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# The EJIL Foreword: The Transformation of International Organizations Law

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## Abstract

This article discusses the ongoing transformation of international organizations law. It first provides an overview (an anatomy) of the paradigmatic theory concerning the law of international organizations: the theory of functionalism. Subsequently, it investigates how functionalism came about and how, from the 1960s onwards, its flaws increasingly became visible. The argument, in a nutshell, is that functionalism, as a theory concerned with relations between international organizations and their member states, has little or nothing to say about the effects of international organizations on third parties – non-member states, individuals and others. Moreover, it is often applied to entities that can hardly be deemed ‘functional’ in accordance with the theory. All of this is increasingly viewed as problematic and forces functionalism to adapt. Whether it can do so is questionable, though, since some of its problems are structural rather than contingent. Things are illustrated by the invocation of the United Nations’s possible responsibility for causing (or failing to prevent) the outbreak of cholera in Haiti.

## 1 Introduction

As Robert Cover held a little over three decades ago, we inhabit a *nomos* – a normative universe – in which we constantly invoke right and wrong, legal and illegal, valid and invalid.<sup>1</sup> Part of our normative universe is formed by international organizations: entities exercising more or less public functions and typically created between states and sometimes seen as the benign alternatives to states. Few people would dispute the relevance of international organizations as part of our *nomos*, and yet our understanding of these creatures is very limited. We have some idea as to what they – or at least some of them – do but only a rudimentary understanding of why and how they do it, and much less still of the legal structures, rules and doctrines that allow them to work. Our understanding of the law of international organizations does not run very deep.

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<sup>1</sup> Cover, ‘The Supreme Court 1982 Term. Foreword: *Nomos* and Narrative’, 97 *Harvard Law Review* (1983) 4.

This lack of understanding is surprising, as international organizations have on most accounts been around for some 150 to 200 years. Moreover, the leading – dominant, paradigmatic – theory concerning the law of international organizations has been around for well over a century and has not been amended a great deal since. The basic outlines of functionalism, the name under which the theory is known, were already in place in the early 20th century, well before the much-vaunted ‘move to institutions’ took off in earnest.<sup>2</sup> It is no hyperbole to refer to functionalism as being paradigmatic, even taking Thomas Kuhn’s relatively narrow definition of that much-abused term into account.<sup>3</sup> Almost all international organizations lawyers, practitioners and academics alike have been functionalists, if only because this is how the discipline continuously reproduces itself – the number of self-consciously non-functionalists has always remained extremely limited.<sup>4</sup>

The main purpose of this article is to dissect functionalism and see how it came to be developed and how it lost some of its traction and attraction. The moment to do so is fortuitous: the law of international organizations is undergoing a transformation, and this transformation shall operate as the backdrop to the story of the rise and (relative) fall of functionalism. It will be my contention that the law of international organizations is losing some of its – well – functional orientation and is slowly trying to move towards something more normatively aware but that, thus far, the functional and the normative orientations have experienced problems of fit. In different words, the underlying ethos of international institutional law<sup>5</sup> is changing. It is slowly moving – or trying to do so – from managerialism towards a more responsible politics. Functionalism has been forced to do so. As it turns out, functionalism had – and has – one serious blind spot, which stems from it being biased in favour of the organization. It cannot account for the role of international organizations in relation to actors other than member states, precisely because an appeal to the function of the organization is capable of justifying any and all activities, to the possible detriment of third parties. It is this blind spot that both causes functionalism to adapt and, at the same time, makes it extremely difficult for functionalism to do so.

Functionalism has never been authoritatively defined. In a nutshell, as I shall reconstruct it, it is essentially a principal–agent theory, with a collective principal (the member states) assigning one or more specific tasks – functions – to their agent. In functionalism, this makes for a closed universe, aiming to provide comprehensive coverage concerning the way organizations are legally structured and embedded. Needless to say, precisely because functionalism has never been authoritatively defined, my reconstruction is an amalgam of insights culled from judicial decisions and legal writings and often rather obviously decontextualized. It brings together authors as varied

<sup>2</sup> Kennedy, ‘The Move to Institutions’, 8 *Cardozo Law Review* (1987) 841.

<sup>3</sup> T. Kuhn, *The Structure of Scientific Revolutions* (2nd edn, 1970), at 10.

<sup>4</sup> Possibly the major non-functionalist has been F. Seyersted, *Common Law of International Organizations* (2008). To some extent, Seyersted has been followed by N.D. White, *The Law of International Organisations* (1996).

<sup>5</sup> I will use the terms ‘international organizations law’ and ‘international institutional law’ interchangeably.

as Paul Reinsch and Frank Sayre, Henry Schermers and Chittharanjan Amerasinghe, Ignaz Seidl-Hohenveldern and Michel Virally. These may have held different opinions on many issues, and may have had diverging political sympathies, but all have adhered to the basic insight that international organizations are functional entities, set up to perform specific tasks for the greater good of mankind and, as such, in need of legal protection. These functionalist needs expressed themselves predominantly in some of the dominant doctrines relating to international organizations, including their powers, their privileges and immunities and their rules on membership. Other aspects of international organization law have remained outside functionalism's remit, albeit not for want of trying. It has turned out that functionalism, being a theory concerning the relationship between organizations and their members, has little to say about legal issues that could not be cast in terms of that relationship – this applies to internal organizational issues (such as staff relations, relations between organs) and, most prominently perhaps, to the situation of third parties.

Functionalism's blind spot relating to control is compounded by its very broad scope of application. It is not just the case that the discipline finds it hard to hold organizations to account; it is also the case that functionalism has come to be applied to a wide variety of entities, not all of which can with equal conviction be said to be working towards the common good. Put differently, there is a qualitative difference between the UN Children's Fund (UNICEF) and the Organization of the Petroleum Exporting Countries (OPEC), yet both enjoy the same status and same treatment under the law of international organizations. There is a marked difference between the North Atlantic Treaty Organization (NATO) and the World Health Organization (WHO), yet both are treated in essentially the same way.

The transformation of functionalism is a process of fits and starts, action and reaction, behaviour and response.<sup>6</sup> It hardly fits a linear narrative except in the broadest of outlines. In such a broad outline, functionalism emerged in the late 19th and early 20th centuries, partly inspired by technologies of colonial governance. It survived the next century or so well-nigh unscathed, despite being outdated at the moment the 'move to institutions' started to take off in earnest and also despite the occurrence of two World Wars and the creation of new international organizations on a massive scale in the 1940s and 1950s. This lasted until, roughly, the 1960s and 1970s, when the theory finally hit the wall, and it slowly started to dawn on observers that the position of international organizations in relation to the outside world required insights that classic functionalism was unable to provide. Ever since, the discipline of international institutional law has been grappling with the position of international organizations in the wider world, and this process is still, by and large, under way.<sup>7</sup>

<sup>6</sup> See Klabbers, 'The Changing Image of International Organizations', in J.M. Coicaud and V. Heiskanen (eds), *The Legitimacy of International Organizations* (2001) 221; Alvarez, 'International Organizations: Then and Now', 100 *American Journal of International Law (AJIL)* (2006) 324.

<sup>7</sup> See also Klabbers, 'Contending Approaches to International Organizations: Between Functionalism and Constitutionalism', in J. Klabbers and Å. Wallendahl (eds), *Research Handbook on the Law of International Organizations* (2011) 3.

I will tell the story, warts and all, largely following a chronological approach and in full awareness that my reading of the story owes much to my own time and place.<sup>8</sup> This is by no means a necessary way of doing things – the story could also be told in thematic ways, for instance, as one of autonomy versus control<sup>9</sup> or, more commonly, as one of politics versus technocracy.<sup>10</sup> Like every narrative, however, each approach highlights some aspects and obscures others. The attraction of telling the story chronologically is that it underlines the zombie-like state of the discipline for much of its existence. Part of the argument will be that functionalism was created for a group of entities that always was small and already had become relatively small by the 1920s. Functionalism, thus, came to be applied to entities for which it never was created and for which it is, really, not all that suitable.

I will tell the story of the emergence of functionalism by exploring the writings of two early authors: Paul Reinsch and Frank Sayre, both of them Americans. This may come as a surprise. In the early 21st century, relatively few American scholars were persistently active in the field of international institutional law, and somehow international institutional law was often regarded as a somewhat eccentric European interest,<sup>11</sup> yet clearly, the discipline was at least co-founded by Americans.<sup>12</sup> More surprisingly perhaps, British and French authors were largely absent at the time of functionalism's emergence.<sup>13</sup> The late 19th- and early 20th-century authors tended to hail

<sup>8</sup> As Toulmin so nicely put it, any account is 'the narrative of a past episode reflected in a more recent mirror'. See S. Toulmin, *Cosmopolis: The Hidden Agenda of Modernity* (1990), at 22. For further methodological reflection, see also Bell, 'Writing the World: Disciplinary History and Beyond', 85 *International Affairs* (2009) 3.

<sup>9</sup> See R. Collins and N.D. White (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (2011).

<sup>10</sup> See Klabbers, 'Two Concepts of International Organization', 2 *International Organizations Law Review (IOLR)* (2005) 277; Klabbers, 'International Institutions', in J. Crawford and M. Koskeniemi (eds), *The Cambridge Companion to International Law* (2012) 228; Peters and Peter, 'International Organizations: Between Technocracy and Democracy', in B. Fassbender and A. Peters (eds), *Oxford Handbook of the History of International Law* (2012) 170. More generally, see also Howse, 'From Politics to Technocracy – And Back Again: The Fate of the Multilateral Trading System', 96 *AJIL* (2002) 94; Koskeniemi, 'The Fate of Public International Law: Between Technique and Politics', 70 *Modern Law Review (MLR)* (2007) 1.

<sup>11</sup> The early international unions, it must be said, were largely limited to Europe, and it is hardly a coincidence that one of Reinsch's articles on international unions was reproduced in a compilation of texts on continental European law. See J.H. Wigmore *et al.* (eds), *The Progress of Continental Law in the Nineteenth Century* (1918).

<sup>12</sup> Usually, the US tradition before World War II is associated with an emphasis on diplomacy and dispute settlement rather than with the creation of international institutions. See generally M. Janis, *The American Tradition of International Law: Great Expectations 1789–1914* (2004); H. Shinohara, *US International Lawyers in the Interwar Years: A Forgotten Crusade* (2012).

<sup>13</sup> It is difficult to think of any British legal scholar systematically discussing international unions before World War I, although individual unions were sometimes discussed in British journals. See, e.g., Bergne, 'The International Copyright Union', 3 *Law Quarterly Review (LQR)* (1887) 14. As for France, Louis Renault is among the very few to discuss international organizations and even then primarily from a statist perspective. Renault, 'Les unions internationales: leurs avantages et leurs inconvénients', 3 *Revue Générale de Droit International Public (RGDIP)* (1896) 14.

from smaller and (semi-) peripheral powers such as Switzerland<sup>14</sup> or Belgium,<sup>15</sup> with possibly the first systematic treatise being written in Russian by a law professor based in Odessa, Pierre Kazansky (as he became known in the francophone community).<sup>16</sup> Perhaps one explanation may be that both Britain and France were trying to retain their empires and were too busy finding ways of shaping and administering their colonial relationships.<sup>17</sup> It was only during World War I that British scholarship started to think more systematically about international organizations.<sup>18</sup>

Reinsch may be credited mainly with developing functionalism, while Sayre, writing in 1919, provided the finishing touches and helped broaden and consolidate the theory. Ironically, Sayre's work, written so as to help guide the creation of the League of Nations, also marked the beginning of the end of functionalism. The move to institutions, which took place in 1919, saw the creation of many entities that no longer lived up to the functionalist blueprint, and, yet, functionalism has remained the leading theory concerning the law of international organizations ever since, most likely due to considerable (and long-lasting) confusion or at least intermingling involving the legal side of functionalism and functionalist integration theory (more on this later in this article).<sup>19</sup>

The story of functionalism hitting the wall revolves around an advisory opinion of the International Court of Justice (ICJ), accompanied by some comments on politicization, on the role of immunities in staff cases and on the collapse of the International Tin Council (ITC). The ICJ's advisory opinion on the WHO's headquarters agreement with Egypt is of supreme relevance because it sheds some light on the structural problems functionalism has with international organizations acting in the world at large.<sup>20</sup> It is by no means the only manifestation. Already in the 1960s, organizations experienced difficulties when confronted with suits from either their staff or from those who had, for example, lost property in the midst of a United Nations (UN)-sponsored operation. Still, the *WHO and Egypt* opinion draws attention to a structural problem,

<sup>14</sup> F. Meili, *Die internationalen Unionen über das Recht der Weltverkehrsanstalten und des geistigen Eigentums* (1889); G. Moynier, *Les bureaux internationaux des unions universelles* (1892).

<sup>15</sup> E. Baron Descamps, *Les offices internationaux et leur avenir* (1894).

<sup>16</sup> Kazansky, 'Les premiers éléments de l'organisation universelle', 29 *Revue de Droit International et de Législation Comparée (RDILC)* (1897) 238; Kazansky, 'Théorie de l'administration internationale', 9 *RGDIP* (1902) 352.

<sup>17</sup> One of the central themes pre-occupying lawyers in late Victorian Britain, it seems, was the maintenance of empire and the codification of English law in the colonies. See, e.g., D. Bell (ed.), *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought* (2007); N. Duxbury, *Frederick Pollock and the English Juristic Tradition* (2004).

<sup>18</sup> Symbolized perhaps by L. Woolf, *International Government* (1916). The newly created Grotius Society saw a first exposition in 1916 as well, although, tellingly perhaps, its author was Dutch. See Bisschop, 'International Leagues', 2 *Transactions of the Grotius Society* (1916) 117.

<sup>19</sup> One example is the self-conscious explanation of the emergence of international financial regulatory organizations in terms of neo-functionalist integration theory by Zaring, 'International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations', 33 *Texas International Law Journal* (1998) 281.

<sup>20</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (WHO and Egypt)*, Advisory Opinion, 20 December 1980, ICJ Reports (1980) 73.

a problem that also came to the fore when the International Law Commission (ILC), drafting the 1986 Vienna Convention on the Law of Treaties with or between International Organizations, proved unable to create a coherent and plausible regime for treaties concluded with or between international organizations – in particular, the position of the member states of the organization giving rise to unsolvable puzzles.<sup>21</sup>

The problems of functionalism in relation to the outside world are most obviously visible with respect to issues of accountability. This has been noted at least since the Tin Council crisis of the mid-1980s, which directly or indirectly spawned an impressive amount of literature on the responsibility or accountability of international organizations and their member states under international law as well as all sorts of initiatives from professional bodies of international lawyers. Still, not only is the ascription of responsibility difficult when it comes to international organizations, but the fact that they enjoy immunity from suit is also a practical stumbling block. In many cases, this immunity is conceptualized as coming close to, or actually being on a par with, absolute immunity.

The outbreak of cholera in Haiti illustrates some of the salient issues. The cholera epidemic is possibly – most likely – caused by a Nepalese contingent of UN peacekeepers. Several suits have been filed in the USA alone, and in all of these, the UN has invoked its immunity.<sup>22</sup> This issue has a functionalist origin: the idea behind the immunity of international organizations is to prevent member states from interfering with the organization's functions. While the immunity is usually limited to immunity for official acts, any distinction between official and unofficial acts is difficult to maintain and comes, it would seem, with a very strong presumption that the opinion of the organization itself is decisive.<sup>23</sup> Hence, the result is the *de facto* absolute immunity of the UN. In other words, it would seem that functionalism is providing an obstacle to the legal responsibility of the UN or, indeed, of international organizations generally,<sup>24</sup> as most of them can claim immunity from suit.<sup>25</sup>

The heart of this article will be formed by an analysis of the emergence of functionalism and its subsequent fall from grace. Thereafter, the Haitian cholera tragedy will be used to explore some of the pitfalls and possibilities of functionalism, followed by a discussion on whether, and if so how, functionalism can be saved. I will start, however, by providing an outline of functionalism, both in terms of its structure as a theory and

<sup>21</sup> C.M. Brölmann, *The Institutional Veil in Public International Law* (2007). Vienna Convention on the Law of Treaties with or between International Organizations 1986, 25 ILM 543 (1986).

<sup>22</sup> See generally Boon, 'Haiti Cholera Case: New Briefs Filed on Privileges and Immunities', available at [opiniojuris.org/2014/05/29/haiti-cholera-case-new-briefs-filed/](http://opiniojuris.org/2014/05/29/haiti-cholera-case-new-briefs-filed/) (last visited 18 December 2014); Boon, 'Developments in the Haiti Cholera Case: US Supports Absolute Immunity of UN and Two New Suits Filed', available at [opiniojuris.org/2014/03/13/developments-haiti-cholera-claims-un-us-support-absolute-immunity-two-new-suits-filed/](http://opiniojuris.org/2014/03/13/developments-haiti-cholera-claims-un-us-support-absolute-immunity-two-new-suits-filed/) (last visited 18 December 2014).

<sup>23</sup> This may be deduced from *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights*, Advisory Opinion, 29 April 1999, [1999] ICJ Reports 62.

<sup>24</sup> See already Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns', 36 *Virg J Int'l L* (1995) 53.

<sup>25</sup> A rare exception is the European Union (EU), whose protocol on privileges and immunities does not refer to the immunity of the EU itself (as opposed to its staff, e.g.).



in terms of its substance. This has not often (if at all) been done in a systematic way, yet it is indispensable for any discussion of the fate of functionalism to make sense.

The task of writing functionalism's story is considerably complicated by the circumstance that functionalism is a broad church. Not only is it the case, as will be shown below, that the scope of functionalism (in terms of its coverage) is broad, but it is also broad in the sense that it comprises lawyers working in a variety of traditions. Perhaps the 'purest' kind of functionalism is practised by the Leiden school, personified first by Schermers and continued by Niels Blokker,<sup>26</sup> academics with a keen eye for problem solving in pragmatic fashion, guided by the idea that the functions of organizations play a central role. Functionalism also encompasses practitioners such as Amerasinghe<sup>27</sup> and, earlier, Wilfred Jenks<sup>28</sup> and Felice Morgenstern<sup>29</sup> – individuals employed by international organizations and reflecting and reporting on their practical experiences in a systematic way around the functions ascribed to organizations. While all of them have systematically thought about organizations, they have by and large refrained from systematic and more or less formal theorizing. By contrast, a third group of scholars (I will refer to them as rationalists), inspired by rational choice theory and economic thought, has aspired to do just this – they have engaged in systematic, formal theorizing.<sup>30</sup> Here, the distinction between legal academics and social scientists is one of degree rather than kind, and they have done much to elevate international organizations to a distinct subdivision of scholarship but, again, revolving around the functions of international organizations. In a sense, then, rationalists tend to be functionalists, even if not all functionalists are rationalists. The net result is that to the extent that functionalism is cast in theoretical terms, it employs a largely rationalist vocabulary, and employing parts of that vocabulary seems inescapable when reconstructing functionalism.

## 2 The Anatomy of Functionalism

### A The Setting

In the early 21st century, it is difficult to think of international law and the governance of international affairs in isolation from international organizations.<sup>31</sup> Much international law is made within, or under the auspices of, international organizations. Trade relations presuppose the World Trade Organization (WTO); refugees become familiar with the UN High Commissioner of Refugees (UNHCR)

<sup>26</sup> H.G. Schermers and N.M. Blokker, *International Institutional Law: Unity within Diversity* (5th edn, 2011).

<sup>27</sup> C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (1996).

<sup>28</sup> C.W. Jenks, *International Immunities* (1961).

<sup>29</sup> E. Morgenstern, *Legal Problems of International Organizations* (1986).

<sup>30</sup> See, e.g., B. Koremenos, C. Lipson and D. Snidal (eds), *The Rational Design of International Institutions* (2001), although their notion of 'institutions' encompasses far more than formal organizations. Lawyers working in this tradition include Abbott, Trachtman and Guzman.

<sup>31</sup> The point is well made in M. Ruffert and C. Walter, *Institutionalisiertes Völkerrecht* (2009); an English translation recently appeared as M. Ruffert and C. Walter, *Institutionalized International Law* (2015).

and the fight against piracy off the Somali coast is fought by NATO and the European Union (EU), among others, coordinated by yet another entity that may or may not qualify as an international organization, the Contact Group on Piracy off the Somali Coast. The G-20, likewise an entity of uncertain status,<sup>32</sup> is engaged in combating tax evasion by multinational companies, and the Organisation for Economic Co-operation and Development (OECD) is tasked with preparing a convention on the topic.<sup>33</sup>

Not only does international law emerge from organizations, but it also sometimes requires them in order to be applied. The best-known example is that many feel that interventions for humanitarian reasons demand the consent of the UN Security Council. This became clear when NATO intervened to stop ethnic cleansing in Kosovo some 15 years ago and was once again underlined when possible interventions in Iraq and Syria reached the global political agenda in 2014. In short, international organizations play a pivotal role, and the broad story of international organizations – what they are, how they work, what they do – can be told in various distinct vocabularies. One such grand narrative is to draw connections between international organizations and global capitalism. In such a narrative, international organizations help grease the wheels of global movements of goods, services and capital while simultaneously keeping labour in check, and such a narrative is intuitively plausible when contemplating the WTO, the International Monetary Fund (IMF) and the World Bank or the OECD, and perhaps also the International Labour Organization (ILO) and the many social-economic activities of the League of Nations and, later, the UN.

In more subtle form, Craig Murphy has traced the various waves of international organizations from the 1860s to industrial catalysts. Applying a neo-Gramscian framework, Murphy contends that industrial revolution tends to be accompanied by a new wave of organizations, revolving around one organization considered pivotal for the global economy and operating as a catalyst or focal point.<sup>34</sup> Thus, Murphy distinguishes a first wave of modern organizations starting in 1865 with the International Telecommunication Union (ITU); a second wave starting around 1905 and involving the Radiotelegraph Union, and a third wave revolving around Intelsat, starting in the mid-1960s.<sup>35</sup> Elements of such a story could then be linked to the coincidence of the creation of international organizations and both European and American colonialism. Many organizations saw the light during the later colonial era, and quite a few of

<sup>32</sup> Henley and Blokker, 'The Group of 20: A Short Legal Anatomy from the Perspective of International Institutional Law', 14 *Melbourne Journal of International Law (MJIL)* (2013) 550.

<sup>33</sup> See [www.oecd.org/ctp/beps-2014-deliverables.htm](http://www.oecd.org/ctp/beps-2014-deliverables.htm) (last visited 8 December 2014).

<sup>34</sup> Murphy wrote just before the Internet revolution took off in earnest, and one can only wonder whether the absence of an international organization to spearhead this fourth revolution (the Internet Corporation for Assigned Names and Numbers, after all, is not considered an international organization) would affect his theorizing. C. Murphy, *International Organization and Industrial Change: Global Governance since 1850* (1994).

<sup>35</sup> *Ibid.* Also neo-Gramscian, but less systematically addressing international organizations, is R. Cox, *Production, Power, and World Order: Social Forces in the Making of History* (1987).



the early writings made explicit that colonial administration and international organization could serve the same purpose of enhancing global welfare.<sup>36</sup>

Another way of framing the larger story of international organizations is by adopting a Foucauldian framework, viewing organizations as bureaucracies exercising and endorsing governmentality in one way or another.<sup>37</sup> This story does not seem to have been written in full just yet,<sup>38</sup> although parts of the sociological literature on international organizations may contain traces of it. In such a view, attention could be paid to how international organizations help states in creating and maintaining relatively well-adapted and productive individuals. Along these lines, one could discuss the work of, for example, the WHO or the salutary effects of the ILO's activities or imagine a Foucauldian story about, say, the role of the International Organization for Migration (IOM) in running migrant and refugee camps, or the disciplining nature of the OECD's Programme on International Study Assessment, with school children being tested on their performances in mathematics and other useful subjects of study for purposes of comparing, ranking and competing between advanced economies.<sup>39</sup> And further examples abound.<sup>40</sup>

A third grand narrative, and the one that is no doubt most familiar to international lawyers, is the narrative of progress in international organization and cooperation. This is a familiar staple, according to which mankind moves in increasingly large circles – from family to tribe, from tribe to nation and eventually to world government.<sup>41</sup> For some, this progression means that the very idea of international organization starts with the work of Pierre Dubois around the year 1300<sup>42</sup> and follows a familiar trajectory stopping at familiar landmarks, including Immanuel Kant's putative perpetual peace<sup>43</sup> and, much, much later, perhaps also covering Wolfgang Friedmann's law of cooperation.<sup>44</sup> It is this narrative of progress, from cooperation via integration to eternal peace, that has informed functionalist studies in integration

<sup>36</sup> For elements of such a story, see Klabbers, 'The Emergence of Functionalism in International Institutional Law: Colonial Inspirations', 25 *European Journal of International Law (EJIL)* (2014) 645.

<sup>37</sup> A useful overview is Rose, O'Malley and Valverde, 'Governmentality', 2 *Annual Review of Law and Social Science* (2006) 83.

<sup>38</sup> A rare attempt and not specifically geared towards the role of international organizations is W. Larner and W. Walters (eds), *Global Governmentality: Governing International Spaces* (2004).

<sup>39</sup> On the International Organization for Migration's (IOM's) role, see briefly, Penovic and Dastyari, 'Boatloads of Incongruity: The Evolution of Australia's Offshore Processing Regime', 13 *Australian Journal of Human Rights* (2007) 33. For a groundbreaking legal analysis of the power exercised by the Programme on International Study Assessment, see Von Bogdandy and Goldmann, 'The Exercise of Public Authority through National Policy Assessment', 5 *IOLR* (2008) 241.

<sup>40</sup> See, e.g., E. Johns, *Non-Legality in International Law: Unruly Law* (2013), discussing the First Responders Manual on disaster relief emanating from (among others) the World Health Organization (WHO) and the Pan American Health Organization in Foucauldian terms, especially at 191–196; Legg, "'The Life of Individuals As Well As of Nations': International Law and the League of Nations' Anti-Trafficking Governmentalities", 25 *Leiden Journal International Law* (2012) 647.

<sup>41</sup> One formulation, representing many, stems from Fiore, 'L'Organisation juridique de la société internationale', 31 *RDILC* (1889) 209, at 242.

<sup>42</sup> The classic study is J. Ter Meulen, *Die Gedanke der internationalen Organisation* (1968 [1918]); a more recent and more critical variation is M. Mazower, *Governing the World: The History of an Idea* (2012).

<sup>43</sup> I. Kant, *Zum ewigen Frieden: ein philosophischer Entwurf* (1984 [1795]).

<sup>44</sup> W. Friedmann, *The Changing Structure of International Law* (1964).

theory as well as later liberal institutionalist work.<sup>45</sup> It can also easily be seen as present in the background of the legal idea of functionalism, for example, as associated with the work of Schermers.<sup>46</sup>

And then there are various combinations of grand narratives possible. Thus, one can think of international organizations as the institutions (or among the institutions) of global governance and thus organize the study of organizations around their contribution to global governance and, more normatively, infuse it with thoughts on how global governance can and perhaps should be kept in check. Thus, Craig Murphy's neo-Gramscian work already refers in its subtitle to global governance, and the well-known global administrative law approach, in its various manifestations,<sup>47</sup> is devoted, in large measure, to the work of international organizations.<sup>48</sup> Murphy's work is also not free from references to Foucault, suggesting, for instance, that the creation of public systems in late 19th century states owed much to the same impulse that inspired the creation of the public international unions<sup>49</sup> and, likewise, that the monitoring tasks of international organizations are variations on Foucault's theme of surveillance.<sup>50</sup>

Regardless of which narrative is adhered to, functionalism plays the same role in all of them as a seemingly neutral, seemingly a-political and purely technical device on how to organize international organizations. The grander narratives all require a mechanism for operating international organizations, and this mechanism cannot be seen to be substantive in nature so as to prioritize some conceptions of the good life over others. Instead, it must appear as neutral, as formal rather than substantive, as engaged solely with technicalities. This is where the genius of functionalism lies: it presents international organizations as neutral and a-political, solely functional entities, which do not compete with states over the good life but, instead, help to achieve it once it is decided what the good life shall be and which can serve the interests of all precisely by focusing on a specific function. Since the interests of all are being served, it follows that the functioning of organizations must be facilitated by the law and, from this, stem such staples of functionalist teachings as the doctrines of attributed and implied powers or the existence of privileges and immunities.

<sup>45</sup> R. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (1984).

<sup>46</sup> The opening pages of the first edition of his classic textbook freely speculate about the prospect that international organizations may, eventually, turn into world government. See H.G. Schermers, *International Institutional Law* (1972), at 3.

<sup>47</sup> Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Problems* (2005) 15; A. von Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions* (2010); Murphy, *supra* note 34.

<sup>48</sup> Generally Kingsbury and Casini, 'Global Administrative Law Dimensions of International Organizations Law', 6 *IOLR* (2009). A timely exploration is E. Benvenisti, *The Law of Global Governance* (2014); a useful overview of the variety of actors and activities involved is D. Avant, M. Finnemore and S. Sell (eds), *Who Governs the Globe?* (2010).

<sup>49</sup> Murphy, *supra* note 34, at 65–66.

<sup>50</sup> *Ibid.*, at 114.

Still, despite its relevance for any of the possible grander narratives concerning the role and influence of international organizations, the law of international organizations has remained distinctly under-theorized and under-discussed.<sup>51</sup> The law of international organizations is often regarded as something of an esoteric specialization of a few handfuls of eccentric academics and individuals working for international organizations, and the only specialized journal on the topic was, tellingly perhaps, established rather late. The *International Organizations Law Review* saw the light in 2004, some years after the first specialized journals on international criminal law, international environmental law, and even international legal history had made their first appearance<sup>52</sup> and no less than four decades after the first textbooks had started to appear.<sup>53</sup>

## B Situating Functionalism

Functionalism is one of those terms that is often used in many branches of scholarly investigation and often carries specific connotations only within such branches. And even within discrete academic disciplines, the same term can carry radically different connotations. Sociologists have their functionalism as do architects and anthropologists, and there is functionalism in law<sup>54</sup> and in the law of international organizations. In legal thinking generally, functionalism has been characterized as the approach that focuses on how the law actually functions.<sup>55</sup> Thus, it has often been endorsed in terms of its descriptive accuracy, while more traditional views have been scathingly referred to as, in the memorable phrase of one leading functionalist, 'transcendental nonsense'.<sup>56</sup> And since this kind of functionalism is typically a theory about how the law (and law generally, at that) works, it bears little resemblance to functionalism in the

<sup>51</sup> Some fairly recent major studies move away from an unfettered functionalism. See, e.g., J.E. Alvarez, *International Organizations as Law-makers* (2005), opting for a restricted and politically self-consciously liberal version of functionalism; A. Reinisch, *International Organizations before National Courts* (2000) (likewise with respect to privileges and immunities); I. Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (2011) (adopting a broadly constructivist framework while discussing the role of organizations rather than the law of international organizations).

<sup>52</sup> Here a nuance is in order, in that *International Organization* was already established in 1947 and in its early years published recognizably legal analyses, alongside papers stemming from different disciplines. Nonetheless, it quickly became a journal devoted to international political economy in which international organizations make an appearance but are rarely analysed in legal terms. The more recent *Review of International Organizations*, established in 2006, is predominantly political science oriented, while the even more recently established *Journal of International Organizations Studies* (since 2010) aims to bring insights from organizational sociology and the discipline of international relations together.

<sup>53</sup> D. Bowett, *The Law of International Institutions* (1964) was most likely the first textbook in English; it was followed by Schermers, *supra* note 46. Probably the first textbook in German was I. Seidl-Hohenveldern, *Das Recht der internationalen Organisationen einschliesslich der supranationalen Gemeinschaften* (1967).

<sup>54</sup> There is also a general international legal functionalism, which, however, has never gained much momentum. Johnston, 'Functionalism in the Theory of International Law', 26 *Canadian Yearbook of International Law* (CYIL) (1988) 3.

<sup>55</sup> It is often seen as a by-product of American legal realism. For useful discussion, see Golding, 'Realism and Functionalism in the Legal Thought of Felix S. Cohen', 66 *Cornell Law Review* (1981) 1032.

<sup>56</sup> Cohen, 'Transcendental Nonsense and the Functional Approach', 35 *Columbia Law Review* (1935) 809.

law of international organizations. Admittedly, functionalism in international organizations law has a descriptive component, but it is not a theory on how international organizations law works – in fact, it is far more normative than just this. If legal functionalism could be summed up as ‘if you want to understand something, observe it in action’,<sup>57</sup> then this directive will be of little use when functionalism in international organizations law is concerned. The functionalism at the core of international organizations law aims to tell us how organizations should and may behave, not how they actually behave. It is in essence a theory not about law (not even institutional law) but, rather, about international organizations and their relationship to their member states.

The functionalism of international organizations law must also be distinguished from what Martin Loughlin has labelled the ‘functionalist style’ in public law thinking,<sup>58</sup> especially in the early 20th century, featuring such thinkers as Leon Duguit in France and Ivor Jennings in Britain. These thinkers distanced themselves from analytic positivism by highlighting the social functions of public law, and while this shared with international organizations law functionalism a commitment to the progressive cause,<sup>59</sup> it differs by being overtly political.<sup>60</sup> By contrast, the functionalism of international organizations law has always styled itself as supremely a-political.

Finally, the functionalism that is central to this article must also be distinguished from functionalist and neo-functionalist integration theory,<sup>61</sup> although the two do share a few fundamentals – indeed, so much so that one of the founders of international organizations law functionalism, Reinsch, is also often regarded as a precursor of functionalist integration theory.<sup>62</sup> Both approaches have the growing interdependence between states as their point of departure, and both observe how this interdependence can be manifested and further developed through international organizations endowed with specific functions. Moreover, both end up predicting, however loosely perhaps, that functional organization will lead to greater interdependence and will therewith, as an article of faith, contribute to world peace.

However, here most of the relatedness comes to a halt, in that the two approaches ask different questions. Functionalist integration theory is predominantly interested in questions relating to the optimal conditions for inter-state cooperation and whether

<sup>57</sup> Cohen, ‘The Problems of a Functional Jurisprudence’, 1 *MLR* (1937) 5, at 8.

<sup>58</sup> Loughlin, ‘The Functionalist Style in Public Law’, 55 *University of Toronto Law Journal* (2005) 361.

<sup>59</sup> As Duguit put it unapologetically, ‘[I]a notion de service public devient la notion fondamentale du droit public moderne. Les faits vont le démontrer.’ L. Duguit, *Les Transformations du Droit Public* (1999 [1913]), at xix.

<sup>60</sup> Jennings phrased it bluntly but effectively: ‘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.’ See I. Jennings, *The Law and the Constitution* (3rd edn, 1943), at xv.

<sup>61</sup> Its most well-known representatives include Karl Deutsch, Leon Lindberg, Ernst B. Haas and, emblematically, David Mitrany. See, e.g., Mitrany, ‘The Prospect of Integration: Federal or Functional’, 4 *Journal of Common Market Studies* (1965) 119.

<sup>62</sup> Schmidt, ‘Paul S. Reinsch and the Study of Imperialism and Internationalism’, in D. Long and B.C. Schmidt (eds), *Imperialism and Internationalism in the Discipline of International Relations* (2005) 43, at 67.

and how cooperation could beget further cooperation.<sup>63</sup> By contrast, the functionalism of international organizations law concentrates on how organizations are legally structured, particularly in relation to their member states.

Still, these questions are often intermingled, and there is room for the thought that international organizations legal functionalism has been able to prosper for nearly a century precisely because it was often substituted – perhaps even mistaken – for integration theory functionalism. The argument in a nutshell would go as follows (it will be set out more fully later in this article). Functionalism was developed in the early 20th century with a specific view, as far as Reinsch was concerned, to the work of the public international unions existing at the time. There were some 30 of these unions in existence, counting only those that had a secretariat of sorts. The scope of the theory, however, would quickly become broadened – in particular, by Sayre’s writings – so as to encompass all kinds of entities, many of them not set up around a single function or a small set of functions except in a very loose sense.

For instance, neither the League of Nations nor the ILO followed any strict functionalist pattern, and the same applied to quite a few other organizations set up in the years following World War I. To be sure, some organizations established in those years still followed a functionalist logic – they would be established around a single function that would not arouse strong political sentiments. This applied, for instance, to the International Office of Epizootics (set up in 1923) and the International Institute of Refrigeration (set up in 1920). Strikingly, however, quite a few of the organizations created just after World War I departed from the functionalist logic. Interpol, for instance, created in 1923, may have been built around a policing function, but surely no one could think of calling this a-political, and Interpol started not as a gathering of states but, rather, as a joint venture of police forces, with a constitution adopted at a police congress.<sup>64</sup> The International Vine and Wine Office was set up in 1924, largely as an interest group of wine-producing nations, while the International Federation of National Standardization Associations, set up in 1926, was the forerunner of today’s International Organization for Standardization (ISO) and was established among national standardization associations.<sup>65</sup>

In other words, by the time functionalism was well and truly in place, the entities for which it was developed had already receded into the background – a new wave of international organizations, qualitatively different from the 30 or so unions Reinsch had studied, had sprung up. Still, the theory stuck. Due to the broadening of the scope of the very concept of international organization in Sayre’s work, functionalism

<sup>63</sup> An excellent discussion is J.K. de Vree, *Political Integration: The Formation of Theory and Its Problems* (1972).

<sup>64</sup> For background, see R. Martha, *The Legal Foundations of Interpol* (2010).

<sup>65</sup> There is some uncertainty here, on various levels. B. Reinalda, in his monumental *Routledge History of International Organizations: From 1815 to the Present Day* (2009) refers to the International Organization for Standardization (ISO) as a non-governmental organization (NGO) and the same applies, by implication, to its predecessors (at 102). In doing so, he follows the ISO’s own rendition. See L. Eicher *et al.*, *Friendship among Equals: Recollections from ISO’s First Fifty Years* (1997). Murphy seems to talk of the same entity but uses the name Federation of Standardizing Societies (Murphy, *supra* note 34, at 154) and treats it as an international organization rather than a NGO.

would continue to be applied to the new wave of entities, despite not being a very close fit – like applying particle theory to waves simply by broadening the notion of particle so as to include waves. This could only work as long as no one looked too closely, and this myopia, in turn, was much facilitated by the simultaneous rise of the functionalism usually associated with integration theory.<sup>66</sup> Reinsch's own work could easily be mistaken for integration theory (and, as noted, he is often considered a precursor), while David Mitrany would start to develop his functionalism as early as the 1930s.

### C *An Outline of Functionalism*

Functionalism emerged in the late 19th and early 20th century through the writings of a handful of individuals. It has proven to be immensely influential, in that almost all international organizations lawyers have been, and are, functionalists, even if they might not realize it themselves. One of the reasons why the theory of functionalism in the law of international organizations may have become so successful is that it has never been made explicit. Authors addressing legal issues relating to international organizations have tended not to be overly systematic in their thinking, even when they have been scrupulously systematic in their approaches and methodology. A clear functionalist manifesto is lacking, and the curious result is that while many are functionalists, few would be able to spell out what functionalism stands for with great precision. In what follows, I will try to reconstruct something of a bare-bones outline of functionalism as a theory – that is, focusing not so much on what it says but, rather, on how the theory itself is constructed: What are the hallmarks of functionalist theory and what is its scope?

The scope of functionalism has always been thought to be comprehensive.<sup>67</sup> In other words, functionalism was considered to offer an explanation for all things related to international institutional law, whether it concerned the privileges and immunities of international organizations or their responsibility under international law and whether it concerned their law-making powers or their internal structures. As Virally suggested in the article that comes closest to being a functionalist manifesto, functionalism has three main corollaries.<sup>68</sup> First, the functions assigned by the member states authorize the organization to work in a particular way. Second, those same functions also determine the limits of what the organization is authorized to do. And, third, this casts obligations on the organization's organs – the organs are not merely entitled to

<sup>66</sup> The most telling illustration is that Virally, in his exploration of the relevance of function for international organizations law, can confidently claim that his thoughts have nothing to do with functionalism – by which he meant integration theory. Virally's brief article is, ironically perhaps, the closest thing to a manifesto of functionalism in international organizations law. See 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) 277. His earlier monograph on the United Nations (UN) does not contain too much theoretical reflection. See M. Virally, *L'Organisation mondiale* (1972).

<sup>67</sup> This is borne out by a look at the standard functionalist treatise by Schermers and Blokker, *supra* note 26, which aims to cover all aspects of international organizations law. That said, it pays relatively little attention to issues that do not quite fit into functionalist theory, such as the responsibility of international organizations or the law of the international civil service.

<sup>68</sup> Virally, 'La notion', *supra* note 66.



act in certain ways but (depending perhaps on the language used) are also under an obligation to do so.<sup>69</sup> Hence, the thought could gain ground that functionalism not only applies to relations between organizations and their member states but also has a bearing on intra-organizational relationships. Moreover, the external relations of organizations were exclusively conceptualized in terms of their treaty-making powers, with issues of responsibility long being anathema. Herewith, functionalism's scope could come to be regarded as comprehensive, explaining all relevant aspects of the behaviour of international organizations since all these aspects were, eventually, traceable to the relationship between the organization and its member states.

The idea that functionalism's scope may actually be limited to some part of institutional law without having anything to say about other parts is a relatively new finding and is itself premised on thinking in terms of the kinds of legal relationships that are involved.<sup>70</sup> Functionalism is primarily concerned with the relations between the organization and its member states – this much is generally acknowledged, including by Virally.<sup>71</sup> Therewith, it has traction on topics that emanate from this particular relationship, such as the precise powers of organizations or their privileges and immunities. Still, these are not the only relevant relationships. Organizations also have internal dynamics (relations between organs, relations between the organization and its staff) and are engaged in relations with the outside world. Hence, it may well be possible to conclude that the scope of functionalism is comprehensive as far as relations between the organization and its members are concerned but that organizations comprise more legally relevant relations than merely the one between the organization and its members. In other words, functionalism cannot explain all because some aspects of organizations fall outside its remit.<sup>72</sup>

Functionalism has also always, and probably equally intuitively, been seen as an inductive approach, placing a premium on comparativism. Schermers started the first edition of his now classic treatise by observing that, although each organization has its own constitution and its own rules, nonetheless 'all public organizations have much in common', which leads to 'much parallel development of international organizations'.<sup>73</sup> Hence, '[m]ost of the general and constitutional problems which the

<sup>69</sup> See also the rendition in Schermers and Blokker, *supra* note 26, at 19, although the identity between organization and organs is made more implicit in their version.

<sup>70</sup> See Klabbers, 'Theorising International Organisations', in F. Hoffmann and A. Orford (eds), *Oxford Handbook on International Legal Theory* (forthcoming). Virally, already realized something to this effect but thought that the outside world was limited to other states and that these relations with non-member states could find a place in his functionalist theory. Virally, *L'Organisation mondiale*, *supra* note 66, at 27.

<sup>71</sup> As Virally put it, the notion of function simultaneously helps determine the role of the organization in relation to its member states, and explains the variety among existing organizations. See Virally, 'La notion', *supra* note 66, at 280.

<sup>72</sup> Some early observers already hinted at this. Von Liszt, e.g., pointed out that the international unions could directly exercise authority over individuals and companies. See Von Liszt, 'Das Wesen des völkerrechtlichen Staatenverbandes und der international Prisenhof', in *Festgabe der Berliner juristischen Fakultät für Otto Gierke zum Dokto-Jubiläum 21. August 1910. Dritter Band: Internationales Recht. Strafrecht. Rechtsvergleichung* (1910) 19, at 30.

<sup>73</sup> Schermers, *supra* note 46, at 1.

organizations meet outside their technical field of operation are comparable and the solution found for one can often be fruitful for others.<sup>74</sup> Thus, the law of international organizations could meaningfully be discovered and developed by looking at what organizations and their member states actually do. Functionalism is not a deductive approach – it does not start from first principles in order to apply these but, rather, works from the bottom up. Yet, as with much inductive scholarship, functionalists have hardly realized they were theoretically engaged – the premises underlying functionalism have hardly registered.

Paradoxically perhaps, given the inductive approach inherent to functionalism, the result is very much ideal theory or, rather, a theory working with ideal types. By aggregating information about the legally relevant structures of a variety of international organizations, functionalism ends up sketching a model that has few, if any, direct correspondence with any existing international organizations. In this sense, the functionalist organization is an ideal type along Weberian lines rather than an empirically existing mode of social relations. As Max Weber noted a century ago, ideal types are needed in order to ascribe meaning to (in his case) sociological phenomena. This almost necessarily comes at the expense of empirical correspondence, though, precisely because ideal types are required, ‘it is probably seldom if ever that a real phenomenon can be found which corresponds exactly to one of those ideally constructed pure types’.<sup>75</sup> It is the same with functionalism in the law of international organizations, and this applies all the more so given the fact that the very concept of international organization is broad (not to say unstable), bringing together entities that have little in common beyond being considered international organizations, as will be discussed later in this article.

The basic idea behind functionalism is that states delegate functions to entities they create for this purpose: international organizations. International organizations are usually considered to be the agents acting on behalf of a principal,<sup>76</sup> and functionalism is no exception. The principal is typically said to be constituted by the member states together.<sup>77</sup> The mandate of the organization will be limited in scope, perhaps limited in time as well<sup>78</sup> and must be revocable. Otherwise, the more appropriate construction is that of a transfer of functions instead of delegation.<sup>79</sup> And as with principal–agent

<sup>74</sup> *Ibid.*, at 1–2. See also Virally, *L’Organisation mondiale*, *supra* note 66, at 25: a general theory ‘ne peut être le fruit que d’une réflexion partant d’une étude comparative de tous les types d’organisations internationales apparus dans la pratique contemporaine.’

<sup>75</sup> M. Weber, *Economy and Society*, edited by G. Roth and C. Wittich, volume 1 (1968), at 20.

<sup>76</sup> See, e.g., Trachtman, ‘The Economic Structure of the Law of International Organizations’, 15 *Chicago Journal of International Law (CJIL)* (2014) 162; Guzman, ‘International Organizations and the Frankenstein Problem’, 24 *EJIL* (2013) 999.

<sup>77</sup> Sometimes the principal is conceptualized as the citizens of the member states. See, e.g., Vaubel, ‘Principal-Agent Problems in International Organizations’, 1 *Review of International Organizations* (2006) 125.

<sup>78</sup> However, most organizations are based on treaties of unlimited duration: a prominent exception was the Treaty Establishing the European Coal and Steel Community 195, 261 UNTS 140.

<sup>79</sup> See generally Hawkins *et al.*, ‘Delegation under Anarchy: States, International Organizations, and Principal-Agent Theory’, in D. Hawkins *et al.* (eds), *Delegation and Agency in International Organizations* (2006) 3, at 5. See also D. Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (2005).

relationships generally, there are two important and immediate (and somewhat contradictory) ramifications. The first is that the agent is likely to have some discretion and autonomy. The principal cannot envisage every possible contingency in advance and, thus, needs to leave some discretion to the agent, as the agent is not normally in a position to consult the principal on an everyday basis. Indeed, if this were possible, it would defy the very purpose of the principal–agent relationship. Nor is the principal in a position to exercise unlimited control over the agent, which creates some autonomy for the agent.<sup>80</sup>

Second though, the agent is considered to be under general and comprehensive control of the principal. The member states create the organization's mandate and tell it, roughly, what to do and how to do it. If the agent misbehaves or does something wrong, the principal can be blamed – the principal should have exercised a greater measure of control. If the agent acts *ultra vires*, again the principal can be blamed – the principal should make sure that the agent does not 'run wild'.<sup>81</sup>

Two factors add complications. First, international organizations are composed of states. This introduces the complication of the principal being a collective actor rather than a single actor. Here, the situation is different from the 'normal' type of principal–agent relations envisaged in private law, where the principal is typically a single actor,<sup>82</sup> delegating tasks to a different single actor or, perhaps, delegating different tasks to different agents.<sup>83</sup> And what makes things more difficult still is that the collective principal itself is typically considered part of the organization (that is, the agent).<sup>84</sup> In the normal course of events, organizations will have a plenary organ in which all member states are represented, precisely so as to give a voice to, and protect the interests of, the collective principal. Hence, the principal is supposed to control and direct the agent but is at the same time part of the institutional structure of the agent.

As a corollary, the theory underlying the principal–agent model as far as international organizations are concerned tends to work better with specific organs of organizations than with organizations per se and is mostly employed (not surprisingly) with respect to executive organs. On this basis, observers can speak of tasks being delegated

<sup>80</sup> The conceptual distinction between discretion and autonomy is derived from Hawkins *et al.*, 'Delegation', *supra* note 79, at 8.

<sup>81</sup> Abbott and Snidal speak of independence and centralization, respectively. See Abbott and Snidal, 'Why States Act through Formal International Organizations', 42 *Journal of Conflict Resolution* (1998) 3.

<sup>82</sup> This may be a composite actor, in the sense in which companies are composite actors. Crucially though, the typical relationship envisages a single legal person as principal – by contrast, the UN has 193 legal persons acting together as principal.

<sup>83</sup> This feature is not prominently visible in the leading rationalist literature. It is overlooked, e.g., by Hawkins *et al.* ('Delegation', *supra* note 79) as well as by Bradley and Kelley, 'The Concept of International Delegation', 71 *Law and Contemporary Problems* (2008) 1. Strikingly, one of the few contributions showing an awareness of the problem of the collective principal wavers between no less three different conceptions with respect to international organizations: the collective principal can be a single member state (with different actors within it vying for prominence); it can be the member states of the organization together, and it can be the organization (with different organs and actors inside) when it delegates tasks. See Lyne, Nielson and Tierney, 'Who Delegates? Alternative Models of Principals in Development Aid', in Hawkins *et al.*, *Delegation and Agency*, *supra* note 79, 41.

<sup>84</sup> This too is by and large ignored in the rationalist literature.

to the UN Security Council or the EU Commission rather than to the UN or the EU and of these bodies having a certain discretion.<sup>85</sup> Indeed, as will be discussed later in this article, the UN and the EU themselves can only be squeezed into a functionalist framework with great difficulty. Moreover, the agent typically works for a single collective principal. The WHO works for the states that have set it up; it does not work on behalf of, say, the IMF, the World Bank, or even the UN, although it forms part of what is usually referred to as the UN family.<sup>86</sup> More to the point, perhaps, the Organization of American States (OAS) works for the American states referred to in its name. It does not work for European states, petroleum-exporting states or Islamic countries. These, instead, are served by the EU, OPEC, and the Organization of Islamic Cooperation (OIC) respectively.

Additionally, with minor variations, the collective principals are composed of, by and large, the same states, at least when universal organizations are concerned. Membership in the UN (193 members in October 2014), the WHO (194), the UN Educational, Scientific and Cultural Organization (UNESCO) (195), the World Meteorological Organization (WMO) (185) and the ILO (185) is near identical, suggesting (in analytical terms) that the same collective principal has delegated different functions to different agents. The same does not hold on the regional level, at least not to the same extent, although again there are important overlaps in terms of membership between, for example, most European organizations. States such as Germany or the Netherlands are members not just of the EU but also of the Council of Europe, the Organization for Security and Co-operation (OSCE), NATO and a host of other organizations.

A separate question (but no less vexing for that) is how exactly to identify the function of any given organization. It is common to do so under reference to the organization's constituent document, but, even so, problems remain. Often enough, constituent documents may refer to a variety of goals or purposes (some of them perhaps conflicting), and there might be a discrepancy between the formal task of an institution and the reasons for its creation.<sup>87</sup> This is problematic for a theory that revolves around the very notion of function. At least one may expect some

<sup>85</sup> For an example discussing delegation to the Security Council rather than the UN, see Thompson, 'Screening Power: International Organizations as Informative Agents', in Hawkins *et al.*, *Delegation and Agency*, *supra* note 79, 229.

<sup>86</sup> This does not exclude the possibility of joint ventures or programmes with others. A well-known example is the Codex Alimentarius Commission set up jointly by the WHO and the Food and Agriculture Organization (FAO). Arguably, the International Court of Justice (ICJ) tried to expand the notion of collective principal by linking the WHO to the UN family at large in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 66. For commentary, see Klabbers, 'Global Governance before the ICJ: Re-reading the *WHA Opinion*', 13 *Max Planck Yearbook of UN Law* (2009) 1.

<sup>87</sup> Note how Zacklin can ascribe a 'primary function, peaceful change' to the sum total of the UN and the specialized agencies together, therewith demonstrating the endless flexibility of the term 'function'. R. Zacklin, *The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies* (2005 [1968]), at 2. Abbott and Snidal, *supra* note 81, at 4, identify, on a high level of abstraction, centralization and independence as the main functions of international organizations.

idea as to how to identify functions and separate them from reasons, motives or purposes.<sup>88</sup>

It seems fair to hold that legal theories (that is, theories internal to the law, as opposed to theories concerning the role of law in a broader context) tend to be Janus-faced – they are (and are often expected to be) both explanatory and normative. The explanatory role of functionalism is well recorded. There is general agreement, for instance, that functionalism can help explain the precise powers of an organization – these, after all, are the instruments through which the organization is supposed to give effect to its function.<sup>89</sup> Likewise, functionalism can help explain the existence of rules on membership, be it the admission of aspiring new members, the suspension of the rights of existing ones or even the expulsion of the latter. If the idea is to exercise certain functions, after all, then it makes sense to admit only those states that can be of assistance in the exercise of these functions and expel those who are no longer useful or who could be useful but tend to act in obstructive ways.<sup>90</sup>

Functionalism is instrumental also in explaining the existence of membership fees. Membership fees can be justified under reference to the delegated function – the agent needs to be compensated by the principal, at least for costs incurred. And since international organizations as agents typically serve only one principal, there can be little debate about those costs as a whole: these have to be borne by the member states collectively. Functionalism also helps explain the granting of privileges and immunities to international organizations. In theory, after all, the organization should not be interfered with and, in order to prevent such interference, should enjoy privileges and immunities. The UN could not work properly if its Secretary-General or other officials would have to stand trial in member states, and it could not do its job if it were forced to pay compensation for damages or even merely faced the threat of lawsuits.<sup>91</sup>

Still, while functionalism can help in explaining these staples of international institutional law, it can rarely, if at all, provide a full explanation. The best-known example is the doctrine of implied powers. Precisely because the member states cannot envisage all possible contingencies in advance, the law has come to recognize the idea that powers need not necessarily be granted explicitly but can also be implied. This is a sensible construction but difficult to reconcile with any strict notion of functional delegation. No matter how often the ICJ may claim that implied powers arise 'by necessary intendment', implied powers will always remain vulnerable to the critique that they

<sup>88</sup> By way of example, the IMO Constitution suggests in Article 1(a) that the IMO should be a platform for cooperation, and should occupy itself with matters of maritime safety, efficiency of navigation and prevention and control of maritime pollution. It would not be overly far-fetched to assume that one of the reasons behind this is not just a concern for safety or pollution, but that IMO was also expected to serve the interests of the shipping industry – as indeed paragraphs (b) and (c) of the same article indicate.

<sup>89</sup> For a fine recent study (departing from functionalism), see V. Engström, *Constructing the Powers of International Institutions* (2012).

<sup>90</sup> For general discussion, see K. Magliveras, *Exclusion from Participation in International Organisations* (1999); A. Duxbury, *The Participation of States in International Organisations* (2011).

<sup>91</sup> Leading functionalist studies include P.H.F. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (1994) and A.S. Muller, *International Organizations and Their Host States* (1995).

were not explicitly granted and that there is a very fine line between an implied power and ‘mission creep’.<sup>92</sup>

The rules on membership too rarely follow a strictly functionalist logic. Admittedly, the refusal of the League of Nations in 1920 to accept Liechtenstein as one of its members may have owed something to functionalist concerns – not having an army, Liechtenstein was considered unable to contribute much to the collective security espoused by the League.<sup>93</sup> Other episodes, however, suggest that functionalist concerns may have to vie for prominence with other concerns. The suspension of member states of international organizations for human rights reasons, for example, however justified, rarely follows functionalist thinking, except perhaps on an unhelpfully high level of abstraction or an incorporation of human rights standards in the function of the organization. On such a reading, the function of the Universal Postal Union (UPU) would not be to regulate global postal relations *simpliciter* but, rather, to regulate global postal relations while respecting human rights; the function of the WHO would not be to safeguard global health but, rather, to safeguard global health in a human rights-friendly manner.<sup>94</sup>

Likewise, discussions on membership fees tend to get sidetracked by concerns that do not immediately follow the functionalist logic. In particular, when member states are in arrears and need to muster the domestic political approval to pay their dues, domestic constituencies may see fit to introduce all sorts of conditions to payments that have little to do with the function or functions of the organization concerned.<sup>95</sup> And the privileges and immunities of international organizations may in general be inspired by functionalist concerns but are always subject to negotiation between the organization and its member states or between the organization and its host state (or both) and, thus, always contingent on what is considered politically possible. If it is true to say that functionalism’s explanatory force derives from its quality as an ideal type rather than from the accuracy of its empirical descriptions, its huge attractiveness must stem from elsewhere, and it is likely that functionalism’s attraction derives from the second of its Janus-faced qualities: its normative character.

Functionalism has proven immensely seductive to students of the law of international organizations, and part of the attraction must reside in functionalism’s promise of a better world. As noted earlier, one of the hallmarks of functionalism is its a-political nature – the only politics involved, in ‘pure’ functionalism, is the promise of global peace. Functional cooperation itself is typically depicted as a-political, merely doing things states could be doing themselves, but doing them better – that is, more efficiently or cheaper. Schermers posited as much in his first edition, noting that in a ‘number of spheres of operation international rules are indispensable’.<sup>96</sup> And using

<sup>92</sup> J. Klabbers, *An Introduction to International Institutional Law* (2nd edn, 2009), at 64–66.

<sup>93</sup> T. Grant, *Admission to the United Nations: Charter Article 4 and the Rise of Universal Organization* (2009), at 240.

<sup>94</sup> Duxbury, *supra* note 90, on occasion seems to suggest as much.

<sup>95</sup> A classic discussion of some prominent examples from the 1980s is contained in Alvarez, ‘Legal Remedies and the United Nations’ *à la Carte Problem*, 12 *Michigan Journal of International Law* (1991) 229.

<sup>96</sup> Schermers, *supra* note 46, at 3.



different wordings, much of the rationalist political science literature gives a voice to the same insight, speaking of how international organizations can help reduce transaction costs.

Small wonder then that international organizations have always been viewed as benign creatures: functionalism hardly permits any other approach. By revolving around functions, organizations cannot do any wrong, as an organization with wrongful functions would, by definition, be wrongful itself. And if such an organization was established, its member states would have something to answer for – they ought not to endow it with wrongful functions, and they ought to make sure their creatures do not do engage in wrongful acts. As a result, organizations themselves have always remained outside the line of fire. In the words of Schermers and Blokker, the deficiencies of the Westphalian system of sovereign states ‘have partly been compensated for by the creation and functioning of international organizations. International organizations have therefore remedied, to some extent, what has been called the *carence institutionelle* of the international legal order.’<sup>97</sup> States may be bad, but organizations are good. And organizations can be good precisely because they are organized around functions.

The truthfulness of this proposition need not be investigated. There is something rather implausible about suggesting that the very states that are so bad nonetheless establish creatures that are inherently good, whose mere existence contributes to the ‘salvation of mankind’.<sup>98</sup> In part, this could only be achieved by a *trompe d’oeuil* – organizations with less than commendable, or politically suspect, functions were simply excluded from the scope of the definition of international organization. On this note, some have held that the erstwhile Warsaw Pact could not be considered an international organization. The Pact was dominated to such an extent by a single member state that it did not meet the basic requirement of being somewhat independent from the member states.<sup>99</sup> This rationale in itself was problematic, of course, partly because the same reasoning could be applied to a number of Western organizations (NATO comes to mind) and partly because the very idea of delegated functions presupposes a certain dependence on member states. Hence, the political nature of the functional organization should not be under-estimated. The existence of the Warsaw Pact, and concomitant reasoning therewith, lays bare a fundamental tension in functionalism: it is ultimately incapable of distinguishing between organizations and, thus, either has to be highly inclusive or deny that some entities are ‘really’ organizations.

<sup>97</sup> Schermers and Blokker, *supra* note 26, at 6.

<sup>98</sup> N. Singh, *Termination of Membership of International Organisations* (1958), at vii. The mood is also beautifully caught in the words spoken by a retiring international civil servant, Arthur Sweetser, to his colleagues: ‘[Y]ou are right, eternally right, in the fight you are making ... you are on the road to the future; you are working for all the ends that make life worth while on this planet – for peace, for the eradication of war, for human advancement, for human rights and decencies, for better living standards, better education, better health, better food, better homes, better labor conditions, better travel and communications – in short, for the world as it ought to be.’ Cited in I. Claude, Jr., *Swords into Plowshares* (2nd edn, 1959), at 449.

<sup>99</sup> Schwartz and Leven, ‘International Organizations: What Makes Them Work?’, 30 *CYIL* (1992) 165.

## D *The Scope of Functionalism and the Notion of International Organization*

International organizations are usually conceived as a broad category: the label is thought to fit many distinct entities. Thus, by most counts, the WHO is an international organization, as is UNESCO. Many consider the EU to be an example as well as other regional entities (the African Union (AU) and the OAS). Some entities that are often included are little more than interest groupings or military alliances – OPEC and NATO are perhaps the best examples, although the EU can also be seen as predominantly engaged with protecting the interests of its member states.<sup>100</sup> Others are set up as international organizations because this was probably more convenient than being established under any system of domestic law. This applies, for example, to institutions for higher education and research, such as the European University Institute or the European Forest Institute, or even education at lower levels, such as the European schools. Some organizations bring together states from the same region (the EU, the AU and the OAS); others instead bring together states with similar ideologies or socio-economic systems (the OIC, NATO, the OECD and the WTO), and yet others are mostly organized around particular functions (the WHO, UNESCO and the financial institutions).

Textbooks on international institutional law differ on points of detail when defining the notion of international organization, but all are broad-minded and open-ended. In fact, most definitions offer little more than guidelines, claiming, for instance, that organizations are usually based on a treaty but that there are other ways of setting them up as well (by resolution, for example). This open-minded attitude strikes as heuristically sensible – there is, analytically, little point in excluding an entity such as the OSCE, whose foundational document is often said to be something less than a treaty. Likewise, most organizations may be created by states, but some encompass entities that are not states (the EU participates in a number of them), and famously the Joint Vienna Institute was set up, in the 1990s, as a joint venture of a handful of organizations in their own right, without any direct participation by states.

Still, if there is little analytic reason to exclude entities based on considerations of form (the presence of states, a treaty basis), there seems to be a normative or political urge to exclude entities from the scope of international institutional law based on member states' intentions. This applies perhaps first and foremost to the various Conference of the Parties or Meetings of the Parties (COPs or MOPs) established under multilateral environmental agreements as well as to other entities: informal working groups of police authorities, for instance,<sup>101</sup> or the loose form of cooperation embodied in the Contact Group on Piracy off the Somali Coast. These, so the reasoning would seem to go, are intentionally set up as informal entities, precisely so as to

<sup>100</sup> Klabbers, 'Sui Generis? The EU as an International Organization', in D. Patterson (ed.), *Blackwell Companion for European Union Law and International Law* (forthcoming).

<sup>101</sup> Such as those that preceded the formalization of cooperation on issues of crime and justice in the EU. For discussion, see Curtin, 'EU Police Cooperation and Human Rights Protection: Building the Trellis and Training the Vine', in A. Barav et al. (eds), *Scritti in Onore di Giuseppe Federico Mancini*, vol. 2 (1998).

circumvent any rigidity that may attach to the notion of international organization and, thus, should not be regarded as international organizations.<sup>102</sup> The reasoning may be flawed, in that it may be impossible to de-activate international law,<sup>103</sup> but it does mean that there is considerable uncertainty with respect to the very notion of what constitutes an international organization.

Most enumerations of international organizations suggest two remarkable characteristics. First, there are overlaps. NATO is both a military alliance and brings together like-minded states; the EU is both a regional organization and an interest group. This should not come as a surprise in that some of these overlaps are inevitable. Surely, any regional organization must somehow juxtapose itself against anything universal and, thus, by definition, needs to rally around the interests of the region. The EU is not unique in protecting and promoting the interests of its member states and citizens; the AU and the OAS also contain traces of interest protection. It is just that the EU is more outspoken about serving the interests of Europe and its citizens and perhaps also in a better position to do so.

The second remarkable feature strikes as being more relevant, given the importance of functionalism for international institutional law – not all organizations are actually built around a function in any meaningful way.<sup>104</sup> It may be claimed that indeed the WHO and UNESCO are created to perform a specific function: the promotion of global health or the promotion of cultural and social domains. With others, however, the function is not very specific and arguably only exists on a high level of abstraction. On this reading, the function of the OECD is to bring together states with advanced market economies, the function of the OAS is to bring together the states of the Americas and the function of the AU is to unite Africa.

Indeed, there is a sense in which the two most iconic international organizations, the UN and the EU, both defy any functionalist logic. The UN's list of functions in the opening article of the UN Charter, is already very broad; even broader still is how the UN has given effect to its tasks in practice.<sup>105</sup> It is not just geared towards the maintenance of international peace and security but also has become the equivalent of a global welfare state, being engaged with such things as drugs and crime prevention, the HIV/Aids pandemic, environmental degradation, human settlement and much more. The point is not that this action is inherently wrong – rather, that in performing such a multitude of functions it is no longer plausible to regard the UN as a functional organization.

The problem here is twofold. To the extent that functionalism insists on organizations exercising delegated functions, the basis of delegation as far as the UN is concerned has become tenuous. It is difficult to explain why exactly the UN should occupy itself with,

<sup>102</sup> Klabbers, 'Institutional Ambivalence by Design: Soft Organizations in International Law', 70 *Nordic Journal of International Law* (2001) 403.

<sup>103</sup> See also Churchill and Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-noticed Phenomenon in International Law', 94 *AJIL* (2000) 623.

<sup>104</sup> Klabbers, 'Unity, Diversity, Accountability: The Ambivalent Concept of International Organization', 14 *MJIL* (2013) 149.

<sup>105</sup> Charter of the United Nations 1945, 1 UNTS 16.

say, drug control, in the absence of any mandate to this effect in the UN Charter. The gap may be (and often is) bridged with the help of the doctrine that organizations can do things that are necessary for their effective functioning – the implied powers doctrine – but if most of the organization’s activities need to be explained on this basis, then it becomes awkward to insist that all of these activities involve delegation.

Second, it becomes difficult to identify what exactly the function of the UN would be. Again, this is not necessarily a problem for everyday purposes (the purpose of the UN must be whatever the UN does), but it does entail difficulties of fit between the theory of functionalism and the empirical reality of the UN. If the only way the UN can be said to be ‘functional’ is by not specifying what the UN actually does but claiming that it functions like a global welfare mechanism, then functionalism simply has little traction with respect to the UN. To underline the point, the problem is not that the UN does too much per se but, rather, that in doing so much it can no longer be meaningfully captured in functionalist terms. It does not have a single identifiable function (or small set of related functions) in much the same way as states, lacking identifiable functions, are not usually considered to be functional entities.

These issues have already plagued the League of Nations and the ILO, both set up in the aftermath of World War I. As with today’s UN, it is unclear what exactly the function of the League was supposed to have been. Perhaps the most plausible option would be to claim that the League existed for the purpose of guaranteeing peace, but peace itself is a task that defies easy functionalist analysis. A narrow conception focuses on the absence of armed conflict, but, surely, the League’s working concept was already broader than this – it worked on the basis of thought that a focus on peace ought to tackle as well the root causes of conflict, including economic and social disparities. And once one goes down this road, there is no turning back. Everything can be linked to peace in one way or another, which is why ‘peace’ is an unsuitable functionalist task. Additionally, while functionalism would emphasize the non-political nature of the international unions, it was more than obvious that the League would be set up for political reasons in order to give effect to a political ideal. While arguably the fiction of the a-political function was never all that plausible, it was destined to fail in connection with the League, as entire generations of textbook writers have unwittingly realized when making distinctions between ‘technical’ or ‘special’ organizations such as the UPU or the WHO and ‘political’ or ‘general’ organizations such as the League of Nations or the UN.<sup>106</sup>

Likewise, the ILO was also more overtly political than any functionalist thesis could possibly bear. For one thing, the timing of its creation, so shortly after the Russian revolution of 1917, cannot be ignored. In part, the point of the ILO was to improve the working man’s lot so as to make sure the attractions of communism could be fended off.<sup>107</sup> In part, also, the political nature of the ILO was highly visible in its decision-making structure – its well-known tripartite structure with states being represented not just by their governments but also by the two social groups having most at stake

<sup>106</sup> Schermers and Blokker, *supra* note 26, at 58.

<sup>107</sup> M. MacMillan, *Paris 1919: Six Months That Changed the World* (2003), at 95.

(employers and employees, capital and labour) spells a clear political ambition way beyond the a-political sterility at the core of functionalism.<sup>108</sup>

If the League and the UN are difficult to fit into the functionalist mould because of the broadness of their tasks, and the ILO was always too political to be functional, the EU too can only be considered 'functionalist' at the expense of analytical rigour. Broadly speaking, it may be the case that it can still be seen as exercising tasks delegated by member states, but, given the pivotal roles of the Commission, the European Parliament and the European Court of Justice in shaping the structure of the EU as well as its policies given the possibility of majority voting and the supremacy of EU law, the functionalist logic has a hard time being applied to the EU. Functionalism insists that member states retain full control over their creatures, but this can no longer be maintained in full with respect to the EU. It is one thing to acknowledge that the member states retain ultimate control, in that they remain capable, acting together, of defying the other institutions,<sup>109</sup> but the picture of the EU as merely exercising delegated functions in a principal-agent relationship defies plausibility.<sup>110</sup>

The EU is an extreme example, but much the same applies to organizations generally. With respect to many of them, it can be said that the bureaucracy leads a life of its own, can present initiatives and can influence the execution of policy guidelines emanating from the political organs.<sup>111</sup> Moreover, the bureaucracy tends to be composed of individuals sharing epistemic backgrounds. The preponderance of economists at the World Bank makes it difficult, so it has been suggested, to sensitize the Bank to concerns other than those that can be captured in economic terms, such as human rights concerns.<sup>112</sup>

In short, as a theory of delegation, functionalism meets with some empirical resistance. Functionalism may describe an ideal model of international organization, but the ideal model is, in reality, not easily met. The really surprising thing then is that functionalism, developed for a specific class of organizations in the late 19th century, has survived the creation of all sorts of other entities, some of them radically different, while still being thought capable of applying to these wildly diverging creatures. It is one thing to discuss applying functionalist thought to, say, the UPU, but why should a very different entity such as OPEC be studied through the same prism and, at the end of the day, benefit from the same kind of treatment that was considered befitting entities such as the UPU?

## E *The Relations of Functionalism*

Systems theory has long pointed out that, left to their own devices, functionally organized social systems tend to run wild and lose sight of their position relative to other systems and, worse perhaps, lose sight of values other than those around which the

<sup>108</sup> Cox, *supra* note 35, at 75–77.

<sup>109</sup> Seminal is Weiler, 'The Community System: The Dual Character of Supranationalism', 1 *Yearbook of European Law* (1981) 267.

<sup>110</sup> All the more so with the emergence of all sorts of (semi-)autonomous EU agencies. See D. Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution* (2009).

<sup>111</sup> This is one of the central insights of neo-functionalist integration theory. See E.B. Haas, *Beyond the Nation-State: Functionalism and International Organization* (1964).

<sup>112</sup> G.A. Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (2012).

system itself is built.<sup>113</sup> The obvious example is economics. Economic reasoning, revolving around the maximization of profits, tends to ignore that there are walks of life where maximizing profits has (or should have) no traction.<sup>114</sup> However, the same applies to all social systems – education, for example, has come to be about how well students perform at exams, which is not quite the same as being about how well they learn, and scholarship is increasingly about publishing and about acquiring external funding rather than about developing new insights or understandings. As a result, so some systems theorists argue, systems need to be controlled and essentially protected against themselves, and one of the ways to do so is through what Gunther Teubner refers to as ‘constitutional irritants’, namely emanations of constitutionalist thought – for example, in the form of human rights – that place limits on the way social systems can operate.

Against this background, it is hardly a surprise that in recent decades the discussion on controlling international organizations has arisen. This has long been anathema among international lawyers because, in functionalist terms, control could not pose a problem. Being a creature of the member states exercising functions delegated by member states, the only sense in which issues of control could possibly arise was if the member states failed to control their creations. If the organization would act in violation of international law, it could only do so because its member states had told it to do so – hence, member state responsibility would arise. And if the organization would act *ultra vires*, the member states could be blamed for failing to exercise proper control. Either way, the behaviour of the organization was traceable to member state failure, and, thus, there was no need to speak of control of international organizations in their own right. As a consequence, the two general studies devoted to the topic during the 1950s and 1960s both quickly morphed into discussion of the responsibility of member states.<sup>115</sup>

Given the structure of functionalism, it was no accident that issues of control could not arise. As noted earlier, functionalism is a theory concerning relations between the organization and its member states, but it does not (and cannot) address relations between the organization and the outside world. Yet, short of the rare situation where the organization misbehaves towards one of its member states, it is precisely at this point in the relations between the organization and the outside world that issues of control may arise.

However, functionalism is not well qualified to address issues of control beyond the supervision of the organization by member states and even this is difficult. Theoretically, the *ultra vires* doctrine should guard against any action by organizations beyond their powers, but the doctrine can be circumvented by the common accord of the member states. If all members agree on a course of action, then it will be difficult to argue that

<sup>113</sup> For a recent rendition, see G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (2012).

<sup>114</sup> M. Sandel, *What Money Can't Buy: The Moral Limits of Markets* (2012).

<sup>115</sup> This applies to Eagleton, ‘International Organizations and the Law of Responsibility’, 76 *Recueil des Cours* (1959/I) 319 and K. Günther, *Die völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten* (1969).



such action is *ultra vires* – after all, how can it be if all are agreed?<sup>116</sup> Individual member states, moreover, only have blunt means of control at their disposal – they may withhold contributions, boycott meetings, try to oust the organization’s leadership or even withdraw. All of these options have in common not just that they are blunt instruments but also that they can be (and often are) used for considerations unrelated to the legality of the organization’s activities. It has been suggested, for instance, that the USA may have wanted to oust the director-general of the Organization for the Prohibition of Chemical Weapons in the early 21st century because he came close to bringing Iraq into the organization’s fold, and this move would have undermined the argument about Iraq possessing weapons of mass destruction, which served to help justify the invasion of that country a few years later.<sup>117</sup>

Apart from the fact that member states do not have very sharp and precise instruments of control at their disposal, it has also become abundantly clear that member states are not the only ones who can claim a legitimate stake in the performance of international organizations. With the growth of activities of organizations, the circle of potentially affected parties has expanded, and as Ruth Grant and Robert Keohane suggest by way of example, it makes a difference whether the World Bank is accountable to its member states or also to the poor and dispossessed.<sup>118</sup> Several organizations – in particular, financial institutions – have taken this to heart and have established internal accountability mechanisms beyond their financial audits.<sup>119</sup> These mechanisms must ensure that in the performance of their tasks these organizations meet with certain standards. Typically, these are standards set internally rather than being externally imposed, but they may reflect rules and principles of international law.<sup>120</sup>

This, in turn, creates problems of compatibility. What if the organization is under conflicting demands from different stakeholders? An example was recently reported in a Dutch weekly magazine, telling the story of food supplies to a Syrian refugee camp in Jordan. The food supplies met all of the requirements set by donor states (2,100 calories per day per adult) but, as it contained food products unknown to Syrian culture, did little to impress another group of stakeholders – the recipients of the food aid. Consequently, these individuals would sell their rations on the black market in exchange for more familiar food products, so much so that eventually the various international organizations involved decided to substitute vouchers, which could be

<sup>116</sup> Even then, remedies may be sparse. See K. Wellens, *Remedies against International Organisations* (2002).

<sup>117</sup> The suggestion is contained, in guarded terms, in Benvenisti, *supra* note 48, at 152–154. On the ousting itself, see Klabbers, ‘The *Bustani* Case before the ILOAT: Constitutionalism in Disguise?’, 53 *International and Comparative Law Quarterly (ICLQ)* (2004) 455.

<sup>118</sup> Grant and Keohane, ‘Accountability and Abuses of Power in World Politics’, 99 *American Political Science Review* (2005) 29.

<sup>119</sup> Organizations have also started intensive forms of cooperation with each other and with yet other actors, which does little to clarify relationships of control. A useful overview is Dunoff, ‘A New Approach to Regime Interaction’, in M. Young (ed.), *Regime Interaction and International Law: Facing Fragmentation* (2012) 136.

<sup>120</sup> For an overview, 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) 75.

used in camp stores for food packages.<sup>121</sup> The moral of the story is that it is by no means impossible for organizations to have to work in accordance with different accountability standards emanating from different groups of stakeholders, and it is by no means impossible that standards by which accountability will be measured may diverge. Member states may have different demands than the recipients,<sup>122</sup> donor states may have different demands than the non-governmental organization monitors and so on. At the end of the day, functionalism is ill-equipped to address such problems, and it is not even particularly well equipped to identify them, given that its focus rests solely on relations between the organization and its member states. With these questions in mind, how then did functionalism come about?

### 3 The Emergence of Functionalism and the ‘Salvation of Mankind’

#### A *Early Efforts*

In 1786, US plenipotentiary (and later president) Thomas Jefferson proposed to the major maritime powers of the day the establishment of an international organization to combat piracy. The major purpose of the organization, so Point 3 of his proposal stipulated, was ‘to compel the piratical states to perpetual peace, without price, and to guarantee that peace to each other’.<sup>123</sup> Jefferson’s proposal came to naught, but it is highly instructive. It is instructive in that the plan is recognizable to today’s international lawyer as a decently structured international organization, complete with organs, voting rules, membership fees and a function. It is also instructive, however, in suggesting the inherently political nature of this function – the fight against what was considered piracy off the Barbary Coast and compelling the pirates to perpetual peace. By the time Jefferson launched his proposal, Barbary piracy had ceased to be of much immediate concern but, instead, had come to symbolize the idea of the enemy of mankind.<sup>124</sup> Hence, in strict functional terms, the Jeffersonian organization would have had little impact; its potential impact on thinking in terms of friend and foe, however, could have been enormous. In the end, it was not to be, but Jefferson’s scheme foreshadowed some of the fissures of functionalism.

While Jefferson’s scheme came to naught, it is common practice to trace the early days of modern international organizations to the early 19th century and, in particular, to the creation of the various river commissions, spearheaded by the Rhine commission, dating back to 1804. These commissions were given a concrete function: to manage aspects of the use of a transboundary river, often especially related to

<sup>121</sup> Verkerk, ‘Syrische vluchtelingen: hoe 116.000 lasten 116.000 mensen werden’, 75 *Vrij Nederland* (22 November 2014) 26.

<sup>122</sup> And not all member states exercise an equal amount of control. On the close relationship between the International Monetary Fund (IMF) and the US Treasury during the 1990s, see R.W. Stone, *Controlling Institutions: International Organizations and the Global Economy* (2011), 51–79.

<sup>123</sup> Szasz, ‘Thomas Jefferson Conceives an International Organization’, 75 *AJIL* (1981) 138.

<sup>124</sup> W. Rech, *Enemies of Mankind: Vattel’s Theory of Collective Security* (2013), at 12.

navigation and river maintenance. Therewith, they already exercised a clear function and served as a model for later inventions.<sup>125</sup>

The third part of the 19th century is often typecast as heralding a second important phase, when a number of societal factors conspired to inspire the creation of many international organizations. There was, first, the general idea that cooperation across borders could be beneficial. The later 19th century saw the emergence of global cooperation in many fields, including cooperation between private citizens, embodied for instance in the creation of the Red Cross by the likes of Henri Dunant and Gustave Moynier<sup>126</sup> or Marx's involvement in the creation of the International Working Men's Association.<sup>127</sup> International lawyers too associated themselves within the venerable Institut de Droit International, an organization inaugurated in 1873.<sup>128</sup>

The late 19th century also formed the heyday of progressivism, the belief that social matters could well be arranged to everyone's satisfaction along rational and scientific lines. International organizations were manifestations hereof, but they were not the only ones. This was also the time during which a rationalist linguist named Ludwig Zamenhof developed Esperanto, the global language that, if widely adopted, would have prevented miscommunication between peoples.<sup>129</sup> Likewise, the Belgian Paul Otlet created the universal decimal classification, still widely used, in order to classify and categorize information,<sup>130</sup> and, by 1883–1884, time itself had been unified with Greenwich Mean Time setting the standard.<sup>131</sup> More generally, Auguste Comte had inaugurated the idea of the social being subject to scientific analysis, and economics likewise had started to make waves. International lawyers, in turn, armed with the new tools of sociology, such as statistics, could develop their affiliation with positivism, as it was precisely the tools of sociology that made investigations into state practice possible.<sup>132</sup> Moreover, it has been argued that the 19th century marked a development from the society of states as a collection of potential aggressors and opponents to a community more akin to a community of fate. It follows, then, that only throughout the 19th century did it even become possible for states to start to think of cooperation in forms other than temporary and fleeting alliances, for instance, through international organizations.<sup>133</sup>

The most often invoked explanation, however, for the creation of the public international unions during the later third of the 19th century and beginning

<sup>125</sup> See, e.g., Peters and Peter, *supra* note 10.

<sup>126</sup> A. Bennett, *The Geneva Convention: The Hidden Origins of the Red Cross* (2005).

<sup>127</sup> E. Wheen, *Karl Marx* (1999), at 272–288.

<sup>128</sup> M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001).

<sup>129</sup> Mazower, *supra* note 42, at 113.

<sup>130</sup> *Ibid.*, at 107.

<sup>131</sup> Reinalda, *supra* note 65, at 99.

<sup>132</sup> On the turn to science in 19th-century international law, see Orford, 'Scientific Reason and the Discipline of International Law', 25 *EJIL* (2014) 369.

<sup>133</sup> The argument about the development into a community of fate is made by Lev. 'The Transformation of International Law in the 19th Century', in A. Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (2011) 111.

years of the 20th century resides in economic factors – material and cultural.<sup>134</sup> The material factors simply suggested a need for inter-state cooperation, and, indeed, the term ‘necessity’ frequently recurs in writings about functional international organizations.<sup>135</sup> The industrial revolution set in motion a process of globalization during the second half of the 19th century, with national boundaries and national idiosyncracies increasingly being seen as obstacles for the free flow of goods across the planet. There was a perceived need to have telecommunications subjected to harmonized rules (hence, the creation of the UPU and the ITU). Standardized weights and measures were expected to bring great benefits to industry and trade (hence, the creation of the International Bureau of Weights and Measures in 1875 and the International Geodetic Association earlier in 1864). Intellectual property regimes were seen to require some minimum harmonization between states (hence, the International Bureau for Industrial Property in 1883 and the Bern Union in 1886). Railway transportation would benefit from having identical track width in states combined with similar rules on tonnage and the like (hence, the establishment of the International Union of Railway Freight Transportation in 1890).

Even entities established for largely humanitarian reasons were also considered to serve economic purposes. The lighthouse at Cape Spartel, for instance, was set up in order to secure maritime traffic around the Moroccan coast following a large number of shipwrecks, but it was expected to have an economic impact as well. Indeed, one of the treaties paving the way for the 1865 Constitution of the Cape Spartel Commission, an agreement on commerce concluded between Morocco and Spain in 1861, explicitly recalled that the absence of a lighthouse ‘exposes navigation and commerce to serious risk and loss’.<sup>136</sup>

Moreover, there was a strong factor related to the culture of economics, so to speak. The late 19th century saw the emergence (or re-emergence) of colonialism by the European powers, in particular, embodied in the scramble for Africa.<sup>137</sup> At roughly the same time, the USA became formally engaged in colonial relations after annexing Hawaii and obtaining Cuba and the Philippines following the Spanish-American war, having prepared for such a colonial role during much of the second half of the 19th century.<sup>138</sup> In such a climate, colonialism was sometimes seen as simply another form of cooperation between entities, and some of the leading contemporary thinkers on international organizations – or international affairs generally<sup>139</sup> – were clearly inspired by the similarities between colonial administration and international organization as well as free trade policies. This line of thinking applies, in particular, to the

<sup>134</sup> The argument that positivism itself was inherently economic in orientation is made with subtlety by M. García-Salmones Rovira, *The Project of Positivism in International Law* (2013).

<sup>135</sup> See, e.g., G. Mangone, *A Short History of International Organization* (1954), at 67.

<sup>136</sup> As quoted in Bederman, ‘The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel’, (1996) 36 *VJIL* 275.

<sup>137</sup> H. Wesseling, *Verdeel en heers: de deling van Afrika 1880–1914* (1991).

<sup>138</sup> W. LaFeber, *The New Empire: An Interpretation of American Expansion 1860–1898* (1963).

<sup>139</sup> Long and Schmidt, *supra* note 62.

scholar who can with some plausibility be referred to as the founding father of legal functionalism, Paul S. Reinsch.

Quite possibly, the notion of function, if not the exact word, was first used in the context of international organizations by Georg Jellinek, writing in 1882. Jellinek devoted a chapter of his book *Die Lehre der staatlichen Verbindungen* to different kinds of entities created between states, ranging from federations and confederations to international unions. The former would work in accordance with a *Staatszweck* or *Bundeszweck* (state goal or federal goal) and included the new states of Germany, Italy, the rejuvenated Swiss confederation and the post-civil war USA. By contrast, the international unions would organize their activities around a *Verwaltungszweck*, something that literally translates as an administrative goal or, in modern parlance, a function.<sup>140</sup>

Other authors writing in the last two decades of the 19th century devoted themselves predominantly to discussing individual international organizations, either separately or, more often, in sequence. This may have been the result of an intuition that those organizations had something in common that would warrant treatment in a single volume, yet the writings of Friedrich Meili, Edouard Descamps or Gustav Moynier (who had earlier helped to found the Red Cross) do not display much awareness at the time that the various organizations could profitably be studied together with the findings being synthesized into a single and coherent body of thought.<sup>141</sup>

Towards the end of the century, in 1897, Odessa-based law professor Pierre Kazansky wrote his *magnum opus*, a three-volume study of the law of international organizations in Russian, coming in at well over 1,300 pages. This may have been the first systematic and synthetic overview of what the existing public unions had in common. Yet the work he produced around the same time in French<sup>142</sup> suggests that Kazansky, while asking systematic questions, was still not quite able to provide systematic and synthetic answers.<sup>143</sup> As a result, the work of Reinsch assumes great importance, as he did provide systematic and synthetic overviews and was thus quite possibly the first to do so.<sup>144</sup>

## B The International Unions of Paul Reinsch

Reinsch held a PhD in law and taught political science at the University of Wisconsin–Madison, becoming one of the pioneers of the study of international

<sup>140</sup> G. Jellinek, *Die Lehre von den Staatenverbindungen* (1882), e.g., at 159.

<sup>141</sup> Moynier, *supra* note 14; Baron Descamps, *supra* note 15.

<sup>142</sup> Kazansky, *supra* note 16.

<sup>143</sup> Sometimes E.F. Martens is referred to as one of the first systematic students of the law of international organizations, but this is most likely based on a misreading. Martens devoted volume 2 of his three-volume *Traité de Droit International* (1886) to what he called droit international administratif, but it turns out that the term, for him, served as shorthand for the special rules of international law in peace-time. Volume 1 was devoted to history, theory, and general rules (law of treaties, e.g.), with volume 3 devoted to the law of armed conflict. Volume 2, accordingly, does discuss to a limited extent the set-up and especially the work of some of the international unions, but also contains large sections on diplomatic and consular law, trade law, and private international law, for instance. Ambassadors, consuls, foreign ministers and armies were all considered to be organs of Martens' international administrative law. *Ibid.*, at 17.

<sup>144</sup> See generally Klabbers, *supra* note 36.

relations. His doctoral thesis dealt with the reception of English law in the young USA and generally concluded that English law had exercised a benign influence, serving as a useful set of guidelines while leaving the USA free to adapt as local circumstances demanded. He wrote several books and compiled several syllabi on the US political system and on colonial administration as well as a book on international relations before devoting himself for a while to the study of international organizations, partly aided by having been a member of the US delegation to several meetings of the Union of American Republics. This spawned a handful of articles, with the two major ones published in the *American Journal of International Law*<sup>145</sup> and forming the core of a monograph published in 1911. In 1913, President Woodrow Wilson appointed him as US minister in China, a position from which he resigned after the Versailles Treaty handed Shantung over to Japan. He then performed several tasks for the Chinese government and died in China at the rather early age of 53.<sup>146</sup>

Reinsch was what might be called an early functionalist, both in lawyerly and political science circles. He wholeheartedly subscribed to the insight that cooperation between states would beget further cooperation and that cooperation was warranted as a result of ever-growing interdependence between states. For him, cooperation between states could essentially take three different forms. It could be in the form of free trade – Reinsch was a vocal advocate of the open door policy towards China and of free trade in general. Cooperation could also take the form of colonial relations. While Reinsch eschewed territorial expansionism, he felt, in certain circumstances, a colonial relationship could be mutually beneficial. And, third, cooperation could be organized in the form of permanent public international unions. The three were, so to speak, three sides of the same coin, and it would have to depend on the precise circumstances to determine which form would be most appropriate. Importantly though, the precise form was not all that relevant. Reinsch was acutely aware that while all three might enhance mutual welfare, they also involved power asymmetries, and he never made this more clear than when downplaying the difference between international organization and colonial administration in a lecture to the Milwaukee Bankers' Club in 1906.<sup>147</sup>

Reinsch was the first to give shape to a theory of international organizations, and, with the benefit of hindsight, his insights can usefully be grouped together under the heading of functionalism. Clearly, he endorsed the idea of international organizations revolving around certain limited and highly specific functions, delegated to them by their member states. These functions in turn derived from a perceived need, occasioned by 'the natural currents of trade'<sup>148</sup> or by the need to create a level playing field

<sup>145</sup> Reinsch, 'International Unions and their Administration', 1 *AJIL* (1907) 579; Reinsch, 'International Administrative Law and National Sovereignty', 3 *AJIL* (1909) 1.

<sup>146</sup> For biographical detail, see N. Pugach, *Paul S. Reinsch: Open Door Diplomat in Action* (1979).

<sup>147</sup> Cited in 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), at 108.

<sup>148</sup> P.S. Reinsch, *Public International Unions, Their Work and Organization: A Study in International Administrative Law* (1911), at 13.



– if one state tightens its labour laws, others may gain a competitive advantage, so a concerted approach is desirable.<sup>149</sup>

He also was quick in presenting some kind of classification for these new creatures, dividing them in accordance with their fields of activity. Hence, there were organizations devoted to communication (including the ITU and the UPU), to economic interests (the Metric Union, intellectual property, the early International Labour Office<sup>150</sup> and agriculture), to sanitation and prison reform (the various health bureaus and the International Opium Commission<sup>151</sup>), to police powers (fisheries organizations, the protection of submarine cables, slave trade and liquor traffic) and to scientific purposes (such as the International Geodetic Association). Inadvertently, he already stumbled on the problem that plagued all subsequent classification efforts. His final group consisted of entities ‘for special and local purposes’, as if the others would not be devoted to special purposes. Still, this group included, to his mind, the various river commissions, the Cape Spartel lighthouse, monetary unions and several commissions for financial affairs, the latter effectively groups of creditor states exercising control over debt-ridden states such as Egypt, Turkey, Greece and Macedonia.<sup>152</sup> Moreover, a separate chapter of the book was devoted to the Union of American Republics, an entity that Reinsch had been able to observe first hand as a US delegate, and rumour has it he may have even been considered as a possible future director-general. In the end, this did not happen, perhaps because, as his biographer explains, Reinsch suffered a concussion just a few weeks before attending the fourth conference of the Union and struck the leader of the US delegation as rather ‘light weight’ and ‘not at all adapted to that post’.<sup>153</sup>

It is also clear that, for Reinsch, the public international unions needed to be studied from the ground up. They all constituted discrete entities, and there was neither a hint that all organizations together could follow something like a blueprint for international government nor a hint that they would be created on the basis of abstractly developed first principles. Each organization responded to a particular need, and each followed a specific trajectory. Reinsch was never very explicit on this point, but the very structure of his work speaks volumes, as does his implied rejection of federalism. Contrary to what might perhaps have been expected from a scholar well steeped in the intricacies of federalist thought, Reinsch barely even mentions the term federalism. To his mind, it was far more proper to think of organizations exercising limiting functions than to think of them as proto-federal entities.<sup>154</sup>

<sup>149</sup> *Ibid.*

<sup>150</sup> This was the executive organ of the International Association for Labour Legislation (Reinalda, *supra* note 65, at 166–167) and given the form of a private association to avoid problems associated with formalism (Murphy, *supra* note 34, at 81). It was set up in 1901, headquartered in Basle, and disappeared when the ILO was created.

<sup>151</sup> He included the international committee of the Red Cross as well. Reinsch, *supra* note 148, at 62.

<sup>152</sup> *Ibid.*, at 73–76.

<sup>153</sup> The words were used by US delegation leader Henry White in a note to Secretary of State Knox and are quoted in Pugach, *supra* note 146, at 53.

<sup>154</sup> The only and decidedly minor exception is his depiction of the creation of a Central American Court of Justice as a possible ‘first step in the direction of federal government’. Reinsch, *supra* note 148, at 119.

Reinsch also suggested that all things that could possibly present themselves for attention in relation to an international union could be solved by reference to the member states. Member states retain full control at all times, even when the questions before the organization have no immediate bearing on the member states. Thus, when the Buenos Aires meeting of the Union of American Republics was scheduled, relations between Argentina and Bolivia were strained and diplomatic relations between the two had been broken off, but it was nonetheless decided that membership entitled Bolivia to participate, and the implication was that the decision had been taken by the member states together in one form or another (probably as plenary) rather than by the Union itself, which Reinsch described as merely playing the role of intermediary in extending an invitation to Bolivia.<sup>155</sup> Moreover, and more tellingly perhaps, the plenary body of any organization remains a gathering of state delegates rather than a body of legislators working *sui juris*.<sup>156</sup>

Indeed, possibly the most fundamental insight that Reinsch shared resides in the alignment of the interests of sovereign states and their international unions. He is at pains to underline that the unions work at little financial cost and at no political cost whatsoever. Nationalism and internationalism, properly conceived, would work in tandem – international cooperation ‘is the result of a national life which has come to realize its humanitarian implications’ and the more ‘nationalism itself’ becomes conscious of its true destiny and its effective aims, the more will it contribute to the growth of international institutions.<sup>157</sup> If, with Reinsch, this was largely wishful thinking, later studies have observed that international organizations have often resulted in the strengthening of their member states, if only by helping to build up a public sector.<sup>158</sup>

Despite his acknowledgement of power asymmetries, Reinsch could depict the unions in all sincerity as functional and, therewith, as a-political since those most central to his study could indeed all be said to be built around a single, identifiable function that could indeed be viewed as politically not very salient. Today’s commentators may find this (justifiably) naïve, but at the time it must have made sense to draw Reinschian conclusions from the existence of the ITU, the UPU, or the International Union of Railway Freight Transportation. It is no coincidence that he treated the politically more salient entities as somehow marginal – he intuitively accepted a distinction between ‘proper’ organizations working for the common good and entities such as river commissions or creditor organizations that came closer to being vehicles for particular interests. Still, his hesitation already foreshadowed the emergence of ambivalence at the heart of the very concept of international organization, and this ambivalence was about to take central stage in the work of Frank Sayre.

### C Sayre’s Contribution

Just like Reinsch, Francis Bowes Sayre had a close relationship with Wilson, albeit of a different nature: Sayre was married to Wilson’s daughter Jessie. Indeed, there are

<sup>155</sup> *Ibid.*, at 103–104.

<sup>156</sup> *Ibid.*, at 102.

<sup>157</sup> *Ibid.*, at 11.

<sup>158</sup> See, e.g., Murphy, *supra* note 34.

more curious parallels and half-parallels between the two. Like Reinsch, Sayre was for many years an academic after a brief spell in legal practice (assistant district attorney in New York<sup>159</sup>). Sayre taught criminal law at Harvard, and while Reinsch is often seen as a pioneer of the study of international relations, Sayre pioneered, so it seems, the field of labour law as a legal specialization.<sup>160</sup> Like Reinsch, Sayre also taught a course on international politics. And again like Reinsch, Sayre spent quite a bit of time in Asia, first as advisor to the king of Siam (in the 1920s), then as US High Commissioner in the Philippines (1937–1942) and after the war as church advisor in Japan. Neither man actually specialized in international organizations, yet both made an indelible mark on the discipline.

Sayre was born in Pennsylvania in 1885 in what seems to have been middle-class circumstances. His father was a self-taught civil engineer who ended up a vice president at the Bethlehem Steel Company.<sup>161</sup> He attended Williams College in Massachusetts and graduated in 1909 as class valedictorian, after which he went to Harvard Law School, where he graduated in 1912. Following a brief spell in the district attorney's office in New York, he returned to Williams College in 1914, and back to Harvard in 1917. In between, in 1913, he had married Jessie Wilson, one of the daughters of President Woodrow Wilson and, at some point, also spent some time in the US administration, as Assistant Secretary of State.

Wilson's biographers do not provide much information on Sayre: one never mentions him,<sup>162</sup> while a more recent biography details that Sayre was at least familiar with some of Wilson's academic work.<sup>163</sup> Wilson, as is well known, had been one of the early giants of the discipline of public administration. He was a political scientist (albeit trained as a lawyer) with a keen interest in how the administration actually works. Still, Sayre's most lasting work, *Experiments in International Administration*, has Wilson written all over it and not just because it is dedicated to Wilson's daughter. *Experiments* was first published in 1919, while the negotiations for a peace treaty and the League of Nations were being conducted in Versailles,<sup>164</sup> and is best seen as an intervention in those negotiations. Wilson's long-time collaborator Colonel House had set up a Commission of Inquiry to prepare for assisting in the drafting of the Versailles Treaty. He asked Sayre to join, and, in this capacity, Sayre started to gather material about international organizations, 'studying the reasons for their success or failure', as he writes in his autobiography.<sup>165</sup> This then took the form of a book, published in January 1919.

<sup>159</sup> Reinsch had briefly been in private practice in Wisconsin.

<sup>160</sup> E.B. Sayre, *Glad Adventure* (1957), at 24, 72.

<sup>161</sup> *Ibid.*, at 5.

<sup>162</sup> J.W. Schulte Nordholt, *Woodrow Wilson: Een leven voor de wereldvrede* (1990).

<sup>163</sup> J.M. Cooper, Jr., *Woodrow Wilson: A Biography* (2009), at 296. The multi-volume *Papers of Woodrow Wilson* mention Sayre repeatedly after 1913, but usually in connection with some family-related theme, as when Jessie extends Frank's greetings to her father or vice versa. The correspondence between Sayre and Wilson himself is relatively small and contains no traces of any substantive discussion concerning international organizations.

<sup>164</sup> For a useful overview of the negotiations, see MacMillan, *supra* note 107.

<sup>165</sup> Sayre, *supra* note 160, at 66.

*Experiments* starts with a reference to the ongoing negotiations: '[N]ot every kind of League will insure peace.'<sup>166</sup> Hence, the book is set up as an investigation into what makes for a successful international organization, and the recipe is given, broadly speaking, that a successful international organization is founded on 'broad interests', 'dictated by justice and righteousness'<sup>167</sup> and must be given an effective executive organ.<sup>168</sup> The book concludes with a similar reiteration, focusing, in particular, on necessity, and, in the process, Sayre does not hesitate to make active comparisons, for example, between the International Sugar Union (only of interest to sugar-exporting states) and the putative League of Nations (of interest to all).<sup>169</sup>

In the end, the book contains a plea for international organizations to be set up on the basis of necessity, with strong executive organs and some kind of weighted voting to reflect power differences, and proposes the hypothesis that organizations can succeed in conditions of necessity. It illustrates these conditions, blissfully oblivious perhaps to issues of selection bias, with the help of existing success stories: the UPU succeeded because it was necessary; the Danube Commission succeeded because it was necessary; the Sugar Commission, arguably the most advanced species of the international organization genus at the time, likewise was successful for a while because it was necessary.<sup>170</sup>

Still, this is not the most interesting thing about *Experiments*. What makes the book relevant for the development and consolidation of functionalism are two related factors. First, Sayre was the first to utilize a broad concept of international organization. For him, an entity such as the UPU was an international organization, but he also treated the Cape Spartel lighthouse as one. Likewise, the various river commissions were treated as international organizations, as were entities such as the Moroccan International Police, despite falling under the nominal authority of the Moroccan government. He even pays some attention to the aborted Commission for Spitsbergen and the Anglo-French condominium over the New Hebrides, although he suggests that the latter is not an international organization properly speaking. Still, 'it bears indirectly upon the subject of international organization'.<sup>171</sup>

Admittedly, Reinsch had included some of the same entities in his work, but he did so typically as an afterthought and typically as curiosities. The UPU would be a proper international union, according to Reinsch, but river commissions, the lighthouse at Cape Spartel and others were grouped together in a few pages under the heading 'International Commissions and Unions for Special and Local Purposes'.<sup>172</sup> Reinsch had adopted a particular definition of international organizations as 'composed of states' and existing to 'further all those activities which cannot be adequately

<sup>166</sup> E.B. Sayre, *Experiments in International Administration* (1919), at 2.

<sup>167</sup> *Ibid.*, at 8.

<sup>168</sup> *Ibid.*, at 8.

<sup>169</sup> *Ibid.*, at 130.

<sup>170</sup> For background on the latter, see Fakhri, 'The Institutionalisation of Free Trade and Empire: A Study of the 1902 Brussels Convention', 2 *London Review of International Law* (2014) 49.

<sup>171</sup> Sayre, *supra* note 166 at 98.

<sup>172</sup> Reinsch, *supra* note 148, at 73–76.

protected or advanced by isolated states'.<sup>173</sup> Some of these, moreover, would have an administrative bureau or commission. Sayre's broad conception, by contrast, dispenses with any reference to the purpose of the unions. Sayre's is a highly formal definition, focusing merely on the international origin of the entity. As long as something is created between states and not subjected to some domestic legal system, it qualifies as an international organization. At no point is Sayre explicit about defining the notion of international organization, but this is what it effectively boils down to, and this is still the standard definition a century later, at the expense of more substantive elements. Thus, there is, for example, no requirement involved that international organizations must serve the public good, and quite a few of the examples studied by Sayre rather openly served some private interest. Sayre does not hesitate to claim, for instance, that the Huangpu River Commission in China, established in 1901, came about because earlier Chinese efforts 'were insufficient to satisfy the foreign interests in Shanghai'.<sup>174</sup> And one of the reasons the International Sugar Union was set up was in order to protect the sugar industry in the British West Indies.<sup>175</sup>

Second, and no doubt as a consequence of grouping a number of divergent phenomena together, Sayre is the first to make analytical distinctions between international organizations. This may sound like a trite matter (in that all textbooks on organizations end up doing the same nowadays), but someone had to start organizing the materials in an analytically responsible way. Kazansky and Reinsch, utilizing a narrower view of organizations as mostly those entities having a public task, had still treated all organizations as more or less identical structures – entities created by member states with a view to performing some public function or other – although Reinsch had already divided them in accordance with their field of action. Sayre now added the insight that different tasks can demand a different kind of design or, alternatively and more plausibly perhaps, that different political configurations may result in different kinds of design, which would be expressed primarily in terms of the powers of organizations.

Sayre distinguished between three kinds of organizations, with the degree of powers conferred as the main variable. This would prove to be a mainstay of functionalism and perhaps inevitably so. Organizations, their functions and their powers have become inextricably related, and it is at least arguable that any other way of classifying organizations (on the basis of substance, as Reinsch had attempted, or on the basis of membership) would have been far less powerful. A first group was formed by organizations with little or no power over their member states. Here, the UPU was his main example. A second group of international organizations concerned those established to address a peculiar situation, possibly with considerable powers, such as the lighthouse at Cape Spartel or the Danube Commission. Typically though, these were great power inventions; the territorial states concerned may have been participants but were rarely drivers. The third group then was formed by organizations addressing

<sup>173</sup> *Ibid.*, at 4.

<sup>174</sup> Sayre, *supra* note 166, at 88.

<sup>175</sup> *Ibid.*, at 118. There is room to believe that this did not quite work out as planned. Fakhri, *supra* note 170.

specific relations between member states (as opposed to specific situations) and given substantial powers. Here, the International Sugar Commission, with its independent power to set sugar prices by majority vote, was the prime example.

The third reason for the lasting significance of *Experiments* is that, as in Reinsch's work, there is a visible colonial connection at work. For Reinsch, it could be said that international organizations, colonialism and free trade were three different instruments to reach the same goal: global peace and prosperity. Much of what applies to Reinsch applies to Sayre as well. He was an enthusiastic advocate of free trade, he held international organizations in great esteem and he did see some point in a responsible colonialism. As with Reinsch, Sayre's views on international organizations were intermingled with his views on colonial governance. Both colonial governance and international organizations were seen as vehicles for paternalistic progress. If this is an underlying theme in *Experiments*, it comes out with even greater force in Sayre's autobiography.

In his sixties, Sayre became the US representative on the newly created UN Trusteeship Council as well as its first president and, in this capacity, went on several missions to trusteeship territories. Invariably, he would conclude that the inhabitants were not yet ready for independence. Thus, with respect to Western Samoa, he (along with the Trusteeship Council) found 'the Samoan people as a whole lacking in political technique and experience and in a popular understanding of national issues'.<sup>176</sup> In addition, there were problems related to education, to how to deal with European residents and to social advancement.<sup>177</sup> Most curiously, perhaps, he found that their 19th-century history had shown that the Samoans were not able to withstand the aggression of European adventurers and, therefore, it seems, should not be granted independence.<sup>178</sup>

More generally, Sayre's autobiography is interlaced with statements suggesting that a responsible form of colonialism might be very helpful. Clearly, like Reinsch, Sayre was not keen on territorial expansion but viewed colonialism in rather paternalistic terms: 'Many peoples under alien rule are manifestly not yet ready for self-government.'<sup>179</sup> Indeed, the colonialism of the past had not all been 'an unmixed evil'.<sup>180</sup> As he explained, '[w]ithout previous colonial rule many people in far parts of the world today would be without parliamentary institutions, sound judicial procedures, governmental protection of minority rights and other bulwarks of human freedom'.<sup>181</sup>

When discussing the Philippines, where he had been the US High Commissioner, he could not help but remark that the local population was far better off. There was now uncontaminated water at the village well, cholera and plague and smallpox had been

<sup>176</sup> Sayre, *supra* note 160, at 292.

<sup>177</sup> *Ibid.*, at 292–293.

<sup>178</sup> *Ibid.*, at 292. It never dawns on Sayre that the problem might reside with the aggression of European adventurers. This turns things into an awkward tautology: because a people cannot resist being colonized, it should be colonized.

<sup>179</sup> *Ibid.*, at 311.

<sup>180</sup> *Ibid.*, at 313.

<sup>181</sup> *Ibid.*



all but eradicated and local children could learn English at good local schools. Roads and radios had helped to open up the Philippines to the outside world. In short, the average Philippino 'thinks of America as a friend who has brought good gifts'.<sup>182</sup> And he says much the same about British rule in India, where the British had made 'an heroic attempt' to reconcile western and eastern civilization<sup>183</sup> and where it had been precisely 'conceptions of liberty and freedom taught by England which finally brought about the independence of India'.<sup>184</sup>

It is this paternalism that also informs much of the discussion in *Experiments*. Many of the examples he discusses are examples of great powers assuming control over some local situation, typically peripheral to the West. Some were in eastern Europe (the Danube Commission, the ill-fated Albanian International Commission of Control), some in North Africa (Cape Spartel lighthouse, the International Sanitary Council in Alexandria, the Moroccan International Police, the Suez Canal Commission), some in sub-Saharan Africa (the Congo Free State and the International Congo River Commission), some in Asia (the International Sanitary Council at Constantinople and two Chinese river commissions) and the condominium over the New Hebrides.<sup>185</sup> To the extent that these were successful, it was because the West took over; to the extent that they failed, it was due to local resistance or discord among the Western powers. The message therewith seemed clear: international cooperation can work and be a force for good, and the difference between colonial administration and international organization is a difference of degree, not of kind.

There was, moreover, a fairly large-print subtext at work here. By casting the net so wide and launching a broad conception of international organization based on a formal definition, he was able to subsume all sorts of ventures under the heading of 'international organization' and, therewith, allow these entities to benefit from the positive attitude towards international organizations. If organizations generally contribute to world peace, then who could complain about, say, river commissions in China under international authority or about the Sugar Union trying to protect the interests of the British colonial sugar industry? These entities, after all, were now seen as benign examples of cooperation between independent states. It is here perhaps that Sayre's most lasting contribution lies. By opening up the concept of international organization, he was able to justify the existence of a number of entities that otherwise could have been regarded as exercises in imperialism.

With the publication of Sayre's *Experiments*, it might be said that functionalism closed its formative phase. The theory was put in place through the writings of Reinsch and Sayre, and now it was up to other authorities to follow it. And the allure of functionalism proved highly seductive, even if its utility was not immediately realized by all and even if few of the newly created institutions of 1919 and later actually fit the functionalist mould. Thus, the League of Nations did not yet provide for functional immunity of member state representatives and League officials. Instead,

<sup>182</sup> *Ibid.*, at 204.

<sup>183</sup> *Ibid.*, at 134.

<sup>184</sup> *Ibid.*, at 137.

<sup>185</sup> The only example of a north-western situation he discusses is the regime relating to Spitsbergen.

these individuals enjoyed ‘diplomatic privileges and immunities’ under Article 7 of the Covenant, and this referred to the regular status of diplomats, without any functional orientation.<sup>186</sup> Indeed, as noted earlier, the function of the League was far too broad and far too overtly political to fit any strict functionalist framework, and it is precisely here that Sayre’s broad, formal definition comes into play. According to his definition, there was no doubt that the League had to be considered an international organization (as opposed to, say, a form of a concert of world power or even a world government). And since the League had to be considered an organization,<sup>187</sup> it stood to reason to subject it to the same legal thought to which the 19th-century function-based international unions had been subjected by Reinsch.

#### D *Functionalism Received*

It is perhaps telling that the Permanent Court of International Justice (PCIJ) needed some time to be swayed by the logic of functionalism. Initially, the PCIJ tried to dismiss all attempts at theorizing about international organizations when confronted with requests for advisory opinions on the powers of the ILO<sup>188</sup> by proclaiming that it was not an academic institution. Yet by the second half of the 1920s, it felt compelled to resort to more general reflection and could not but help resorting to functionalism.<sup>189</sup> It launched the idea of organizations possessing powers attributed to them by their member states in an opinion on the Danube Commission and did so in recognizably functionalist language. The Danube Commission had been created on the basis of a so-called definitive statute, its constituent treaty, and the Court now stipulated that since the Danube Commission is ‘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’.<sup>190</sup>

Perhaps of even greater significance was the idea immediately preceding this classic statement. Where, as in the case at hand, two independent authorities (Romania and the Danube Commission) are vying for prominence, ‘the only way in which it is possible to differentiate between their respective jurisdictions is by defining the functions allotted to them’.<sup>191</sup> The exercise of multiple authority over the same territory

<sup>186</sup> See Zacklin, ‘Diplomatic Relations: Status, Privileges and Immunities’, in R.J. Dupuy (ed.), *A Handbook on International Organizations* (1988) 179, at 180. Before the League’s creation, grants of privileges and immunities were exceptional. See Kunz, ‘Privileges and Immunities of International Organizations’, 41 *AJIL* (1947) 828.

<sup>187</sup> The League, as is well known, did not prove to be terribly effective at executing what many held to be its central task. For a vigorous critique on realist premises, see N. Graebner and E. Bennett, *The Versailles Treaty and Its Legacy: The Failure of the Wilsonian Vision* (2011).

<sup>188</sup> The requests were inspired by French concerns about the ILO possibly ‘running wild’. D. Morse, *The Origin and Evolution of the ILO and its Role in the World Community* (1969), at 15.

<sup>189</sup> See generally Klabbers, ‘The Life and Times of the Law of International Organizations’, 70 *Nordic Journal International Law* (2001) 287.

<sup>190</sup> *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, Advisory Opinion, 8 December 1927, 1927 PCIJ Series B, No. 14, at 64.

<sup>191</sup> *Ibid.*

would by no means be impossible, as authority can take place through the parceling out of functions. And this, then, squared whatever circle was still left to square. Statehood and organizations can go well together – organizations merely exercise functional authority and do so at the behest of states. These states do not abdicate any of their sovereignty. Instead, cooperation through international organizations comes at no cost, is helpful to all and strengthens the member states. Small wonder then that organizations were regarded as the cure to all evils, as embodying the ‘salvation of mankind’, in Singh’s evocative classic phrase.<sup>192</sup>

Functionalism continued to develop, both in the case law of the PCIJ and ICJ and in treaty practice. A prominent manifestation in judicial practice was the ICJ’s finding that the implied powers of an organization could be any powers that were necessary for the function of the organization.<sup>193</sup> Treaty practice followed a similar path. Contrary to the practice of the League of Nations, Articles 104 and 105 of the UN Charter had already highlighted the relevance of the functions of the UN for the purposes of legal capacity and privileges and immunities, and the 1946 Convention on the Privileges and Immunities of the United Nations (General Convention), which was explicitly adopted in order to give effect to Articles 104 and 105 of the UN Charter, did much the same when holding the member state representatives, staff members and experts on mission to enjoy their privileges and immunities only with a view to facilitating the functioning of the organization and in the interest of the organization.<sup>194</sup>

The literature did not immediately follow suit, not so much out of dissatisfaction with functionalism but largely because it took a while before the law of international organizations came to be regarded as a general topic worthy of study. It is rather striking that between 1919 (the publication of Sayre’s *Experiments*) and the second half of the 1950s, few general legal studies appear. This absence oozes the sentiment, formulated as such by Schermers in 1972, that a separate discipline of the law of international organizations could hardly be said to exist. Instead, each organization consists in a universe of itself and functions as a ‘separate unit of the international community’.<sup>195</sup> While many studies of specific, discrete organizations saw the light, most of all concerning the UN, general literature was rare indeed.<sup>196</sup> It only burst open, so to speak, in the late 1950s and early 1960s, quickly followed by the first English-language textbooks.<sup>197</sup>

This general literature of the late 1950s and early 1960s is, however, overwhelmingly functionalist in tone. Functionalist work starts to appear on the structure of the specialized agencies,<sup>198</sup> on the treaty-making powers of international organizations,<sup>199</sup>

<sup>192</sup> Singh, *supra* note 98.

<sup>193</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports (1949) 174.

<sup>194</sup> Convention on the Privileges and Immunities of the United Nations 1946, 1 UNTS 15.

<sup>195</sup> Schermers, *supra* note 46, at 1. See also Klabbers, ‘The Paradox of International Institutional Law’, 5 *IOLR* (2008) 151.

<sup>196</sup> One exception was A.J.P. Tammes, *Hoofdstukken van internationale organisatie* (1951).

<sup>197</sup> Bowett, *supra* note 53; Schermers, *supra* note 46.

<sup>198</sup> H.G. Schermers, *De gespecialiseerde organisaties: hun bouw en inrichting* (1957).

<sup>199</sup> J.W. Schneider, *Treaty-making Power of International Organizations* (1959).

on privileges and immunities,<sup>200</sup> on issues of membership<sup>201</sup> and on the financing of international organizations<sup>202</sup> and, a few years later, also on such topics as the amendment of constituent treaties.<sup>203</sup> At the same time, international lawyers began to wonder how this functionalism related to sovereignty and equality, both in general and in relation to specific topics such as decision making.<sup>204</sup> Notwithstanding this explosion of scholarship, it is again noteworthy that many of the post-war entities depart from Reinsch's image of public unions. Some stayed faithful to Reinsch's idea – for instance, some of the specialized agencies of the UN, such as the WHO. But quite a few others of the newly established organizations have little in common with Reinsch's public unions. NATO, the Council of Europe, the Western European Union, the EU, the General Agreement on Tariffs and Trade and the UN itself all depart to such an extent that they can hardly be deemed to fit functionalist thought.<sup>205</sup>

## 4 The Slow Fall from Grace

### *A Politics, Mismanagement and Turf Wars*

Ironically perhaps, it was precisely during the heydays of functionalism in the decades following World War II that the first cracks in the glamorous functional image of international organizations started to become visible, and their contribution to the 'salvation of mankind' came to be questioned. Over time, this manifested itself in at least four ways. First, international organizations came to be accused of politicization, departing from their proper functions. Member states likewise chose to highlight partisan considerations over clearly functional ones, at least when they saw benefits in doing so. Second, their immunities came to be questioned. Third, it became clear that, under functionalism, organizations were structurally unable to accommodate the position of third parties. The 1980 *WHO and Egypt* opinion of the ICJ placed the writing on the wall. And, fourth, the collapse of the ITC suggested that the problem of accommodating third parties was not merely of academic relevance but also could have serious practical consequences. Organizations slowly came to be regarded as vehicles for political action, suggesting that they were not nearly as a-political and devoid of power politics as Reinsch had hoped for. In the decades following World War II, organizations slowly came to be seen as political actors in their own right. Functionalism was a great idea but, as the practice of the post-war world suggested, not really tenable.

<sup>200</sup> K. Ahluwalia, *The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organizations* (1964).

<sup>201</sup> Singh, *supra* note 98.

<sup>202</sup> J.G. Stoessinger *et al.*, *Financing the United Nations System* (1964).

<sup>203</sup> Zacklin, *supra* note 87.

<sup>204</sup> B. Bross, *The Doctrine of Equality of States As Applied in International Organizations* (1959).

<sup>205</sup> With the General Agreement of Tariffs and Trade, moreover, it was by no means clear that it could be seen as an international organization to begin with.

The politicization of international organizations found some expression in discussions on expulsion or suspension of member states. If the UN had a certain ambivalence towards Franco's Spain right from the start,<sup>206</sup> the situation in various other organizations relating to Spain in the 1940s and 1950s inspired some further action. A move in the International Civil Aviation Organization (ICAO) to expel Spain was pre-empted by Spain itself announcing to cease all participation, according to Konstantinos Magliveras,<sup>207</sup> and there were attempts to oust it from the UPU.<sup>208</sup> What is remarkable though is that the discussions were never about Spain's contribution to the functioning of the ICAO or the UPU (or the UN, for that matter); the attempts at expulsion were clearly aimed at the politics of Spain's government. Therewith, it became clear that membership issues could not always fit functionalism's terms – the charge of politicization turned out to reside right around the corner.

In retrospect, this should not have come as a surprise. Already in the late 1920s and continuing for a few years, Britain tried (in vain) to get Liberia expelled from the League of Nations due to the existence of domestic slavery and compulsory labour in Liberia. It was clearly arguable (and Britain did make the argument) that, in doing so, Liberia violated the League Covenant as well as the Slavery Convention, which it had ratified in 1930, yet the link with the functioning of the League was not altogether clear and, surely, quite a few other members of the League (including Britain itself) could have been accused at least of failing 'to secure just treatment of the native inhabitants of territories under their control', as Article 23(b) of the League of Nations Covenant prescribed.<sup>209</sup> Hence, already the attempt to get Liberia expelled from the League suggested a tension between functionalism and non-functional concerns – the risk of politicization already loomed large.<sup>210</sup>

This would become much clearer still in the 1960s and 1970s. In the UPU, South Africa was barred from participating already in 1964, a decision that was interpreted as blocking its participation during the 1964 session of the plenary, and this process repeated itself a few times throughout the 1970s and 1980s until the UPU's Congress decided in 1994 to lift any objections to South Africa's participation.<sup>211</sup> In other organizations, including the UN, the credentials of South Africa's representatives would not be accepted, effectively making it impossible for South Africa to participate in the organization's work.<sup>212</sup> Some have made the observation that South Africa

<sup>206</sup> The situation in Spain was effectively the first regime-related issue to be presented to the UN Security Council. See UN Doc. S/Res/4, 1946. Of the first three resolutions, one dealt with the Military Staff Committee envisaged in the UN Charter, and two addressed the presence of Soviet troops in Iran.

<sup>207</sup> Magliveras, *supra* note 90, at 61. Readings of the incident differ, with others holding that Spain withdrew from the International Civil Aviation Organization (ICAO). See Schermers and Blokker, *supra* note 26, at 115.

<sup>208</sup> Magliveras, *supra* note 90, at 68–69.

<sup>209</sup> See *ibid.*, at 21, suggesting that the expulsion of Liberia would have been a disproportionately grave sanction. See also Duxbury, *supra* note 90, at 107. Covenant of the League of Nations 1919, 13 AJIL Supp. 128 (1919). Slavery Convention 1926, 60 LNTS 253.

<sup>210</sup> I use the term in a non-pejorative sense, referring to the relevance of other than function-related factors.

<sup>211</sup> Magliveras, *supra* note 90, at 69–75.

<sup>212</sup> *Ibid.*, at 209–222.

was expelled from the ITU,<sup>213</sup> and it seems to have suspended itself from the WHO in 1964.<sup>214</sup> Israel too has been on the brink of expulsion several times in several organizations, partly as a result of its general lack of popularity in the Arab world, partly also in response to specific acts. Thus, following the bombing by Israel of a nuclear installation in Iraq in 1981, the credentials of Israeli representatives in the International Atomic Energy Association and the ITU were not accepted.<sup>215</sup>

The charge of politicization came to rest firmly on many organizations and would be combined (often literally so) with charges of mismanagement, leading even to the withdrawal of prominent member states from some organizations. Withdrawal was, as such, nothing new. Several member states had left the League of Nations before or after being confronted with charges of aggression, and the emergence of the Cold War had resulted in the early 1950s in the withdrawal of the Soviet Union and some of its allies from the WHO and, briefly, from UNESCO,<sup>216</sup> whereas Indonesia more or less withdrew from the UN and several other UN-related organizations after Malaysia was elected to the Security Council.<sup>217</sup> France, moreover, withdrew from NATO's military structure (but not from NATO as such) in the mid-1960s over political disputes concerning the command of troops.<sup>218</sup>

Still, while all of these examples have obvious political overtones and suggest that functionalism in its pure form will rarely be manifest, they were either withdrawals resulting from a member state's unhappiness with specific incidents (Indonesia) or occasioned by the general political climate: the Cold War or French anxiety about the defence of Europe. Qualitatively different was the course pioneered by the USA in 1975 when it announced its intention to withdraw from the ILO for a variety of reasons that were all intimately related to the politics of the ILO. It cited concern about the erosion of the ILO's tripartite structure, the ILO's selective outrage concerning human rights abuses, the ILO's disregard for its internal procedures and, in general, the politicization of the ILO.<sup>219</sup> Earlier in 1975, the ILO General Conference had voted to grant the Palestine Liberation Organization (PLO) observer status, which had caused the US delegation to leave the meeting in protest.<sup>220</sup>

The letter containing notice of the US withdrawal was quite explicit on some of the underlying reasons. '[I]nternational politics', wrote then Secretary of State Henry

<sup>213</sup> See Schermers and Blokker, *supra* note 26, at 110, who mention in the same breath that South Africa was also expelled from the Universal Postal Union (UPU). Magliveras treats South Africa's position in the International Telecommunication Union (ITU) as one of credentials rather than expulsion. See Magliveras, *supra* note 90, at 227.

<sup>214</sup> Magliveras, *supra* note 90, at 152.

<sup>215</sup> *Ibid.*, at 223–227.

<sup>216</sup> See Beigbeder, *Management Problems in United Nations Organizations: Reform or Decline?* (1987), at 27. Schermers and Blokker, *supra* note 26, at 104, note that neither the WHO nor UNESCO recognized these withdrawals, as their constituent instruments did not contain a withdrawal clause.

<sup>217</sup> On Indonesia's 'more or less' withdrawal from the UN, see further Klappers, *supra* note 92, at 112.

<sup>218</sup> *Ibid.*

<sup>219</sup> The US withdrawal took effect in 1977 – it rejoined in 1980. See further Alford, 'The Prospective Withdrawal of the United States from the International Labor Organization: Rationales and Implications', 17 *Harvard International Law Journal* (1976) 623.

<sup>220</sup> *Ibid.*, at 627.



Kissinger, 'is not the main business of the ILO', although he accepted that the ILO had a 'legitimate and necessary interest' in some issues with political ramifications. And Kissinger made no secret of the threat of withdrawal being utilized to change the ILO's course. As he explained, the USA 'does not desire to leave the ILO' but intends 'to make every possible effort to promote the conditions which will facilitate our continued participation'.<sup>221</sup>

Just as telling were the withdrawals of both the USA and the United Kingdom (UK) from UNESCO in 1984 and 1985, respectively. Both states cited dissatisfaction with the politicization of the organization, claiming that UNESCO had started to concentrate too much on issues only tangentially related to its mandate (human rights, communication and media issues and peace and disarmament) and was ignoring its original function in science, culture and education. Moreover, both had serious concerns about how the organization was managed. US Secretary of State George Shultz expressed concern that 'trends in the management, policy and budget of UNESCO' detracted from its effectiveness and curtly stated that '[g]ood intentions are not enough'.<sup>222</sup> The name of UNESCO's then Director-General Amadou-Mahtar, M'Bow, became a byword for organizational mismanagement.<sup>223</sup> As with the withdrawal from the ILO, the US withdrawal from UNESCO was presented as an invitation to UNESCO to change its ways and to 'redirect itself to its founding purposes'.<sup>224</sup>

Such charges were far from isolated, even if they did not always result in member state withdrawal. The Food and Agriculture Organization (FAO), for instance, was lambasted for its role in the Ethiopian famine of the mid-1980s, with one particularly obnoxious charge being that the FAO's Director-General had decided that food deliveries would have to wait until Ethiopia had appointed a different representative to the FAO.<sup>225</sup> Journalist Graham Hancock sums up the general image of the FAO in no uncertain terms. As he explained, the FAO seems like 'an institution that has lost its way, departed from its original mandate, become confused about its place in the world – about what exactly it is doing, and why'.<sup>226</sup>

More generally, the same journalist reports about rather unedifying turf wars between international organizations. The FAO and UNESCO were fighting about which of them would be responsible for agricultural education; UNICEF's specific health-related goals (vaccination, for example) would collide with the WHO's more general health-related programmes; the FAO and the World Food Programme (partly run by the FAO, intriguingly) would quibble about the final responsibility for authorizing shipments of food aid, while FAO was also royally upset when a newly created

<sup>221</sup> Kissinger's letter is reproduced in 14 *International Legal Materials* (1975) 1582.

<sup>222</sup> Shultz's letter announcing withdrawal from UNESCO is reproduced in 23 *International Legal Materials* (1984) 220. See generally also Beigbeder, *supra* note 216, at 26–27.

<sup>223</sup> Weiss speaks of 'rampant mismanagement' during M'Bow's reign. See T.G. Weiss, *What's Wrong with the United Nations and How to Fix It* (2009), at 123.

<sup>224</sup> Shultz's letter, *supra* note 222, at 221.

<sup>225</sup> G. Hancock, *Lords of Poverty* (1989), at 85.

<sup>226</sup> *Ibid.*, at 88.

Office for Emergency Operations in Africa within the UN accepted a donation to buy rice seed for Chad. After all, doing so was the FAO's job.<sup>227</sup>

In short, politicization and questionable management were coming to be seen as endemic to international organizations. Many organizations were accused of setting the wrong priorities, of departing from their original mandates and functions, of wastefulness and turf wars. And the law of international organizations, it seemed, was ill-equipped to do much about it. A member state could indicate its dissatisfaction by withdrawing, as the USA did with the ILO and UNESCO, but doing so would always be vulnerable to charges of politicization as well. This applies not only to fairly obvious political gestures, such as the US withdrawal from the ILO after the latter had granted observer status to the PLO, but also to the more 'functional' arguments presented: the departures from the original mandate, the lack of respect for agreed upon procedures, and so on. It turned out that the notion of 'function' was a bit of a chimaera – many activities can be both seen as covered by some original function and as departing from it.

Highly illustrative is the letter written by UNESCO Director-General M'Bow in response to the US notice of withdrawal.<sup>228</sup> M'Bow makes clear, first of all, that whatever one may think of UNESCO, its existence is 'vital for mankind'. In other words, even if it fails to fulfil its mandate, it still exercises a useful function on a higher level of abstraction merely by existing.<sup>229</sup> M'Bow proceeded by washing his hands in innocence – the USA may have been accusing UNESCO of departing from its original mandate and of being politicized, but, if so, it was up to the member states to take charge and reply. It is the member states, after all, 'who decide on the lines of emphasis of the Organization's programmes and activities'.<sup>230</sup> Indeed, he could not emphasize the relevance of the member states enough: 'UNESCO is an organization of States', and its governing bodies are 'intergovernmental'.<sup>231</sup> And to the extent that there 'may have been some changes in the subjects of immediate concern' since the organization was created, this shift reflected the 'immense changes' that had taken place in the world of international affairs more generally, in particular perhaps, decolonization.<sup>232</sup> And he astutely hinted at the circumstance that UNESCO was created to contribute to peace and security, according to its constitution.<sup>233</sup> The subtext, then, was clearly that any charges about UNESCO going astray by focusing on issues of peace and disarmament were ludicrous.

If this political bickering already suggested that functionalism had a hard time addressing issues of control, it nonetheless still seemed to maintain that control could

<sup>227</sup> *Ibid.*, at 104–105. Righter notes, in a similar vein, that at some point no less than 'fifteen different UN organizations ... involve themselves with ocean management' and that by the 1990s some 20 per cent of the International Atomic Energy Association's technical assistance was devoted to agriculture. See R. Righter, *Utopia Lost: The United Nations and World Order* (1995), at 53.

<sup>228</sup> M'Bow's letter is reproduced in 23 *International Legal Materials* (1984) 224.

<sup>229</sup> *Ibid.*, at 226.

<sup>230</sup> *Ibid.*, at 227.

<sup>231</sup> *Ibid.*, at 228.

<sup>232</sup> *Ibid.*, at 229.

<sup>233</sup> *Ibid.*, at 228. Article 1 of UNESCO's Constitution lists peace and security as an overarching purpose.

be exercised by the member states, if only they wanted to. Functionalist international lawyers seemed adamant that mismanagement could be solved by member state control and that member states should act against unnecessary turf wars between organizations. They were reluctant to accept member state withdrawals as proper responses unless the constituent instrument would have a withdrawal clause – and, even then, they would frown upon withdrawal. Schermers, for example, in the first edition of his textbook, started his discussion of withdrawal by noting worriedly that it ‘generally means a weakening of the organization’, and he was adamant that in the absence of a withdrawal clause unilateral withdrawal was not permitted – it was not allowed by customary international law nor could it be justified under reference to the nature of a constitution.<sup>234</sup>

## B Organizations and Immunities

Functionalism also incurred problems in cases involving the activities of international organizations as employers. When international organizations were first created, during the 19th century, the idea of an international civil service was still anathema. The staff members of organizations were often regarded as civil servants of the host state, with the secretariat incorporated in one of the host government’s departments.<sup>235</sup> Alternatively, staff were often drawn from member state bureaucracies, typically working on the basis of secondment and therewith remaining subject to the labour laws of their national state. An international civil service did not yet exist in the sense in which the term is nowadays used.

This started to change during the 1920s, when Sir Eric Drummond, the first Secretary-General of the League of Nations, boldly developed the idea of an international civil service, loyal only to the organization. The League’s first staff regulations made clear that the League’s officials ‘are exclusive international officials and their duties are not national but international’.<sup>236</sup> A few years later, the Graduate Institute of International Studies was set up in Geneva in 1927, partly in order to help prepare students for careers in the international civil service and, therewith, to socialize students into the internationalist mindset.

The creation of an international civil service was a logical outgrowth of functionalist thought. If the organization is to perform a specific function, it follows that its staff members should be dedicated to the success of that specific function; they should not be under instructions from domestic authorities nor should they take any instructions from authorities other than those of the organization. Hence, quite a few constituent instruments provide in crisp and clear terms that ‘the staff shall not seek or receive

<sup>234</sup> Schermers, *supra* note 46, at 44–54. The quoted words can be found at 44. The current edition expresses the same points. See Schermers and Blokker, *supra* note 26, at 98–110. Almost the same conclusion is reached by Feinberg, ‘Unilateral Withdrawal from an International Organization’, 39 *British Yearbook of International Law* (1963) 189 (who seems to accept unilateral withdrawal if this can be implied from the constitution).

<sup>235</sup> Amerasinghe, *supra* note 27, at 327.

<sup>236</sup> As quoted in T.G. Weiss, *International Bureaucracy* (1975), at 35.

instructions from any government or from any authority external to the Organization' – in the words of Article 100 of the UN Charter – and that the member states shall 'respect the exclusively international character of the responsibilities' of the staff of the organization, as the same article provides. In the rare cases where the constituent instrument remains silent on the issue, the staff regulations adopted by the organization will nonetheless provide much the same.<sup>237</sup>

The same functional logic results in the regular granting of privileges and immunities from member state jurisdiction to international organizations, their staff and member state representatives.<sup>238</sup> After all, a judicial decision by a domestic court can also be seen as an external instruction and, thus, as interference by a member state in the workings of the international civil service. Yet, it rapidly became clear that one undesirable consequence hereof would be to immunize the organization from any form of labour law, and once the first international civil service complaints arose, it became clear that something needed to be done. The League of Nations set up its internal administrative tribunal in 1927 (it was transferred to the ILO in 1946 and is now generally known as the International Labour Organization Administrative Tribunal), and the International Institute for Agriculture followed suit in 1932.<sup>239</sup>

As Amerasinghe sums up, an independent system of law complete with administrative tribunals is necessitated by a number of considerations.<sup>240</sup> Being recruited from many different states, it is thought desirable that all staff is subject to the same legal regime. It is also considered desirable to prevent officials from being subjected to national pressures. And, third, the much welcomed immunity from the jurisdiction of member state courts entails that without administrative tribunals, disgruntled staff members would have no place to take their grievances to.

There are some hints in the case law of the ICJ that aspire to lodge the creation or workings of administrative tribunals within the functionalist logic. When asked to assess the legality of the creation of the UN Administrative Tribunal (UNAT), for instance, the Court remarked that the creation of such a tribunal would 'be consistent with the expressed aim of the Charter to promote freedom and justice for individuals'.<sup>241</sup> It should be noted that the UN is an 'easy case': its functions, aims and purposes are so broad as to encompass well-nigh any human activity imaginable. Hence, to hold that the creation of an administrative tribunal is compatible with the functioning of the UN is not all that difficult. Yet there seem to be no other relevant judicial decisions involving the creation of administrative tribunals, and the absence hereof stands

<sup>237</sup> Note that the position of organizational leadership owes less to functionalism and may contain overt hints at a political role, as is, e.g., the case in Article 99 of the UN Charter. See, e.g., Cox, 'The Executive Head: An Essay on Leadership in International Organization', 23 *International Organizations* (1969) 205; S. Chesterman (ed.), *Secretary or General? The UN Secretary-General in World Politics* (2007).

<sup>238</sup> See generally Jenks, *supra* note 28; Miller, 'The Privileges and Immunities of the United Nations', 6 *IOLR* (2009) 7.

<sup>239</sup> C.F. Amerasinghe, *The Law of the International Civil Service As Applied by International Administrative Tribunals*, volume 1 (2nd edn, 1994), at 49–53.

<sup>240</sup> Amerasinghe, *supra* note 27, at 329–331.

<sup>241</sup> *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 13 July 1954, ICJ Reports (1954) 47, at 57.

to reason. The organizations setting them up would not themselves undermine their own creations, and the staff members appealing to them would not question the legality of the administrative tribunals either. As a result, the ICJ's reasoning with respect to the erstwhile UNAT seems to have been accepted as a general proposition – such administrative tribunals contribute to global justice, as do international organizations generally, and therewith fit a functionalist framework.

More generally, sometimes international organizations have been sued successfully before domestic courts since organizations may typically waive their immunity from suit, and some (in particular, financial institutions) typically do so in order to be seen as worthy partners to do business with. Their credibility on the financial markets depends, in part, on the possibility of being sued. Hence, the constituent instruments of many financial institutions allow for immunity from suit to be waived in certain circumstances or have limited their immunity through a general clause.

A clear example is laid down in Article 50 of the Charter of the Asian Development Bank (ADB), which provides that the ADB 'shall enjoy immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities'.<sup>242</sup> Other constituent instruments may have similar provisions in less clear terms. Thus, Article VII, section 3 of the Articles of Agreement of the World Bank suggests that the Bank may be sued in member states where the Bank has an office, has appointed an agent or has issued or guaranteed securities but without spelling out what kinds of activities it may be sued over.<sup>243</sup> The provision therewith suggests a waiver of immunity but not a very specific one. Be that as it may, courts have generally not been unwilling to allow for the possibility of suits over the borrowing activities of financial institutions, based on clauses such as those mentioned here, albeit depending on the precise construction of the clause.<sup>244</sup>

However, courts have been less willing to accept suits brought against international organizations over their employment relations. As early as 1931, the Italian Court of Cassation confirmed the immunity of the International Institute of Agriculture (one of the forerunners of today's FAO) in employment cases in *International Institute of Agriculture v. Profili*, while at the same time showing awareness that such immunity may come with some unfairness. It noted that the staff member complaining about being dismissed could within the organization only appeal to the very organ that had dismissed him and added that '[o]pinions may be divided about the adequacy of such a remedy'.<sup>245</sup> Nonetheless, the 'power of autonomy' of the organization ruled out all possible forms of interference, including interference by the judiciary.<sup>246</sup>

<sup>242</sup> Agreement Establishing the Asian Development Bank 1965, 571 UNTS 123.

<sup>243</sup> Articles of Agreement of the World Bank 1944, 13 UNTS 346.

<sup>244</sup> See, e.g., *Lutcher S.A. v. Inter-American Development Bank*, 382 F.2d 454 (1967) 42 ILR 138.

<sup>245</sup> Court of Cassation, Italy, *International Institute of Agriculture v. Profili*, 26 February 1931 (1931) 5 Annual Digest 413, at 415. It was, so Amerasinghe suggests, in part this judicial decision that inspired the International Institute of Agriculture to establish its own administrative tribunal. See Amerasinghe, *supra* note 239, at 53.

<sup>246</sup> *Profili*, *supra* note 245, at 415.

The *Profili* case set the tone for many decades, but, throughout the 1980s, cracks started to appear. In *Broadbent v. Organization of American States*, the US District Court for the District of Columbia could still come close to endorsing absolute immunity for international organizations in 1978,<sup>247</sup> but a few years later the climate seemed to change. A Dutch local court held in 1983 that employment relations were not covered by the notion of ‘official acts’ of the organization, and thus the organization (*in casu*, the Iran–US Claims Tribunal, a semi-permanent international judicial entity based in The Hague) could not invoke immunity over employment issues. While this decision was overruled on appeal,<sup>248</sup> it nonetheless contained a hint that organizations would not be completely untouchable, or, at the very least, it suggested that the immunity of international organizations was in need of a theoretical justification.

This theoretical justification would be supplied three months later<sup>249</sup> by the US Court of Appeals for the District of Columbia in *Mendaro v. World Bank*.<sup>250</sup> Susana Mendaro, an Argentine national, had been working as a researcher for the World Bank since 1977. She claimed to have been subjected to sexual harassment and discrimination by other employees (unpunished and perhaps even stimulated by her supervisors) and that she should have been promoted to a higher position given the work she had been doing. She brought a suit in the USA under the 1964 Civil Rights Act, and while she acknowledged that the Bank was generally immune from suit, she nonetheless suggested that the reference in Article VII, section 3 to the possibility of the Bank being sued in a member state, a state where it had appointed an agent or a state where it has issued or guaranteed securities, should be construed as a broad waiver of immunity. The Court disagreed and upheld the Bank’s immunity, providing, surprisingly and perhaps somewhat perversely, a rationale in functionalist terms.

The Bank, so the Court argued, is established to carry out specific functions, and these should be understood together with the purpose of immunities law to make sense of the relevant clause in the Articles of Agreement of the World Bank, namely Article VII, section 3. Doing so makes clear, so the Court continued, that the waiver of immunity in Article VII serves the Bank’s purpose in case of suits by creditors, bondholders and the like. By contrast, a waiver of immunity in employment disputes does not serve the Bank’s purposes and might even come to damage its worldwide operations.<sup>251</sup> Likewise, waiving immunity with respect to commercial transactions makes functional sense, since otherwise the Bank’s practical operations could be hampered and this might ‘unreasonably hobble its ability to perform the ordinary activities of a financial institution operating in the commercial marketplace’. By contrast, the absence of immunity in employment relations ‘would lay the Bank open to disruptive

<sup>247</sup> *Broadbent v. Organization of American States*, 628 F.2d 27 (1980) 63 ILR 162.

<sup>248</sup> Hague District Court and the Dutch Supreme Court, *Iran–United States Claims Tribunal v. A.S.*, Decision of the Local Court of The Hague, 20 December 1985 (1985) 94 ILR 321.

<sup>249</sup> There is no indication, incidentally, that the US District Court was aware of the Dutch decision that preceded it by three-and-a-half months, having been decided on 7 June 1983.

<sup>250</sup> *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir 1983) (1983) 99 ILR 92.

<sup>251</sup> *Ibid.*, at 97.



interference with its employment policies',<sup>252</sup> and, not to put too fine a point to it, the Court gave as a hypothetical example that being subjected to national employment laws and employment cases before national courts might make it difficult for the Bank to 'establish and administer effective employment practices regarding Jewish employees in offices located in Middle Eastern countries'.<sup>253</sup>

Hence, if immunity from suit was to be justified in functionalist terms, so too was the absence of immunity – both were reducible to functionalist logic and both were built upon functionalist premises. Immunity prevents outside interference; the absence of immunity in some cases allows for the full participation of the organization on the commercial marketplace and, therewith, helps at least the financial institutions to function effectively. The Court therewith killed two birds with one stone but at the expense of possibly legitimate grievances by individual employees. This issue, however, was not much in consideration. The Court expressed some sympathy with Mendaro and hinted that in cases of widespread disregard of employee rights immunity could be revoked as a matter of US law but did not go any further.<sup>254</sup>

Still, it became increasingly clear that the immunity of international organizations in staff cases might well result in injustice, to such an extent that human rights guarantees might be at stake. Explicit human rights-based arguments relating to immunity from suit had already been made before domestic courts in the 1960s in disputes involving property.<sup>255</sup> In Belgium, for example, suit was brought for the burning and looting of property owned in the Congo and attributed to UN peacekeepers. The plaintiff suggested that Article 10 of the Universal Declaration of Human Rights, and Article 6 of the European Convention on Human Rights (ECHR) granted individuals with a right of access to justice that would be difficult to reconcile with the immunity from suit enjoyed by the UN, but the argument was dismissed. The Universal Declaration, so the Brussels Civil Tribunal held, was not a binding treaty, and the UN was not a party to the ECHR.<sup>256</sup>

### C *The WHO and Egypt Opinion*

Politicization, mismanagement and the questioning of immunities may have suggested that international organizations were 'running wild' and escaping from member state scrutiny, but the *WHO and Egypt* advisory opinion, rendered in 1980, laid

<sup>252</sup> *Ibid.*, at 100.

<sup>253</sup> *Ibid.*, at 101.

<sup>254</sup> *Ibid.*, at 98, n. 41.

<sup>255</sup> Note that as early as 1952 the UN Administrative Tribunal (UNAT) referred to the freedom of association as recognized in the Universal Declaration of Human Rights. See UN Administrative Tribunal, *Robinson v. Secretary-General of the United Nations*, 11 August 1952 (1952) 19 ILR 494. Since the UNAT held that the UN had implemented freedom of association, the case was decided on other grounds.

<sup>256</sup> Brussels Civil Tribunal, *M. v. Organisation des Nations Unies and État Belge (Ministre des affaires étrangères)*, 11 May 1966 (1966) 45 ILR 446. Three years later, the Brussels Court of Appeal affirmed, in *M. v. United Nations and Belgium (Minister for Foreign Affairs)*, 15 September 1969 (1969) 69 ILR 139. Universal Declaration of Human Rights 1948, UN Doc. A/810, 1948.

bare a more structural theoretical problem.<sup>257</sup> It brought to the fore the complicated situation where a member state of an international organization is, at one and the same time, also a treaty partner of the organization. The state is thus both inside and outside, member and partner, internal and external to the organization. This is a common situation. Most, perhaps all,<sup>258</sup> international organizations have concluded at least one agreement with one of their member states – their host states.<sup>259</sup> And some organizations cannot help but conclude agreements with member states. Thus, with 193 member states, there are very few states left outside the UN, and such activities as peacekeeping tend to involve many agreements with states contributing troops as well as with the states where the troops are deployed.

The Sanitary Council in Alexandria goes back to the year 1831 when it was established as Egypt's Board of Health, but it quickly took on an international character given the circumstance that several states exercised power in Egypt under the capitulations regime.<sup>260</sup> It was solidified as an international organization with the conclusion of the Venice International Sanitary Convention in 1892, and when in 1946 the WHO was established, it seemed obvious that the Alexandria Sanitary Council should become the WHO's regional office for the eastern Mediterranean. This would eventually occur but not without some twists and turns.<sup>261</sup>

By the late 1970s though, a discussion had started within the WHO on the desirability of having a regional office in Alexandria, Egypt, and proposals were made to relocate the office to Amman, Jordan, and to do so as soon as possible. The background was plain. In 1978, Egypt had agreed at Camp David to a *modus vivendi* with Israel, sealed by a formal peace agreement concluded in 1979, and this meant that Egypt's popularity in the Arab world dwindled considerably.<sup>262</sup> Egypt understandably felt that the proposal to move the health office to Jordan was 'politically motivated',<sup>263</sup> and the whole affair was further complicated by the existence of a considerable lack of clarity concerning the legal instrumentalities by which the relationship between Egypt and the WHO had been legally structured.

This turned the matter into a highly technical affair concerning the question whether the relationship between the WHO and Egypt was governed by the formally concluded Host Agreement, concluded in 1951, or whether the Host Agreement was only relevant as evidence of the particular position of the regional office in Egypt but

<sup>257</sup> *WHO and Egypt*, *supra* note 20.

<sup>258</sup> There is some uncertainty at the fringes perhaps. By way of example, in the case of the Council of the Baltic Sea States, the organization itself has not concluded a host state agreement but has left this to its Secretariat. The Secretariat has entered into an agreement with Sweden. See generally Klabbers, 'Ostseerat', in A. Hatje and P. Müller-Graff (eds), *Enzyklopedie Europarecht, Band I: Europäisches Organisations- und verfassungsrecht* (2014) 1163. And not all organizations are based in one of their member states. OPEC (based in non-member Austria) is an example.

<sup>259</sup> The leading study is Muller, *supra* note 91.

<sup>260</sup> The Council is briefly discussed in Reinalda, *supra* note 65, at 172.

<sup>261</sup> These are well documented in *WHO and Egypt*, *supra* note 20, at paras 13–26.

<sup>262</sup> It was suspended for instance, or so it seems, from the Arab League. See the discussion (somewhat ambivalent) in Magliveras, *supra* note 90, at 96–100.

<sup>263</sup> *WHO and Egypt*, *supra* note 20, at para 28.

was not constitutive of that position.<sup>264</sup> The Host Agreement had been under negotiation for quite some time, so in order to facilitate the work of the Alexandria bureau an informal agreement had been concluded in 1949, and the regional office officially started work on 1 July of that year.

In light of the desire to relocate the office to Amman 'as soon as possible', it became relevant to know on which of the two agreements the establishment of the office was based. The 1951 Agreement specified, in section 37, a period of notice of no less than two years. Strict adherence to the 1951 Agreement would therewith do little to facilitate a quick relocation. The 1949 informal agreement, however, created no such obstacles. It did not contain a termination clause and, thus, so some argued, could be terminated with immediate effect, all the more so as it was an informal agreement. In the end, the Court seemed to compromise<sup>265</sup> between the two options. Unable to choose, it resorted to general international law and held that a reasonable period of notice should be respected, without specifying how long such a period should last.<sup>266</sup>

More important though than the specific outcome, or even the immediate politics underlying the question, is that the opinion laid bare a structural problem within functionalism. Clearly, the matter could not simply be treated as one involving the relations between the WHO and one of its members. There was, after all, some kind of relationship under general international law at issue. Equally clearly, though, the matter could not solely be treated as one of international law, as doing so would somehow undermine the institutional element inherent in the relationship between an organization and its member states. The Court acknowledged as much in quite specific terms, addressing one side of the equation: international organizations have no absolute power to determine or change the location of the sites of their headquarters, for states still 'possess a sovereign power of decision' with respect to acceptance or not of decisions relating to headquarters.<sup>267</sup> Unable to say anything of finality, the Court decided to limit itself to immediate crisis management, aiming to dissolve a nasty political crisis on behalf of the WHO,<sup>268</sup> but it could not sidestep the more principled issues altogether. In a sentence that has become well known in later years, the Court held that international organizations are subjects of international law and 'as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.'<sup>269</sup>

This holding recognized not only that international organizations were parts of a broader world but also that they could have obligations towards this broader outside world. That organizations operated in a broader world was not a novel observation – the ICJ had acknowledged as much in its classic 1949 *Reparation for Injuries* opinion,

<sup>264</sup> Agreement between the World Health Organization and Egypt of 25 March 1951, cited in *ibid*.

<sup>265</sup> Gray refers to the opinion as 'judgment by lowest common denominator'. See Gray, 'The International Court's Advisory Opinion on the WHO-Egypt Agreement of 1951', 32 *ICLQ* (1983) 534, at 536.

<sup>266</sup> See also J. Klabbers, *The Concept of Treaty in International Law* (1996), at 202–203.

<sup>267</sup> *WHO and Egypt*, *supra* note 20, at para. 37.

<sup>268</sup> This is how Gray, plausibly, reads the opinion. See Gray, *supra* note 265.

<sup>269</sup> *WHO and Egypt*, *supra* note 20, at para. 37.

in which it held that the UN was an international legal person that could bring a claim against a non-member state.<sup>270</sup> However, what was novel about the *WHO and Egypt* opinion was the observation that organizations could also owe obligations towards the outside world, even if that outside world was also a part of the organization (as in Egypt's status as a member state of the WHO). And equally novel was the suggestion concerning the law governing the relations with the outside world. This had to be looked for in treaties to which organizations are parties and in the general rules of international law, whereas in the specific situation of a treaty partner also being a member state, a reference to the internal law of the organization seemed appropriate, just in case. This is not to say that the sentence proved terribly helpful. For one thing, with the exception of host state agreements, international organizations are parties to very few treaties. The EU with its lively treaty practice is clearly an exception.

The Court realized that it could not decide the case on the basis of functionalist analysis. Several separate opinions aimed to do so and ended up drawing radically different conclusions from their functionalist analysis. Perhaps the most classic functionalism underpinned the separate opinion of Judge Lachs. For Judge Lachs, any WHO decision would 'represent the collective will of the Organization', and he doubted whether there 'is an obligation of, or even call for, negotiations with the host State.'<sup>271</sup> The WHO could unilaterally decide to close any office, and it was just a fact of life ('a truism'<sup>272</sup>) that on occasion the collective will of the organization would conflict with the will of individual members. In order to guarantee the 'proper functioning'<sup>273</sup> of international organizations and have good working relationships between host states and organizations, some degree of precision and comprehensiveness might well be desirable but not more than that. Egypt should simply do as the WHO wished and help implement the WHO's decision, 'since as a member of the Organization it shares in the collective interest of minimizing any disruption of services involved in the transfer once decided'.<sup>274</sup> Notably though, Judge Lachs could only reach his conclusion by downplaying the position of Egypt as a treaty partner.

Judge Gros started from similar premises, asking himself whether the WHO had the power to decide unilaterally on the location of headquarters, but, contrary to Judge Lachs, he answered in the negative. One of his criticisms of the majority opinion was that it 'by-passes the fundamental question of the lack of competence of a specialized agency to decide on measures which do not fall within the functions attributed to it, and which by their nature are foreign to the objectives defined in its constitution'.<sup>275</sup> To him, a removal of the office for political reasons was not health-related, and therefore, *ultra vires*, 'such an action does not fall within its competence'.<sup>276</sup> This way he could avoid having to address the dual nature of Egypt's position both as member

<sup>270</sup> *Reparation*, *supra* note 193.

<sup>271</sup> *WHO and Egypt*, *supra* note 20, at 111 (separate opinion of Judge Lachs).

<sup>272</sup> *Ibid.*

<sup>273</sup> *Ibid.*, at 113.

<sup>274</sup> *Ibid.*, at 111.

<sup>275</sup> *Ibid.*, at 99–100 (separate opinion of Judge Gros).

<sup>276</sup> *Ibid.*, at 104.

and as third party. On Judge Gros' construction, Egypt was simply a treaty partner, and 'the WHO should respect the agreement which it concluded with Egypt for the Alexandria Office'.<sup>277</sup> What this left unsaid, then, was that Egypt is also a member state and, as such, partly, at least nominally, responsible for the WHO's decision.

In doing so, both judges inadvertently made clear that functionalist analysis cannot come to terms with the relationship between an international organization and the outside world. With Judge Gros, the problem is solved by ignoring it – since the WHO's decision is invalid, its treaty relation with Egypt cannot be at stake. And for Judge Lachs, the problem is sidestepped by focusing on Egypt's position as a member state rather than as a treaty partner. The majority recognized, however, that things were more complicated. Judge Ruda realized as much. He found that the WHO cannot be obligated to maintain an office against its will, and Egypt cannot be obligated to host an office if it does not want to, so both could unilaterally terminate the host state relationship. But doing so, he added, 'could not be carried out without taking into account the legitimate interests of the other side'.<sup>278</sup> And it is precisely this concern that functionalism proved unable to accommodate.

#### D *The Collapse of an Organization*

The *Werdegang* of functionalism culminated in the collapse of the ITC, which spawned a veritable cottage industry of lawyerly projects trying to make sense of the responsibility of international organizations and their member states under international law, and it reverberates to this day. The ITC was an international organization comprising 23 member states and the European Community, as it then was. Its foundational instrument was the Sixth International Tin Agreement.<sup>279</sup> Among its tasks were the stabilization of the market in tin and tin products, and, in order to do so, it would buy tin when the market price was low (thus, artificially stimulating demand and raising the price) and sell its buffer when prices were high, therewith increasing supply and lowering the market price. In order to function, it had to borrow considerable sums of money and, by 1985, proved unable to pay back its loans. Hence, proceedings were started by some of the creditors, and some of the loan contracts between the ITC and the tin brokers on the London Metal Exchange did not provide for arbitration with the ITC itself. The main question to arise was this: if the ITC defaults on its loans, can the money be claimed from the ITC's member states? And this, of course, brings the relationship between the organizations and its member states back to the fore: can member states be held responsible for the acts of an organization of which they are members?

In essence, the creditors, keen to be reimbursed, made two arguments based directly on international law (and a handful of others based primarily on English law).<sup>280</sup> The first of these was to the effect that there would exist a rule of international law

<sup>277</sup> *Ibid.*, at 103.

<sup>278</sup> *Ibid.*, at 124 (separate opinion of Judge Ruda).

<sup>279</sup> Sixth International Tin Agreement, 1981, 1282 UNTS 205.

<sup>280</sup> UK House of Lords, *Australia and New Zealand Banking Group Ltd and others v. Australia and Others*, 26 October 1989 (1990) 29 ILM 670.

according to which the member states of international organizations remain jointly and severally liable for acts of those organizations. This argument, however, was flatly rejected by the House of Lords, per Lord Oliver of Aylmerton. The supposed evidence, ‘which consisted in the main of an immense body of distinguished international jurists, totally failed to establish any generally accepted rule of the nature contended for’.<sup>281</sup> Lord Templeman put the same point in more guarded terms: ‘No plausible evidence was produced of the existence of such a rule of international law’,<sup>282</sup> and, even if there was evidence, their Lordships felt that a rule of member state liability under international law could only be enforced on the international level, not in the courts of the UK.<sup>283</sup> The second international law argument was something of a variation on the same theme but perhaps more straightforward. Under this argument, the ITC was to be seen as an agent for its principals (its member states), but this too was dismissed – the circumstance that the ITC had a separate legal personality (and had contracted in its own name) ruled out this argument.<sup>284</sup>

In the end, then, the claims of the metal brokers and banks were dismissed, but not without regret. Lord Griffiths spoke of a ‘grave injustice’ having been done to the brokers and bankers and felt strongly that the member states should provide the Council with the funds to settle its debts. He added with some melancholy, however, that this was not a matter for the House of Lords to decide but, rather, ‘must be pursued through diplomacy’.<sup>285</sup>

The ITC litigation made abundantly clear that something could go wrong in the management of international organizations. Even if and when they were set up for good, noble purposes, the situation, nonetheless, may occur where third parties (outsiders to the organization) could suffer damage. The episode also made abundantly clear that the law of international organizations is unable to provide a remedy in cases where third parties suffer damage from the organization’s exploits. However grave the injustice suffered, third parties fall outside the matrix of the law of international institutions. As many immediately realized, international institutional law does not provide any relief. As a result, there have been many attempts to devise possible solutions, concentrating in particular on the creation of responsibility or accountability regimes relating to either the organization itself or its member states.<sup>286</sup> In retrospect, it should not come as a surprise that the law provides little relief. Its dominant theory, after all, is not geared towards including the interests of outsiders. Functionalism focuses exclusively on the relations between organizations and their member states and is structurally incapable of catering to the position of those other than member states.

<sup>281</sup> *Ibid.*, at 706 (per Lord Oliver of Aylmerton).

<sup>282</sup> *Ibid.*, at 675 (per Lord Templeman).

<sup>283</sup> *Ibid.*, at 675 (per Lord Templeman) and 705 (per Lord Oliver of Aylmerton).

<sup>284</sup> *Ibid.*, at 708–709 (per Lord Oliver of Aylmerton). Alternatively, it would require the House of Lords to construe the terms of the Tin Agreement in order to verify the precise relations between the organization and its member states, yet this would have been unjustifiable. It is not for a domestic court to authoritatively interpret a treaty, so Lord Oliver of Aylmerton argued.

<sup>285</sup> *Ibid.*, at 678–679 (per Lord Griffiths).

<sup>286</sup> Sadurska and Chinkin, ‘The Collapse of the International Tin Council: A Case of State Responsibility?’, 30 *VJIL* (1990) 845.



## 5 Cholera in Haiti

The problems relating to the functionalist approach to international organization can perhaps best be made visible by means of an example. Several recent or fairly recent examples vie for prominence. The inaction of the UN in Rwanda, two decades ago, suggests that little solace can be offered if the organization decides not to act at all.<sup>287</sup> If the main function of the UN is indeed to help provide international peace and security, then somehow the Rwandan slaughter seems difficult to reconcile with the UN's main *raison d'être*, and, indeed, many have held that by not acting the UN did something wrong. Still, in the absence of a clear legal obligation<sup>288</sup> resting on the UN to intervene in the name of international peace and stability, it is difficult to identify the internationally wrongful act required to hold the UN responsible under the articles on the responsibility of international organizations, assuming these represent customary international law to begin with.<sup>289</sup>

The complicated events in Srebrenica in the mid-1990s also suggest that functionalism has its limits. As is well known, a UN-proclaimed safe area turned out to be not safe at all when a Dutch battalion allowed some 8,000 men and boys to be sent to their deaths. Again, a precise legal obligation is not all that easy to discern. Even human rights advocate extraordinaire Geoffrey Robertson can only make references to the 'moral guilt' of the Dutch<sup>290</sup> and how Srebrenica represents 'the moral nadir reached by UN peacekeeping'<sup>291</sup> but without being able to pinpoint what legal wrongs were committed by whom.<sup>292</sup> The victims and their relatives went on to sue for compensation against both the UN and the Netherlands, in various proceedings.<sup>293</sup> Claims brought against the UN came to a quick stop – the UN invoked absolute immunity, and the Dutch Supreme Court (Hoge Raad) agreed,<sup>294</sup> as did the European Court of Human

<sup>287</sup> For a powerful explanation in terms of organizational sociology, see M. Barnett and M. Finnemore, *Rules for the World: International Organizations in World Politics* (2004).

<sup>288</sup> It might be possible to claim that the UN was under an obligation to prevent genocide, but, if so, then the same obligation rested on all states as well, and it would require additional argument to single out the UN as the main entity responsible.

<sup>289</sup> The International Law Commission (ILC) adopted its articles on the responsibility of international organizations in 2011, following the work of Special Rapporteur (now Judge) Giorgio Gaja. The customary status of the articles is controversial. It is generally acknowledged that the articles are not based on a lot of relevant international practice. See, e.g., Wood, "'Weighing" the Articles on Responsibility of International Organizations', in M. Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013) 55.

<sup>290</sup> G. Robertson, *Crimes against Humanity* (1999), at 77.

<sup>291</sup> *Ibid.*, at 79.

<sup>292</sup> He does classify the event at large as genocide (*ibid.*, at 77), but seems to do so colloquially and without detailing the legal responsibility of the UN and the Netherlands. The ICJ in 2007 also classified the event as genocide, with responsibility attributed to the Bosnian Serbs. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports (2007) 43, at para. 415.

<sup>293</sup> Henquet, 'The Jurisdictional Immunity of International Organizations in the Netherlands and the View from Strasbourg', 10 *IOLR* (2013) 538.

<sup>294</sup> Dutch Supreme Court, *Stichting Mothers of Srebrenica et al. v. The Netherlands and the United Nations*, Case no. 10/04437, 13 April 2012.

Rights.<sup>295</sup> Since then, Dutch courts have accepted the (limited) civil responsibility of the Netherlands in a case brought by a Bosnian UN interpreter against Holland<sup>296</sup> as well as in separate proceedings brought by the Stichting Mothers of Srebrenica and others.<sup>297</sup>

A more recent prominent example that presents itself is the response to the outbreak of cholera in Haiti. In January 2010, an earthquake struck in Haiti, eventually killing several thousands of people. Soon, reports trickled down about looting and pilfering. '[T]he narrative in the foreign press', writes journalist Jonathan Katz, 'had transformed from postdisaster desperation to burgeoning chaos.'<sup>298</sup> This situation provoked a security-based response. By means of Resolution 1908 (2010), the UN Security Council decided to strengthen its earlier established MINUSTAH operation by expanding the number of soldiers and policemen.<sup>299</sup> Five months later, Resolution 1927 (2010) added another 680 police.<sup>300</sup>

Later resolutions mention, in factual terms, that there had been an outbreak of cholera in Haiti, adding to its share of humanitarian problems.<sup>301</sup> There is no hint, however, of the UN assuming much responsibility here, neither for the outbreak as such nor for trying to combat it. Typical is the following consideration, taken from SC Resolution 2070 (2012):

*Noting* the ongoing efforts by the Government of Haiti to control and eliminate the cholera epidemic, and urging the United Nations entities in coordination with other relevant actors to continue to support the Government of Haiti in addressing the structural weaknesses, in particular in the water and sanitation systems, and underscoring the importance of strengthening the Haitian national health institutions, and recognizing United Nations efforts to combat cholera.<sup>302</sup>

Clearly, the text suggests that managing the cholera crisis is a matter for the Haitian government, with the role of the UN limited to providing support. Note also that the cholera epidemic is tucked away in the 17th recital, far behind issues such as pre-trial detention, prison hygiene or debris removal.

Yet, there is a strong suspicion that the cholera outbreak can be ascribed to the Nepalese contingent of peacekeepers, a suspicion more or less confirmed by reports

<sup>295</sup> ECtHR, *Stichting Mothers of Srebrenica et al. v. The Netherlands*, Application no. 65542/12, Judgment of 11 June 2013.

<sup>296</sup> Hague Appeals Court, *Nuhanovic v. The Netherlands*, Case no. BW9015, Judgment of 5 July 2011 (later confirmed by the Supreme Court). For background, see Riemerma, 'Hasan Nuhanovic: Dutchbattoolk', 75 *Vrij Nederland* (15 November 2014) 56.

<sup>297</sup> Hague Appeals Court, *Stichting Mothers of Srebrenica et al. v. The Netherlands*, Case no. C/09/295247, 16 July 2014.

<sup>298</sup> J. Katz, *The Big Truck That Went By: How the World Came to Save Haiti and Left Behind a Disaster* (2013), at 82. Katz ascribes some of this to claims by a World Food Programme (WFP) spokesperson, later retracted, that the WFP warehouses had been looted. Unless otherwise indicated, I follow the facts as laid down in Katz's book.

<sup>299</sup> SC Res. 1908, 19 January 2010.

<sup>300</sup> SC Res. 1927, 4 June 2010.

<sup>301</sup> SC Res. 2012, 14 October 2011; SC Res. 2070, 12 October 2012.

<sup>302</sup> SC Res. 2070, 12 October 2012, recital 17.

ordered by the UN itself.<sup>303</sup> Nepal had been in the throes of a cholera epidemic just before a rotation of UN troops occurred, and fresh peacekeepers were brought in from a country itself suffering from cholera. As might be expected, the UN does have procedures for the acceptance of peacekeepers. According to the *Medical Support Manual for United Nations Peacekeeping Operations*,<sup>304</sup> prospective peacekeeping personnel are to be tested for medical fitness to serve, with UN standards being considered as minimum standards. Medical examination and clearance of personnel is considered the responsibility of the troop-contributing country, but it is the responsibility of the UN to process the information. In other words, no one should be sent on a mission by the UN without the UN having received clearance from the troop-contributing country, and the manual accordingly warns that incomplete information may result in delayed deployment. Moreover, the manual stipulates that examinations and tests must be conducted within three months before deployment in order to be considered valid.<sup>305</sup> A number of medical conditions are listed as preventing deployment, including heart diseases, chronic asthma, certain types of diabetes and others, but not cholera.<sup>306</sup> This absence is understandable – the manual lists chronic conditions, not acute ones, presumably on the basis of the thought that individuals suffering from acute ailments would obviously (and literally) not be fit for deployment at any rate.

The same manual contains a few words (only a few) on waste disposal. Having first observed that the quality of food and drinking water are the combined responsibility of the UN and the troop contributor, the manual continues by stating that '(a)dequate provision must also be made to ensure high standards of sanitation and proper disposal of wastes',<sup>307</sup> and the next sentence leaves it unclear where responsibility for waste disposal rests.<sup>308</sup> According to a UN press communiqué, the Nepalese contingent's waste management met all international standards: a number of septic tanks had been built at far more than the required distance from a river, and these tanks were emptied every week by a private contractor.<sup>309</sup> Hence, there was no question, according to the communiqué, of waste being dumped in the river. Eyewitness accounts, however, suggested differently and noted human excrements in the river. What is more, the local population reportedly stopped using the river for purposes even of washing, let alone drinking, soon after the Nepalese contingent had first been deployed, some six years earlier. Possibly, the private contractor emptied its trucks carelessly; possibly also a broken PVC pipe may have played a role.<sup>310</sup>

<sup>303</sup> *Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti (Independent Panel)*, available at [www.un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf](http://www.un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf) (last visited 15 December 2014).

<sup>304</sup> Available at [reliefweb.int/sites/reliefweb.int/files/resources/D196COB0FF3A637BC1256DD4004983B9-dpko-medical-1999.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/D196COB0FF3A637BC1256DD4004983B9-dpko-medical-1999.pdf) (last visited 28 November 2014).

<sup>305</sup> *Ibid.*, at 45–46.

<sup>306</sup> *Ibid.*, at 46–47.

<sup>307</sup> *Ibid.*, at 65.

<sup>308</sup> *Ibid.*, at 65–66. The sentence runs: 'Although not directly responsible, the FMedO and contingent medical personnel are to assist logistics, engineering and hygiene inspection personnel in maintaining these standards.' FMedO stands for Force Medical Officers.

<sup>309</sup> The communiqué is quoted in Katz, *supra* note 298, at 226.

<sup>310</sup> *Ibid.*, at 228–229.

It is clear that something happened on the UN's watch, but it is not all that clear what international legal obligations have been violated, how exactly responsibility can be attributed and for what. The UN itself, when directly approached on behalf of the victims, seems to have declined all responsibility,<sup>311</sup> with its legal counsel repeatedly stating that any questions relating to the responsibility of the UN would necessarily include a review of policy and political matters and therewith not be receivable.<sup>312</sup> Hence, a direct appeal to the UN has been foreclosed. Still, several proceedings have been started before US courts by survivors and relatives of the victims, resulting in the UN asserting its immunity from suit.

The tragic episode illustrates the limits of functionalist thought. The functionalist would hold that the UN was established for a set of functions, including the maintenance of peace and security and (if only by implication or constitutional sedimentation) the restoration of social order in its member states. It has been granted privileges and immunities in order to facilitate it in the exercise of these functions.<sup>313</sup> These privileges and immunities can be found in the UN Charter (Article 105), in the 1946 General Convention and again in the 2004 Status of Forces Agreement (SOFA) between Haiti and the UN.<sup>314</sup> They have been granted specifically, on a functionalist reading, to allow the UN to exercise its functions without interference and thus should be respected. The functionalist may (and probably will) deplore the outbreak of cholera but would maintain that immunity law protects the UN and does so for good reason. And the functionalist would apply the same type of reasoning had another organization been involved – if, for instance, cholera had been spread by World Bank economists or by nurses sent by the WHO.

The one possible argument internal to functionalism that the functionalist might allow is the argument that since the privileges and immunities are related to the functioning of the organization, the UN cannot claim immunity for activities that have little bearing on the functioning of the UN. It is no coincidence that attempts to lift the UN's immunity revolve around the notion of function. A first variation is straightforward: causing cholera cannot be considered to be among the functions of the UN, and, thus, the UN should not be held immune. This is not a compelling argument, though, since (one may presume) the outbreak of cholera was not the result of a policy decision to spread the disease.<sup>315</sup> The argument borrows from the *ultra vires* doctrine but therewith presupposes the conscious use of a power to begin with.

A more plausible variation on this argument might be to suggest that even if the UN has legitimate business in Haiti, surely it should not act negligently. Yet, compelling as

<sup>311</sup> Daugirdas, 'Reputation and the Responsibility of International Organizations', 25 *EJIL* (2014) 991.

<sup>312</sup> See, e.g., letter from Patricia O'Brien to Mr Brian Concannon, Institute for Justice and Democracy in Haiti, 5 July 2013, available at [ijdh.org/wp-content/uploads/2013/07/20130705164515.pdf](http://ijdh.org/wp-content/uploads/2013/07/20130705164515.pdf) (last visited 28 November 2014).

<sup>313</sup> See very emphatically Kunz, *supra* note 186; see also Bekker, *supra* note 91.

<sup>314</sup> Agreement between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti 2004, 2271 UNTS 251

<sup>315</sup> Likewise, the UN has been prosecuted in the early 1960s over espionage, with the authorities suggesting that since espionage is not among the UN's functions, it could not plead immunity. Several US courts disagreed though, and upheld immunity. See *United States v. Melekh*, 190 F. Supp. 67 (1960) 32 ILR 308.

it is, this argument is simply not available to the functionalist. It is not that functionalists think negligence is a great good but, rather, that functionalism is incapable of distinguishing between negligent and other behaviour. All that matters to functionalism is that the act can somehow be linked to the function of the organization. Hence, as soon as it can be established that the UN can justify being active in Haiti, anything it does falls within the scope of the justification.<sup>316</sup> There is not, and cannot be, an objective yardstick as to what is or is not functional, and, in a similar setting, in regard to the notion of what constitutes an 'official act', the ICJ has opined that the opinion of the Secretary-General creates a very strong presumption 'which can only be set aside for the most compelling reasons'.<sup>317</sup> Hence, once the UN has a foot in the door, its discretion is well-nigh unlimited: any initial functionalist justification carries within it justification for all sorts of further activities.<sup>318</sup>

Yet a third variation on the same argument is to distinguish between public law claims and private law claims.<sup>319</sup> This distinction builds on Article 29 of the 1946 General Convention, holding that the UN 'shall' make provision for appropriate settlement of disputes arising out of contracts 'or other disputes of a private law character' to which the UN is a party. The reference to contracts suggests<sup>320</sup> that the intention was to cover the type of situations that would not automatically involve the official functioning of the UN, roughly analogous to the distinction between *acta jure imperii* and *acta jure gestionis* in the law of state immunity. This, in turn, followed from two considerations. First, buying office supplies or ordering catering services are something the UN needs to do, and, thus, part of its functions but not in a very direct sense. Pieter Bekker qualifies them as 'incidental' to the performance of functions of the organization.<sup>321</sup> In a sense, every paperclip bought by the UN serves an official purpose and yet, other than as black comedy, it cannot be maintained that the UN was set up in order to buy paperclips. In other words, the drafters of the 1946 General Convention realized all too well that some classes of activities might require a different approach. Second, contractual relations require contract partners, and no such partners can be found in the long run if no modes of settlement are envisaged.

Hence, in line with functionalism, the 1946 General Convention assumes immunity in activities relating to member states but not with respect to activities involving private parties, and practice has by and large confirmed this assumption. The UN habitually compensates for traffic accidents and other private law claims but invokes immunity whenever confronted with public law claims. This then, as Frédéric Mégret

<sup>316</sup> Katz perceptively senses as much when he suggests that the increased presence after the earthquake was based on a misplaced concern for security and order. Katz, *supra* note 298, at 84.

<sup>317</sup> *Difference Relating to Immunity*, *supra* note 23, at para. 61.

<sup>318</sup> Likewise A. Orford, *International Authority and the Responsibility to Protect* (2011).

<sup>319</sup> See, e.g., Alvarez, 'The United Nations in the Time of Cholera', available at [asil.org/blogs/united-nations-time-cholera](http://asil.org/blogs/united-nations-time-cholera) (last visited 18 December 2014).

<sup>320</sup> Intriguingly, and perhaps rather worryingly, the UN website still lists the discussions in the UN General Assembly leading to the conclusion of the 1946 General Convention as being 'under embargo' (last futile attempt to access dated 1 December 2014).

<sup>321</sup> Bekker, *supra* note 91, at 196.

observes, serves to make the distinction between private and public acts of pivotal importance,<sup>322</sup> but, again, this is a distinction that sits uncomfortably within functionalism, as functionalism can only think in terms of functions per se. Functionalism thinks in terms of functional and non-functional but not in terms of private or public acts or claims. The habitually accepted liability for traffic and contractual claims and the like can be justified either in functional terms (the UN needs lodgings, paperclips and other things) or as the cost of doing business and appearing as a 'good citizen on the world stage' (traffic claims),<sup>323</sup> but the outbreak of cholera affecting hundreds of thousands of people and killing more than 8,000 to date is of a different magnitude, defeating the framework of functionalism. The discussion in terms of private and public claims may be illuminating, but it cannot be accommodated within functionalism.

And a fourth variation can be founded on the basis of the SOFA, which, following the UN's Model SOFA,<sup>324</sup> provides for the creation of a standing claims commission to deal with disputes or claims 'of a private law character'. This, however, meets again with the problem that functionalism is not well equipped to differentiate between private and public claims, and, in practice, it would seem that no standing claims commission has ever been established, although local claims review boards have become a matter of regular practice.<sup>325</sup>

It is not only the case that arguments about negligence or malpractice or even downright malevolence are not readily available to functionalism; it is even the case that the functionalist justification is itself rather misplaced. Functionalism was never developed for multi-purpose or multifunctional agencies such as the UN. Instead, its brief was merely to help analyse and protect a number of unions with a clearly delimited and clearly public task, such as the ITU or the UPU. And yet, all relevant instruments, whether they concern the UN Charter, the 1946 General Convention, or the UN Haiti SOFA, are cast in functional terms. Still, given that functionalism is the only accepted framework that is available, it should come as no surprise that claims against international organizations are brought in functionalist terms or in terms that leave the functionalist approach unaffected or stay within a broadly functionalist paradigm but merely tweak at the margins. The Haiti cholera crisis is no exception.<sup>326</sup>

Even if immunity were lifted, it is not immediately obvious where, as a matter of international law, the UN went wrong. As far as the testing of peacekeepers goes, the earlier-mentioned manual makes clear that, first, peacekeepers shall be tested and, second, that tests take place at the latest three months before deployment. Thus, there

<sup>322</sup> Mégrét, 'La responsabilité des Nations Unies aux temps du choléra', *Revue Belge de Droit International* (2013) 161.

<sup>323</sup> The characterization is from Rashkow, 'Immunity of the United Nations: Practice and Challenges', 10 *IOLR* (2013) 332, at 342.

<sup>324</sup> See Article 51 of the Model Status of Forces Agreement. UN Doc. A/45/594, 9 October 1990.

<sup>325</sup> K. Schmalenbach, *Die Haftung internationaler Organisationen* (2004), at 457.

<sup>326</sup> US District Court, *Delama Georges et al. v. United Nations et al.* Case no. 1:13-cv-07146-JPO, Hearings of 23 October 2014, available at [opiniojuris.org/wp-content/uploads/Oral-Argument\\_Cholera-Case-10.23.pdf](http://opiniojuris.org/wp-content/uploads/Oral-Argument_Cholera-Case-10.23.pdf) (last visited 18 December 2014). District Judge Oetken upheld the UN's immunity in a decision rendered on 9 January 2015.



are rules and procedures in place, and these rules and procedures, moreover, suggest that the sending of troops fit for deployment is the primary responsibility of the contributing state. Surely, an argument can be made that the rules and procedures are inadequate. Maybe the manual should explicitly rule out those suffering from cholera and other acute diseases and maybe the period of three months is too long. It may well be supposed, however, that the three-month period represents a more or less arbitrary compromise between health concerns and operational efficiency concerns. Troop-contributing states need time to carry out the tests, and the bureaucracy needs some time to process the results.<sup>327</sup> All in all, three months never seemed unreasonable until the outbreak of cholera showed its dangers.<sup>328</sup>

Second, as far as waste management is concerned, if the UN's claim that matters were outsourced to a private company are correct, then it would seem that the UN is guilty of a lack of oversight but perhaps not much more. The private company concerned would then arguably be in violation of Haitian law, and Haiti itself should surely also have exercised more oversight. If, however, the UN's claim is incorrect, then the negligence argument has a lot more traction, and it is probably no coincidence that the independent panel advocates that 'United Nations installations worldwide should treat fecal waste using on-site systems that activate pathogens before disposal'.<sup>329</sup>

Note that none of this is intended to absolve the UN from any responsibility; quite the contrary. The point is rather to show that the law of international organizations, with its strongly functionalist orientation, has great difficulties coming to terms with the kind of scenario that took place in Haiti. Organizations, being functional creatures, are (under functionalism) under few if any international legal obligations other than those that flow from their own internal rules or from the few treaties that they are parties to or, as the ICJ puts it, the 'general rules of international law'.<sup>330</sup> Unless this latter phrase encompasses all of customary international law and all general principles of law (which seems unlikely), it will be difficult to argue, first, that any international law was violated and, second, that somehow the organization's immunity should not apply.

At the end of the day, functionalism can only think in terms of the binary opposition between functional and non-functional, and any attempt to frame UN responsibility within this binary argument is bound to remain problematic. Functionalism does not hold that immunity be earned by means of good behaviour or that it depends on consideration (in exchange for claims procedures)<sup>331</sup> but, instead, holds that immunity follows from the nature of the organization's work. The whole point about immunity

<sup>327</sup> The law is filled with this kind of rules: who, e.g., can explain the logic behind the rule, to be found in many double taxation treaties, that residence abroad must span at least 186 days in order to qualify as tax residence? Why not 183 (this would represent half a year) or, say, 217, or 52 days?

<sup>328</sup> Of course, this presupposes that the tests actually did take place. If no testing took place at all, then the UN violated its own rules and procedures. Katz suggests that no testing took place, and seems to be citing a UN spokesperson as his source. Katz, *supra* note 298, at 233.

<sup>329</sup> *Independent Panel*, *supra* note 303, at 30.

<sup>330</sup> *WHO and Egypt*, *supra* note 20, at para. 37.

<sup>331</sup> Especially the latter type of argument was made before Judge Oetken in *Georges*, *supra* note 326.

is to allow the organization to work without interference – not to make immunity dependent on the organization’s behaviour or on an original and unspecified bargain to get rid of immunity altogether.<sup>332</sup> On such a reading, immunity would eventually only attach to those activities that are unobjectionable, and, surely, this would miss the point spectacularly.

The only way out is to discard the functionalist approach altogether and adopt a radically different vocabulary, often inspired by sympathy for the plight of those who are identified as victims. For some, this has been the vocabulary of constitutionalism and the rule of law,<sup>333</sup> suggesting (often implicitly) that international organizations, if they are to be seen as legitimate, must adopt liberal constitutionalist thought, and from this it follows that they ought to respect human rights and ought to be open to accountability should they fall short of human rights requirements. The European Court of Human Rights has seen fit to adopt the beginnings of such an approach when launching a doctrine of equivalent protection. In certain classes of cases, organizations are to afford equivalent protection to the protection offered by access to domestic courts.<sup>334</sup> Notably, however, the reach thereof is limited. The Strasbourg Court has so far limited its doctrine to staff cases and, at any rate, cannot exercise jurisdiction over international organizations generally.<sup>335</sup> At best, it can find parties to the convention responsible for not creating organizations that would be in a position to honour the principles embodied in the convention.<sup>336</sup>

Others have adopted an administrative law vocabulary, suggesting that where international bodies exercise public power, their exercise of public power should in principle be open to scrutiny, regardless of the uncertainties as to where the law comes from.<sup>337</sup> Still, laudable as such attempts are, they are difficult to reconcile with the general tenets of functionalism and, more importantly, cannot easily be reconciled with the relevant legal instruments. Where the relevant legal instruments are all based on, and giving effect to, considerations of functional necessity, competing approaches will have to give way.

Neither do the Articles on Responsibility of International Organizations seem to offer much solace.<sup>338</sup> While the inspiration for the ILC to place the topic on its agenda stemmed in part from concerns about the operational activities of international

<sup>332</sup> That said, the precise scope of immunity is always dependent on negotiations. Klabbers, *supra* note 92, at 133.

<sup>333</sup> A thoughtful example is J.M. Farrall, *United Nations Sanctions and the Rule of Law* (2007).

<sup>334</sup> See ECtHR, *Waite and Kennedy v. Germany*, Application no. 26083/94, Judgment of 18 February 1999. In a telling twist, moreover, the Court has invoked *Waite and Kennedy* as authority for the proposition that access to courts is not an absolute right but may be subject to limitations. See, e.g., ECtHR, *Al-Dulimi and Montana Management Inc. v. Switzerland*, Application no. 5809/08, Judgment of 26 November 2013, at para. 124.

<sup>335</sup> The EU might someday become the exception should it ever accede to the Convention. See Klabbers, ‘On Myths and Miracles: The EU and Its Possible Accession to the ECHR’, 1 *Hungarian Yearbook International European Law* (2013) 45. In December 2014, however, the Court of Justice of the European Union determined that the draft accession agreement is incompatible with EU law. See CJEU, Opinion 2/13, 18 December 2014 (not yet reported).

<sup>336</sup> For further discussion, see G. Verdirame, *Who Guards the Guardians? The UN and Human Rights* (2011).

<sup>337</sup> A thoughtful recognition hereof is Kingsbury, ‘The Concept of “Law” in Global Administrative Law’, 20 *EJIL* (2009) 23.

<sup>338</sup> ILC, Articles on Responsibility of International Organizations, Doc. A/66/10, 2011.

organizations (with particular reference to the UN's efforts to maintain and secure international peace and security),<sup>339</sup> the ILC's effort, nonetheless, will not have much direct impact on issues such as the Haitian cholera outbreak.<sup>340</sup> One reason is that the scope of the articles is by and large limited to relations between international organizations *inter se* and between international organizations and states. While this is without prejudice to other responsibility relationships,<sup>341</sup> it still means that those other relationships – for instance, between organizations and private individuals – are not covered. In other words, the ILC, in following the model of the articles on state responsibility,<sup>342</sup> has opted to frame the responsibility of international organizations within what is largely a civil law paradigm, a paradigm involving responsibility between and among actors of equal standing. By contrast, rules on the responsibility of international organizations were – and are – mostly needed for those cases where organizations exercise public authority – that is, when their behaviour affects actors other than their member states or other states or organizations.<sup>343</sup> In other words, a public law model of responsibility would likely have been more appropriate.<sup>344</sup>

Such a public law paradigm is precluded by functionalism. Since functionalism addresses solely relations between organizations and their member states, it leaves no room for third parties, much less for third parties that are not states: individuals, companies, creditors. This has always rendered functionalism easy to work with – there has never been any need to balance the position of member states against those of individuals or others. However, the price, by now, will be obvious: under functionalism, it becomes well-nigh impossible to hold international organizations accountable to those other than their own member states. The one exception envisaged in the ILC articles might be the rare instance where an international organization has committed an internationally wrongful act towards a non-member state or outsider organization, but such cases really cannot occur under functionalism. A decision by, say, the WMO to invade some non-member state could no longer be justified in terms of the WMO's function and, therefore, be *ultra vires* and thus invalid. Under functionalism, organizations only perform lawful tasks – otherwise, how could they have possibly been created?<sup>345</sup>

<sup>339</sup> Pellet, 'Responsibility of International Organizations', available at [legal.un.org/ilc/reports/2000/english/annex.pdf#page=1](http://legal.un.org/ilc/reports/2000/english/annex.pdf#page=1) (last visited 1 December 2014).

<sup>340</sup> Indirect impact is a different thing, with the articles being invoked in political and legal argument and, therewith, arguably, steering the development of legal practice. See Daugirdas, *supra* note 311; more generally see also Johnstone, *supra* note 51.

<sup>341</sup> See, e.g., Article 33 of the Articles on Responsibility of International Organizations, *supra* note 338.

<sup>342</sup> As advocated by Pellet, *supra* note 338.

<sup>343</sup> Presumably this is what Pellet had in mind when referring to 'operational activities' and mentioning the collapse of the International Tin Council. See *ibid.*

<sup>344</sup> The terminology stems from P. Cane, *Responsibility in Law and Morality* (2002). Surprisingly perhaps, for all the displeasure with the ILC's Articles on Responsibility of International Organizations, *supra* note 338, there is little awareness that the absence of a public law paradigm represents a missed opportunity. But see Pronto, 'Reflections on the Scope of Application of the Articles on the Responsibility of International Organizations', in Ragazzi (ed.), *supra* note 289, 147.

<sup>345</sup> The sentiment still lingers, and may help explain the strong resistance against articles on responsibility, as the very idea of responsibility somehow suggests that organizations can do wrong.

As soon as behaviour can be captured in functionalist terms, the same functionalism ends up justifying it or, if not justifying it, at least making it impossible to counter it while remaining within the same discourse. As a result, it proves difficult to capture serious tragedies such as the Haitian cholera in international legal terms. The UN can claim immunity, and functionalism at any rate does not recognize any international legal obligation resting on the UN without such obligation being, somehow, functional or self-imposed. Therewith, the Haitian cholera outbreak becomes a remarkable signpost for the poverty of the law. It is clear that something happened on the UN's watch, and there is a widely shared feeling that the UN has done something wrong – but the precise wrong is difficult to capture in legal terms. More radically, it may perhaps even be suggested that the law is implicated in the tragedy. Presuming that the deployment itself was lawful, one might argue that the UN was responsible for the damage but not for the injury, and only the latter is deemed legally cognizable.<sup>346</sup>

Regardless of the legal niceties, the UN's behaviour afterwards constitutes moral failure.<sup>347</sup> Invoking immunity may be justifiable under international law; abdicating any form of responsibility, however, is not justifiable. At the very least, the UN could have graciously apologized, for no matter how the tragedy is looked at, it remains the case that more than 8,000 people have died following the arrival of UN peacekeepers – those people would have been alive but for the UN's involvement, and for this it ought to accept some responsibility.<sup>348</sup> Whether the responsibility should take the form of paying compensation is a different matter (and there is room for the argument that a duty to compensate might prevent the UN from acting in other situations), but the spectacle of the UN turning its back is far from edifying, all the more so given the current Secretary-General's outspoken invocation of ethical standards.<sup>349</sup>

## 6 Towards Redemption?

The story so far suggests a number of things. It suggests, first of all, that when functionalism was created, in Reinsch's days, it made some sense. There were some 30 or so unions working for what could plausibly be considered the global common good (even if some would benefit more than others), and it made some sense to stimulate

<sup>346</sup> For a thoughtful argument on law as implicated in tragedy, see S. Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (2007).

<sup>347</sup> It has also been characterized as a public relations disaster. See Alvarez, *supra* note 319.

<sup>348</sup> In July 2014, Secretary-General Ban Ki-moon acknowledged that the UN has a moral responsibility to help prevent the further spread of cholera, but this stops far short of accepting any kind of responsibility for contributing to its outbreak. See [www.ijdh.org/2014/07/topics/health/united-nations-top-official-goes-to-haiti-to-promote-cholera-elimination-elections/](http://www.ijdh.org/2014/07/topics/health/united-nations-top-official-goes-to-haiti-to-promote-cholera-elimination-elections/) (last visited 15 December 2014).

<sup>349</sup> That said, it seems he conceptualizes ethics predominantly as being of relevance when it comes to financial issues. Here is a prominent quote (dated 2007) from his website: 'We must hold all UN employees to the highest standards of integrity and ethical behaviour. On this, I have sought to set an early example, by submitting financial disclosure statement to the UN Ethics Office, for standard external review by Pricewaterhouse Coopers ... But all the financial disclosures in the world will mean very little if we do not bolster our ethical standards – and our implementation of them – both at Headquarters and in the field.' Available at [www.un.org/sg/ethical.shtml](http://www.un.org/sg/ethical.shtml) (last visited 15 December 2014).

those entities and make it possible for them to work without interference – the world would be a better place. Second, the story so far suggests that already early on, the pitfalls of functionalism became visible: politicization set in rapidly, and the notion of ‘organization’ came to comprise entities that could less easily be associated with the global common good. Third, by the 1980s, it had become clear that whatever functionalism’s merits, it was unable to do justice (sometimes quite literally) to third parties. As a result, the law of international organizations is in an intricate process of transforming itself. While it is moving away from an unmitigated functionalism, the precise direction in which the law is moving is as yet difficult to identify.

At the moment, several different trends can be seen, in practice and in the literature, all of them departing from functionalism. The first tendency that can be discerned is the increased ‘opening up’ of immunity law, largely under the influence of human rights concerns and largely in relation to the activities of international organizations as employers. It is by now no longer controversial to hold that organizations can only be allowed to invoke immunity in employment relations if and when they have set up a decent alternative for staff to have access to justice, following *Waite and Kennedy v. Germany*.<sup>350</sup> Even if pleas to lift immunity in cases such as those relating to the outbreak of cholera in Haiti will remain unsuccessful, it nonetheless becomes increasingly difficult to justify immunity, and episodes such as the saga in *Kadi v. Council and Commission* before the Court of Justice of the EU have also underlined the popularity of providing access to justice in order to challenge acts of international organizations.<sup>351</sup>

Second and related, domestic and regional courts have seen fit to intervene in what were hitherto generally considered relations between organizations and their member states, again based on the imperative of protecting third parties. The *Kadi* saga is but a well-known example. The exercise of some kind of judicial review by domestic courts has become far more common and has come to be accompanied by sophisticated legal argument.<sup>352</sup>

Third, there appears to be a general move towards accountability in whatever form, as, indeed, the previous two points also suggest. Absent any consensual theory as to why international organizations can be considered legally bound under international law other than in the most obvious cases, and, indeed, absent much agreement on how to identify international law to begin with outside the most obvious cases, naturally the attention has shifted away from the basis of legal obligation to thinking more in terms of accountability and responsibility, regardless of legal obligation.<sup>353</sup> In this sense, the ILC’s articles on responsibility of international

<sup>350</sup> See, e.g., De Brabandere, ‘Belgian Courts and the Immunities of International Organizations’, 10 *IOLR* (2013) 464. *Waite and Kennedy*, *supra* note 334.

<sup>351</sup> See Case C-402/05, *Kadi v. Council and Commission*, [2008] ECR I-6351. Books devoted to challenging organizations were unthinkable until a few years ago. Arguably, Wellens, *supra* note 116, set the tone, followed by A. Reinisch (ed.), *Challenging Acts of International Organizations before National Courts* (2010).

<sup>352</sup> A. Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (2011).

<sup>353</sup> Klabbers, ‘From Sources Doctrine to Responsibility? Reflections on the Private Lives of States’, in P. d’Argent, B. Bonafé and J. Combacau (eds), *Les limites du droit international: essais en l’honneur de Joe Verhoeven* (2015) 69.

organizations, insisting as they do on the violation of a legal obligation as condition precedent, are merely fighting a rear-guard battle. More generally, responsibility practices (a term that accurately suggests that responsibility can come in various guises<sup>354</sup>) focus not on the source of wrongfulness but, rather, on the consequences of behaviour. The (justified) outcry over the outbreak of cholera in Haiti makes sense from the perspective of addressing the plight of the victims – and does so precisely because it is difficult to capture the wrongfulness of the behaviour in terms of international law. Hence, the traditional methodology is reversed. The UN is widely considered responsible, with legal argument devoted to what and how exactly its responsibility can be established.

In the literature, this move to accountability is visible in the popularity of conceptions of global administrative law (in various guises),<sup>355</sup> in the endorsement of the constitutionalization of international organizations,<sup>356</sup> in the application of ‘rule of law’-based thinking to international organizations<sup>357</sup> and in the generally accepted idea that organizations are, at a minimum, bound to respect human rights obligations.<sup>358</sup> All of these suggest an increased recognition of the relevance of responsibility practices, and all of them are difficult to reconcile with functionalism – they depart from the exclusive focus on the relation between the organization and its member states and quite literally aim to interfere with the functioning of the organization. More importantly still, all of them are based on ideas about responsibility that hardly seem to be in alignment with the special characteristics of organizations. They may tap into notions of responsibility that are valid between actors of more or less equal standing but at the expense of accepting the specifically organizational aspects of the responsibility of international organizations.

In light of the three recent trends signalled above, a re-thinking of international organizations law should involve consideration of the specific nature of organizational responsibility. It may be the case, as has been suggested, that institutional responsibilities (or the responsibilities attached to particular offices, roles or institutions) have become increasingly separated from responsibilities of consequence: ‘[B]ureaucracies create many mechanisms that separate men and women from the consequences of their action.’<sup>359</sup>

<sup>354</sup> Again, the term is borrowed from Cane, *supra* note 344.

<sup>355</sup> Kingsbury, Krisch and Stewart, *supra* note 47; Von Bogdandy et al., *supra* note 47; Kingsbury and Casini, *supra* note 48; Benvenisti, *supra* note 48; Avant et al., *supra* note 48.

<sup>356</sup> Peters, ‘The Constitutionalisation of International Organisations’, in N. Walker, J. Shaw and S. Tierney (eds), *Europe’s Constitutional Mosaic* (2011) 253.

<sup>357</sup> Farrall, *supra* note 333.

<sup>358</sup> A. Clapham, *Human Rights Obligations of Non-state Actors* (2006); Verdirame, *supra* note 336; De Schutter, ‘Human Rights and the Rise of International Organisations: The Logic of Sliding Scales in the law of International Responsibility’, in J. Wouters et al. (eds), *Accountability for Human Rights Violations by International Organisations* (2010) 51.

<sup>359</sup> R. Jackall, *Moral Mazes: The World of Corporate Managers* (2010 [1988]), at 135. See also Veitch, *supra* note 346, at 47. This is perhaps also what Hart had in mind when briefly discussing role responsibility. H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968), at 212–214.



In turn, the separation of a responsibility of consequences from a responsibility of role or office is leading to two (somewhat contradictory) lines of argument.<sup>360</sup> One such line is that as long as an entity meets its mandate it cannot be held responsible, no matter the consequence of its behaviour. Thus, UN Security Council sanctions may well end up killing hundreds of thousands of individuals, but as long as the Council does not transgress the UN Charter or otherwise violate any rule of international law, no responsibility will come to rest on it, the UN, or UN member states – indeed, there is a decent chance that no responsibility will even be invoked.<sup>361</sup>

The other line of argument is (as noted) that as soon as something occurs, attention will focus on who (if anyone) can be held responsible, without paying too much attention to the possible existence of legal obligations. This then mirrors the sometimes maligned turn to ethics or the invocation of legitimacy as the decisive element. Unable to identify which legal rule has been violated by which actor, recourse is had to opaque notions of legitimacy or ethics as having been violated. Yet these merely shift the problem, in that usually the absence of a clear legal rule also suggests the absence of widespread agreement on what would be ethically correct or legitimate.<sup>362</sup>

In addition to the relevance of role responsibility, it may also be the case, as others have suggested, that our standard model of responsibility is insufficient to begin with for application in politics. The standard model owes much to Weber's reference to Martin Luther for whom responsibility was ultimately either responsibility to himself or to God.<sup>363</sup> However, this, as Daniel Warner illuminated more than two decades ago, misses the point that responsibility, thus conceived, is not responsive to any external party of flesh and blood. Responsibility comes to miss the element of 'responsiveness' or the answer to the question 'responsible to whom'. At best, it stays close to the question 'responsible for what'. In legal terms, this often transmutes into responsibility being a one-off: do something wrong; be held responsible and proceed as if nothing has happened. Responsibility regimes typically isolate a slice out of a series of related events, and typically this involves ignoring the context in which these events took place, ignoring learning and socialization and ignoring any possible future relations involving the same actors.<sup>364</sup> Instead, Warner suggests, responsibility and

<sup>360</sup> For this reason, some moral philosophers have identified and endorsed a turn to 'institutional ethics', on the theory that the ethical obligations of individuals towards each other cannot easily be transplanted to those of institutions. See, e.g., Thompson, 'The Institutional Turn in Professional Ethics', in D. Thompson, *Restoring Responsibility: Ethics in Government, Business, and Healthcare* (2005) 267.

<sup>361</sup> And this presupposes that the UN Charter sets limits to the discretion of the Council, a matter not without its fair share of controversy.

<sup>362</sup> For a strong critique of the underlying deontology, see Koskeniemi, 'Legitimacy, Rights and Ideology: Notes Towards a Critique of the New Moral Internationalism', 7 *Associations* (2003) 349.

<sup>363</sup> Weber, 'The Profession and Vocation of Politics', in M. Weber, *Political Writings*, edited by P. Lassman and R. Speirs (1994) 309.

<sup>364</sup> See further Klabbers, 'Towards a Culture of Formalism? Martti Koskeniemi and the Virtues', 27 *Temple International and Comparative Law Journal* (2013) 417.

accountability involve ongoing relationships. After all, one can only be responsible in relation to someone or something else.<sup>365</sup>

The various responsibility regimes proposed (whether by the ILC or borrowing from administrative or constitutionalist notions), being based on duties resting on international organizations, further tend to ignore the circumstance that many of the shady situations in which international organizations find themselves are the results not of bad intentions but, rather, of intractable policy dilemmas. When the World Bank is summoned to take human rights into account, this is not to make it stop engaging in torture or stifling individual's freedom of religion. Instead, the human rights concerns are usually linked to displacement and other social and economic rights. This, in turn, suggests that the Bank and its human rights critics operate on the basis of different political agendas.<sup>366</sup> The tension between the Articles of Agreement of the World Bank and human rights concerns reflects a tension between a consequentialist, economic outlook on the good life and a more deontological, rights-based outlook. Or, in yet other terms, it can be seen as a conflict between a neo-liberal ideology and a more social-democratic ideology. In yet other words, the Bank's very attempt to do good following a particular method inspires the critique that the method as such is not terribly helpful and ought to be replaced. Either way, pitting the Bank against human rights is pitting two political projects against each other, one of them 'constitutional' (in that it draws on the Bank's constitutional instrument) and the other one likewise 'constitutional' in that it draws on ostensibly universal values as codified in human rights. The net result is that the Bank can never do the right thing in everyone's eyes – it is caught in a policy dilemma where it is 'damned if it does, and damned if it does not'. In such a situation, attempts to hold it responsible for human rights violations assume a largely partisan air.<sup>367</sup>

The Haiti cholera outbreak, likewise, suggests that our thinking in terms of responsibility is problematic. The cholera outbreak, after all, owes nothing to intentional policy-making. The UN did not order or authorize Nepalese peacekeepers to cause cholera, and it did have procedures in place to prevent such things from happening – procedures that seemed reasonable enough until the outbreak of cholera illustrated that they were deficient. After all, no similar tragedy had occurred in some 60 years of peacekeeping. The point can be generalized as follows. Even if it were clear why and how international organizations assume legal obligations under international law, those legal obligations themselves are typically somewhat elusive. Not only are legal rules by definition over-inclusive and under-inclusive,<sup>368</sup> they are also drafted as ideal theory so as to give guidance to actors in ideal circumstances. However, this

<sup>365</sup> D. Warner, *An Ethic of Responsibility in International Relations* (1991). Likewise A. Ebrahim and E. Weisband (eds), *Global Accountabilities: Participation, Pluralism, and Public Ethics* (2007).

<sup>366</sup> Useful on this point is Sarfaty, *supra* note 112.

<sup>367</sup> The World Bank itself has, not surprisingly, aimed to steer a middle course. See Shihata, 'Human Rights, Development and International Financial Institutions', 8 *American University Journal of International Law Practice* (1992) 27.

<sup>368</sup> Seminal F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-based Decision-making in Law and in Life* (1991).

presupposes that actors can act free from constraints, and this presupposition is hopelessly untenable, as in politics generally (and possibly *a fortiori* in international politics) such ideal circumstances are rarely, if ever, present. Politics is a messy affair, and political leaders, whether of states or other entities, are under various pressures.<sup>369</sup> There are pressures relating from a lack of information and, highly relevant, from time pressures – in times of crisis, delays can kill people. And there is the pressure of simply doing good as opposed to doing good for one's country, organization or constituency, which helps explain why many feel that political leaders may, under certain circumstances, engage in lying and deception and perhaps even (dare it be said) in violating legal prescriptions.<sup>370</sup>

The law of international organizations will have to come to terms with the relevance of role responsibility. Whether functionalism itself should be saved is a different question. There are limits to what functionalism can achieve. Functionalism cannot explain everything related to the global public unions. This is so for two reasons. First, functionalism, as noted, is a theory on the relations between organizations and their member states and simply has no room for relations that cannot be reduced to organization-member relations. It is for this reason that functionalism has little to say about employment relations, about checks and balances<sup>371</sup> within organizations or, indeed, about issues of responsibility or accountability. Any attempt to infuse functionalism with non-functional thought will most likely dilute functionalism and will at any rate create problems of fit and choice. The point is that the UPU's brief is to 'regulate postal traffic', not to 'regulate postal traffic while respecting human rights'.<sup>372</sup> A member state held to violate human rights can be suspended or expelled but only if respect for human rights is prioritized. In other words, if and when confronted with such a situation, a choice still has to be made whether the regulation of postal affairs is what matters or whether respect for human rights is of greater importance at the end of the day. One may justifiably opt for the latter, but one can hardly do so under the banner of functionalism.

Second though, and possibly of greater structural relevance, functionalism aims to take the politics out of politics, and this just seems impossible. Even the least political

<sup>369</sup> F. Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (2014); R. Geuss, *Philosophy and Real Politics* (2008); C.A.J. Coady, *Messy Morality: The Challenge of Politics* (2008).

<sup>370</sup> Arendt, 'Lying in Politics', in H. Arendt, *Crises of the Republic* (1972); C. Nolan, Jr., (ed.), *Ethics and Statecraft: The Moral Dimension of International Affairs* (2nd edn, 2004); M. Jay, *The Virtues of Mendacity: On Lying in Politics* (2010); J. Mearsheimer, *Why Leaders Lie: The Truth about Lying in International Politics* (2011).

<sup>371</sup> The very term 'checks and balances' is evocative of domestic constitutional analogies, and it should be no surprise that international organizations law contains few checks and balances. See Klabbers, 'Checks and Balances in the Law of International Organizations', in M.N.S. Sellers (ed.), *Autonomy in the Law* (2007) 141.

<sup>372</sup> For this reason, it has been suggested that the main functions of some organizations are themselves emanations of human rights. See, e.g., Kwakwa, 'An International Organisation's Point of View', in Wouters *et al.*, *supra* note 358, 591. See similarly Naldi and Magliveras, 'Human Rights and the Denunciation of Treaties and Withdrawal from International Organisations', 33 *Polish Yearbook of International Law* (2013) 95.

of topics invite political debate. Think only of the WMO's decision to suspend South Africa in 1975 over its apartheid policies (how much less political can things get than the weather?), prompting one commentator to conclude in some surprise that it 'is almost impossible to argue' that apartheid 'breached the WMO Convention'<sup>373</sup> and, even more starkly, that it 'is impossible to align the decision to suspend South Africa from membership with the non-fulfilment of a member's obligations (as required by the WMO Convention), thus indicating that the decision is tainted with illegality.'<sup>374</sup> In other words, on the basis of a purely functional analysis the WMO could not have suspended South Africa – the fact that the WMO did so (or that the discussion could even arise) suggests that there is no such thing as a purely functional organization. It serves as a stark reminder that politics will always find a way in. Further evidence concerning the WMO is furnished when the organization found itself in some hot water after it had dismissed in 2006 an internal auditor who had found evidence of corruption in the organization's higher echelons, leading to litigation and calls for further investigations.<sup>375</sup>

Nonetheless, even if functionalism cannot incorporate non-functional concerns, and even if it has a hard time keeping politics out, the basic idea underlying functionalism would still seem to be valid. There is a solid argument to be made that the world needs institutions with a limited functional mandate to work for the global common good. Reinsch and Sayre both held that institutions were built on interdependence and necessity – surely those conditions persist, even if debate as to where and when they persist is bound to be perennial. And if such entities are working for the global common good, it would seem justifiable to try and facilitate their work and insulate them from outside pressures. Hence, functionalism continues to exercise a basic attraction.

However, to save functionalism, two requirements would seem to be pivotal. First, the notion of the global common good will have to be construed narrowly so as not to encompass just any institution created between states, and this in turn places great demands on political leadership. The temptation to utilize the global common good for parochial, partisan or even personal concerns must be resisted. This will prove difficult. A director-general who is not keen on expanding the jurisdiction of her agency may well be admired for her modesty and humility but will also rapidly be accused of lacking vision and leadership, and political leaders may be tempted to leave some kind of legacy in the form of tangible results obtained during their leadership.<sup>376</sup> In other words, 'functional' leadership involves a delicate balancing act, and this in turn will demand a serious degree of practical wisdom. It was one thing for UN Secretary-General Dag Hammarskjöld to use the vacuum created by the Cold War in order to

<sup>373</sup> Duxbury, *supra* note 90, at 235. Convention of the International Meteorological Organization 1947, 77 UNTS 143.

<sup>374</sup> *Ibid.*, at 273.

<sup>375</sup> See M. Jung, *Stimmenkauf in internationalen Organisationen* (2010), at 47–48.

<sup>376</sup> It has been suggested that the WHO's work on tobacco control owed much to the desire of its then Director-General to leave a tangible legacy in the form of a convention, the first ever to come out of the WHO. See Jacob, 'Without Reservation', 5 *CJIL* (2004) 287, at 293.

stimulate peacekeeping;<sup>377</sup> it was quite something else for organizational leadership to engage in turf wars during famines.<sup>378</sup>

Second, the exclusive link with member states must be broken, in that international organizations have many constituencies, all of which can make justifiable demands concerning both the everyday guidance of the organization and its accountability.<sup>379</sup> As noted, the IMF must not just be accountable to domestic treasury departments but also to its clients and ultimate objects: the poor and dispossessed.<sup>380</sup> Again, this will require considerable practical wisdom and sound judgment on the part of leadership. Different constituencies will demand different things and will hold organizations to account following different standards – it will take wisdom and more than a little political courage to navigate all of this successfully.<sup>381</sup>

## 7 Concluding Remarks

Alasdair MacIntyre opens his ambitious and magisterial *After Virtue* with a scary but illustrative parable: imagine a series of natural disasters and man-made riots that destroy most of what was until then known scientifically about the universe. Later on, science is revived but merely on the basis of fragments, on bits and pieces of theory, on ‘half-chapters from books, single pages from articles, not always fully legible because torn and charred’.<sup>382</sup> This then comes to represent science, but without the context in which earlier data and theories were produced and with few people, if anyone, actually realizing that what they are doing now bears little resemblance to the world before the disasters and riots. For MacIntyre, moral philosophy had suffered precisely this fate, and his work was an attempt to figure out where things went wrong and to reconstruct it from the ground up.

Something similar would seem to apply to the law of international organizations. Functionalism is still invoked on a regular basis, albeit not always with great enthusiasm anymore. Gérard Cahin evocatively speaks of the notion of function as the ‘parent pauvre’ of the law of international organizations.<sup>383</sup> Functionalism still informs the textbooks, with almost ritual incantations invoking the authority of Reinsch and Sayre but with little time for the context in which they wrote, how their work was situated or how it was further developed by later writers. And even the word ‘developed’

<sup>377</sup> An excellent study of Hammarskjöld is M. Fröhlich, *Political Ethics and the United Nations: Dag Hammarskjöld as Secretary-General* (2008).

<sup>378</sup> Hancock, *supra* note 225.

<sup>379</sup> A. Kuper, *Democracy beyond Borders: Justice and Representation in International Institutions* (2004).

<sup>380</sup> Public administration scholars have long recognized that public agencies stand in an accountability relationship to those who use their services. See J. Gruber, *Controlling Bureaucracies: Dilemmas in Democratic Governance* (1987).

<sup>381</sup> See generally (if briefly) Klabbers, ‘Controlling International Organizations: A Virtue Ethics Approach’, 8 *IOLR* (2011) 285.

<sup>382</sup> A. MacIntyre, *After Virtue: A Study in Moral Theory* (2nd edn, 1985), at 1.

<sup>383</sup> Cahin, ‘La variété des fonctions imparties aux organisations internationales’, in E. Lagrange and J.M. Sorel (eds), *Traité des organisations internationales* (2013) 671, at 674.

in the previous sentence seems out of place. It is not necessarily the case that writers such as Jenks, Schermers, Seidl-Hohenveldern, Bowett or even Virally actually ‘developed’ functionalism – what is incontrovertible though is that they helped functionalism to change shape and adapt it to new political demands. The emergence of military alliances with institutional features demanded an expansion of functionalism; the emergence of the EU demanded (but never really received) an adaptation of functionalism, as did the creation and subsequent disappearance of Soviet-dominated entities or, later, the emergence of networks, contact groups, study groups and meetings or conferences of the parties to treaties. Functionalism turned out to be a jack of all trades, flexible as an Olympic gymnast and always bending with the wind, until the expansion of organizational activities (paired with the hubris of some of the leadership involved) made clear that functionalism had some limits, that those limits were actually quickly reached and that some of them were part of functionalism’s DNA.

‘Modern international law’, Martti Koskenniemi wrote in the opening article of the first ever issue of this Journal, ‘is an elaborate framework for deferring substantive resolution elsewhere: into further procedure, interpretation, equity, context, and so on.’<sup>384</sup> The modern law of international organizations, under functionalism, goes a step further still and is sometimes an elaborate framework not for deferring substantive resolution but, rather, for dissolving substantive resolution. The Haiti cholera outbreak suggests that at the end of the day and despite all justifiable misgivings, the law has little to offer but the protection of the international organization: it is shielded in that it is unclear which are its obligations under international law; it is shielded in that it is unclear which behaviour is attributable to it and it is shielded in that it can invoke immunity from suit at any rate. And, yet, there is something worth cherishing about international organizations generally, at least if and when they serve the global good, and about a modest functionalism. Organizations may be well-nigh untouchable right here and right now, but at least they carry the promise of the ‘salvation of mankind’ – they promise a better future, a better tomorrow. As with all such promises, what matters more is their existence than whether they will ever come true.

<sup>384</sup> Koskenniemi, ‘The Politics of International Law’, 1 *EJIL* (1990) 1, at 28.