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Re-thinking Functionalism:
Paul S. Reinsch and the Making of International Institutional Law

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The Straus Institute Working Paper Series can be found at
http://nyustraus.org/index.html

ISSN 2160-8261 (print)
ISSN 2160-827X (online)

New York University School of Law
New York, NY 10011
USA

Publications in the Series should be cited as:
AUTHOR, TITLE, STRAUS INSTITUTE WORKING PAPER NO./YEAR [URL]

RE-THINKING FUNCTIONALISM:
PAUL S. REINSCH AND THE MAKING OF INTERNATIONAL INSTITUTIONAL LAW

By Jan Klabbers*

Abstract

The study of the law of international organizations is dominated by a functionalist approach, yet the origins, development and coherence of functionalism have remained under-studied and under-theorized. The present paper explores the work of Paul Samuel Reinsch, one of the first authors to systematically address the institutional law of public international unions, with a view to coming to a richer understanding of functionalism and therewith of international institutional law. In doing so, the paper contributes to the intellectual history of international institutional law and maps possibilities for enhancing the proper functioning of international organizations.

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I Introduction

It has been said of John H. Jackson that he almost single-handedly crafted the sub-discipline of international trade law, out of an array of international rules and the trade-related rules of a handful of important trading nations.[1] Likewise, Cherif Bassiouni may well be considered the spiritual father of international criminal law, tirelessly advocating the creation of international criminal tribunals and distilling the relevant law from a mixture of domestic criminal law and procedure and such international law as was already accepted.

While such claims can easily be overblown, it may nonetheless prove instructive to study the works of those who have been influential in shaping and molding an academic discipline or sub-discipline: a study of the work of early and influential patrons may yield valuable insights into how the discipline in question functions, how it is structured, and what its strengths and blind spots are.

When it comes to international institutional law, several influential pathfinders vie for prominence. To the extent that international institutional law is a self-standing discipline or sub-discipline to begin with (which is doubtful[2]), its paternity is contested. While European scholars and practitioners such as C. Wilfred Jenks, Henry G. Schermers, Ignaz Seidl-Hohenveldern, Michel Virally, or Derek W. Bowett have all been –and still are – tremendously influential in the period after World War II, it almost seems as if they all came out of the blue, with no giants available on whose shoulders to stand. And while it is generally acknowledged that the Permanent Court of International Justice played a leading role in developing the law of international organizations during the interwar years through its advisory opinions on the competences of the International Labour Organisation[3], the Greco-Turkish Mixed Commission[4],

[1] See David Kennedy, 'The International Style in Postwar Law and Policy', (1994) 1 *Utah Law Review*, 7-103.
[2] See Jan Klabbers, 'The Paradox of International Institutional Law', (2008) 5 *International Organizations Law Review*, 151-173.
[3] The most relevant of these is *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer*, advisory opinion, [1926] Publ. PCIJ, Series B, no. 13.
[4] See *Interpretation of the Greco-Turkish Agreement of December 1st, 1926*, advisory opinion, [1928] Publ. PCIJ, Series B, no. 16.

or those of the European Danube Commission[5], it somehow always seems as if academics only discovered this some two decades later. The one exception sometimes mentioned is Pitman Potter, who was actively studying and writing about international institutional law during the period between the two world wars.[6] While the interbellum saw many writings on specific international organizations, and quite a few covering the substantive work of some of those organizations, attempts to systematize, and especially theorize, remained rare[7], despite occasional protestations to the contrary.[8]

In short, the discipline suffers from an intellectual hiatus, and that is arguably strengthened by the idea that the 'move to institutions' only seriously took place after 1919 with the creation of the League of Nations and the International Labour Organisation.[9] For this proposition too seems to suggest something of a 'bursting on the scene' quality: first there was nothing, and then all of a sudden enlightened visionaries created international organizations and, in their wake, international institutional law emerged as a discipline or sub-discipline. And then nothing happened for quite a while (save for a few opinions rendered by the PCIJ), until in the 1950s the likes of Schermers, Bowett and others started to do some serious work.

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[5] See *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, advisory opinion, [1926] Publ. PCIJ, Series B, no 14.

[6] This refers to Pitman B. Potter, *An Introduction to the Study of International Organization* (New York: The Century Co., 1922). While Potter too was a political science professor at the University of Wisconsin, the book does not display anything like a mentor-student relationship between Reinsch and Potter (Potter probably joined the department some years after Reinsch had left) and, in fact, to some extent the book is not about the law of international organizations but rather about something that today would be called transnational law or global governance. It is a study of international law through the prism of global unification more than anything else: of its 29 chapters, only a handful are recognizably about international unions, narrowly construed.

[7] A rare exception was Andrea Rapisardi-Mirabelli, 'Théorie générale des unions internationales', (1925) 7 *Recueil des Cours*, 341-393.

[8] Rochester, e.g., suggests *a contrario* that the academic discipline of international institutional law came to fruition when the League of Nations was created: "… international organization did not become an identifiable, systematic area of inquiry until the creation of the League of Nations in 1920, following World War I, at a time when the international relations field itself emerged as a distinct academic discipline." See J. Martin Rochester, 'The Rise and Fall of International Organization as a Field of Study', (1986) 40 *International Organization*, 777-813, at 779. In the same vein, Ronald Yalem, 'The Study of International Organization, 1920-1965: A Survey of the Literature', (1966) 10 *Background*, 1-56.

[9] This would be the nutshell rendition of Kennedy's infinitely more subtle thesis, the sort of rendition one sometimes finds bracketed in footnotes in the learned journals ("arguing that the 'move to institutions' seriously took off with the creation of the League and the ILO"). See David Kennedy, 'The Move to Institutions', (1987) 8 *Cardozo Law Review*, 841-988.

Somehow, this particular thesis defies plausibility, for two main reasons. First, the first international organizations taking forms that we would recognize today date back to the middle or late 19th century, and thus antedate the year 1919, never mind World War II.[10] Second, international lawyers did try to come to terms with these newly minted creatures. The years just after 1919 saw a lively debate on the legal nature of the League of Nations, for instance[11], and earlier already, the late 19th century witnessed a steady stream of writings among in particular francophone writers about international offices, their advantages, their disadvantages, and their future promise.[12] Moreover, the months just before the creation of the League saw a steady stream of proposals and plans, or speculative analyses about what a league to enforce peace should look like.[13] While these hardly added up to a coherent body of theory, they nonetheless contained some of the seeds which would later grow into international institutional law.

This late 19th century move to institutions culminated, in the first decade of the 20th century, in the writings of one individual who started to publish the results of serious, methodical and systematic research on the institutional aspects of international organizations as early as 1907, i.e. well before the League and the ILO were created, research that is eminently recognizable to today's audiences as research into international institutional law. The individual concerned was Paul Samuel Reinsch, a political science professor from Wisconsin and sometime ambassador of the United States. It is my contention in this paper that Reinsch laid the foundations for what was to become the theory of functionalism in the law of international

[10] The river commissions have a longer ancestry still, with the International Rhine Commission going back to 1804.

[11] See, e.g., P.E. Corbett, 'What is the League of Nations?', (1924) 5 *British Yearbook of International Law*, 119-148; Lassa Oppenheim, 'Le caractère essentiel de la Société des Nations', (1919) 26 *Revue Générale de Droit International Public*, 234-244; Sir Geoffrey Butler, 'Sovereignty and the League of Nations, (1920-21) 1 *British Yearbook of International Law*, 35-44, and John Fischer Williams, 'The Status of the League of Nations in International Law', in John Fischer Williams, *Chapters on Current International Law and the League of Nations* (London: Green and Co., 1929), 477-500.

[12] See, e.g., Gustave Moynier, *Les bureaux internationaux des unions universelles* (Geneva: Cherbulier, 1892); Baron Descamps, *Les offices internationaux et leur avenir* (Brussels: Académie Royale de Belgique, 1894); Louis Renault, 'Les unions internationals: leurs avantages et leurs inconvénients', (1896) 3 *Revue Générale de Droit International Public*, 14-26; Pierre Kazansky, 'Théorie de l'administration internationale', (1902) 9 *Revue Générale de Droit International Public*, 352-366.

[13] The legally most lasting of these is perhaps Francis B. Sayre, *Experiments in International Administration* (New York: Harper and Brothers, 1919). See also Simeon E. Baldwin, 'The Vesting of Sovereignty in a League of Nations', (1918-19) 28 *Yale Law Journal*, 209-218, and H.L. Randall, 'The Legal Antecedents of a League of Nations', (1918-19) 28 *Yale Law Journal*, 301-313.

organizations, and if his contribution thus far has mainly been unheralded, it is for two reasons. First, international institutional lawyers are not usually prone to excavate the intellectual history of international institutional law, and as noted, to the extent that they do, they typically use the creation of the League of Nations as their starting point. While it is not the case that Reinsch's work has gone unrecognized (he is often enough mentioned as a pioneer or a forerunner[14]), it is nonetheless true that the era in which he wrote is usually regarded not as part of the discipline's history but as its pre-history[15], and is thus often dealt with in a sentence or two but rarely in any depth.

Second, and arguably more important, Reinsch's contribution (and those of his forerunners) has remained under-illuminated because, not unlike Molière's *bourgeois gentilhomme*, lawyers and others working in or with international organizations have all been speaking the language of functionalism without realizing it. Functionalism may well have been one of the few true paradigms (in Thomas Kuhn's fairly restricted meaning of the term[16]) in the non-natural sciences, in that until, roughly, the mid-1980s, all those who worked in or with the law of international organizations did so from the same vantage point, applying the same ideas and methods to resolve similar issues across a multitude of organizations. It was only from the mid-1980s onwards (with the failure of the International Tin Council, and anecdotal evidence on the malfunctioning of organizations coming to the fore[17]) that slowly but surely the functionalist paradigm came to be accompanied by a new set of concerns, related to control over the acts of international organizations, which seemed difficult to reconcile with functionalism. Since then, the discipline has been highly active in trying to devise control mechanisms, ranging from more

[14] Thus, Yalem, The Study, at 2, list him as one of three pioneers writing before 1920, the others being Leonard Woolf and Francis Sayre. While Woolf was an important figure, his main interest resides in the social role of international organizations, rather than in the development of a legal discipline. Sayre, however, will be returned to elsewhere in this paper.

[15] Something of an exception (although not overly explicit) is Jan Klabbers, 'The Life and Times of the Law of International Organizations', (2001) 70 *Nordic Journal of International Law*, 287-317.

[16] See Thomas S. Kuhn, *The Structure of Scientific Revolutions*, 2nd ed. (University of Chicago Press, 1970).

[17] See e.g. the devastating criticism concerning the operation of international organizations engaged in development work in Graham Hancock, *Lords of Poverty* (London: Mandarin, 1991 [1989]). For a useful overview of the Tin Council crisis, see Philippe Sands, 'The Tin Council Litigation in the English Courts', (1987) 34 *Netherlands International Law Review*, 367-391.

or less traditional responsibility or accountability regimes[18] to more ambitious schemes involving the use of administrative law techniques and concepts[19], or even by applying, in various ways, the vocabulary of constitutionalism (with all its associations with such things as protection of basic rights and legitimate governance) to international organizations.[20] Some of those organizations themselves, moreover, have engaged in self-control by creating or upgrading internal oversight departments or appointing compliance officers.

The 'move to control' raises fundamental questions about the theory of international institutional law and in particular relating to theoretical integration: how can control be integrated into the framework of functionalism?[21] Doing so presupposes an understanding of functionalism beyond the nominal, a task not made any easier by the well-nigh total absence of anything even remotely resembling a functionalist manifesto.[22] Hence, the task of the present paper is twofold: it is to provide an overview of functionalist theory and its methodologies, and it is to do so by means of an excavation of the relevant work of its first proponent: Paul Reinsch.

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[18] In addition to the work of learned bodies such as the Institut de Droit International, the International Law Association and, currently, the International Law Commission, see in the literature, amongst others, Matthias Hartwig, *Die Haftung der Mitgliedstaaten für internationale Organisationen* (Berlin: Springer, 1993); Moshe Hirsch, *The Responsibility of International Organizations toward Third Parties: Some Basic Principles* (Dordrecht: Martinus Nijhoff, 1995); Pierre Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Brussels: Bruylant, 1998); Karel Wellens, *Remedies against International Organizations* (Cambridge University Press, 2002). A lone forerunner was Konrad Ginther, *Die völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten* (Vienna, 1969).

[19] See, amongst others, Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The Emergence of Global Administrative Law', (2005) 68 *Law & Contemporary Problems*, 15-61; Daniel C. Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law', (2006) 115 *Yale Law Journal*, 1490-1562; Armin von Bogdandy *et al*. (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Berlin: Springer, 2010).

[20] See, amongst many others, Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', (1981) 75 *American Journal of International Law*, 1-27; Joseph H.H. Weiler, *The Constitution of Europe* (Cambridge University Press, 1999); Joseph H.H. Weiler and Marlene Wind (eds.), *European Constitutionalism beyond the State* (Cambridge University Press, 2003); Deborah Z. Cass, *The Constitutionalization of the WTO: Legitimacy, Democracy, and Community in the World Trading System* (Oxford University Press, 2005); Ernst-Ulrich Petersmann, 'How to Reform the UN System? Constitutionalism, International Law, and International Organizations, (10997) 10 *Leiden Journal of International Law*, 421-474, and Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Leiden: Martinus Nijhoff, 2009).

[21] It is no coincidence that the hefty Schermers/Blokker textbook, the leading functionalist treatise coming in at some 1300 pages, devotes a mere handful of pages to the responsibility of organizations. See H.G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity*, 4th edn. (Leiden: Martinus Nijhoff, 2003).

[22] Arguably the closest to a manifesto is Michel Virally, 'La notion de fonction dans la théorie de l'organisation internationale', in Suzanne Bastid *et al*. (eds.), *Mélanges offerts à Charles Rousseau: La communauté internationale* (Paris: Pédone, 1974), 277-300.

The paper will conclude with a few preliminary thoughts on the possible reconciliation of functionalism and control, or, put differently, with some thoughts on how control can be integrated into the theory of functionalism.

There are a couple of reasons why Reinsch, despite not being the first to write about international institutional law, is of pivotal importance. Reinsch has sometimes been credited with having popularized the term 'international organization' (a term possibly first coined by the Scottish jurist James Lorimer)[23], but also stands out among his contemporaries and his predecessors by the systematic, methodical nature of his work, as well as its comprehensiveness.[24] Moreover, he was among the first to be acutely aware of the dynamic, institutional component of international organizations, and would establish something of a theory and methodology, however rudimentary, about the law of international organizations.

II International Institutional Law at the Turn of the 19th Century

When international organizations were first created in the form we can still recognize nowadays (leaving aside whether e.g. such entities as the Greek Amphyctionic Council, or the Hanseatic League many centuries later, can be regarded as true predecessors[25]), roughly from the second half of the 19th century onwards, their special characteristics were still to be discovered. Writings from the late 19th and early 20th century tend to equate international organizations with their constituent treaties, without realizing that there may be something out of the ordinary involved in the creation of permanent or semi-permanent institutions. As good an example as any can be found in the work of leading Dutch international lawyer Van Eysinga, who would later become a judge at the Permanent Court of International Justice. Addressing Dutch treaty relations, the many river commissions which had just been created in the decades before he wrote were simply

[23] See Pitman B. Potter, 'Origin of the Term International Organization', (1945) 39 *American Journal of International Law*, 803-806.
[24] In a similar vein, see David J. Bederman, 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel', (1996) *Virginia Journal of International Law*, 275-377, esp. at 339 (singling out Reinsch because of the systematic nature of his work).
[25] See e.g. A.E.R. Boak, 'Greek Interstate Associations and the League of Nations', (1921) 15 *American Journal of International Law*, 375-383.

treated under the heading of water treaties – there is no recognition in Van Eysinga's work of the institutional features of these river commissions, or that somehow institutional elements would set them apart from ordinary, non-institutional treaties.[26]

Van Eysinga's writings did not focus on international institutions and he could thus, possibly, simply never have given much thought to their special features[27], and something similar applies to other early writers on international organizations: often, recognition of these new creatures being not just sequential treaties but somehow also having an institutional component, was lacking.[28]

To some extent, this absence of an institutional focus should come as no surprise. It is not simply the case that the late 19th century authors did not come to think of those unions as institutions, those unions themselves showed few institutional features to begin with. Thus, writing in 1894, Descamps' overview of the various unions existing at the time suggests that many of them were headquartered in the foreign ministry or some other authority (e.g. the Swiss postal service, in the case of the Universal Postal Union) of their host state, and staffed predominantly by nationals of the host state or sent by their home governments[29] – as opposed to being appointed in their own right as qualified professionals to international positions. Not untypical, the international bureau (usually the only recognizable institutional element) would assist in the preparation of periodical conferences, but these conferences would eventually come to be organized and convoked by the host state.[30] In short: in those formative years, it would not

[26] See J.W.M. van Eysinga, *Ontwikkeling en inhoud der Nederlandsche tractaten sedert 1813* (The Hague: Martinus Nijhoff, 1916), e.g., at 6, 13.

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

[28] Indeed, it would be a while still before international lawyers started to distinguish between various types of treaties. The *locus classicus* is A.D. McNair, *The Law of Treaties*, 2d edn. (Oxford: Clarendon Press, 1961), first published in 1930.

[29] Thus, Moynier remarks that while most of the staff of the customs tariffs union, hosted by neutral Belgium ("un foyer de paix") is appointed by the host state, translators 1st class are sent by their national governments. See Moynier, Les bureaux internationaux, at 128, 135.

[30] See Descamps, Les offices internationaux, e.g. at 20 (discussing the role of the bureau of the Union internationale pour la protection de la propriété industrielle).

have been all that obvious that the institutions were actually developing as institutions; it may well have seemed more plausible to regard them as somewhat a-typical treaties.

Like van Eysinga's work, a late 19th century article by Louis Renault suggests a view of organizations as solidified treaty regimes - more solid because of the repetitive nature of strings of related treaties, rather than any organizational features *per se*.[31] Perhaps as a result, Renault is mostly interested in sketching the advantages and disadvantages of participation in international unions from the point of view of member states, instead of positing a general theory or discussing features of internal institutional design. Thus, he mentions that one of the drawbacks of participating in a union is that it may be all that much harder to terminate a treaty embedded in an organizational framework, because by its very nature such termination will affect treaty relations with all member states.[32] This belies predominantly a conception of organizational treaties as bundles of bilateral rights and obligations, therewith still denying them a specific organic character.[33] And while Renault wisely remarks that a certain amount of concord is desirable for the organization to be successful[34], at no point does he address such issues as decision-making procedures, or the creation of organs, or financing, or other organizational matters. And to the extent that he discusses, hypothetically, law-making powers, he quickly reaches the conclusion that anything of this kind would amount to "une *abdication de souveraineté*".[35] In short, for Renault, unions are collections of treaties between states: the very idea of an international organization with an identity separate from its member states and an independent institutional existence is still anathema.[36]

Much the same applies to other authors writing around the turn of the century. Thus, Moynier, writing in 1892, notes that the postal union has the unique characteristic that it allows for different treaty regimes involving different member states, without inquiring whether this

[31] See Renault, Les unions internationales.
[32] *Ibid*., at 21.
[33] Another disadvantage, *dixit* Renault, is that bilateral treaties can be precisely calibrated between the two contracting parties. Such is not possible with unions. *Ibid*., at 22-23.
[34] *Ibid*., at 24.
[35] *Ibid*., at 25 (emphasis in original).
[36] Much the same still applies to what is arguably the most sophisticated discussion published at the turn of century, the contribution by Kazansky, L'administration internationale.

complicates membership issues – it is merely a matter of different parties accepting different sets of rights and obligations.[37] Likewise, Meili's 1889 study is largely concerned with the effects of membership of international unions on the substance of German private law, for instance relating to railways or to telephone messages.[38]

In summation, those writing at the turn of century paid far greater attention to issues of substance than to institutional design. Moynier devotes lengthy passages to the work of the telegraphic union, the postal union, *et cetera*, as does (somewhat briefer) Descamps. On occasion an institutional concern may slip in, as when Moynier notes that the postal union has appropriated a power ('une compétence accrue') to organize conferences of member states[39] or that its law-making function makes it almost parliamentary in nature ('parlement au petit pied')[40], but most of Moynier's study, and those of his contemporaries, is devoted to an enumeration of the activities of organizations in their fields of action. Meili, while anticipating the possible self-executing nature of decisions of international unions[41], is also far more intrigued by substance than by organizational design.

A rare exception[42] resides in a short but important piece by Pierre Kazansky, published in

[37] See Moynier, Les bureaux internationaux, at 40.
[38] See, e.g., Friedrich Meili, *Die internationalen Unionen über das Recht der Weltverkehrsanstalten und des geistigen Eigentums* (Leipzig: Duncker & Humblot, 1889).
[39] *Ibid*., at 48.
[40] *Ibid*., at 41.
[41] *Ibid*., at 73 (suggesting the inevitable tendency of international rail traffic standards to become directly applicable railway law ('direkt geltendes Eisenbahnrecht') within the member states of the railway union.
[42] Sometimes Pasquale Fiore is also mentioned as an early functionalist representative. See, e.g., Bederman, The Souls, at 344-345, and Catherine M. Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Oxford: Hart, 2007), at 46. The relevant article is hard to find though: Brölmann lists it as having been published in 1899 in the *Rivista di Diritto Internazionale* which, however, was only established in 1906. Bederman refers to the 1899 volume of the *Revue de Droit International*. A journal under that title was only founded in 1927; the *Revue de Droit International et de Législation Comparée* did exist in 1899, but its volume for that year does not seem to be available at the electronic Bibliothèque Nationale Francaise: see www.gallica.fr (last visited June 1, 2010). Moreover, the relevant passage in Fiore's monograph sometimes referred to (first published in Italian in 1890) has lost much in the English translation, based on the 5th edition of the Italian original. Here, Fiore's comments are limited to comments about the international legal personality of legal entities, which derives from a mixture of a 'well-defined purpose of international interest' and recognition by third parties. Importantly though, this personality is limited to the entity's tasks. See Pasquale Fiore, *International Law Codified and its Legal Sanction or the Legal Organization of the Society of States* (New York: Baker, Voorhis & Co., 1918, Borchard transl.), at 116 (paragraphs 81 and 82).

the 1902 volume of the *Revue Générale de Droit International Public*.[43] Kazansky was arguably the first to ask institutional questions and discuss institutional issues. Thus, he distinguished between the legal status of international bureaux (the secretariats of the existing unions) and international commissions: the latter would enjoy more liberties than the former, and their resolutions would, in effect, be treaties between member states.[44] He also realized that the unions were not so much about prohibiting behaviour, but about empowering, although he was not yet clear as to who would be empowered, and still tended to think that the unions were aggregates of their member states rather than truly independent actors. Nonetheless, he already observed a prominent role for their functioning, noting for instance (although the language is ambiguous) that host states might take extra care in reviewing the acts of organizations on their territory, bearing their functioning in mind.[45]

To the extent that late 19th century authors discussed institutional features of international unions, such discussions would typically be limited to two issues. The first of these would be the costs of maintaining international unions, with authors typically remarking that the costs would be borne by the member states together, and would be limited: some ceiling would usually be mentioned. Second, the authors of the late 19th century tended to think of the creation of international unions as the logical next step in the evolution of mankind, displaying a progress narrative that, however naïve perhaps[46], was widely shared. Thus, Moynier sketches the typical progression as one which runs from group and family via tribe and state to international union[47], and when trying to classify the unions as legal persons draws an explicit analogy with the notion

[43] See Kazansky, L'administration internationale.
[44] *Ibid*., at 358-359. This foreshadowed the treaty analogy which would prominently feature in *Railway Traffic between Lithuania and Poland (Railway Sector Landwarow-Kaisiadorys)*, [1931] Publ. PCIJ, Series A/B, no 42, and is sometimes still in use by tribunals trying to gauge the legal effect of decisions of international organizations. For further discussion, see Jan Klabbers, *An Introduction to International Institutional Law*, 2nd ed. (Cambridge University Press, 2009), 184-185.
[45] *Ibid*., at 360. The ambiguous language: "… si l'institution intéressée est un Bureau international, comme celui-ci est ordinairement soumis aussi aux lois et aux arrêtes de l'Etat ou il est placé, cet Etat doit exercer sur elle, au point de vue de son fonctionnement, une surveillance particulière."
[46] A certain political naivety seems to have been endemic, finding perhaps its highlight in Moynier's praise of Belgium's King Leopold: he depicts the choice of Brussels as hosting an organization for the treatment of slaves as "un moyen de rendre au roi Léopold un hommage mérité, pour tout ce qu'il a fait en faveur de la civilisation de l'Afrique." See Moynier, Les bureaux internationaux, at 118.
[47] *Ibid*., at 149.

of suzerainty: a classification from the colonial era signifying an entity that was neither completely dependent nor completely sovereign - a lesser degree of sovereignty, if you will.[48] Meili, for his part, saw the unions as harbingers of global law ('Weltrecht')[49], and went so far as to speculate about a possible interplanetary or interstellar law as the final stage of political organization.[50] Kazansky explained the rise of international organizations under reference to the protection of social rather than political interests, and hypothesized that with the advent of a universal political organization, the nation state would necessarily come to an end.[51]

And to the extent that the late 19th century authors would discuss institutions to begin with, they would somehow distinguish between the unions and their organs, in a manner suggesting that the unions would be meeting places for states, and that any international action that would take place would do so within (and through the work of) their secretariats, designated under such labels as Offices, or Bureaux. Hence, the discipline showed a marked tendency to treat organizations as Janus-faced entities: places where states can meet and discuss things and perhaps, if all goes well, conclude agreements between them, on the one hand, and offices where action takes place on the other hand. In slightly different form, this distinction is still prominently present in international institutional law writings and debates – although not always in a distinction between the organization and its organs.[52] This distinction found expression in the titles of some of the leading works at the time[53], and no doubt helped paved the way for the de-politicization of international institutional law: it suggests that the bureaux engage in technical and a-political activities, whereas the more overtly political work gets done in plenary, and thus potentially remains within the full control of the member states.[54]

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[48] I*bid*., at 148.
[49] Meili, Die internationalen Unionen, at 57
[50] *Ibid*., at 6.
[51] See Kazansky, L'Administration internationale, at 366.
[52] See Jan Klabbers, 'Two Concepts of International Organization', (2005) 2 *International Organizations Law Review*, 277-293.
[53] See, e.g., Moynier, Les bureaux internationaux des unions universelles, or, less explicit, Descamps, Les offices internationaux (which juxtaposes the offices mentioned in the title against the unions they are part of).
[54] Sayre would, sometime later, describe the situation with admirable clarity (discussing the Universal Postal Union): "Although the permanent bureau is an organ with no real power, the Postal Union itself possesses considerable authority and, on the whole, it has most successfully substituted international for state government in

Against the background of these late 19th century authors, Paul Reinsch' work assumes great importance. The very first volume of the *American Journal of International Law*, published in 1907, contained a lengthy article by Reinsch, discussing the new international unions. The article would be followed, two years later, by another lengthy piece in the same journal, and the two articles combined would become the core of his 1911 monograph on international organizations. It is these three works which will be central to the present paper, as the way Reinsch structured his work would set the tone for much of the subsequent scholarship to follow for many subsequent years, and would provide a useful outline of functionalism.

Paul Samuel Reinsch was born in 1869, in Milwaukee, Wisconsin, in a family of German heritage.[55] Having attended Concordia (Lutheran) College in Milwaukee and having received his law degree from the University of Wisconsin-Madison in 1894, he briefly practiced law. His interest in politics would soon take over though, and would remain a constant factor throughout the rest of his all too short life until his untimely death in 1923. He wrote a PhD in 1898 (on the reception of English common law in the American colonies[56]), while being an adjunct lecturer at the University of Wisconsin. Thereafter, he quickly became assistant professor and professor of political science at the same university, from 1898 until 1913. President Wilson then appointed him as US Minister to China, a post from which he resigned after the Versailles Treaty granted Shantung to Japan. He died in Shanghai in 1923, having been asked by the Chinese government to help reorganize its financial system. An attempt to get his own political career off the ground failed. In the race for a Senate seat for Wisconsin in 1920, the committed Democrat and Progressive Reinsch was well-beaten by Republican and Independent candidates, eventually attracting a mere 13.18% of the vote.[57]

Reinsch was a prolific writer (he published a large number of books during his all too short life), but actually wrote relatively little on international law. During his later years in

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postal matters." See Francis B. Sayre, *Experiments in International Administration* (New York: Harper and Brothers, 1919), at 24.

[55] Much of this is derived from the entry under his name in the Dictionary of Wisconsin History, available at www.wisconsinhistory.org/distionary/index.asp (last visited 19 May 2010).

[56] See Paul S. Reinsch, *English Common Law in the Early American Colonies* (PhD thesis, University of Wisconsin, 1898).

[57] See http://uselectionatlas.org (last visited 19 May 2010).

particular he acquired some fame as an orientalism expert, having published some works on China and making good use of his position there, but even his early textbook on world politics was written with China in mind.[58] Earlier in his career, he devoted much time and energy to the workings of US politics, compiling readers on federal government and state government, and a popular monograph on civil administration, and somehow colonialism, in a peculiar way, remained a constant source of fascination – and inspiration, as we shall see. But in the meantime, he wrote his articles on what he ended up calling 'international administrative law', which combine the public lawyer's eye for institutions and processes with the political scientist's sense (and practical experience) for how things work, embedded in what would nowadays be called a liberal and cosmopolitan social-democratic mindset. The latter runs as a red thread through his work: his ambivalent colonialism, his worldly, cosmopolitan idealism, and his involvement in Wisconsin politics and administration with the so-called 'Wisconsin Idea' (a set of principles aimed at protecting the weak and basing policy on expert knowledge), all seem to spring from the same mindset.

III Reinsch's Work

As noted, Reinsch was already an established professor of international politics, having authored a handbook on world politics and having taught on the topic, when he embarked on his writings on international organizations. The first of his notable contributions was published in 1907. Reinsch started his article by extolling the virtues of internationalism, as practical responses to practical problems, and by putting his readership at ease: the new unions do not threaten national sovereignty: "It is not so much the case that nations have given up certain parts of their sovereign powers to international administrative organs, as that they have, while fully reserving their independence, actually found it desirable, and in fact necessary, regularly and permanently to co-

[58] Indeed, if mentioned as an international relations scholar, it is typically as an 'Asian scholar'. See e.g. Torbjörn Knutsen, 'Origins and Originality: The 19th Century Rise of International Relations as an Academic Field', paper presented to the 2005 conference of the International Studies Association, available at http://www.allacademic.com//meta/p_mla_apa_research_citation/0/6/9/3/5/pages69353/p69353-9.php (last visited 3 June 2010), at 9.

operate with other nations in the matter of administrating certain economic and cultural interests."[59]

Having stated this, he systematically discusses a number of organizations, typically first outlining the issues with which they are concerned. Thus, the International Union of Railway Freight Transportation addresses such issues as the single bill of lading to secure continuity of transportation across borders, uniform standards with respect to dangerous or breakable articles, and the responsibility of railway administration for losses and delays.

It is only once their field of activities has been described that the institutional features are discussed: typically, the unions have an administrative organ (sometimes working under supervision of the host state), and typically, the tasks of these organs are presented as administrative in nature: collecting and disseminating information, preparing future meetings, *et cetera*. Even activities that carry political overtones are not singled out: thus, the central bureau of the same International Union of Railway Freight Transportation is to "give due form to suggestions"[60] to proposed amendments to the constituent document, and even has a quasi-judicial function, but none of these are presented as other than administrative in nature. Even the quasi-legislative role of the Sugar Commission, while duly noted, is neutralized: here is a quasi-legislative task presented as administrative in nature, and as inevitably belonging to the tasks of this specific organization.[61]

In the opening pages of the article, Reinsch explicitly juxtaposes the rise of international unions (internationalism) against nationalism. This was, in all likelihood, part of a legitimizing strategy: in order for international organizations to be considered relevant, they had to be positioned as harbingers of cosmopolitanism, as a viable alternative to the parochialism of the nation-state. And this, in turn, could only be done by insisting on their functional nature: whereas states can engage in all sorts of mischief (and worse) because their sovereignty knows no limits, organizations are limited by their functions. They could not do wrong even if they tried.

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[59] See Paul S. Reinsch, 'International Unions and their Administration', (1907) 1 *American Journal of International Law*, 579-623, at 581.
[60] *Ibid*., at 591.
[61] *Ibid*., at 604. Sayre would a few years later classify the Sugar Commission as in a class of its own, with far greater powers of standard-setting than any other international union. See Sayre, Experiments, at 12-17.

Little of this was posited explicitly, but the structure of the piece speaks volumes: as soon as the design of a union would come to be discussed, the discussion would start with listing the function or functions of the organization or organ in question. Clearly, organizations were built around functions, and equally clearly, these functions formed the heart of what organizations could do, both positively (these were their tasks) and negatively (these functions also marked, by definition, the limits of the organization's tasks). The Permanent Court of International Justice, two decades later, could hardly have formulated the same point with greater precision or economy when discussing the functions of the European Commission of the Danube, based on its constituent treaty (the so-called Definitive Statute): "As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfillment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it."[62] This, as the saying goes, kills two birds with one stone: it simultaneously grants the Commission the power to do everything it can to give effect to its functions, and limits the activities of the Commission to those which are connected to its functions.

While Reinsch refrains from badmouthing nationalism directly, nonetheless internationalism is portrayed as commendable: internationalism "comprises those cultural and economic interests which are common to civilized humanity."[63] He quotes at length the Italian King Victor Emmanuel III's convocation for the establishment of an international agricultural union (the International Institute of Agriculture, forerunner of today's FAO) which should be "dégagé de tout but politique", but which would nonetheless help contribute to peace.[64]

This, the first of Reinsch's two seminal articles on international institutions is, by and large, comparative, albeit with a twist. The article contains a lengthy enumeration of many international organizations or, sometimes, aborted initiatives to establish one. There is some analytical division: the organizations are subdivided as dealing with communication, or economic interests, or sanitation and prison reform, or various other purposes. Towards the end,

[62] See *Jurisdiction of the European Commission of the Danube*, at 64.
[63] See Reinsch, International Unions and their Administration, at 579.
[64] *Ibid*., at 605-6.

however, the mode of analysis shifts from topic to region, when Reinsch discusses ever so briefly the existing unions in the Americas. This is not systematically carried out though, and it is fair to say that the main division underlying the article is one relating to the field of activities of the organizations. As noted, though, it is comparativism with a twist: no general conclusions are drawn on the basis of the comparative survey, and somewhat feebly perhaps, Reinsch promises in the closing sentence that a synthetic overview of the functions of organizations and their relation to national administrations "is to be discussed in a future paper."[65] Again, it is no coincidence that he prefaces this by claiming that any appreciation of the value of international unions depends first and foremost on "a careful analytical study of the powers and functions of the international organs".[66]

The 'future paper' Reinsch promised at the end of his 1907 article would be published two years later, in the 1909 volume of the *American Journal*, and indeed it elaborated on the first paper, fine-tuning some of the theoretical points, and concentrating on the commonalities. It is no accident given Reinsch's ambitions that the opening sentence places international organizations as the harbingers "of a law common to the entire civilized world", and a page later he speaks, without hyperbole, of "world law".[67]

The first part of the article aims to place the international unions in their relationship to their member states, and the theory Reinsch develops would come to be enormously influential. International cooperation, so he suggests, is necessary in a number of fields. Thus, international cooperation is needed to prevent the importation of animal or plant diseases; it is needed to ensure that letters and telegrams are delivered across borders; it is needed to make sure that states do not benefit unduly from competitive advantages in their labour legislation. Hence, the world law ("universal civil law"[68]) thus arising is based on necessity and pragmatism: it is "the legal expression of positive interests and activities that have already developed in the life of the

[65] *Ibid*., at 623.
[66] *Ibid*., at 623.
[67] See Paul S. Reinsch, 'International Administrative Law and National Sovereignty', (1909) 3 *American Journal of International Law* 1-45, at 1 and 2 respectively.
[68] *Ibid*., at 5.

world".[69] In fact, much of the cooperation thus achieved is based on the "enlightened sense of self-interest" of the member states.[70] After all, should member states refuse to cooperate, they may be excluded from a union, and such exclusion could "be almost a national calamity".[71]

As a result, there is no real conflict between state sovereignty and international organization, not, at least, if sovereignty is properly conceptualized as divided, as a bundle of rights.[72] In fact, the two go hand in hand: the sovereign state "merely utilizes these international organizations for the benefit of its own citizens and subjects."[73] International cooperation is a necessity and thus in everyone's interest, and there can even said to be an ethical duty to cooperate on the international level.[74] The resulting cosmopolitanism is not so much idealistic but rather, as Reinsch explains, "concrete and practical".[75] The state remains necessary, because it is out of states that international unions are composed, in much the same way that states themselves are composed of towns and provinces and villages. This bespeaks of an underlying narrative of progress: arguments about protecting national prerogatives are seen as expressions of "a very strong impediment to the progress of international legislation."[76]

Having established the eventual harmony between state sovereignty and international organization, Reinsch continues by sketching what he calls 'general principles of organization'. While organizations are created in response to concrete needs and grow spontaneously, nonetheless they display an "underlying unity"[77], or even a "common law of international unions".[78] Elements of this common law may include that admission is often granted freely, hemmed in only by geographical or functional concerns. It also includes a regular division

[69] *Ibid*., at 2.
[70] *Ibid*., at 8.
[71] *Ibid*., at 9.
[72] *Ibid*., at 10: "… the old abstract view of sovereignty is no longer applicable to the conditions in a world where states are becoming more and more democratic and where the organization of interests is taking on an international aspect. It is undoubtedly a mistake to look upon sovereignty as an irreducible entity including the sum of all political and social power."
[73] *Ibid*., at 11.
[74] *Ibid*., at 13.
[75] *Ibid*., at 17.
[76] *Ibid*., at 10.
[77] *Ibid*., at 20.
[78] *Ibid*., at 26.

between plenary, executive, and administrative bodies, and often unanimity when it comes to decision-making in plenary bodies. And most importantly, perhaps, Reinsch posits an equation between functions and powers: the terms are used, throughout the article, as synonyms. Those functions and powers stem from the member states, typically in response to some perceived need. While states have been reluctant to grant powers to organizations, in the end such could not avoided: "… the needs of international intercourse have become so prominent that it has been found convenient in many cases to give a certain limited power of action, carefully guarded and well defined, to the international administrative organs."[79]

Another two years later, in 1911, Reinsch published a monograph on the international unions, built around the two *American Journal* articles but accompanied by a remarkable introduction, which aims to square whatever theoretical circles may have been left. Reinsch notes that while increased spending on the military at the same time as the rise of international organizations may seem like a paradox, it really is no such thing. Both, he suggests, are inherent in the spirit of the age: this spirit is characterized by a "desire for energetic action, for strong personality, for positive deeds and achievements"[80], and these can manifest themselves either in working for international unity or for narrow nationalist purposes. The nationalist, however, merely suffers from false consciousness, for true nationalism, in an age of interdependence, is internationalism: "The more nationalism itself becomes conscious of its true destiny, the more will it contribute to the growth of international institutions."[81] In the end then, incentives to go to war would become weaker, the stronger the 'bonds of community' between nations would become. Hence, world peace is inevitable, and is inevitably linked to the growth of international organizations. These do not stand against sovereignty, or nationalism, but are really only their natural outgrowths.

The same theme is repeated in the conclusions to the book. International organizations are presented as the alternative to warfare. In almost Malthusian fashion, Reinsch notes that in

[79] *Ibid*., at 38.
[80] See Paul S. Reinsch, *Public International Unions, Their Work and Organization: A Study in International Administrative Law* (Boston MA: Ginn & Co., 1911), at 6.
[81] *Ibid*., at 11.

the past, overpopulation had resulted in "terrible bloodlettings".[82] The "common accord" of nations, however, promised something far better: "The question is whether the energies of humanity are to be expended in old-fashioned, cruel, and universally harmful warfare, or are to be directed into the ample field of constructive work for the betterment of the conditions under which men live throughout the world. When this consideration is clearly understood, the true meaning and importance of international organization in the form of public unions will be grasped…".[83]

The monograph is, it must be said, somewhat more in the nature of a *capita selecta* work than that it systematically makes an argument. In addition to updated versions of the two *American Journal* pieces, it contains a lengthy chapter on the union of American republics (Reinsch had been a member of the US delegations to the 3rd and 4th Pan-American Congresses, and could thus write on the basis of first-hand observation), a very brief sub-chapter on the Central American Union, an even briefer chapter devoted to the Permanent Court of Arbitration, and a fairly odd chapter on international organizations and war. Somehow, it seems that Reinsch never realized that he engaged in a pioneering effort when addressing international institutional law – the book is a patchwork of bits and pieces that makes its argument only implicitly and between the lines. Still, in its totality, it provides a fascinating insight into the creation of international institutional law.

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

[82] *Ibid*., at 186.
[83] *Ibid*.

The first pan-American Congress took place in Washington, in 1888, and was considered by Reinsch to be a new phenomenon: it was not convened (as so many other congresses) to deal with a single, specific diplomatic issue, nor was it convened (as some of the European congresses had been) to address a single technical issue, such as telegraph traffic or postal relations; instead, it dealt with larger political questions.[84] Therefore, it was no surprise that its immediate results were fairly small but, so Reinsch continued optimistically – and foreshadowing the voices of thousands of statesmen after him, speaking in the name of progress: "More intimate relations would first have to be established and the countries would have to gain clearer views concerning the tendencies and probable effects of international arrangements among American states before definite action could be expected."[85]

By the time of the third conference, held in Rio de Janeiro in the summer of 1906, the states concerned had digested two lessons of vital importance. First, the Rio conference was meticulously prepared by the governing board of the Bureau of American Republics (a permanent Secretariat *avant la lettre*), and the preparation included the prior adoption of rules and regulation relating to the conference itself. Second, instead of making broad and sweeping political claims, the delegates in Rio seemed to have realized that the sort of forum offered by the pan-American congresses lent itself more to piecemeal action: technical regulation, and discussions on detail.[86]

The work of the Bureau proved so useful that it was scarcely a coincidence that the role of the Bureau was expanded and cemented at the third conference: it now became a permanent body with some circumscribed tasks, including the monitoring of the implementation of resolutions adopted by the Congress, and the gathering of information on topics of common interest, in particular on exchange in education.[87] A further institutionalizing move at the third Congress saw the creation of two bureaux (in Havana and Rio de Janeiro) for the registration of

[84] *Ibid*., at 82-83.
[85] *Ibid*., at 83.
[86] *Ibid*., at 93-94. This was to become a staple of functionalist integration theory. For an excellent overview and synthesis, see J.K. de Vree, *Political Integration: The Formation of Theory and Its Problems* (The Hague: Mouton, 1972).
[87] See Reinsch, Public International Unions, at 96.

patents, copy-rights and trademarks to give effect to an earlier convention, a customs section within the bureau itself, and the creation of a bureau for sanitary information (to be located in Montevideo) and a commission for public and private international law (with its seat in Rio de Janeiro).[88]

Reinsch was also in a position to observe that all the serious political work in Rio was done in committees. Agreement would be reached in small committees of delegates, to be approved without dissent by the plenary: "In this respect the conference differed most radically from its predecessors, in both of which long and earnest debates took place in the plenary sessions."[89]

Further institutional developments were clarified during the fourth conference, held in Argentina in 1910. One of them was the issue whether a member of the union (*in casu* Bolivia), having broken off diplomatic relations with the host state, would nonetheless have a right to participate, and the conference decided in the affirmative[90], therewith further separating the organization from its member states.[91] Interestingly though, a more general right of the bureau to receive diplomatic envoys was still rejected as being practically difficult[92], and would be shelved for a couple of decades until the creation of the League of Nations made any form of permanent representation well-nigh inevitable.

Another development referred to the question whether membership of an international organization implied recognition of statehood by all its members, and the sensible conclusion Reinsch drew was that it does not.[93] However, he also anticipated the situation where competing factions would both claim to represent their state. While Reinsch held – again sensibly - that the

[88] *Ibid*., at 97.
[89] *Ibid*., at 99.
[90] *Ibid*., at 104.
[91] Discussing the effect of war on unions, his conclusions stem from the same underlying independence of the organization: treaties establishing international organizations will be treated as suspended between belligerents, but not otherwise affected. See *ibid*., at 174.
[92] *Ibid*, at 104.
[93] This is still the prevailing position. See John Dugard, *Recognition and the United Nations* (Cambridge University Press, 1987).

proper thing to do would be to admit neither[94], the story of China's representation (much later, of course) to the United Nations runs differently.

Finally, the fourth congress also bolstered the idea of permanence by renaming the bureau (this became the Pan-American Union) and by creating the term 'director-general' to designate its lead official. The Union itself, by now, had been re-christened Union of American Republics. All in all, Reinsch discusses a number of institutional issues arising over the course of some two decades, and the development of a loose collection of American countries into the more institutionalized form of the Union of American Republics.

Reinsch's two articles, in conjunction with the 1911 monograph, arguably constitute the first important body of work on the law of international organizations as we know it, and set the tone for the further development of the ways in which international lawyers started to think about international organizations and the law relating to them. First, there is the matter of method: with international organizations being numerous, and with all of them the result of different configurations of needs and interests, nonetheless some 'underlying unity' could be found by comparing them, by trying to distill a 'common law of international unions'. While acknowledging the necessary degree of difference between the various unions and therewith respecting the autonomous existence of each individual organization, nonetheless Reinsch suggested, and demonstrated, that careful comparison could lead to useful understandings, valid across international organizations, however *mutatis mutandis* perhaps. The lessons drawn from the Pan-American Congresses are exemplary in this regard. Still, it was not the comparison as such which made Reinsch stand out: after all, his late 19th century predecessors had similarly engaged in comparative work. What Reinsch added though, and was possibly the first in doing so, was an element of synthesis: he would not hesitate to generalize on the basis of his comparisons whereas his predecessors would be reluctant to do so, and he would even hypothesize (however implicitly and however carefully) that a solution chosen within organization A might also be useful for organizations B and C.[95]

[94] See Reinsch, Public International Unions, at 105.

[95] It is striking, e.g., that Moynier, writing in 1892, discusses the financing of many unions in some details, but does not note any similarities across unions. See Moynier, Les bureaux internationaux.

Second, the activities of international organizations are often portrayed as neutral, a-political, purely routine administrative work. True or false, as Reinsch rightly foreshadowed, there is a very strong perceived need to reconcile the activities of international organizations with state sovereignty, and in order to achieve this, their political nature has to be downplayed. The emphasis, instead, necessarily comes to rest on functions, tasks, and powers – always on the understanding that powers have been granted to the organizations by their member states and continue to 'belong', so to speak, to those member states. Functions and powers came to be equated, and much of the work of international organizations was perceived in a-political terms: it manifests itself most of all in the distinction between 'technical' and 'political' organizations, which can still be found in textbooks. In this form it was pioneered by Reinsch[96], only for the distinction to be quickly picked up by other writers. A good example is the always outspoken Brierly writing a decade-and-a-half later on 'The Shortcomings of International Law', distinguishing between 'roughly' the economic and social field on the one hand, and the political field on the other, when discussing the activities of international organizations.[97]

This reconciliation between internationalism and national sovereignty also took on pragmatic colours: at one point, Reinsch felt compelled to observe that "it is not only desirable but absolutely necessary" that the agenda of any international conference or congress, even within existing institutional frameworks, is sent in advance to the participating governments, to allow them to instruct their delegates. These, after all, are not legislators working *sui juris*, but are instead representatives of governments.[98] The message was clear: whatever international unions may do, they remain under constant control by the participating governments.

Third, and perhaps remarkably given his obvious sympathies for international cooperation and his intimate familiarity with federalism as a system of government, Reinsch rarely analogized between international organization and federation: this, so it seems, was not the

[96] Here perhaps some qualification is in order: others used a similar distinction but in different terms, typically speaking of global and common social interests versus political interests. The latter, by definition, would be connected to the nation state. An example is Kazansky, L'administration internationale, at 366.
[97] See J.L. Brierly, 'The Shortcomings of International Law', (1924) 5 *British Yearbook of International Law*, 4-16, at 11.
[98] See Reinsch, Public International Unions, at 102.

way to reconcile the international with the national. One of the few occasions where the word is mentioned is when he discusses the short-lived Central American Union, which comprised a Central American Court of Justice. This then seemed, to Reinsch, to manifest "a first step in the direction of federal government."[99] Still, none of this had materialized at the time he wrote, which allowed him to conclude that the Central American Union "has thus far not passed beyond the stage of purely international action."[100] Thus, the conclusion presents itself that Reinsch never really considered international organization as proto-federal by definition; it seemed far more proper to think of organizations not as integrating entities, but rather as performing tasks given them by their member states.[101] In other words, if federalism is about power-sharing, international unions are about functional divisions of labour. And when in doubt as to who gets to do what, the most natural thing to do would be to consult those same member states.

Fourth, in a neat rhetorical move, the political nature of international organizations is channeled away from their concrete effects on member states and instead linked to their contribution to world peace. It is not actually the case, in the end, that organizations are a-political; they are political, but they are political on a higher level and for a good cause; they contribute to world peace – if 'world peace', am ambition shared by statesmen, Nobel laureates, and Miss Universe contestants alike, can be deemed a political aspiration to begin with. Who in their right mind could possibly object to world peace? Who could, as a result, possibly object to the exchange of information or to data collection? Thus, organizations are presented as purely beneficial creatures and, what is more, as the result of the very nationalism that they are meant to overcome. There are little or no costs involved in making organizations work (neither financial costs nor political costs in the form of a loss of sovereignty or decision-making power[102]), whereas the potential benefit is nothing less than world peace. In doing so, moreover, the

[99] See Reinsch, Public International Unions, at 119.
[100] *Ibid*.
[101] As noted, for most of those writing at the turn of the century, the central theme was a narrative of progress: from family via state to international union. The near-total absence of such a narrative is a distinguishing trait of Reinsch's work. Organizations may be blessings, but world government does not concern him.
[102] Reinsch systematically makes a point of listing how much the organizations cost per year, at one point even outlining that they offer good value for money: the various intellectual property bureaus "have always stayed well within their modest budget, notwithstanding the volume and real importance of their published work." See Reinsch, International Unions and their Administration, at 597.

distinction between technical and political organizations came to be mobilized. As Brierly shrewdly pointed out, although the League of Nations could be seen as a political organization[103] and was partly active as such, it also promoted "very numerous conventions" on economic and social matters.[104] Thus, the League was good from two angles: to the extent that it was political, it contributed to world peace: and to the extent that it was a-political, it also contributed to world peace. Whatever the League would do, in other words, would be considered good; the League simply could do no wrong. And the same would apply to other organizations.

This too was already present in Reinsch's writings from the first decade of the 20th century: organizations were given functions or powers and would carry those out in the best possible manner and making great use of the best experts of the world, "operating as public agencies of international interests"[105] and centralizing "the best experience of the world".[106] Member states could do wrong, of course: they could fail to live up to their obligations under the constituent documents of the organizations, but the unions themselves were seen as a higher form of being.

Fifth, those unions would still be subservient to their member states. To the extent that Reinsch does his best to align national sovereignty with internationalism, he nonetheless shies away from being all too cavalier about the independence of the unions. They remain under firm control by their member states, even if the bureaux would on occasion be able to take initiatives of their own, or help prepare the agendas of member state meetings, or even, as with the Sugar Commission, propose prices. Typically, organizations are portrayed as agents of their principals, and lack an identity of their own.[107] This could not be the entire story though, if only because

[103] One contemporary author suggested that the League was political in the sense that it provided a different internationalist alternative to the internationalism of Bolshevism, and therewith helped protect the nationalism that was considered foundational of the League's member states. Hence, the League stood not for some cosmopolitan idea (like Bolshevism), but rather for a collection of national entities, safeguarding those national entities. See Sir Geoffrey Butler, 'Sovereignty and the League of Nations', (1920-21) 1 *British Yearbook of International Law*, 35-44, at 40.

[104] See Brierly, The Shortcomings, at 11.

[105] See Reinsch, International Administrative Law, at 1.

[106] *Ibid*., at 16.

[107] It would take almost a century before someone would undertake a systematic conceptual analysis of the ways in which powers are granted to international organizations. See Dan Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford University Press, 2005).

complete control in full detail is impractical, so inevitably an element of delegation and discretion crept in (with member states giving the organization broad tasks without telling them what to do in great detail), but always under strict member state control. Reinsch's ambivalent position is best embodied in the Sugar Commission: given the broad task to set prices, yet still not seen as independent in its own right.[108]

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

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

Self-evident as functionalism may seem in retrospect, an argument can be made that there was nothing inevitable about its creation. Organizations could have been treated, as for instance Seyersted would later come to do (at least in part)[109], not as based on functions but as organic creatures in their own right. They could have been posited as competitors to their member states,

[108] This ambivalence concerning the independence of international organizations is still a hallmark of functionalism: organizations are typically depicted as having a 'volonté distincte' from their member states while simultaneously remaining under control by those same member states.

[109] A synthesis of Seyersted's opinions was posthumously published, in the manner of a *magnum opus*, as Finn Seyersted, *Common law of International Organization* (Leiden: Martinus Nijhoff, 2008).

rather than as the latter's creations and instruments. The relationship could have been conceived in terms of irrevocable transfers of powers rather than agent-principal relations mixed with power delegations. And as some of the late 19th century writers made clear, international organizations could have been considered as embryonic elements of world government, replacing the state rather than existing side by side with it. Hence, the question arises: why would Reinsch have come to his brand of functionalism, rather than to competing visions? Admittedly, such competitive views were not readily available when he wrote, but still: in retrospect the contributions by some of the late 19th century writers outlined above could have formed the basis of alternative conceptions of international institutions.[110]

IV Colonial Inspirations

Reinsch, while a prolific writer, and in spite of his undisputed reputation on the topic among his peers[111], devoted fairly little of his time to the study of international organizations. Of the dozen or so books he authored or compiled, only one is devoted to the topic, and this book itself is, as noted, a collage of two previously published articles with some additional material for good measure. It seems fair to say that the study of international organizations was, for Reinsch, a peripheral interest. Indeed, more generally, his interest in law *per se* seems to have dwindled somewhat over the years: his professional image (as well as his self-image, presumably), it seems, was that of a political scientist rather than a lawyer.[112] Tellingly, he was one of the

[110] This applies perhaps most forcefully to Renault, Les unions international, and Kazansky, L'administration internationale.

[111] It is scarcely a coincidence that Wigmore, Borchard and Pollock, when compiling a book with leading texts on continental European law, included Reinsch as the author on international unions. A large part of the 1907 article was reprinted in John Henry Wigmore *et al*. (eds.), *The Progress of Continental Law in the Nineteenth Century* (Boston: Little, Brown & Co., 1918). Incidentally, doing so cast the law of international unions as something of a European eccentricity, despite Reinsch's attempt to sketch it as relevant for the US and the Americas in his monograph.

[112] Notably, upon his death in 1923, the journal carrying an obituary was the American Political Science Review, rather than the American Journal of International Law. See Frederic A. Ogg, 'Personal and Miscellaneous', (1923) 17 *American Political Science Review*, 265-273, at 272-273.

founders and first vice-presidents of the American Political Science Association, and would later become president of that same Association.[113]

Instead of working full time on international unions, three other topics captured his main interest. One of these, perhaps not all that surprising for a lawyer cum political scientist based in the US, was the study of the US political system. Reinsch compiled two large tomes of readings on respectively US federal government and US state government[114], and two monographs largely devoted to US politics: *American Legislatures and Legislative Methods* (1907)[115] and *Civil Government* (1909).[116]

More surprisingly perhaps, he was one of the pioneers of the study of international relations, publishing a textbook on the topic as early as 1900[117] and, as a historian of the study of international relations notes, Reinsch was teaching classes on world politics at the University of Wisconsin as early as 1902.[118] His work on international affairs is generally characterized by an awareness of global interdependence, something which runs as a red thread through most of his writings. Thus, in a popular work on government, he reminds his audience that each and every country, "no matter how strong, is in some way dependent upon other countries and other parts of the world"[119], and this circumstance largely explains the rise of international organizations: "No nation is entirely self-sufficient. They must all coöperate [sic – JK] in order that the greatest advantages of civilization may be secured."[120] And this cooperation typically, if not invariably, takes the form of international unions. Reinsch would continue to work in the field of international relations, giving effect to his fascination with China, publishing a monograph on

[113] See Brian C. Schmidt, 'Political Science and the American Empire: A Disciplinary History of the 'Politics' Section and the Discourse of Imperialism and Colonialism', (2008) 45 *International Politics*, 675-687, at 677.
[114] See Paul S. Reinsch, *Readings on American Federal Government* (Boston: Ginn & Co., 1909), and Paul S. Reinsch, *Readings on American State Government* (Boston: Ginn & Co., 1911).
[115] See Paul S. Reinsch, *American Legislatures and Legislative Methods* (New York: The Century Co., 1907).
[116] See Paul S. Reinsch, *Civil Government* (Chicago: B.H. Sanborn & Co., 1909).
[117] See Paul S. Reinsch, *World Politics at the End of the Nineteenth Century, as Influenced by the Oriental Situation* (New York: MacMillan, 1900).
[118] See Torbjörn Knutsen, 'A Lost Generation? IR Scholarship before World War I', (2008) 45 *International Politics*, 650-674, at 660. Knutsen twice refers to Reinsch's monograph *World Politics* as a 'landmark' book. *Ibid*., at 660, and 669.
[119] See Paul S. Reinsch, Civil Government, at 111.
[120] *Ibid*., at 207.

Far Eastern politics in 1911, and, after his spell as US minister to China, diplomatic reminiscences[121] and a study of secret diplomacy[122]. But already the 1900 monograph, *World Politics at the End of the Nineteenth Century*, is preoccupied with the rise of China: it carries the subtitle *As Influenced by the Oriental Situation*.

Reinsch's third main interest lay with colonialism. He devoted his PhD thesis to the topic, studying colonialism from the receiving end, so to speak (it was concerned with the reception of English common law in the US), and would later publish two monographs more concerned with the sending side: *Colonial Government* (1902)[123] and *Colonial Administration* (1905).[124] This was hardly a fluke: it has been observed that the rise of the discipline of international relations arose in the US against the background of a burgeoning imperialism.[125] This became an urgent matter for practicing social scientists when the US itself became a colonial power following the Spanish-American war, and remained on the agenda under Theodore Roosevelt's expansionist policies.[126]

It is often stated that the law of international organizations is directly influenced by experiences with federalism, and there is no doubt some truth to this. It can hardly be a coincidence, e.g., that the lone voice in the ICJ cautioning against the expansive use of the implied powers doctrine with respect to the UN was the US judge on the bench, Green Hackworth[127], well-steeped in the intricacies of federal administration.[128] And yet, as noted, there is fairly little evidence that the work of Reinsch was deeply influenced by his familiarity with federalism – and at no point does he draw explicit analogies. Indeed, in a sense, Reinsch's

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[121] See Paul S. Reinsch, *An American Diplomat in China* (New York: Doubleday, Page & Co., 1922).
[122] See Paul S. Reinsch, *Secret Diplomacy, How Far Can it be Eliminated?* (New York: Harcourt, Brace & Co., 1922).
[123] See Paul S. Reinsch, *Colonial Government* (New York: MacMillan, 1902).
[124] See Paul S. Reinsch, *Colonial Administration* (New York: MacMillan, 1905).
[125] See Schmidt, A Disciplinary History, at 675-676.
[126] A very readable recent study is James Bradley, *The Imperial Cruise: A Secret History of Empire and War* (Boston: Little, Brown & Co., 2009).
[127] See *Reparation for Injuries Suffered in the Service of the United Nations*, advisory opinion, [1949] ICJ Reports 174.
[128] Prior to being appointed to the ICJ, Hackworth had spent some four decades working for the US government, entering the State Department in 1916 as a junior clerk. See Marjorie M. Whiteman, 'Green Haywood Hackworth, 1883-1973', (1974) 68 *American Journal of International Law*, 91-94.

functionalism and federalism would have made for an uneasy partnership: federalism is not based on functional divisions, but rather on territorial divisions.[129] Dipping into federalism for inspiration would almost naturally have steered away from a functionalist approach, in that federal thought presupposes the sort of struggle for power between the whole and its parts that functionalism tries to avoid precisely by focusing on function. Functionalism, in the form expounded by Reinsch, hardly recognizes power struggles to begin with: organizations exercise their functions, and if they somehow fail to do so, then their member states will rein them in. Instead of being influenced by federalism then, it would seem that, in addition to his interest in world politics, the more direct influence for Reinsch stems from his work on colonialism.

Reinsch was, like so many of his contemporaries, convinced that expansionism was both inevitable and, under certain conditions, desirable. What set him apart from quite a few of his contemporaries though was his concern for the fate of the colonized. He refused to see these as inferior people and, quite overtly, made the case that the West had a lot to learn from other civilizations, most notably perhaps the Chinese and Japanese. Being a cultural but not a military nationalist, and coming as close to being a peace activist as was compatible with the detached self-image of the scholar[130], Reinsch felt naturally that Western values and technology could have a beneficial impact, and that cooperation was the preferred way to achieve an such beneficial impact.

It would be too facile to simply place Reinsch amongst those who firmly believed in the West's civilizing mission and that this end would justify all means. While not averse of 'civilizing mission' arguments, much of his argument was suffused by the twin conceptions of interdependence and peace: in a world of growing interdependence, peace would be best guaranteed by increased cooperation. Sometimes this would simply have to take a colonial form: while the colonialist should guard against 'reckless exploitation', there was no harm in introducing "a sane and rational policy of economic development", in introducing "a productive

[129] Still useful is Kenneth C. Wheare, *Federal Government* (Oxford University Press, 1947).
[130] See generally Barbara Jean Furstenberg, *The Scholar and Public Policy: An Analysis of the Thought of Paul S. Reinsch* (MSc Thesis, University of Wisconsin, 1964).

economy into regions where at the present time barbarian exploitation holds undisputed sway."[131]

Indeed, in an important sense, the thread that bound Reinsch's fascination for colonialism and his work on international organizations together was his (maybe overly) rosy picture of colonialism as a form of cooperation: for him colonization was a form of cooperation, not its antithesis. This helps explain how he could be critical of territorial aggrandizement, yet at the same time point to the responsibilities of colonial powers: some forms of colonialism were, quite simply, not colonialism proper, but rather attempts at institutionalizing some form of cooperation.

This was influenced, no doubt, by the circumstance that Reinsch's first work on colonialism was a study of how English common law had come to affect the law of the American colonies, and the general approach he took to the topic was that English law had been helpful, but was hardly considered as compulsory. His general conclusion was a as follows: "Respect is often expressed for the common law, the resolution is in some cases even formed of using it as a model, but it is only in a few cases clearly established as the rule of the judicature and in still fewer instances followed with precision in the ordinary administration of the law."[132]

Such a conception builds on an underlying notion of colonialism as a largely benign force: as an attempt to influence by wisdom and usefulness rather than imposition. Colonialism, for Reinsch, was not (or not solely) a matter of telling others what to do and if necessary coercing them into doing so; instead, colonialism signified a common enterprise, a common adventure on the path to civilization and prosperity. The colonizer's legal system may be of use for that purpose, but always adapted to local conditions, and with some measure of discretion left to the local authorities. While he would later acknowledge there to be a distinction between settlers' colonies and conquered colonies, this distinction would affect matters in degree, but not in kind: the administration of law in conquered colonies would merely be more difficult, and this would be the result not so much of the coercion used, but of the greater variety between local laws and the law of the colonial power. With settlers' colonies, after all, one might expect greater

[131] See Reinsch, Colonial Administration, at 11.
[132] See Reinsch, English Common Law, at 57.

affinity between the law in the place of origin of the settlers and the law as it develops in the colonies.[133]

The important point though was not to become overly ambitious. Reinsch concludes the introduction to his work *Colonial Administration* with the following words: "It will … be wise for the colonial legislator not to attempt too much, not to have too ambitious a program. But if rightly planned, the economic reforms which it is in his power to effect with success, may, like the massive architecture of a cathedral crypt, in time upbear an edifice which will answer larger purposes than those of mere economic welfare and progress."[134]

In the end, colonial expansion and cooperation were seen, by Reinsch, as two sides of the same coin or, perhaps better yet, as two techniques, different if intimately related, for achieving the same goal: peace in an interdependent world.[135] It is surely no coincidence that in his *World Politics*, published as early as 1900, he points out that the best policy for the US is the development of friendly and commercial relations with other states rather than territorial aggrandizement, and such is to take place by means of the creation of trade depots and establishing means of communication.[136] If universal imperialism, as he refers to it, should be avoided because it would inevitably lead to costly conflicts, cooperation in the fields of trade and communication is to be praised. From here it is but a small step to look at international unions, and to bestow these organizations with some glamour.

Reinsch's opinion that colonialism and cooperation were but two means to the same end comes out perhaps most vividly in a speech given to the Milwaukee Bankers' Club, in 1906, where Reinsch argues that "it will be easy for the United States to maintain the upper hand in South American affairs without ever appealing to force… The time is ripe for the United States to take a leading part in South American affairs… [and] it is for this country to say whether we

[133] See Reinsch, Colonial Government, at 346.
[134] *Ibid*., at 37.
[135] In a sense, Reinsch was hardly alone in conflating colonialism and cooperation. The same sentiment reached its highpoint in the (aborted) plans to establish an International Colonial Institute. See the discussion in Descamps, Les offices internationaux, at 38-41.
[136] See Paul S. Reinsch, World Politics, at 361.

shall take advantage of these opportunities or not."[137] In light of this statement, it makes sense that Reinsch's monograph on international unions devotes considerable – and detailed – attention to the Union of American Republics, as does his downplaying of the role of the United States: "It is of course in the nature of things that the government of a nation so great and powerful as is the United States should exert a considerable influence in any council that it may enter, but there was absolutely no inclination to strive for an influence greater than would be freely accorded by the other governments as a natural result of the situation. The Union of American Republics is therefore truly international, its action is based upon the unanimous consent of all the states composing it, and no power or group of powers claims for itself a determining influence."[138]

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

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

[137] Quoted in Furstenberg, The Scholar and Public Policy, at 108.
[138] See Reinsch, Public International Unions, at 116-117.

His colonial studies themselves, in the meantime, also follow a pragmatic structure, and one that almost invites a comparative methodology. *Colonial Government* starts with a discussion of a number of general issues (including the role of missionaries, and that of entrepeneurs), followed by a systematic overview of forms of colonial government (from spheres of influences to protectorates, from administration by chartered companies to direct administration, and culminating in chapters on representative institutions, self-government and colonial federations), and concluded by a third part on institutions of colonial government (organs, institutions, law, courts). Likewise, *Colonial Administration* has a pragmatic, practical set-up, looking almost like a handbook for the would-be colonial administrator. It discusses in various chapters such topics as how to organize education in the colonies, how to finance colonies, how to achieve development, and how to organize defense and policing tasks. And again, the chapters are typically comparative in their organization, either comparing the practices of the various colonial powers, or (and this is how its handbook quality is partially revealed) comparing the types of approaches needed for the different categories of colonized peoples[139], or comparing various colonial situations (say, Egyptian land tax as compared to the so-called Javan *land rente* and land taxation in Algeria).

In conclusion, it would seem fair to say that Reinsch's work on international unions owed something to his earlier studies of colonialism. It cannot be maintained that the comparative methodology was solely inspired by colonial studies; other scholars before Reinsch had also adopted something of a comparative approach to international unions[140] and, as will be discussed below, there is a conceptual connection between functionalism and colonialism which renders any simplistic analogy with the methodology of colonial studies suspect. Nonetheless, it would seem that Reinsch's work on colonialism spawned insights about cooperation between states,

[139] Reinsch distinguishes, awkwardly, between "savage races, those populations whose social cohesion has been impaired or destroyed, the Mohammeddan races, and other races of a higher civilization." See, e.g., Reinsch, Colonial Administration, at 41.

[140] This applies to Descamps, Les offices internationaux, and Moynier, Les bureaux internationaux, even though their work lacks the sort of synthesis that may make comparison worthwhile.

about division of labour and functions, and about applying law across boundaries, that proved to influence functionalism – far more so, at any rate, than any federal analogy.[141]

V Functionalism: A Re-statement

Functionalism pervades well-nigh the entire corpus of international institutional law. On some points (as will be discussed below) this is explicitly recognized. Thus, many will agree that topics such as the legal personality of international organizations (international as well as domestic), their powers, and their privileges and immunities are typically influenced by functionalism. Yet, while these are, admittedly, the doctrines where functionalism is most overtly present, functionalism plays a key-role elsewhere as well, even if it does so in ways that are not immediately obvious.

Many of the doctrines that make up the law of international institutions are, in one way or another, accessible through the pivotal notion of the organization's powers. This applies, quite obviously, to treaty-making by international organizations, but may also apply to such issues as to whether the organization can terminate its own existence, raise the mandatory contributions of member states, create subsidiary organs, decide on admission of new members or expulsion of current ones, whether and how it can adopt legally binding instruments, settle disputes between member states, *et cetera*. All these are usually construed in terms of the organization's powers, and therewith ultimately governed by functionalist thought. This need not necessarily be the case: it might be possible to think of financing of international organizations, or the creation of subsidiary organs, in terms that are not ultimately dependent on functionalism. The claim here is not that functionalism necessarily pervades international institutional law, but only - more modestly - that it does so as a matter of fact.

There is but one major doctrinal exception, and that is the issue of control of the acts and omissions of international organizations. This is more difficult to relate to functionalism *per se*,

[141] Federal analogies in international institutional law are criticized on rather different grounds (absence of *demos*, e.g.) by Gaetano Arangio-Ruiz, 'The "Federal Analogy" and UN Charter Interpretation: A Crucial Issue', (1997) 8 *European Journal of International Law*, 1-28.

although, as we will see, functionalism is not completely averse to identifying limits to what organizations can do. With control issues, functionalism has a structural problem, in that it is not open for organizations to claim that they need to be unaccountable in order to perform their functions, or need to violate standards of international law in order to do their job properly: such arguments are simply not available. Sometimes organizations may come close to such an argument, e.g. when their constituent treaties put limits on their activities which, almost by definition, entail the violation of other standards. Perhaps the leading example is that of the World Bank, which has long maintained that taking human rights into account in its decision-making processes would be difficult to reconcile with its constituent treaty, which instructs the Bank to base its decisions on purely economic considerations.[142] While such arguments may reflect a genuine policy dilemma for the Bank, they are nonetheless ultimately unpersuasive: at the very least, it would demand a further argument as to why the constituent document would have to be taken more seriously than human rights.

With the help of Reinsch's work, set against the background of the writings of late19th century international lawyers, the contours of a functionalist theory of the law of international organizations become visible. The core of the theory can be summarized as follows. Organizations are created by states, expressing their sovereignty. There may be differences between these states in terms of political power, military or economic prowess, or influence generally, but legally these are not all that relevant: the playing field is leveled by the requirement of state consent, even if once consent is given some power differences come to the fore quite naturally. The creation of organizations is by no means in conflict with the very idea of state sovereignty; instead, it is an emanation of sovereignty. [143]

The creation of organizations follows quite naturally from the conditions of interdependence. Since no state can go it alone, they must find ways to cooperate: cooperation is in everyone's interest, and follows from necessity. The ideal form this cooperation can take is, so

[142] See Article 4, Section 10, of the IBRD Articles of Agreement. The classic statement along these lines is Ibrahim Shihata, 'Human Rights, Development and International Financial Institutions', (1992) 8 *American University Journal of International Law and Policy*, 27-37.
[143] See Jan Klabbers, 'Clinching the Concept of Sovereignty: Wimbledon *Redux*', (1998) 3 *Austrian Review of International and European Law*, 345-367.

it seems, the public international union; at any rate, the alternative, in the form of territorial aggrandizement, may be decidedly worse. Hence, international organizations are presented as the benign alternatives to colonial expansion. They carry the promise of material benefits and welfare, at costs that are either non-existent or negligible: theirs is a mission to promote the common good. Either way, instead of colliding with national sovereignty, international organizations and national sovereignty go hand in hand.

Since organizations are emanations of sovereignty, it follows that states stay in perfect control: organizations are given tasks or functions, on the basis of delegation by states or even downright instruction (in the same way in which principals instruct their agents), and are ideally given the necessary powers to give effect to these functions. Those powers are, again ideally, granted in express form: the constituent treaty will specify what the tasks of the organization are, and what its powers are. What Reinsch did not yet discuss in any great detail, but would become an important element of functionalist doctrine, is what to do when an express power is lacking. In such a case, it may be derived, as the PCIJ would later hold[144], from an express power, or perhaps even, as the ICJ would hold two decades later still, from the very functions of the organization: if an organization needs a particular power in order to function properly, such a power can be deemed implied.[145]

The organizations discussed by Reinsch all turn out to be organized in similar ways, with most of them having a plenary body, an executive body, and a secretariat. Decision-making too occurs in similar ways, with the interests of the member states being safeguarded by the circumstance that voting usually takes place by unanimity. Hence, the member states firmly remain masters of the treaty, but by exercising their functions nonetheless organizations help to overcome international problems, and help to make the world a better, more harmonious place. This, finally, is by no means considered as political: how could there be reasonable disagreement about the desirability of world peace, international cooperation, and the like? And if there is agreement on the ultimate end, there can hardly be disagreement on the means either. Or rather,

[144] See Interpretation of the Greco-Turkish Agreement.
[145] See Reparation for Injuries.

with the ends justifying the means, any disagreement on the means would rapidly evaporate in view of the importance of the ends.

What remains somewhat under-illuminated in Reinsch's work is the relationship between the organization and its member states. Reinsch, essentially, defines any conflict away when suggesting that organizations and state sovereignty go hand in hand. This would quickly be amended though: writing less than a decade later, Francis Sayre (a Harvard educated lawyer and, as it happened, the son-in-law of Woodrow Wilson) would point out that when organizations lack success, it is often caused by member states clinging to their sovereignty. Not surprisingly, Sayre advocated for limitations on sovereignty, claiming that "the right of the individual state to stand out against the ordered progress of the world is open to serious question."[146] His proposed solution was firmly embedded in thinking in terms of principals and agents: while it would be unrealistic to expect diplomatic conferences or plenary bodies to decide by majority vote, majority vote could profitably be introduced in organs "exercising defined and specially delegated powers."[147] This built on Reinsch's understanding of the Sugar Commission[148] and took it a step further, without however solving the conundrum of the tension between organizations and member state sovereignty. This tension still prevails to this day, and the creation of organs with limited, "defined and specially delegated powers" has proved to be less than a resounding success. Doing so is based on the premise that the politics can be taken out of politics, and while this has remained a popular thought within functionalism (positing technical expertise as the answer to politics), it is bound to remain unsatisfactory.[149]

From the central idea of functions to be performed in the common interest, it is but a small step to outline other elements of functionalist doctrine, which were not yet visible in Reinsch's writings if only because the issues had not yet arisen in practice. Thus, functionalism would come to inspire the law on the privileges and immunities of international organizations: such privileges and immunities are typically granted to allow the organization to exercise its

[146] See Sayre, Experiments, at 152.
[147] *Ibid*., at 153.
[148] See Reinsch, International Unions and their Administration, at 604.
[149] For a recent critique, see Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', (2007) 70 *Modern Law Review*, 1-30.

functions properly. By the same token, grants of legal personality are supposedly informed by functionalist considerations: organizations shall typically be granted, within their member states, such legal capacities as are necessary for their functioning, leading to just the right dose of personality.

Functionalism, while placing the functioning of organizations central, is not principally opposed to any limits; instead, as advocates of functionalism might put it, one of the beauties of functionalism is that it has built-in limits as to what exactly it is that organizations can do. Again, this is not yet something discussed explicitly by Reinsch, but has become a staple of the post-war literature and can be said to inhere already in his work: he is at all times careful to suggest that the work on international unions remains under supervision by the member states. Thus, if an organization can boast such implied powers as are necessary for its functioning, it automatically also follows that it lacks the powers to engage in activities that cannot be connected to its function. The Permanent Court of International Justice had already made this clear in its advisory opinion on the European Danube Commission[150], and the point would much later be echoed by Bekker, holding with brilliant brevity that an international organization "shall be entitled to (no more than) what is strictly necessary for the exercise of its functions in the fulfillment of its purposes."[151] Likewise, if an organization's privileges and immunities are necessarily linked to its functions, it follows that privileges and immunities that are unrelated to those functions are not granted – or ought not to be granted, perhaps.[152] The same applies to legal capacities under the domestic laws of the organization's member states and, perhaps[153], those under international

[150] See note 62 above and accompanying text.
[151] See Peter H.F. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of their Legal Status and Immunities* (Dordrecht: Martinus Nijhoff, 1994), at 5.
[152] The difficulties of applying this were exposed before the ICJ in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights (Cumuraswamy)*, advisory opinion, [1999] ICJ Reports 62 (denying that the opinion of the Secretary-General of the UN on the scope of official activities of UN officials would be conclusive, but acknowledging that it would create a very strong presumption).
[153] My hesitation here finds its cause in the circumstance that international legal personality is often (questionably, to my mind) treated as a threshold condition, independent from any capacities. Taken to the extreme, it would be possible, accordingly, to be an international legal person yet have no capacities to act under international law. To convolute matters further still, this argument conflates powers and capacities, which are best kept separate. For further reflection, see Klabbers, An Introduction, 46-52.

law as well: those capacities that are not necessary for an organization's functioning ought not to be granted.[154]

This raises troubling issues though of a practical nature, most obviously the issue who gets to decide on these questions. The short answer is, as the ICJ famously put it in *Certain Expenses*, is that "each organ must, in the first place at least, determine its own jurisdiction".[155] In other words: questions as to the necessity of an organization's activities in light of its functions are to be determined by those organizations (or their organs) themselves – this means, in practice, that the theoretical limits of functionalism may well prove to be illusory.

For Reinsch and his contemporaries, those limits were hardly an issue. International organizations, after all, were not expected to do the sort of things one might want to limit, with the possible exception of encroaching on state sovereignty, as illustrated e.g. by Renault's listing of the advantages and disadvantages of membership of international organizations.[156] This, however, was caught by the theory in the way it reconciled membership of organizations with state sovereignty: not in conflict, but in harmony. Other than this, limits were, quite literally, anathema for the first generations of writers on international institutions. Perhaps the best way to illustrate the prevailing spirit is by reverting, once again, to Gustave Moynier, writing in 1892 about the wonders of the telegraph union, based on the Paris Treaty: "Il serait oiseux de démontrer les avantages considérables que le monde civilize a retire de la conclusion du traité de Paris. On les comprend sans qu'il soit besoin d'y insister."[157] In other words: the beneficial effects of international organizations are self-evident; they are intuitively felt and need not be

[154] This illustrates the limits of any theory in the social field: since, e.g., privileges and immunities are typically the result of negotiations between an organization and its host state, there can be no certainty in advance that the resulting privileges and immunities will actually be necessary (and only those necessary) to exercise to organization's functions. For the claim that nonetheless organizations are, by virtue of general international law, entitled to a certain level of privileges and immunities, see A.S. Muller, *International Organizations and their Host States* (The Hague: Martinus Nijhoff, 1995).
[155] See *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, [1962] ICJ Reports 151, at 168.
[156] See Renault, Les unions internationales.
[157] See Moynier, Les bureaux internationaux, at 18.

demonstrated. International organizations are inherently good, contributing, as a later luminary put it without hesitation or irony, to the 'salvation of mankind'.[158]

There is an intimate connection between the cosmopolitan bliss of international organizations and functionalist theory, as is already visible in Reinsch's writings. States, those containers of national sovereignty, are capable of bad behaviour: they can invade other states, start wars, mistreat their own citizens, *et cetera*, and the origin of this is that states have an unbridled sovereignty which, if untamed, can cause all sorts of havoc. It is no coincidence that the most idealistic tract on international organizations, Leonard Woolf's *International Government*, written during World War I, quite literally starts with a brief chapter on the causes of war.[159] This at once brings cause and effect together: states are the problem, international government through organizations the solution. It is this sentiment that runs through a century of writings on international institutional law: Schermers and Blokker can still, writing in 2003, lament the horizontal nature of international law and claim that is has "partly been compensated for by the creation and functioning of international organizations"; partly, international organizations compensate "for the lack of a central, supranational authority."[160] Reinsch, while not the first to launch the idea, was no stranger to it, postulating an ethical duty to cooperate on the international level, reinforced by practical necessities and resulting in a "concrete and practical" cosmopolitanism.[161] This is, in essence, the very same argument still espoused: states are here to stay and remain necessary, because it is out of states that international unions are formed. But the worst effects of the resulting order are mitigated by means of organizations, whose capacities are not unlimited but, instead, based on functions.[162]

In this set-up, organizations can not lose. As long as they stick to their functions, they can hardly be accused of wrongdoing for, if they do wrong while sticking to their functions, the wrongdoing can be traced to the member states: these should not have assigned shady functions.

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[158] See Nagendra Singh, *Termination of Membership of International Organisations* (London: Stevens and Sons, 1958), at vii.
[159] See Leonard Woolf, *International Government* (New York: Brentano, 1916), 8-11.
[160] See Schermers & Blokker, International Institutional Law, at 6 and 7, respectively.
[161] See Reinsch, International Administrative Law, at 17.
[162] Incidentally, this may well be why the (to some extent) non-functionalist thought of Seyersted has met with little following and sometimes invited ridicule or hostility. See Seyersted, Common Law of International Organizations.

And where organizations depart from their functions, it seems obvious that their member states have exercised too little control: hence, again blame can be assigned to the member states. On such a line of thought, there is no reason to develop rules specifically with a view to the responsibility of international organizations because, in an important sense, organizations cannot do wrong: whatever wrongs they commit are always traceable to their member states.[163] Indeed, the far easier approach is simply to deny that organizations with shady functions are 'really' international organizations: history is replete with examples of organizations that are by and large ignored (the Organization of the Islamic Conference comes to mind[164]), or re-classified as something other than an international organization (sometimes OPEC is qualified as a cartel), or given a positive spin (the colonial organization mentioned by Descamps may be an example[165]), or defined away as the result of dominance by single member state: think CMEA and Warsaw Pact, and perhaps NATO as well.[166]

If functionalism is inspired by (and thus connected to) cosmopolitan sentiments, methodologically there is a strong connection between functionalism and comparativism. This too is abundantly visible in the work of Reinsch as well as that of his immediate predecessors, all of whom use a comparative approach to discuss the activities of the international unions they were studying. Reinsch's contribution here resides not so much in comparativism *per se*, but in extending it to cover also institutional issues (as opposed to substantive issues), and in the authority of the synthesis he proposed.

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[163] This helps explain why Eagleton, in the 1950s, could not conceive of organizational responsibility, and it helps explain why the first response by international lawyers to the crack in the functionalist theory was precisely to shield the member states. See Clyde Eagleton, 'International Organizations and the Law of Responsibility', (1959/I) 76 *Recueil des Cours*, 319-425, and the reports by Rosalyn Higgins in *Annuaire de l'Institut de Droit International* (1995) and (1996).

[164] This is one of the largest non-universal organizations, complete with organs, a secretariat, a constituent document, *et cetera*; yet it is difficult to find literature on it. Its website is http://www.oic-oci.org/home.asp (last visited 4 June 2010).

[165] See Descamps, Les offices internationaux, at 38-41..

[166] Illustrative of the latter approach is Bryan Schwartz and Elliot Leven, 'International Organizations: What Makes Them Work?', (1992) 30 *Canadian Yearbook of International Law*, 165-194. Incidentally, this has quite a long pedigree: already Sayre, writing in 1919, felt that the Suez Commission could hardly be considered a true international organization, dominated as it was by the United Kingdom. To his mind, the Suez Commission "amounted to little more than an empty form" and was only accorded a "sham power". See Sayre, Experiments, at 77 and 79, respectively.

The connection between functionalism and comparativism may seem random, a contingency rather than a necessity, but on closer scrutiny the connection can be theorized as well. Organizations are created to perform certain functions, rather than as organic creatures that can decide on their own activities. Since these functions cannot be expected to be identical from one organization to the next[167] (why duplicate things, after all?), it would seem to follow that organizations are all unique: they all have their own charters or constitutions, their own organs, their own functions, and their own powers.[168] In order to formulate any general conclusions in such a functionally organized system, the most obvious path to follow is to see what they have in common and where they part ways. Indeed, the point can be made stronger still: any comparison will have to focus on function because, on a high yet still meaningful[169] level of abstraction at any rate, the only thing international organizations have in common is that they can be said to have been created to perform functions. Hence, functionalism and comparativism work in tandem: functionalism generates hypotheses which can be tested through a comparative method or, more likely perhaps, the other way around: comparing organizations generates hypotheses which sometimes – all too rarely, perhaps - will be tested for theoretical coherence or cast into larger explanatory frameworks.

VI Re-aligning Functionalism and Control

The point of the present paper has been to provide a sketch of functionalism in the law of international organizations, and to do so by means of close study of some of the writings of its

[167] With the partial exception of regional organizations. It may or may not make sense to copy the EU model in Central America or sub-Saharan Africa, but it does not make any sense to create another IMF in addition to the already existing IMF. Indeed, in its 1996 WHA opinion, the ICJ went a long way towards discouraging such ideas. See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, advisory opinion, [1996] ICJ Reports 66. For discussion, see Jan Klabbers, 'Global Governance at the ICJ: Re-reading the *WHA Opinion*', (2009) 13 *Max Planck Yearbook of United Nations Law*, 1-28.

[168] In this light, classifying the EU as an entity *sui generis* is of doubtful utility. It borders on the nonsensical when combined with the claim that the EU is also the most evolved species of the genus: it cannot be both at once. Moreover, it leads to the curious conclusion that there can be no separate discipline or sub-discipline of international institutional law. See further Klabbers, The Paradox.

[169] On a not so meaningful level, they can also all be said to occupy premises, or make use of computers, or have employees who drink coffee.

founding father, Paul S. Reinsch, set against the background of a discipline *in statu nascendi* at the time he wrote. Doing so confirms the insights that functionalism is pervasive in international institutional law[170], is wedded to a comparative methodology, and is embedded in a general cosmopolitanism.

All this makes that it is difficult to think of legal methods to control international organizations: functionalism's traditional mechanisms (limits based on functions) do not seem to work very well, and as has been established elsewhere, neither do such mechanisms as the *ultra vires* doctrine.[171] If functionalism has an Achilles heel, it is that it renders control of the acts (and omissions) of international organizations illusory, and as this paper has sought to demonstrate, the 'control problem' has always been inherent to functionalism. It is not so much the case that later scholars and practitioners somehow perverted a perfectly good working system; instead, as the study of the work of Reinsch and his immediate predecessors suggests, the problem of control was part and parcel of functionalism ever since its inception.[172]

And yet, to some extent the control problem as we know it is the result of a perversion, but a perversion of a different kind. Functionalism has at least been partially been correct in insisting that as long as organizations adhere to their functions, there is fairly little that can go wrong. Functionalism was right in claiming that, first of all, few functions would be inherently problematic, and second, in suggesting that recourse could always be had to the member states.

Yet, functionalism has been more right in theory than in practice, so to speak. For one thing, functionalism has been too cavalier about organizations actually sticking to their functions.

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[170] And, admittedly, has quite some explanatory force. See in greater detail Jan Klabbers, 'Constitutionalizing Virtue in International Institutional Law', in Nigel D. White and Richard Collins (eds.), *International Organisations and the Idea of Autonomy* (London: Routledge, 2011, forthcoming). See also Jan Klabbers, 'Two Contending Approaches to the Law of International Organizations', in Jan Klabbers and Asa Wallendahl (eds.), *Research Handbook on International Organizations Law: Between Functionalism and Constitutionalism* (Cheltenham: Edward Elgar, 2011, forthcoming).

[171] See, e.g., Jan Klabbers, 'Constitutionalism Lite', (2004) 1 *International Organizations Law Review*, 31-58. Note also that in US corporate law, the *ultra vires* doctrine had already largely been discarded by the 1930s: see Morton Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* (Oxford University Press, 1992), at 77-78.

[172] As Morgenstern would later put it, the functioning of international organizations owes much to acquiescence on the part of member states. See Felice Morgenstern, 'Legality in International Organizations', (1976-77) 48 *British Yearbook of International Law*, 241-257.

Practice suggests, however, that often enough organizations depart from their functions ('mission creep' is a prominent example) and that organizations become engaged in lateral battles which have little to do with their functions: they engage in bureaucratic turf wars, appoint staff on the basis of (real or perceived) donor state wishes, and may engage in all sorts of petty politics that compromise their functioning.[173] Functionalism, so to speak, underestimated the way in which bureaucracies function.[174]

Second, practice suggests that there are situations that are too complex for a simple functionalism to provide relevant answers: functionalism needs to be re-thought in order to deal with complex policy dilemmas. Such situations may arise when behaviour might be expected on the basis of an organization's function, but is not spelled out in its constituent document: examples may be the lack of intervention by the UN in Rwanda or Srebrenica. Second, there may be situations (as already alluded to) where an appeal to an organization's function may collide with other significant community norms: the position of the World Bank vis-à-vis human rights may provide an example. Third, there may be situations where the organization's *modus operandi* is no longer deemed adequate; arguably, such a situation occurred in Cambodian refugee camps in the early 1990s, where the situation looked so hopeless that UNHCR's leadership (the revered humanitarian Sergio Vieira de Mello) decided to break with accepted practices, therewith arguably breaching existing legal rules and the rights of individual refugees but possibly saving the integrity of UNHCR's work.[175] And fourth, there may be situations where even if an organization can work legally unhampered, its doing so nonetheless collides with basis notions of good governance or human rights: the sanctions policies ordained and administered by the Security Council may well constitute an example.[176]

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[173] A recent overview with tell-all title is Thomas G. Weiss, *What's Wrong with the United Nations and How to Fix It* (Cambridge: Polity Press, 2008). An earlier, and quite devastating (if anecdotal), critique of the functioning of international organizations engaged in development policies is Hancock, Lords of Poverty.

[174] In this light, analyzing organizations from the perspective of bureaucracy theory yields useful insights. An excellent example is Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithaca NY: Cornell University Press, 2004).

[175] For a discussion, see Samantha Power, *Chasing the Flame: One Man's Fight to Save the World* (London: Penguin, 2008), esp. at 67-68.

[176] For a fine overview of the work of the sanctions committees wedded to a critique of what ails them, see Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge University Press, 2007).

In such cases, an appeal to functionalism as traditionally employed is bound to remain insufficient; such a traditional approach, after all, can justify just about anything. Instead, the appeal will have to be filtered (so to speak) through an ethical approach which helps organizations to re-instate their original functions. The main candidate for such an approach is known as virtue ethics, an approach based on Aristotle and focusing on the character of those making the decisions.[177] Briefly put, a virtue ethicist will not only ask whether behaviour is legal (or otherwise in conformity with some external standard), but will also ask whether the decision-maker was acting honestly, or justly, or charitably, or generously (virtuously, in a word), when making the decision. This helps to flesh out the sometimes opaque statement that an activity may have been legal but violated some moral obligation, in that it helps identify which particular moral obligation was at issue; it may be of assistance in creating a vocabulary for evaluating the acts and omissions of international organizations; and, most importantly for present purposes, it may help remind the organization of what its functions are and therewith come to re-invigorate functionalism.

The underlying idea, in all its simplicity, is this. If leaders of international organizations and their influential member states behave virtuously, their behaviour is more likely to be deemed acceptable. Part of behaving virtuously is to behave in accordance with the functions originally assigned to an organization.[178] While there is some disagreement as to what count as virtues, the disagreement is relatively minor: most reasonable people (and probably most unreasonable ones too), regardless of their cultural heritage, would agree that honesty, charity,

[177] See Aristotle, *Ethics* (London: Penguin, 1976, Thomson transl.). Authoritative recent re-statements include Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 2nd ed. (London: Duckworth, 1985) and Rosalind Hursthouse, *On Virtue Ethics* (Oxford University Press, 1999). More specifically law-oriented versions include Steve Sheppard, *I Do Solemnly Swear: The Moral Obligations of Legal Officials* (Cambridge University Press, 2009) and , focusing on the ethics of judging, Colin Farrelly & Lawrence B. Solum (eds.), *Virtue Jurisprudence* (Basingstoke: MacMillan Palgrave, 2008).

[178] Similar approaches can be found in the public administration and the business administration literature, with authors endorsing that entities refer back to the values and functions they were based on. Leading examples from the public administration field include Larry D. Terry, *Leadership of Public Bureaucracies: The Administrator as Conservator*, 2nd ed. (Thousand Oaks CA: Sage, 2003), and Paul du Gay (ed.), *The Values of Bureaucracy* (Oxford University Press, 2005). For business administration, see Joseph L. Badarocco, jr, *Leading Quietly* (Cambridge MA: Harvard Business Press, 2002), and Doug Lennick and Fred Kiel, *Moral Intelligence* (Upper Saddle River NJ: Wharton School Publishing, 2005).

generosity, modesty, and justice are among the virtues. Few would advocate greater injustice, or increased dishonesty, or more hubris. While there may be disagreement between individuals or cultures as to what constitutes honesty, or as to what honesty demands in a particular setting, nonetheless few would dispute that honesty is, generally, a good thing.[179]

This is not the place to work out all the philosophical niceties, but perhaps a practical example may prove helpful. One of the policy-dilemmas sketched above is that of the UN Security Council imposing sanctions, and in doing so treating human rights requirements rather cavalierly. Legally, this is difficult to combat: the Security Council, it may be claimed, has unfettered liberties of action under the UN Charter. It may impose sanctions, and it may do so in any which way it pleases, as it is not legally bound to adhere to any standard in doing so, including human rights norms or, more broadly, standards of good governance.[180]

This reasoning, as has become obvious in the aftermath of case-law from the Court of Justice of the EU[181], has become a difficult position to maintain. While legally plausible, it nonetheless strikes most observers as undesirable. Surely, a body such as the UN Security Council, arguably the most important and powerful administrative body in the world, should not disrespect standards of good governance, including human rights standards. The argument has an intuitive appeal, but how to give shape to it?

The standard response in the literature has been to find that, somehow, the UN is legally bound to adhere to human rights standards after all. Such is then usually derived from article 25 of the Charter, which holds that the member states "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter". Moreover, under article 24 UN, the Council must do its work in accordance with the purpose and principles of the UN. Together this

[179] Virtues, it needs to be stressed, are not to be confused with values. Values are political positions one can take or shed; virtue instead relates to character qualities. Perhaps as a result, most disagreement would be about values, not virtues, yet even with values claims of incommensurable positions may be overblown. As the moral philosopher Sir Isaiah Berlin once put it, "A great many people believe, roughly speaking, the same sort of thing. More people in more countries at more times accept more common values than is often believed." See Steven Lukes, 'Isaiah Berlin in Conversation with Steven Lukes', 120 *Salgamundi* (1998) 52-134, at 119, and more generally Steven Lukes, *Moral Relativism* (London: Profile, 2008).

[180] For an extended argument along these lines, see Eric Rosand, 'The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?', (2004-5) 28 *Fordham International Law Journal*, 542-590, esp. at 551-560.

[181] In particular case C-402/05 P, *Kadi* v *Council and Commission*, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML (last visited 7 June 2010).

stipulates, so the argument goes, that decisions of the Council must be taken in accordance with the UN Charter. The UN Charter, in article 1 and elsewhere, says that the UN shall promote and encourage respect for human rights. Hence, it follows that in taking its decisions, the Council should respect human rights – a legitimate expectation has been created, which organs ought to honour.[182]

No matter how sympathetic, as a purely legal matter such reasoning is vulnerable to critique. For instance, even though the Charter refers to human rights in a few places, it does so in hortatory language, and does not spell out which human rights are binding on the Council. The UN, moreover, while it has sponsored the conclusion of some highly important human rights documents, is not technically a party to any of them: hence, the contractual basis of obligation is lacking. This may be countered by pointing out that the most relevant human rights norms have become part of customary international law, but this in turn is also vulnerable: such customs are based on the practices (or words) of states, not of international organizations. If the idea behind custom is to give legal effect to practices within a specific political community, it remains an open question why norms binding upon states would *per se* also bind international organizations, especially if the latter are conceptualized as separate entities with distinct moral agency.[183]

Be that as it may, what should be clear is that what seems a reasonably easy question initially ("Can the Security Council ignore human rights when making its decisions?") cannot be answered with great ease and confidence under reference to international law alone. The argument requires a different, perhaps additional track, and harking back to the UN's functions may well do the work. For surely, with all the legal casuistry in the world, it would be difficult to maintain upon a virtuous reading of the UN Charter that the Council may willfully ignore human rights: the various references to human rights in the Charter may not add up to a plausible case as a matter of law alone, but they do suggest that respecting human rights in its activities is in line

[182] A brief rendition of the argument can be found in Clemens Feinäugle, 'The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?', (2008) 9 *German Law Journal* 1513-1539. For more detail, see August Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions', (2001) 95 *American Journal of International Law*, 851-872.

[183] For useful discussion, see Toni Erskine (ed.), *Can Institutions have Responsibilities? Collective Moral Agency and International Relations* (Basingstoke: Palgrave MacMillan, 2003).

with the UN's functions. If the question "Is it legal?' be replaced, as virtue ethicists may ask, by "Is it just?" or "Is it honest?", then the answer should be obvious: it may be legal (in that it is not explicitly legally prohibited) to trample upon human rights when designing sanctions regimes or imposing sanctions on individuals, but it is neither just nor honest, in that it signifies a departure from the great tasks given to the UN.[184]

VII Concluding Remarks

This is not the place to further develop a virtue ethics approach to the control of international organizations[185], but what is important, for the moment, is the connection of virtue ethics to functionalism. The analysis of early functionalism, in the work of Reinsch in particular, has demonstrated that functionalism started out as a strictly virtuous approach. Early functionalists, however idealistic about the possible role of international organizations in international government or a system of interstellar law, were nonetheless keen not to throw out the baby with the bathwater: international organizations were to exist side by side with states. To the extent that early functionalism boosted itself by painting a picture of states as bad, and prone to war, such a picture only worked on the premise that organizations would be their opposites, and this, in turn, demanded that organizations adhere closely to their functions. Should they lose track of their functions (and concomitant limits) and lose their moorings, then they would become indistinguishable from states. Functionalism, it turns out (not surprisingly), thrives on international organizations remaining faithful to their functions, for only this allows them to remain to be seen as legitimate actors and viable alternatives to states. Hence, to the extent that organizations have departed from the straight and narrow, their best hope for redemption lies with virtue ethics: a return to the sort of sentiments that inspired the early functionalists.

[184] I borrow the type of question from G.E.M. Anscombe, 'Modern Moral Philosophy', as reproduced in Roger Crisp and Michael Slote (eds.), *Virtue Ethics* (Oxford University Press, 1997) 26-44, at 34.
[185] The author is working on a monograph on the topic which, it is hoped, will also address the philosophical niceties in greater detail.

This does not mean giving up on implied powers, or privileges and immunities, but it does mean taking those original functions seriously and resisting the temptation to have political ends justify the means. It may also imply a change in hiring policies, with less room for nepotism, for appointment based solely on the wishes of large donor states, or promotion based on seniority alone. And it may imply doing away with amendments of existing legal rules in the form of uncontrolled policy decisions or strategic documents and maybe, just maybe, it may imply not standing by idly when people are slaughtered by the thousands. The answer to such huge embarrassments as Rwanda or Srebrenica may not reside in creating yet more rules and yet more tribunals, but in taking functionalism seriously.