *supra* note 27 and Kazansky, ‘Théorie’, *supra* note 27.

professor in Odessa and had written several short studies of the activities of individual international organizations<sup>62</sup> as well as a voluminous 1,360 page study of international unions,<sup>63</sup> all in Russian, and it is likely that his two articles in French formed something of a synthesis of his work.

Kazansky was arguably the first to ask institutional questions and discuss institutional issues. He noted similarities in the organizational set up of the organizations he identified: these would typically have plenary and administrative organs (and sometimes a tribunal of sorts as well).<sup>64</sup> Moreover, he distinguished between the legal status of international bureaux (the secretariats of the existing unions) and international commissions: the latter would enjoy more liberties than the former, and their resolutions would, in effect, be treaties between member states.<sup>65</sup> He also realized that the unions were not so much about prohibiting behaviour, but about empowering in the light of some shared goal ('*tel ou tel but*'<sup>66</sup>), although he was not yet clear as to who would be empowered, and still tended to think that the unions were aggregates of their member states rather than truly independent actors. Nonetheless, he already observed a prominent role for their functioning, noting for instance (although the language is ambiguous) that host states might take extra care in reviewing the acts of organizations on their territory, bearing their functioning in mind.<sup>67</sup>

To the extent that late 19th century authors discussed institutional features of international unions, such discussions would typically be limited to two issues. The first of these was the costs of maintaining international unions, with authors typically remarking that the costs would be borne by the member states together, and would be limited: some ceiling would usually be mentioned. Secondly, the authors of the late 19th century tended to think of the creation of international unions as the logical next step in the evolution of mankind, displaying a progress narrative that, however naïve perhaps,<sup>68</sup> was widely shared. Thus, Moynier sketches the typical progression as one which runs from group and family via tribe and state to international union,<sup>69</sup>

<sup>62</sup> These were (nearly) anonymously reported on and typically referred to as brochures addressing the International Telegraphic Union, the Anti-slavery Union, and the International Union for the Publication of Customs Tariffs. In addition, he produced a brief brochure advocating for a global repertory of treaties. See the book notices at 29 *Revue de Droit International et de Législation Comparée* (1897) 451 and 570.

<sup>63</sup> This was reviewed, without great enthusiasm, by the Moscovite law professor Count Kamarowsky, 'Examen des productions récentes et de l'état actuel de la littérature du droit international en Russie', 34 *Revue de Droit International et de Législation Comparée* (1902) 457, at 467–468.

<sup>64</sup> Kazansky, 'Les premiers éléments', *supra* note 27, at 243–244.

<sup>65</sup> See Kazansky, 'Théorie', *supra* note 27, at 358–359, and 'Les premiers éléments', *supra* note 27, at 243. This foreshadowed the treaty analogy which would prominently feature in *Railway Traffic between Lithuania and Poland (Railway Sector Landwarow-Kaisiadorys)* [1931] Publ. PCIJ, Series A/B, No. 42. For further discussion see J. Klabbers, *An Introduction to International Institutional Law* (2nd edn, 2009), at 184–185.

<sup>66</sup> Kazansky, 'Les premiers éléments', *supra* note 27, at 243.

<sup>67</sup> See Kazansky, 'Théorie', *supra* note 27, at 360. The ambiguous language: '*si l'institution intéressée est un Bureau international, comme celui-ci est ordinairement soumis aussi aux lois et aux arrêtés de l'Etat ou il est placé, cet Etat doit exercer sur elle, au point de vue de son fonctionnement, une surveillance particulière.*'

<sup>68</sup> A certain political naïvety seems to have been endemic, finding perhaps its highlight in Moynier's praise of Belgium's King Leopold: he depicts the choice of Brussels as hosting an organization for the treatment of slaves as '*un moyen de rendre au roi Léopold un hommage mérité, pour tout ce qu'il a fait en faveur de la civilisation de l'Afrique*': see Moynier, *supra* note 27, at 118.

<sup>69</sup> *Ibid.*, at 149.

and when trying to classify the unions as legal persons draws an explicit analogy with the notion of suzerainty: a classification from the colonial era signifying an entity that was neither completely dependent nor completely sovereign – a lesser degree of sovereignty, if you will.<sup>70</sup> Meili, for his part, saw the unions as harbingers of global law ('*Weltrecht*')<sup>71</sup>, and went so far as to speculate about a possible interplanetary or interstellar law.<sup>72</sup> Kazansky, in turn, strikingly noting that the international unions '*remplissent une grande mission civilatrice*',<sup>73</sup> explained the rise of international organizations under reference to the protection of social rather than political interests, and hypothesized that with the advent of a universal political organization, the nation state would necessarily come to an end.<sup>74</sup>

And to the extent that the late 19th century authors would discuss institutions to begin with, they would somehow distinguish between the unions and their organs, in a manner suggesting that the unions would be meeting places for states, and that any international action that took place would do so within (and through the work of) their secretariats, designated under such labels as Offices, or Bureaux. Hence, the discipline showed a marked tendency to treat organizations as Janus-faced entities: places where states could meet and discuss things and perhaps, if all went well, conclude agreements between them, on the one hand, and offices where action took place on the other hand. In essence, this distinction still informs international institutional law writings and debates – although not always through a distinction between the organization and its organs.<sup>75</sup> This distinction found expression in the titles of some of the leading works at the time,<sup>76</sup> and no doubt helped paved the way for the depoliticization of international institutional law: it suggests that the bureaux engage in technical and a-political activities, whereas the more overtly political work gets done in plenary, and thus potentially remains within the full control of the member states.<sup>77</sup>

#### 4 The Work of Paul S. Reinsch

Against the background of these late 19th century authors, Paul Reinsch' work assumes great importance. The very first volume of the *American Journal of International Law*, published in 1907, contained a lengthy article by Reinsch, discussing the new international unions. The article would be followed, two years later,

<sup>70</sup> *Ibid.*, at 148.

<sup>71</sup> Meili, *supra* note 56, at 57.

<sup>72</sup> *Ibid.*, at 6.

<sup>73</sup> Kazansky, 'Les premiers éléments', *supra* note 27, at 246.

<sup>74</sup> See Kazansky, 'Théorie', *supra* note 27, at 366.

<sup>75</sup> See Klabbers, 'Two Concepts of International Organization', 2 *Int'l Orgs L Rev* (2005) 277.

<sup>76</sup> See, e.g., Moynier, *supra* note 27, or, less explicitly, Descamps, *supra* note 27 (who juxtaposes the offices mentioned in the title against the unions they are part of).

<sup>77</sup> Sayre would, sometime later, describe the situation with admirable clarity (discussing the Universal Postal Union): '[a]lthough the permanent bureau is an organ with no real power, the Postal Union itself possesses considerable authority and, on the whole, it has most successfully substituted international for state government in postal matters': see Sayre, *supra* note 28, at 24.

by another lengthy piece in the same journal, and the two articles combined would become the core of his 1911 monograph on international organizations. These three works together provide the outline of functionalism.

Paul Samuel Reinsch was born in 1869, in Milwaukee, Wisconsin, in a family of German heritage.<sup>78</sup> Having attended Concordia (Lutheran) College in Milwaukee and having received his law degree from the University of Wisconsin-Madison in 1894, he briefly practised law. His interest in politics and history would soon take over though, and would remain a constant factor throughout the rest of his life until his untimely death in 1923.<sup>79</sup> He wrote a doctoral thesis in 1898 (on the reception of English common law in the American colonies<sup>80</sup>), while being an adjunct lecturer at the University of Wisconsin. Thereafter, he quickly became assistant professor and professor of political science at the same university, from 1898 until 1913. President Wilson then appointed him as US Minister to China, a post from which he resigned after the Versailles Treaty granted Shantung to Japan. He died in Shanghai in 1923, having been asked by the Chinese government to help reorganize its financial system. In the meantime, an attempt to get a political career off the ground failed. In the race for a Senate seat for Wisconsin in 1920, the committed Democrat and Progressive Reinsch was well beaten by Republican and Independent candidates, eventually attracting a mere 13.18 per cent of the vote.<sup>81</sup>

Reinsch was a prolific writer but actually wrote relatively little on international law. During his later years in particular he acquired some fame as an orientalism expert, having published some works on China and made good use of his position there, but even his early textbook on world politics was written with China in mind, in particular China's opening up to the West. Earlier in his career, he devoted much time and energy to the workings of US politics, compiling readers (syllabi) on federal government and state government, and a popular monograph on civil administration, and somehow imperialism and colonialism, in a peculiar way, remained a constant source of fascination – and inspiration, as we shall see.<sup>82</sup> But in the meantime, he wrote his articles on what he ended up calling 'international administrative law', which combined the public lawyer's eye for institutions and processes with the political scientist's sense (and practical experience) for how things work, embedded in what would nowadays be called a liberal and cosmopolitan social-democratic mindset. These strands run as red threads through his work: his ambivalent colonialism, his worldly, cosmopolitan

<sup>78</sup> Much of this is derived from the entry under his name in the *Dictionary of Wisconsin History*, available at: [www.wisconsinhistory.org/dictionary/index.asp](http://www.wisconsinhistory.org/dictionary/index.asp) (last visited 19 May 2010).

<sup>79</sup> For further biographical details see Schmidt, *supra* note 11.

<sup>80</sup> See P.S. Reinsch, *English Common Law in the Early American Colonies* (PhD thesis, University of Wisconsin, 1898).

<sup>81</sup> See <http://uselectionatlas.org> (last visited 8 October 2012).

<sup>82</sup> He wrote for instance a passionate plea for recognizing colonial autonomy rather than striving for assimilation, condemned the exploitation of the Congo, and reviewed Hobson's classic study on imperialism. See respectively, Reinsch, 'Colonial Autonomy, with Special Reference to the Government of the Philippine Islands', 1 *Procs of the Am Political Science Assn* (1904) 116; Reinsch, 'Real Conditions in the Congo Free State', 178 *N Am Rev* (1904) 216, and Reinsch, 'Review of J.A. Hobson, *Imperialism: A Study*', 18 *Political Science Q* (1903) 531.

idealism, and his involvement in Wisconsin politics and administration with the so-called ‘Wisconsin Idea’ (a set of principles aimed at protecting the weak and basing policy on expert knowledge), all seem to spring from the same mindset.

As noted, Reinsch was already an established professor of international politics when he embarked on his writings on international organizations. Reinsch started his 1907 article by extolling the virtues of internationalism, as practical responses to practical problems, and by putting his readership at ease. The new unions do not threaten national sovereignty: ‘[i]t is not so much the case that nations have given up certain parts of their sovereign powers to international administrative organs, as that they have, while fully reserving their independence, actually found it desirable, and in fact necessary, regularly and permanently to co-operate with other nations in the matter of administrating certain economic and cultural interests’.<sup>83</sup>

Having stated this, he systematically discusses a number of organizations, typically first outlining the issues with which they are concerned. It is only once their field of activities has been described that the institutional features are discussed by Reinsch: typically, the unions have an administrative organ and, typically, the tasks of these organs are presented as administrative in nature: collecting and disseminating information, preparing future meetings, etc. Even activities that carry political overtones are not singled out: thus, the central bureau of the International Union of Railway Freight Transportation is to ‘give due form to suggestions’<sup>84</sup> to proposed amendments to the constituent document, and even has a quasi-judicial function, but none of these are presented as other than administrative in nature. Even the quasi-legislative role of the Sugar Commission, while duly noted, is neutralized.<sup>85</sup>

In the opening pages of the article, Reinsch explicitly juxtaposes the rise of international unions (internationalism) against nationalism. This was, in all likelihood, part of a legitimizing strategy: in order for international organizations to be considered relevant, they had to be positioned as harbingers of cosmopolitanism, as a viable alternative to the parochialism of the nation-state. And this, in turn, could only be done by insisting on their functional nature: whereas states can engage in all sorts of mischief (and worse) because their sovereignty knows no limits, organizations are limited by their functions.

Little of this was posited explicitly, but the structure of the piece speaks volumes: as soon as the design of a union came to be discussed, the discussion would start with listing the function or functions of the organization or organ in question. Clearly, organizations were built around functions and, equally clearly, these functions formed the heart of what organizations could do, both positively (these were their tasks) and negatively (these functions also marked, by definition, the limits of the organization’s tasks). The Permanent Court of International Justice, two decades later, could hardly have formulated the same point with greater precision or economy when discussing the functions of the European Commission of the Danube, based on its constituent

<sup>83</sup> See Reinsch, ‘International Unions and their Administration’, 1 *AJIL* (1907) 579, at 581.

<sup>84</sup> *Ibid.*, at 591.

<sup>85</sup> *Ibid.*, at 604. For a different classification see Sayre, *supra* note 28, at 12–17.

treaty (the so-called Definitive Statute): '[a]s the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfillment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it'.<sup>86</sup> This simultaneously grants the Commission the power to do everything it can to give effect to its functions, and limits the activities of the Commission to those which are connected to its functions.

While Reinsch refrains from badmouthing nationalism directly, nonetheless internationalism is portrayed as commendable: internationalism 'comprises those cultural and economic interests which are common to civilized humanity'.<sup>87</sup> He quotes at length the Italian King Victor Emmanuel III's convocation for the establishment of an international agricultural union (the International Institute of Agriculture, forerunner of today's FAO) which should be '*dégagé de tout but politique*', but which would nonetheless help to contribute to peace.<sup>88</sup>

This, the first of Reinsch's two seminal articles on international institutions is, by and large, comparative. The article contains a lengthy list of many international organizations or, sometimes, aborted initiatives to establish one. There is some analytical division: the organizations are subdivided as dealing with communication, or economic interests, or sanitation and prison reform, or various other purposes. Towards the end, however, the mode of analysis shifts from topic to region, when Reinsch discusses ever so briefly the existing unions in the Americas. This is not systematically carried out throughout, and the main division underlying the article relates to the field of activities of the organizations. Still, it is comparativism with a twist: no general conclusions are drawn on the basis of the comparative survey, and Reinsch promises in the closing sentence that a synthetic overview of the functions of organizations and their relation to national administrations 'is to be discussed in a future paper'.<sup>89</sup> Again, he prefaces this by claiming that any appreciation of the value of international unions depends first and foremost on 'a careful analytical study of the powers and functions of the international organs'.<sup>90</sup>

The 'future paper' Reinsch promised at the end of his 1907 article would be published two years later, and indeed it elaborated on the first paper, fine-tuning some of the theoretical points, and concentrating on the commonalities. It is no accident, given Reinsch's ambitions, that the opening sentence places international organizations as the harbingers 'of a law common to the entire civilized world', and a page later he speaks, without hyperbole, of 'world law'.<sup>91</sup>

The first part of the article aims to place the international unions in their relationship to their member states, and the theory Reinsch develops would come to be

<sup>86</sup> See *Jurisdiction of the European Commission of the Danube*, *supra* note 21, at 64.

<sup>87</sup> See Reinsch, *supra* note 83, at 579.

<sup>88</sup> *Ibid.*, at 605–606.

<sup>89</sup> *Ibid.*, at 623.

<sup>90</sup> *Ibid.*

<sup>91</sup> See Reinsch, 'International Administrative Law and National Sovereignty', 3 *AJIL* (1909) 1, at 1 and 2 respectively.

enormously influential. International cooperation, so he suggests, is necessary in a number of fields. Thus, international cooperation is needed to prevent the importation of animal or plant diseases; it is needed to ensure that letters and telegrams are delivered across borders; it is needed to make sure that states do not benefit unduly from competitive advantages in their labour legislation. Hence, the world law ('universal civil law'<sup>92</sup>) thus arising is based on necessity and pragmatism: it is 'the legal expression of positive interests and activities that have already developed in the life of the world'.<sup>93</sup> In fact, much of the cooperation thus achieved is based on the 'enlightened sense of self-interest' of the member states.<sup>94</sup> After all, should member states refuse to cooperate, they may be excluded from a union, and such exclusion could 'be almost a national calamity'.<sup>95</sup>

As a result, there is no real conflict between state sovereignty and international organization, not, at least, if sovereignty is properly conceptualized as divided, as a bundle of rights.<sup>96</sup> In fact, the two go hand in hand: the sovereign state 'merely utilizes these international organizations for the benefit of its own citizens and subjects'.<sup>97</sup> International cooperation is a necessity and thus in everyone's interest, and there can even be an ethical duty to cooperate on the international level.<sup>98</sup> The resulting cosmopolitanism is not so much idealistic but rather, as Reinsch explains, 'concrete and practical'.<sup>99</sup> The state remains necessary, because it is out of states that international unions are composed, in much the same way that states themselves are composed of towns and provinces and villages. This bespeaks of an underlying narrative of progress: arguments about protecting national prerogatives are seen as expressions of 'a very strong impediment to the progress of international legislation'.<sup>100</sup>

Having established the eventual harmony between state sovereignty and international organization, Reinsch continues by sketching what he calls 'general principles of organization'. While organizations are created in response to concrete needs and grow spontaneously, nonetheless they display an 'underlying unity',<sup>101</sup> or even a 'common law of international unions'.<sup>102</sup> Elements of this common law may include that admission is often granted freely, hemmed in only by geographical or functional concerns. It also includes a regular division between plenary, executive, and administrative bodies, and often unanimity when it comes to decision-making in plenary bodies. And most importantly, perhaps, Reinsch posits an equation between functions

<sup>92</sup> *Ibid.*, at 5.

<sup>93</sup> *Ibid.*, at 2.

<sup>94</sup> *Ibid.*, at 8.

<sup>95</sup> *Ibid.*, at 9.

<sup>96</sup> *Ibid.*, at 10.

<sup>97</sup> *Ibid.*, at 11.

<sup>98</sup> *Ibid.*, at 13.

<sup>99</sup> *Ibid.*, at 17.

<sup>100</sup> *Ibid.*, at 10. This was a common sentiment at the time, witness for instance the closing sentence of a classic two-part article by Fiore, 'L'Organisation juridique de la société internationale', 31 *Revue de Droit Internationale et de Législation Comparée* (1889) 105 and 209, at 242: '[l']Unité primitive du genre humaine fut la famille; l'unité finale sera la confédération juridique des nations civilisées'.

<sup>101</sup> See Reinsch, *supra* note 91, at 20.

<sup>102</sup> *Ibid.*, at 26.

and powers: the terms are used, throughout the article, as synonyms. Those functions and powers stem from the member states, typically in response to some perceived need. While states have been reluctant to grant powers to organizations, in the end such could not be avoided: 'the needs of international intercourse have become so prominent that it has been found convenient in many cases to give a certain limited power of action, carefully guarded and well defined, to the international administrative organs'.<sup>103</sup>

Another two years later, in 1911, Reinsch published a monograph on the international unions, built around the two *American Journal* articles but accompanied by a remarkable introduction, which aims to square whatever theoretical circles were left. Reinsch notes that while increased spending on the military at the same time as the rise of international organizations may seem like a paradox, it really is no such thing. Both, he suggests, are inherent in the spirit of the age: this spirit is characterized by a 'desire for energetic action, for strong personality, for positive deeds and achievements',<sup>104</sup> and these can manifest themselves either in working for international unity or for narrow nationalist purposes. The nationalist, however, merely suffers from false consciousness, for true nationalism, in an age of interdependence, is internationalism: '[t]he more nationalism itself becomes conscious of its true destiny, the more will it contribute to the growth of international institutions'.<sup>105</sup> In the end then, incentives to go to war would become weaker the stronger the 'bonds of community' between nations became. Hence, world peace is inevitable, and is inevitably linked to the growth of international organizations. These do not stand against sovereignty, or nationalism, but are really only their natural outgrowths.

The same theme is repeated in the conclusions to the book. International organizations are presented as the alternative to warfare. In almost Malthusian fashion, Reinsch notes that in the past overpopulation had resulted in 'terrible bloodlettings'.<sup>106</sup> The 'common accord' of nations, however, promised something far better: '[t]he question is whether the energies of humanity are to be expended in old-fashioned, cruel, and universally harmful warfare, or are to be directed into the ample field of constructive work for the betterment of the conditions under which men live throughout the world. When this consideration is clearly understood, the true meaning and importance of international organization in the form of public unions will be grasped'.<sup>107</sup>

The monograph is somewhat more in the nature of a *capita selecta* work than that it systematically makes an argument. In addition to updated versions of the two *American Journal* pieces, it contains a lengthy chapter on the union of American republics (Reinsch had been a member of the US delegations to the third and fourth Pan-American Congresses, and could thus write on the basis of first-hand observation<sup>108</sup>),

<sup>103</sup> *Ibid.*, at 38.

<sup>104</sup> See P.S. Reinsch, *Public International Unions, Their Work and Organization: A Study in International Administrative Law* (1911), at 6.

<sup>105</sup> *Ibid.*, at 11.

<sup>106</sup> *Ibid.*, at 186.

<sup>107</sup> *Ibid.*

<sup>108</sup> He also reported on these conferences separately. See, e.g., Reinsch, 'The Third International Conference of American States', 1 *Am Political Science Rev* (1906–1907) 187, and Reinsch, 'The Fourth Pan-American Conference', 37 *Annals of the Am Academy of Political and Social Science* (1911) 16.

a very brief sub-chapter on the Central American Union, an even briefer chapter devoted to the Permanent Court of Arbitration, and a fairly odd chapter on international organizations and war. Somehow, it seems that Reinsch never realized that he engaged in a pioneering effort when addressing international institutional law – the book makes its argument only implicitly and between the lines. Still, in its totality, it provides a fascinating insight into the creation of international institutional law.

Perhaps the most interesting part of Reinsch's monograph is the chapter on the international union of American republics, for by discussing the issues that arose during the various congresses of the union Reinsch almost inadvertently composes an embryonic textbook on the law of international organizations. The Congresses had to deal with the creation of subsidiary organs, with issues of membership, with financing and auditing, and with issues of representation of members, amongst others, and came up with solutions which have proven to be of lasting significance: solutions adopted and conceptual thought developed by the Congresses has been of great use to international organizations ever since – and it is this use of comparativism that has become a characteristic element of functionalism.

The first pan-American Congress took place in Washington, in 1888, and was considered by Reinsch to be a new phenomenon: it was not convened (as so many other congresses) to deal with a single, specific diplomatic issue, nor was it convened (as some of the European congresses had been) to address a single technical issue, such as telegraph traffic or postal relations; instead, it dealt with larger political questions.<sup>109</sup> Therefore, it was no surprise that its immediate results were fairly small but, so Reinsch continued optimistically, 'More intimate relations would first have to be established and the countries would have to gain clearer views concerning the tendencies and probable effects of international arrangements among American states before definite action could be expected.'<sup>110</sup>

By the time of the third conference, held in Rio de Janeiro in 1906, the states concerned had digested two important lessons. First, the Rio conference was meticulously prepared by the Governing Board of the International Bureau of American Republics (a permanent secretariat *avant la lettre*), and the preparation included the prior adoption of rules and regulations relating to the conference itself. Secondly, instead of making broad and sweeping political claims, the delegates in Rio seemed to have realized that the sort of forum offered by the Pan-American congresses lent itself more to piecemeal action: technical regulation and discussions on detail.<sup>111</sup>

The work of the bureau proved so useful that its role was expanded and cemented at the third conference: it now became a permanent body with some circumscribed tasks, including the monitoring of the implementation of resolutions adopted by the Congress, and the gathering of information on topics of common interest, in particular on exchange in education.<sup>112</sup> A further institutionalizing move at the third Congress

<sup>109</sup> See Reinsch, *supra* note 104, at 82–83.

<sup>110</sup> *Ibid.*, at 83.

<sup>111</sup> *Ibid.*, at 93–94. This became a staple of functionalist integration theory: see J.K. de Vree, *Political Integration: The Formation of Theory and Its Problems* (1972).

<sup>112</sup> See Reinsch, *supra* note 104, at 96.

saw the creation of two bureaux (in Havana and Rio de Janeiro) for the registration of patents, copyrights, and trade marks to give effect to an earlier convention, a customs section within the bureau itself, and the creation of a bureau for sanitary information (to be located in Montevideo) and a commission for public and private international law (with its seat in Rio de Janeiro).<sup>113</sup>

Reinsch also observed that all the serious political work in Rio was done in committees. Agreement would be reached in small committees of delegates, to be approved without dissent by the plenary: '[i]n this respect the conference differed most radically from its predecessors, in both of which long and earnest debates took place in the plenary sessions'.<sup>114</sup>

Further institutional developments were clarified during the fourth conference, held in Argentina in 1910. One of them was the issue whether a member of the union (*in casu* Bolivia), having broken off diplomatic relations with the host state, would nonetheless have a right to participate, and the conference decided in the affirmative.<sup>115</sup> therewith further separating the organization from its member states.<sup>116</sup> Interestingly though, a more general right of the bureau to receive diplomatic envoys was still rejected as being practically difficult,<sup>117</sup> and would be shelved until the creation of the League of Nations made any form of permanent representation well-nigh inevitable.

Another development referred to the question whether membership of an international organization implied recognition of statehood by all its members, and the sensible conclusion Reinsch drew was that it does not.<sup>118</sup> However, he also anticipated the situation where competing factions would both claim to represent their state. While Reinsch held – again sensibly – that the proper thing to do would be to admit neither,<sup>119</sup> the story of China's representation (much later, of course) to the United Nations runs differently. Finally, the fourth congress also bolstered the idea of permanence by renaming the bureau (this became the Pan-American Union) and by creating the term 'director-general' to designate its lead official. The union itself, by now, had been re-christened Union of American Republics. Reinsch's two articles and 1911 monograph arguably constitute the first important body of work on the law of international organizations as we know it, and set the tone for the further development of international institutional law. First, there is the matter of method: with international organizations being numerous, and with all of them the result of different configurations of needs and interests, nonetheless some 'underlying unity' could be found by comparing them, by trying to distill a 'common law of international unions'. Reinsch suggested, and demonstrated, that careful comparison could lead to useful understandings, valid across international organizations, however *mutatis*

<sup>113</sup> *Ibid.*, at 97.

<sup>114</sup> *Ibid.*, at 99.

<sup>115</sup> *Ibid.*, at 104.

<sup>116</sup> Discussing the effect of war on unions, his conclusions stem from the same underlying independence of the organization: treaties establishing international organizations will be treated as suspended between belligerents, but not otherwise affected: see *ibid.*, at 174.

<sup>117</sup> *Ibid.*, at 104.

<sup>118</sup> This is still the prevailing position. See J. Dugard, *Recognition and the United Nations* (1987).

<sup>119</sup> See Reinsch, *supra* note 104, at 105.

*mutandis* perhaps. The lessons drawn from the Pan-American Congresses are exemplary in this regard. Still, it was not the comparison as such which made Reinsch stand out: after all, his late 19th century predecessors had similarly engaged in comparative work. What Reinsch added was an element of synthesis: he would not hesitate to generalize on the basis of his comparisons whereas his predecessors would be reluctant to do so.<sup>120</sup>

Secondly, the activities of international organizations are often portrayed as neutral, a-political, purely routine administrative work. As Reinsch rightly foreshadowed, there is a very strong perceived need to reconcile the activities of international organizations with state sovereignty, and in order to achieve this, their political nature has to be downplayed. The emphasis, instead, necessarily comes to rest on functions, tasks, and powers – always on the understanding that powers have been granted to the organizations by their member states and continue to ‘belong’, so to speak, to those member states. Functions and powers came to be equated, and much of the work of international organizations was perceived in a-political terms: it manifests itself most of all in the distinction between ‘technical’ and ‘political’ organizations, which can still be found in textbooks. In this form it was pioneered by Reinsch,<sup>121</sup> and quickly picked up by other writers. A good example is Brierly, distinguishing between ‘roughly’ the economic and social field on the one hand, and the political field on the other, when discussing the activities of international organizations.<sup>122</sup>

This reconciliation between internationalism and national sovereignty also took on pragmatic colours: at one point, Reinsch felt compelled to observe that ‘it is not only desirable but absolutely necessary’ that the agenda of any international conference or congress, even within existing institutional frameworks, is sent in advance to the participating governments, to allow them to instruct their delegates. These, after all, are not legislators working *sui juris*, but are instead representatives of governments.<sup>123</sup> The message was clear: international unions remain under constant control by the participating governments.

Thirdly, and perhaps remarkably given his obvious sympathies for international cooperation and his intimate familiarity with federalism as a system of government, Reinsch rarely analogized between international organization and federation. One of the few occasions where the word is mentioned is when he discusses the short-lived Central American Union, which comprised a Central American Court of Justice. This then seemed, to Reinsch, to manifest ‘a first step in the direction of federal government’.<sup>124</sup> Still, none of this had materialized at the time he wrote, which allowed him to conclude that the Central American Union ‘has thus far not passed beyond

<sup>120</sup> It is striking, e.g., that Moynier, writing in 1892, discusses the financing of many unions in some detail, but does not note any similarities across unions: see Moynier, *supra* note 27.

<sup>121</sup> Here perhaps some qualification is in order: others used a similar distinction but in different terms, typically speaking of global and common social interests versus political interests. The latter, by definition, would be connected to the nation state. An example is Kazansky, ‘Théorie’, *supra* note 27, at 366.

<sup>122</sup> See Brierly, ‘The Shortcomings of International Law’, 5 *British Yrbk Int’l L* (1924) 4, at 11.

<sup>123</sup> See Reinsch, *supra* note 104, at 102.

<sup>124</sup> *Ibid.*, at 119.

the stage of purely international action'.<sup>125</sup> Thus, the conclusion presents itself that Reinsch never really considered international organization as proto-federal; it seemed far more proper to think of organizations not as integrating entities, but rather as performing tasks given them by their member states.<sup>126</sup> In other words, if federalism is about power-sharing, international unions are about functional divisions of labour. And when in doubt as to who gets to do what, the most natural thing to do would be to consult those same member states.

Fourthly, the political nature of international organizations is channelled away from their concrete effects on member states and instead linked to their contribution to world peace. Organizations are not so much a-political but are political on a higher level and for a good cause; they contribute to world peace – if 'world peace', an ambition shared by statesmen, Nobel laureates, and Miss Universe contestants alike, can be deemed a political aspiration to begin with. Who could possibly object to world peace? Who could, as a result, possibly object to the exchange of information or to data collection? Thus, organizations are presented as purely beneficial creatures and, what is more, as the result of the very nationalism that they are meant to overcome. There are few or no costs involved in making organizations work (neither financial costs nor political costs in the form of a loss of sovereignty or decision-making power<sup>127</sup>), whereas the potential benefit is nothing less than world peace. In emphasizing world peace, moreover, the distinction between technical and political organizations came to be mobilized. As Brierly shrewdly pointed out, although the League of Nations could be seen as a political organization<sup>128</sup> and was partly active as such, it also promoted 'very numerous conventions' on economic and social matters.<sup>129</sup> Thus, the League was good from two angles: to the extent that it was political it contributed to world peace: and to the extent that it was a-political it also contributed to world peace.

This too was already present in Reinsch's writings: organizations were given functions or powers and would carry those out in the best possible manner and making great use of the best experts of the world, 'operating as public agencies of international interests'<sup>130</sup> and centralizing 'the best experience of the world'.<sup>131</sup> Member

<sup>125</sup> *Ibid.*

<sup>126</sup> As noted, for most of those writing at the turn of the century, the central theme was a narrative of progress: from family via state to international union. The near total absence of such a narrative is a distinguishing trait of Reinsch's work. Organizations may be blessings, but world government does not concern him.

<sup>127</sup> Reinsch systematically makes a point of listing how much the organizations cost per year, at one point even outlining that they offer good value for money: the various intellectual property bureaus 'have always stayed well within their modest budget, notwithstanding the volume and real importance of their published work': see Reinsch, *supra* note 83, at 597.

<sup>128</sup> One contemporary author suggested that the League was political in the sense that it provided a different internationalist alternative to the internationalism of Bolshevism, and therewith helped to protect the nationalism that was considered foundational of the League's member states. Hence, the League stood not for some cosmopolitan idea (like Bolshevism), but rather for a collection of national entities, safeguarding those national entities: see Butler, *supra* note 26, at 40.

<sup>129</sup> See Brierly, *supra* note 122, at 11.

<sup>130</sup> See Reinsch, *supra* note 91, at 1.

<sup>131</sup> *Ibid.*, at 16.

states could do wrong, of course: they could fail to live up to their obligations under the constituent documents of the organizations, but the unions themselves were seen as a higher form of being.

Fifthly, those unions would still be subservient to their member states. To the extent that Reinsch aligns national sovereignty with internationalism, he nonetheless shies away from being all too cavalier about the independence of the unions. They remain under firm control by their member states, even if the bureaux would on occasion be able to take initiatives of their own, or help prepare the agendas of member states' meetings, or even, as with the Sugar Commission, propose prices. Typically, organizations are portrayed as agents of their principals, and lack an identity of their own.<sup>132</sup> This could not be the entire story though, if only because complete control in full detail is impractical, so inevitably an element of delegation crept in (with member states giving the organization broad tasks without telling it what to do in great detail), but always under strict member state control. Reinsch's ambivalent position is best embodied in the Sugar Commission: given the broad task to set prices, yet still not seen as independent in its own right.<sup>133</sup>

And finally, and perhaps most importantly of all, his work gives pride of place to the functions of international organizations. Organizations derive their *raison d'être* from their functions, derived as these are from the common interest and global necessities, and their functions also specify the limits of their proper action. The functions specify the powers of the organization (or are even, as he sometimes suggests, identical to the powers), and help to distinguish organizations from their member states: those member states are unfettered sovereigns, whereas international organizations are hemmed in by their functions.

These six points together would come to constitute the paradigm through which international institutional law would operate: built around functions, the activities of international organizations could be both applauded and criticized by reference to these functions. The notion of function allowed the emergence of a body of scholarship studying the legal position of organizations and their rights and obligations, utilizing a comparative perspective, and it allowed international organizations to prosper: who, after all, could possibly object to entities that would serve useful functions and were not expected to transcend their proper sphere of activities?

Self-evident as functionalism may seem in retrospect, an argument can be made that there was nothing inevitable about its creation. Organizations could have been treated, as for instance Seyersted would later come to do (at least in part),<sup>134</sup> as organic creatures in their own right, as competitors to their member states, rather than as the latter's creations and instruments. The relationship could have been conceived in

<sup>132</sup> It would take almost a century before someone would undertake a systematic conceptual analysis of the ways in which powers are granted to international organizations. See D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (2005).

<sup>133</sup> This ambivalence concerning the independence of international organizations is still a hallmark of functionalism: organizations are typically depicted as having a '*volonté distincte*' from their member states while simultaneously remaining under the control of those same member states.

<sup>134</sup> A synthesis of his opinions was posthumously published as F. Seyersted, *Common law of International Organization* (2008).

terms of irrevocable transfers of powers rather than agent–principal relations mixed with power delegations. And as some of the late 19th century writers made clear, international organizations could have been considered as embryonic elements of world government, replacing the state rather than existing side by side with it. Hence, the question arises: how did Reinsch come to his brand of functionalism, rather than to competing visions? Admittedly, such competitive views were not readily available when he wrote, but still: the contributions by some of the late 19th century writers outlined above could have formed the basis of alternative conceptions of international institutions.<sup>135</sup> Why then did Reinsch seize upon a functionalist analysis? The answer must reside in his familiarity with colonial administration.

## 5 Colonial Inspirations

Reinsch, while a prolific writer, and in spite of his undisputed reputation on the topic among his peers,<sup>136</sup> devoted fairly little of his time to the study of international organizations. Indeed, more generally, his interest in the law seems to have dwindled somewhat over the years: his professional image (as well as his self-image, presumably), it seems, was that of a political scientist rather than a lawyer.<sup>137</sup> Tellingly, he was one of the founders and first vice-presidents of the American Political Science Association, and would later become its president.<sup>138</sup>

Instead of his working full time on international unions, three other topics captured his main interest. One of these was the study of the US political system. Reinsch compiled two large tomes of readings on respectively US federal government and US state government,<sup>139</sup> and two monographs largely devoted to US politics: *American Legislatures and Legislative Methods* (1907)<sup>140</sup> and *Civil Government* (1909).<sup>141</sup>

More surprisingly perhaps, he was one of the pioneers of the study of international relations, publishing a textbook on the topic as early as 1900<sup>142</sup> and, as a historian

<sup>135</sup> This applies perhaps most forcefully to Renault, *supra* note 27, and both of Kazansky's works, *supra* note 27.

<sup>136</sup> It is scarcely a coincidence that Wigmore, Borchard, and Pollock, when compiling a book with leading texts on continental European law, included Reinsch as the author on international unions. A large part of the 1907 article was reprinted in J.H. Wigmore *et al.* (eds), *The Progress of Continental Law in the Nineteenth Century* (1918). Incidentally, doing so cast the law of international unions as something of a European eccentricity, despite Reinsch's attempt to sketch it as relevant for the US and the Americas in his monograph.

<sup>137</sup> Notably, upon his death in 1923, the journal carrying an obituary was the *American Political Science Review*, rather than the *AJIL*. See Ogg, 'Personal and Miscellaneous', 17 *Am Political Science Rev* (1923) 265, at 272–273.

<sup>138</sup> See Schmidt, 'Political Science and the American Empire: A Disciplinary History of the "Politics" Section and the Discourse of Imperialism and Colonialism', 45 *Int'l Politics* (2008) 675, at 677.

<sup>139</sup> See P.S. Reinsch, *Readings on American Federal Government* (1909), and P.S. Reinsch, *Readings on American State Government* (1911).

<sup>140</sup> See P.S. Reinsch, *American Legislatures and Legislative Methods* (1907).

<sup>141</sup> See P.S. Reinsch, *Civil Government* (1909).

<sup>142</sup> See P.S. Reinsch, *World Politics at the End of the Nineteenth Century, as Influenced by the Oriental Situation* (1900).

of the study of international relations notes, Reinsch was teaching classes on world politics at the University of Wisconsin as early as 1902.<sup>143</sup> His work on international affairs is generally characterized by an awareness of global interdependence, something which runs as a red thread through most of his writings. Thus, in a popular work on government, he reminds his audience that each and every country, 'no matter how strong, is in some way dependent upon other countries and other parts of the world',<sup>144</sup> and this circumstance largely explains the rise of international organizations: '[n]o nation is entirely self-sufficient. They must all cooperate [*sic* – JK] in order that the greatest advantages of civilization may be secured.'<sup>145</sup> And this cooperation typically, if not invariably, takes the form of international unions. Reinsch would continue to work in the field of international relations, giving effect to his fascination with China, publishing a monograph on Far Eastern politics in 1911, and, after his spell as US minister to China, diplomatic reminiscences<sup>146</sup> and a study of secret diplomacy.<sup>147</sup> But already the 1900 monograph, *World Politics at the End of the Nineteenth Century*, is preoccupied with the rise of China: it carries the subtitle *As Influenced by the Oriental Situation*.

Reinsch's third main interest lay with colonialism. He devoted his PhD thesis to the topic, studying colonialism from the receiving end, so to speak (it was concerned with the reception of English common law in the US), and would later publish two monographs more concerned with the sending side: *Colonial Government* (1902)<sup>148</sup> and *Colonial Administration* (1905).<sup>149</sup> Doing so was hardly a fluke: it has been observed that the discipline of international relations arose in the US against the background of a burgeoning imperialism.<sup>150</sup> This became an urgent matter for practising social scientists when the US itself became a colonial power following the Spanish-American war,<sup>151</sup> and remained on the agenda under Theodore Roosevelt's expansionist policies.<sup>152</sup> The US acquired Cuba, Puerto Rico, and the Philippines, among others, in 1898, and also annexed Hawaii. All this signalled, as one historian puts it, 'the involvement of the United States in the dialectic of imperialism'.<sup>153</sup>

At home, moreover, US lawyers were accustomed to think of the state and law as neutral, as a 'non-political cushion or buffer between state and society'.<sup>154</sup> The state was supposed to be colour-blind and blind to distributive or redistributive issues; small wonder then that Reinsch carried this attitude with him in his discussions of trade, colonialism, and internationalism. Imperialism and colonialism were no incidents in the late 19th

<sup>143</sup> See Knutsen, 'A Lost Generation? IR Scholarship before World War I', 45 *Int'l Politics* (2008) 650, at 660. Knutsen twice refers to Reinsch's monograph *World Politics*, *supra* note 142, as a 'landmark' book, at 660 and 669.

<sup>144</sup> See Reinsch, *supra* note 141, at 111.

<sup>145</sup> *Ibid.*, at 207.

<sup>146</sup> See P.S. Reinsch, *An American Diplomat in China* (1922).

<sup>147</sup> See P.S. Reinsch, *Secret Diplomacy, How Far Can it be Eliminated?* (1922).

<sup>148</sup> See P.S. Reinsch, *Colonial Government* (1902).

<sup>149</sup> See P.S. Reinsch, *Colonial Administration* (1905).

<sup>150</sup> See generally Long and Schmidt (eds), *supra* note 11; also Schmidt, *supra* note 138, at 675–676.

<sup>151</sup> See W. LaFeber, *The New Empire: An Interpretation of American Expansion 1860–1898* (1963).

<sup>152</sup> See J. Brady, *The Imperial Cruise: A Secret History of Empire and War* (2009).

<sup>153</sup> See G. Barraclough, *An Introduction to Contemporary History* (1964), at 63.

<sup>154</sup> See M. Horwitz, *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy* (1992), at 9.

century US; instead, they were staples of everyday political life. In much the same way as late 19th century European internationalism revolved around imperialism and territorial expansion,<sup>155</sup> so too did US discussions revolve around colonial issues: imperialism and internationalism sometimes stood as opposites, but could also work in tandem, with internationalism (including the attractions of international institutions) relying on imperialism.<sup>156</sup> In such a setting, it is hardly a coincidence that the first journal devoted to the study of international relations, the venerable *Foreign Affairs*, started life as the *Journal of Race Development*, or that Reinsch as vice-president of the American Political Science Association pushed for recognition of colonial administration as a sub-discipline.<sup>157</sup>

It is often stated that the law of international organizations is directly influenced by experiences with federalism, and there is no doubt some truth to this. It can hardly be a coincidence, for example, that the lone voice in the International Court of Justice cautioning against the expansive use of the implied powers doctrine with respect to the United Nations was the American judge on the bench, Green Hackworth,<sup>158</sup> well steeped in the intricacies of federal administration.<sup>159</sup> And yet, as noted, there is fairly little evidence that the work of Reinsch was deeply influenced by federalism. Indeed, functionalism and federalism would have made for an uneasy partnership: federalism is not based on functional divisions, but rather on territorial divisions.<sup>160</sup> Dipping into federalism for inspiration would have steered one away from a functionalist approach, in that federal thought presupposes the sort of struggle for power between the whole and its parts that functionalism tries to avoid precisely by focusing on function. Functionalism, in the form expounded by Reinsch, hardly recognizes power struggles to begin with: organizations exercise their functions, and if they somehow fail to do so or do it overzealously, then their member states will – or should – rein them in.<sup>161</sup> Instead of being influenced by federalism then, the more direct influence for Reinsch stems from his work on colonialism, and, for him, colonialism and the drive to establish international unions both arose from the realization that the world was increasingly becoming interdependent.<sup>162</sup> Both were techniques to foster cooperation and help increase global welfare, in much the same way as open trade. It is no coincidence that Reinsch was a strong supporter of the US Open Door policy towards China taking place towards the turn of the 19th century: this was one more technique for improving people's lives both at home and abroad.<sup>163</sup>

<sup>155</sup> See Koskenniemi, *supra* note 15, 166–169.

<sup>156</sup> See Long and Schmidt, 'Introduction', in Long and Schmidt (eds), *supra* note 11, at 1, explicitly at 21 ('the reliance of internationalism on imperialism ... focuses our view on the continuing importance of unequal relationships and structures in international affairs').

<sup>157</sup> See Vitalis, 'Birth of a Discipline', in *ibid.*, at 159.

<sup>158</sup> See *Reparation for Injuries Suffered in the Service of the United Nations*, advisory opinion [1949] ICJ Rep 174.

<sup>159</sup> Prior to being appointed to the ICJ, Hackworth had spent some four decades working for the US government. See Whiteman, 'Green Haywood Hackworth, 1883–1973', 68 *AJIL* (1974) 91.

<sup>160</sup> K.C. Wheare, *Federal Government* (1947) is still useful.

<sup>161</sup> For this reason, the federal analogy may be most appropriate with respect to the EU, which defies any analysis in strictly functionalist terms. For a recent exploration see R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (2009).

<sup>162</sup> Some of his European predecessors had hinted at similar conceptions: as noted, Moynier invoked the language of suzerainty when discussing organizations, while Kazansky highlighted their civilizing mission. See *supra*, text accompanying notes 70 and 73.

<sup>163</sup> See also Schmidt, *supra* note 11, at 54.

Reinsch was, like so many of his contemporaries, convinced that expansionism was both inevitable and, under certain conditions, desirable. What set him apart from quite a few of his contemporaries though was his concern for the fate of the colonized. Being a cultural but not a military nationalist, and coming as close to being a peace activist as was compatible with the detached self-image of the scholar,<sup>164</sup> Reinsch felt naturally that Western values and technology could have a beneficial impact, and that cooperation was the preferred way to achieve such beneficial impact.

It has been claimed that Reinsch ‘strongly objected’ to colonialism and was a ‘severe critic’ thereof,<sup>165</sup> but this seems overly dependent on an equation of colonialism and territorial conquest. At best, he condemned certain colonial practices, while accepting others – indeed, the same author suggests that Reinsch looked favourably upon such institutions as protectorates.<sup>166</sup> Reinsch was no supporter of territorial aggrandizement and the assimilation of colonies, but he nonetheless accepted that colonial administration could exercise a beneficial influence. In the days when the US was beginning to exercise colonial power and Europe’s infamous ‘scramble for Africa’ had only just taken place, around the turn of the century, colonialism informed much thinking about politics, both in the US and elsewhere.<sup>167</sup>

Yet, it would also be too facile to simply place Reinsch amongst those who firmly believed in the West’s civilizing mission. While not averse to ‘civilizing mission’ arguments,<sup>168</sup> much of his argument was suffused by the twin conceptions of interdependence and peace: in a world of growing interdependence, peace would be best guaranteed by increased cooperation. Sometimes this would simply have to take a colonial form: while the colonialist should guard against ‘reckless exploitation’, there was no harm in introducing ‘a sane and rational policy of economic development’, in introducing ‘a productive economy into regions where at the present time barbarian exploitation holds undisputed sway’.<sup>169</sup>

In an important sense then, the thread that bound Reinsch’s fascination for colonialism and his work on international organizations together was his (maybe overly) rosy picture of colonialism as a form of cooperation: for him colonization, at least in the form of allowing for colonial autonomy, was a form of cooperation, not its antithesis. Colonial administration, free trade, and the establishment of international unions were all part of the same mindset.

This was influenced, no doubt, by the circumstance that Reinsch’s first work on colonialism was a study of how English common law had come to affect the law of the American colonies, and the general approach he took to the topic was that English law was hardly considered as compulsory. His general conclusion was as follows: ‘[r]espect is often expressed for the common law, the resolution is in some cases even formed of using it as a model,

<sup>164</sup> See generally B.J. Furstenberg, *The Scholar and Public Policy: An Analysis of the Thought of Paul S. Reinsch* (MSc Thesis, University of Wisconsin, 1964, on file at NYU library).

<sup>165</sup> See Schmidt, *supra* note 11, at 58 and 56.

<sup>166</sup> *Ibid.*, at 64.

<sup>167</sup> Schmidt himself cogently argues that the discipline of international relations owes much to colonialism: *ibid.*, at 58.

<sup>168</sup> See, e.g., Reinsch, ‘The Negro Race and European Civilization’, 11 *Am J Sociology* (1905) 145.

<sup>169</sup> See Reinsch, *supra* note 149, at 11.

but it is only in a few cases clearly established as the rule of the judicature and in still fewer instances followed with precision in the ordinary administration of the law'.<sup>170</sup>

Such a conception builds on an underlying notion of colonialism as a largely benign force: as an attempt to influence by wisdom and usefulness rather than imposition. Colonialism signified a common enterprise, a common adventure on the path to civilization and prosperity. The colonizer's legal system may be of use for that purpose, but always adapted to local conditions, and with some measure of discretion left to the local authorities. While he would later acknowledge there to be a distinction between settlers' colonies and conquered colonies, this distinction would affect matters in degree, but not in kind: the administration of law in conquered colonies would merely be more difficult, and this would be the result not so much of the coercion used, but of the greater variety between local laws and the law of the colonial power. With settlers' colonies, after all, one might expect greater affinity between the law in the place of origin of the settlers and the law as it develops in the colonies.<sup>171</sup>

The important point, though, was not to become overly ambitious. Reinsch concludes the introduction to his work *Colonial Administration* with the following words: '[i]t will ... be wise for the colonial legislator not to attempt too much, not to have too ambitious a program. But if rightly planned, the economic reforms which it is in his power to effect with success, may, like the massive architecture of a cathedral crypt, in time upbear an edifice which will answer larger purposes than those of mere economic welfare and progress.'<sup>172</sup>

In the end, colonial expansion and cooperation were seen, by Reinsch, as two techniques, different if intimately related, for achieving the same goal: peace in an interdependent world.<sup>173</sup> In his *World Politics*, he points out that the best policy for the US is the development of friendly and commercial relations with other states rather than territorial aggrandizement, and such is to take place by means of the creation of trade depots and establishing means of communication.<sup>174</sup> If universal imperialism, as he refers to it, should be avoided because it would inevitably lead to costly conflicts, cooperation in the fields of trade and communication is to be praised. From here it is but a small step to look at international unions.

Reinsch's opinion that colonialism and cooperation were two related techniques comes out most vividly in a speech given to the Milwaukee Bankers' Club, in 1906, where Reinsch argues that 'it will be easy for the United States to maintain the upper hand in South American affairs without ever appealing to force ... The time is ripe for the United States to take a leading part in South American affairs ... [and] it is for this country to say whether we shall take advantage of these opportunities or not.'<sup>175</sup> In light of this statement, it makes sense that Reinsch's monograph on international

<sup>170</sup> See Reinsch, *supra* note 80, at 57.

<sup>171</sup> See Reinsch, *supra* note 148, at 346.

<sup>172</sup> *Ibid.*, at 37.

<sup>173</sup> The conflation of imperialism and internationalism reached its highpoint in the (aborted) plans to establish an International Colonial Institute. See the discussion in Descamps, *supra* note 27, at 38–41.

<sup>174</sup> See Reinsch, *supra* note 142, at 361.

<sup>175</sup> Quoted in Furstenberg, *supra* note 164, at 108.

unions devotes considerable – and detailed – attention to the union of American republics, as does his downplaying of the role of the United States:

It is of course in the nature of things that the government of a nation so great and powerful as is the United States should exert a considerable influence in any council that it may enter, but there was absolutely no inclination to strive for an influence greater than would be freely accorded by the other governments as a natural result of the situation. The union of American republics is therefore truly international, its action is based upon the unanimous consent of all the states composing it, and no power or group of powers claims for itself a determining influence.<sup>176</sup>

The statement makes clear that cooperation in the form of organizations was one of various possible emanations of the ‘civilizing mission’, but is remarkable also in the light it sheds on how international unions would be conceptualized. Reinsch is careful to point out that the union is the result of unanimous consent, even if the consent is dictated as the ‘natural result of the situation’ of having one powerful state in the vicinity of a number of lesser powers. The difference in political power is acknowledged but rendered irrelevant as a matter of law: what matters is the consent of the member states. Anyone in doubt, moreover, would eventually come to doubt the sincerity of the US: even if it was vastly more powerful in political terms, it had ‘no inclination to strive’ for a disproportionate amount of influence. The cynic might observe that it would hardly have needed to, but that is, in Reinsch’s view, beside the point.

The confluence of colonialism and cooperation also plays out on the level of methodology. No two colonial powers were the same, and it seems fair to say even that few colonial situations, administered by the same country, were the same. As a result, Reinsch derives many of his insights in colonial government and colonial administration from careful comparison. Typically, his chapters are structured as sequential discussions of the practice of the English, the French, the Germans, and others (or the Spanish, Portuguese, and Dutch and others, depending on the period or the territory under discussion), leading up to a ‘lessons learned’ type of conclusion.

His colonial studies themselves, in the meantime, also follow a pragmatic structure, and one that invites a comparative methodology.<sup>177</sup> *Colonial Government* starts with a discussion of a number of general issues (including the role of missionaries and entrepreneurs), followed by a systematic overview of forms of colonial government (from spheres of influences to protectorates, from administration by chartered companies to direct administration, and culminating in chapters on representative institutions, self-government, and colonial federations), and concluded by a third part on institutions of colonial government (organs, institutions, law, courts). Likewise, *Colonial Administration* has a pragmatic, practical set-up, looking almost like a handbook for the would-be colonial administrator. It discusses how to organize education in the colonies, how to finance colonies, how to achieve development, and how to organize defence and policing tasks. And again, the chapters are typically comparative

<sup>176</sup> See Reinsch, *supra* note 104, at 116–117.

<sup>177</sup> This followed the work of other writers on colonial administration, most notably Alleyne Ireland: see Schmidt, *supra* note 11, at 59–60.

in their organization, either comparing the practices of the various colonial powers, or comparing the types of approaches needed for the different categories of colonized peoples,<sup>178</sup> or comparing various colonial situations (say, Egyptian land tax as compared to the so-called Javan *land rente* and land taxation in Algeria).

In conclusion, Reinsch's work on international unions owed something to his earlier studies of colonialism. It cannot be maintained that the comparative methodology was solely inspired by colonial studies; other scholars before Reinsch had also adopted something of a comparative approach to international unions.<sup>179</sup> Nonetheless, Reinsch's work on colonialism spawned insights about cooperation between states, about division of labour and functions, and about applying law across boundaries, that proved to influence functionalism – far more so, at any rate, than any federal analogy.<sup>180</sup>

## 6 Concluding Remarks

Functionalism has exercised and continues to exercise an enormous influence on the law of international organizations, and for good reason. Functionalism has considerable explanatory power, both when it comes to the design of international organizations and with respect to the contents of international institutional law. Many staples of functionalist discourse serve to enable the organization to exercise its assigned functions, from the implied powers doctrine to the prevalence of privileges and immunities, from the composition of many an international organ to the rules (limited as they are) on succession between organizations.<sup>181</sup>

This article has attempted to lay bare functionalism's ancestry. While rarely spelt out in detail, functionalism would become systematized in the work of Paul Reinsch in the early 20th century. Instead of drawing inspiration from federal thought, Reinsch was mostly inspired by the theory and practice of colonial administration, viewing international organizations like he viewed colonial administration: as a means of cooperation rather than domination. Yet, in Reinsch's work, domination is never far off: he realizes all too well that powerful states may utilize international organizations to serve their own interests, as his discussion of cooperation in the Americas makes perfectly clear.

Given functionalism's considerable explanatory power, there is little reason to discard it. Instead, the discussion of its ancestry has, it is hoped, made two things clear. First, functionalism is itself the product of political attitudes, and needs to be

<sup>178</sup> Reinsch distinguishes, awkwardly, between 'savage races, those populations whose social cohesion has been impaired or destroyed, the Mohammedan races, and other races of a higher civilization': see, e.g., Reinsch, *supra* note 149, at 41.

<sup>179</sup> This applies to Descamps, *supra* note 27, and Moynier, *supra* note 27, even though their work lacks the sort of synthesis that may make comparison worthwhile.

<sup>180</sup> Federal analogies in international institutional law are criticized on rather different grounds (e.g., absence of *demos*) by Arangio-Ruiz, 'The "Federal Analogy" and UN Charter Interpretation: A Crucial Issue', 8 *EJIL* (1997) 1.

<sup>181</sup> See generally Klabbers, *supra* note 65.

approached as such. In particular its insistence that organizations are by definition benevolent is open to scrutiny, in light of the analogies it draws between international organizations and colonialism. The colonial inspirations of functionalism and international organization suggest that international organizations may well be used instrumentally by powerful member states so as to continue expansionist policies; this is not a fluke or an accidental by-product, but is an inherent part of functionalism. Accordingly, it has recently been noted that an organization such as the IMF has been following the US Treasury to an uncomfortably large extent.<sup>182</sup> Hence, a political perspective on functionalism may help to uncover biases in the system – as has indeed been happening on occasion.<sup>183</sup> Secondly, and relatedly, controlling the activities of international organizations is the ‘blind spot’ of functionalism. Such control was long considered unnecessary, either because organizations could do no wrong, or because they ought to be controlled by their member states (or both), but even the latter is insufficient: it makes a difference whether the World Bank is held to account to member states, or to the poor and dispossessed in the places where projects are carried out.<sup>184</sup> Hence, the challenge for international institutional law is to find a way to integrate issues of control into functionalism.

For Reinsch and his contemporaries, control was hardly an issue. International organizations, after all, were not expected to do wrong, with the possible exception of encroaching on state sovereignty, as illustrated by Renault’s listing of the advantages and disadvantages of membership of international organizations.<sup>185</sup> This, however, was caught by the theory in the way it reconciled membership of organizations with state sovereignty: not in conflict, but in harmony. Other than this, limits were, quite literally, anathema for the first generations of writers on international institutions. Perhaps the best way to illustrate the prevailing spirit is by reverting, once again, to Moynier, writing in 1892 about the wonders of the telegraph union: ‘[i]l serait oiseux de démontrer les avantages considerable que le monde civilize a retiré de la conclusion du traité de Paris. On les comprend sans qu’il soit besoin d’y insister.’<sup>186</sup> In other words, the beneficial effects of international organizations are self-evident; they need not be demonstrated.

There is an intimate connection between the cosmopolitan bliss of international organizations (even if mediated through experiences with colonial administration) and functionalist theory, as is visible in Reinsch’s writings. States, those containers of national sovereignty, are capable of bad behaviour. It is no coincidence that the most idealistic tract on international organizations, Leonard Woolf’s *International Government*, written during World War I, quite literally starts with a brief chapter on the causes of war.<sup>187</sup> This at once brings cause and effect together: states are the

<sup>182</sup> See R. Stone, *Controlling Institutions: International Organizations and the Global Economy* (2011).

<sup>183</sup> See, e.g., Singer, ‘Jurisdictional Immunities of International Organizations: Human Rights and Functional Necessity Concerns’, 36 *Virginia J Int’l L* (1995) 53.

<sup>184</sup> See Grant and Keohane, ‘Accountability and Abuses of Power in World Politics’, 99 *Am Political Science Rev* (2005) 29, at 33.

<sup>185</sup> See Renault, *supra* note 27.

<sup>186</sup> See Moynier, *supra* note 27, at 18. Moynier’s cosmopolitan credentials were impeccable: he was one of the founders of the Red Cross.

<sup>187</sup> See L. Woolf, *International Government* (1916), at 8–11.

problem, international government through organizations the solution. It is this sentiment that runs through a century of writings on international institutional law. Schermers and Blokker can still lament the horizontal nature of international law and claim that it has 'partly been compensated for by the creation and functioning of international organizations'; partly, international organizations compensate 'for the lack of a central, supranational authority'.<sup>188</sup> Reinsch, while not the first to launch the idea, was no stranger to it, postulating an ethical duty to cooperate on the international level, reinforced by practical necessities and resulting in a 'concrete and practical' cosmopolitanism.<sup>189</sup>

Methodologically there is a strong connection between functionalism and comparativism, and, again, the colonial experience proved inspirational. The connection between functionalism and comparativism may seem random, but can be theorized as well. Organizations are created to perform certain functions, rather than as organic creatures that can decide on their own activities. Since these functions cannot be expected to be identical from one organization to the next (why duplicate things?), it would seem to follow that organizations are all unique. In order to formulate any general conclusions in such a functionally organized system, the most obvious path is to see what they have in common and where their ways part. Indeed, any comparison will have to focus on function because the only thing international organizations have in common is that they have been created to perform functions. Hence, functionalism and comparativism work in tandem: functionalism generates hypotheses which can be tested through a comparative method or, more likely perhaps, the other way round: comparing organizations generates hypotheses which sometimes – all too rarely, perhaps – will be tested for theoretical coherence or cast into large explanatory frameworks.

Functionalism in the law of international organizations has been, and is, tremendously influential. Since functionalism provides the legal infrastructure for the work of international organizations, it has facilitated the growth of organizations as well as the influence these entities can exercise. Therewith, the social and political relevance of a proper understanding of functionalism is self-evident. Yet, its intellectual origins have always remained hidden from view. This article hopes to have made a contribution to our understanding of functionalism and its origins and, in its wake, of the ways in which international organizations work.

<sup>188</sup> See Schermers and Blokker, *supra* note 1, at 6 and 7, respectively.

<sup>189</sup> See Reinsch, *supra* note 91, at 17.