

## INTERNATIONAL LEGAL THEORY

# Towards a Postcolonial Genealogy of International Organizations Law

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### Abstract

This article sketches the contours of a postcolonial genealogy of international organizations law. Contrary to conventional accounts, which remain strongly Eurocentric, the article claims that international organizations law did not emerge until the closing stages of the Second World War, and that its evolution was strongly influenced by the accelerating processes of decolonization that accompanied its birth. More specifically, the article argues that the emergence of international organizations law was spurred by a series of perceived problems regarding the adequacy of the international legal system in the aftermath of the end of formal colonial rule, in which the relations of power constructed through colonialism remained profoundly implicated. The politics of decolonization thus shaped the practice of international organizations law, provided the catalyst for many of the foundational cases in international organizations law, and motivated much of its early doctrinal scholarship. Moreover, the article argues that the functionalist logic of international organizations law is deeply embedded in a postcolonial imaginary which, by supporting the division of the world into formally equivalent nation-states, ostensibly cuts against the hegemonic territorialism of colonial governance.

### Keywords

decolonization; genealogy; history; international organizations law; postcolonial

## I. INTRODUCTION

Despite a growing body of scholarship on the relationship between imperialism and international law, most historical accounts of the law of international organizations remain strongly Eurocentric.<sup>1</sup> Introductions to the subject typically begin with a

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<sup>1</sup> On imperialism and international law see, e.g., A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004); S. Pahuja, *Decolonising International Law* (2011). On Eurocentrism in histories of

sweeping history of international co-operation, sometimes going back as far as Ancient Greece. Along the way, the Congress of Vienna, the Hague Conferences, and the public international unions established in the nineteenth century are duly noted, before arriving at the Treaty of Versailles – a sequence of distinctly European milestones. The League of Nations – created primarily by European nations, to solve problems of co-operation among them – is usually taken as the key turning point in the construction of international organizations, and by implication in the law applicable to them.<sup>2</sup> Moreover, the construction of that law is usually attributed to a relatively small group of twentieth-century Western jurists.<sup>3</sup> One struggles to find any reference at all to (anti)imperialism, (anti)colonialism, or (de)colonization in textbooks on international organizations law, much less a discussion of the significance of these phenomena on its formation and evolution.<sup>4</sup>

This article aims to sketch the contours of an alternative, postcolonial genealogy of international organizations law. Contrary to conventional accounts, I claim that that law, properly understood, did not emerge until the closing stages of the Second World War, and that its evolution was strongly influenced by the accelerating processes of decolonization that accompanied its birth. The politics of decolonization thus shaped the practice of international organizations, provided the catalyst for many of the foundational cases in international organizations law, and motivated much of its early doctrinal scholarship.<sup>5</sup> In outlining this genealogy, this article spans a period which saw a shift in the dominant global imaginary from a world of empires to a world of nation-states. I argue that the functionalist logic of international organizations law is deeply embedded in a postcolonial imaginary which, by allowing (and indeed supporting) the division of the world into formally equivalent nation-states, appears to cut against the hegemonic territorialism of colonial governance.

In seeking to trace a *postcolonial* genealogy of international organizations law, I do not intend to suggest that the latter has somehow overcome or transcended a now-irrelevant colonial past.<sup>6</sup> To the contrary, ‘postcolonial’ is used here to describe the problems and politics arising in the aftermath of the end of formal colonial rule, in which the relations of power constructed through colonialism remained

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international law see M. Koskenniemi, ‘Histories of International Law: Dealing with Eurocentrism’, (2011) 19 *Rechtsgeschichte* 152.

<sup>2</sup> See, e.g., C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2005), 1–5; D.W. Bowett, *The Law of International Institutions* (1963), 1–9; P. Reuter, *International Institutions* (1958), 35–67. As these titles suggest, many important texts in the discipline refer to ‘international institutions’ rather than ‘international organizations’. Accordingly, this article uses ‘international organizations law’ as a synonym for both ‘the law of international organizations’ and ‘international institutional law’.

<sup>3</sup> See also the ‘Forum on International Institutional Law’, (2008) 5 *International Organizations Law Review* 1.

<sup>4</sup> There are no entries for these terms in the indexes of Amerasinghe, *supra* note 2; Bowett, *supra* note 2; J. Klabbbers, *An Introduction to International Institutional Law* (2002); and H.G. Schermers and N.M. Blokker, *International Institutional Law: Unity Within Diversity* (2011). Schermers and Blokker has one entry for ‘colonies’. Reuter, *supra* note 2, is unusual in discussing colonization as a stage in the historical evolution of international relations and international institutions before the Second world War (at 59–61); he also notes a group of international organizations in the period before 1919 that were ‘clearly connected with temporary situations of a colonial type’ (at 207).

<sup>5</sup> This article does not address the question of whether international organizations law is best described as a discipline, sub-discipline, field, or branch of international law; it uses these descriptors interchangeably.

<sup>6</sup> On the dangers of the terms ‘postcolonial’ and ‘postcolonialism’ see E. Shohat, ‘Notes on the “Post-Colonial”’, (1992) *Social Text* 99; A. McClintock, ‘The Angel of Progress: Pitfalls of the Term “Post-Colonialism”’, (1992) *Social Text* 84.

(and remain) profoundly implicated.<sup>7</sup> Nor do I want to imply that international organizations law is motivated and shaped by a single political vision, much less that it has succeeded in fulfilling any such vision in the real world. Instead, I argue that the emergence of international organizations law was spurred by a series of perceived problems regarding the adequacy of the international legal system in the post-colonial (or decolonizing) moment. Accordingly, this article aims to indicate how international organizations law emerged from diverse responses to the postcolonial *problematique* by political leaders and jurists in both the global North and the global South, rather than conduct a detailed analysis of the specific solutions offered by each of them.<sup>8</sup>

This suggests a complex story of legal construction from both ‘above’ and ‘below’. While a significant number of works have examined the colonial and postcolonial genealogies of particular international organizations,<sup>9</sup> few have extended that analysis to international organizations law itself; Jan Klabbers’ work on the ‘colonial inspirations’ of functionalism in the discipline is a rare exception.<sup>10</sup> My goal in this article is to decentre further European (and more generally Western) actors and ideas – but not to displace them entirely. International organizations law was not first created in Europe and then extended to the rest of the world; nor was it the sole invention of non-European actors. Important elements of that law may surely be detected, with the benefit of hindsight, in the pre-war precedents of international bodies, as well as (intra)imperial law. My claim is that decolonization animated – and was in turn supported by – the crystallization of these earlier, scattered precedents into a recognizable field and discipline. In elaborating this claim, I hope to contribute to a body of scholarship that explores the agency of non-Western actors in shaping international law, while illuminating the ‘puzzling tendency of international law to combine both imperial and counter-imperial tendencies’.<sup>11</sup>

Recovering the postcolonial genesis of international organizations law may also have practical implications. There is now a growing awareness of the extent to which international law has facilitated the expansion of the governance powers exercised by international organizations,<sup>12</sup> while hampering the ability of states and individuals to hold them to account for causing or contributing to violations of international law. These problems were highlighted by recent difficulties in making the United Nations (UN) accept responsibility for its role in causing a cholera

<sup>7</sup> R.J.C. Young, ‘What is the Postcolonial?’, (2009) 40 *ARIEL* 13.

<sup>8</sup> The processes of post-war decolonization can hardly be separated from the emergence of welfare states, global markets, or the Cold War over the same period. Separate genealogies of international organizations law could be constructed focused on each of these phenomena.

<sup>9</sup> See, e.g., Anghie, *supra* note 1; B. Rajagopal, *International Law from Below* (2003); M. Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (2009); Pahuja, *supra* note 1; A. Orford, *International Authority and the Responsibility to Protect* (2011); M. Fakhri, *Sugar and the Making of International Trade Law* (2014); E. Helleiner, *Forgotten Foundations of Bretton Woods* (2014); U. Özsü, *Formalizing Displacement: International Law and Population Transfers* (2015); G.F. Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (2017).

<sup>10</sup> J. Klabbers, ‘The Emergence of Functionalism in International Institutional Law: Colonial Inspirations’, (2014) 25 *EJIL* 645.

<sup>11</sup> Pahuja, *supra* note 1, at 42.

<sup>12</sup> J.E. Alvarez, *International Organizations as Law-makers* (2006); Sinclair, *supra* note 9.

outbreak in Haiti, which had devastating effects for that country.<sup>13</sup> A variety of efforts have been undertaken in recent years to codify and reform the law relating to the responsibility and accountability of international organizations.<sup>14</sup> Yet these efforts have done little to illuminate how and why the law has taken the form that it has. Gaining insight into the evolution and rationale of international organizations law is therefore more pressing than ever.

In pursuing this aim, I adopt a sociological view of law as both contributing to and the outcome of multiple, complex social interactions. Like all socio-legal phenomena, international organizations law is constituted through the interplay of ideas and practices, articulated and performed by real people, in particular material conditions. I am concerned with understanding that law in context, sensitive to the contestations surrounding its formation, as well as changes in its meaning and content over time. In particular, this article observes the emergence of international organizations law as occurring through the interaction of several factors: wide-ranging institutional discourses and practices incorporating legal elements; judicial opinions that crystallized doctrinal statements in response to questions concerning individual organizations; and a growing body of academic scholarship, which increasingly sought to systematize those discourses, practices, and doctrinal statements into a coherent body of law. Giving meaning to all of these is a shared imaginary of how the world is and should be put together.

The article proceeds by outlining and advancing several interrelated lines of argument. [Section 2](#) defines international organizations law for the purposes of the discussion that follows. [Section 3](#) argues that, contrary to the common sense of most international lawyers, international organizations law did not exist in any meaningful way before the Second World War. [Section 4](#) examines that turning point in more detail, identifying the circumstances that gave birth to the new discipline. [Section 5](#) sketches a series of postcolonial inspirations in the practice, jurisprudence, and doctrinal scholarship of international organizations law. Finally, [Section 6](#) analyzes the postcolonial imaginary animating that law, which helps to explain its broad appeal – and perhaps also some of the challenges it faces today.

## 2. DEFINING INTERNATIONAL ORGANIZATIONS LAW

How international organizations law should be defined is a difficult question, partly due to issues of terminology and partly because of shifts in disciplinary focus over time.<sup>15</sup> For the purposes of this article, it will suffice to identify the main features of the sub-discipline, inferred from a review of the most important textbooks that purport to provide a general introduction to the subject. Arguably, the earliest work in the genre was Paul Reuter's *International Institutions*, published in French in 1955 and

<sup>13</sup> R. Freedman, 'UN Immunity or Impunity? A Human Rights Based Challenge', (2014) 25 EJIL 239; K. Daugirdas, 'Reputation and the Responsibility of International Organization', (2015) 25 EJIL 991.

<sup>14</sup> See, e.g., ILC Draft Articles on the Responsibility of International Organizations, UN Doc. A/66/10 (2011); International Law Association, Committee on Accountability of International Organizations – Final Report, in *Report of the 71st Conference Berlin* (2004), 164.

<sup>15</sup> See generally J. Klabbers, 'The Paradox of International Institutional Law', (2008) 5 IOLR 1.

in English translation in 1958.<sup>16</sup> D.W. Bowett's *The Law of International Institutions*, published in 1963, aimed more explicitly at delineating a field of legal inquiry,<sup>17</sup> while Henry Schermers' *International Institutional Law* remains the most exhaustive treatment.<sup>18</sup> Other recent textbooks that offer a general overview include those by White,<sup>19</sup> Amerasinghe,<sup>20</sup> and Klabbers.<sup>21</sup>

These texts all share several distinguishing features, which provide the basis for a working definition of international organizations law. The first is a more-or-less common definition of international organizations as public (or intergovernmental) organizations, established between states (or governments) on the basis of a treaty (or other instrument governed by international law), and possessing legal capacity (or organs capable of expressing their will), separate from that of their members.<sup>22</sup> Second, that common definition of their subject-matter allows these texts to undertake a comparative analysis of cross-cutting legal issues affecting such organizations. The first edition of Schermers' book thus described international institutional law as the branch of law concentrating on 'the institutional problems which arise or may arise in all or most international organizations'.<sup>23</sup> Accordingly, one can expect to find in a general text on international organizations law a relatively uniform set of institutional (rather than substantive) issues: membership, organs, powers, decision making processes, interpretation and amendment of constituent instruments, financing, dissolution, dispute settlement, and so on.

Within these broad parameters there are, of course, variations in the approaches adopted among authors and over time. Yet despite such variations, the distinguishing features outlined above characterize a recognizably delimited, albeit sizable, body of scholarship. That corpus includes works that treat a single issue common to many organizations. However, it excludes a wide range of works, including those that treat single international organizations, such as the UN, in a non-comparative way; those that compare multiple organizations, but focus on their substantive law and practice, rather than cross-cutting institutional issues; and those that examine private (non-governmental), public-private hybrid organizations, or groupings that do not possess legal capacity or personality separate from their members.

Defined in this way, international organizations law may seem a rather dry and technical subject, devoid of any particular politics. Yet, as others have noted,

<sup>16</sup> Reuter, *supra* note 2. An earlier work in Dutch, A.J.P. Tammes' *Hoofdstukken van International Organisatie* (1951), reached a limited audience.

<sup>17</sup> Bowett, *supra* note 2. The sixth edition of Bowett's textbook, co-written by P. Sands and P. Klein, was published in 2009.

<sup>18</sup> H. Schermers, *International Institutional Law* (1972). The fifth edition, co-written with N. Blokker, appeared in 2011.

<sup>19</sup> N. White, *The Law of International Organisations* (1996). The third edition was published in 2016.

<sup>20</sup> Amerasinghe, *supra* note 2. The first edition appeared in 1996.

<sup>21</sup> J. Klabbers, *supra* note 4. The third edition was retitled *An Introduction to International Organizations Law* (2015).

<sup>22</sup> See, e.g., Reuter, *supra* note 2, 214–18; I. Detter, *Law Making by International Organizations* (1965), 19; Schermers and Blokker, *supra* note 4, at 37. The element of legal capacity or will is sometimes articulated as a question of international legal personality. See, e.g., ILC, *supra* note 14, Art. 2(a) (defining 'international organization' as 'an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality.' The definition continues: 'International organizations may include as members, in addition to States, other entities').

<sup>23</sup> Schermers, *supra* note 18, at 2.

international organizations lawyers frequently express the conviction that their discipline is critical to the goal of a peaceful, lawful world. How such exalted expressions of hope and faith are to be reconciled with the focus on the mundane details of doctrine and practice that characterizes much work on international organizations law is a puzzle that this article hopes to illuminate.<sup>24</sup> At a minimum, most international lawyers assume that international organizations are created to meet the needs of states and are therefore ‘good’. As a consequence, a ‘functionalist’ logic has been applied to determining the extent of organizations’ powers, their privileges and immunities, and other important features.<sup>25</sup>

### 3. BEFORE INTERNATIONAL ORGANIZATIONS LAW

Notwithstanding the post-war provenance of general introductions to the subject, international organizations lawyers share a common sense that the origins of their discipline can be traced at least as far back as the end of the First World War.<sup>26</sup> As David Kennedy has argued, the ‘academic discipline of international institutions’ marks 1918 as ‘a break between a preinstitutional and an institutionalized moment’ in international life;<sup>27</sup> the first wave of scholarship on international organizations law is often described as arising in the aftermath of the Great War.<sup>28</sup> Yet many contemporary scholars look back even further, to the previous century, when lawyers first began reflecting on the legal frameworks and activities of public international unions such as the International Telegraph Union and the Universal Postal Union.<sup>29</sup> In this respect, nineteenth-century European observers such as Pierre Kazansky, Gustave Moynier, and Louis Renault, as well as the American Paul Reinsch, appear to some as early publicists of the law of international organizations.<sup>30</sup>

Challenging that conventional self-understanding, this section of the article argues that no recognizable field or discipline of international organizations law existed prior to the Second World War. Indeed, the establishment of such a discipline, by definition comparative in nature, was hardly possible in the absence of a shared definition of the subject-matter. Throughout the interwar period (and earlier), the term ‘international organization’ was commonly used in at least two, somewhat overlapping senses. Most commonly, it referred in a general way to the overall structure or system of international co-operation. This usage can be traced back at least as far as James Lorimer in the 1860s;<sup>31</sup> it encompassed such varied forms of international association as federal states,<sup>32</sup> the Balance of Power and the Concert

<sup>24</sup> See especially Section 6 below.

<sup>25</sup> Not all international organizations lawyers share this orientation, however: see, e.g., Klabbbers, *supra* note 21; and Alvarez, *supra* note 12.

<sup>26</sup> See generally J. Klabbbers, ‘The Life and Times of the Law of International Organizations’, (2001) 70 *Nordic J. Int’l L.* 287; *supra* note 10; and *supra* note 21.

<sup>27</sup> D.W. Kennedy, ‘The Move to Institutions’, (1987) 8 *Cardozo Law Review* 841, at 844.

<sup>28</sup> Schermers and Blokker, *supra* note 4, at 9.

<sup>29</sup> See Amerasinghe, *supra* note 2, at 1; Bowett, *supra* note 2, at 1–9.

<sup>30</sup> The contributions of these scholars are well summarized in Klabbbers, *supra* note 10.

<sup>31</sup> P.B. Potter, ‘Origin of the Term International Organization’, (1945) 39 *AJIL* 803.

<sup>32</sup> J.B. Scott, *The United States of America: A Study in International Organization* (1920); H.M. Vinacke, *International Organization* (1934), Ch. 4.



of Europe.<sup>33</sup> Less often, ‘international organization’ denoted a specific institution, though rarely distinguishing clearly between public (intergovernmental), private (nongovernmental), and hybrid bodies. In this more specific sense, the term was used to describe public international unions, the League of Nations,<sup>34</sup> and ‘several hundred unofficial organizations’ besides.<sup>35</sup> Pitman Potter’s 1934 definition captures well the imprecision of the term at the time:<sup>36</sup>

By international organization is here meant the union of two or more states for service of a common end. The union must consist of an actual material and spiritual community of interest and policy to start with, but must be recognized as such by the states involved and given legal formulation by them . . . In each case the states may act individually but concurrently under the common agreement, through their own national agencies, or collectively through an agency operating upon international mandate. The forms which these agencies take range widely – diplomats, courts, conferences, and others . . .

This broad scope of meaning assigned to ‘international organization’ was reflected in its usage within the League of Nations. Article 23 of the Covenant of the League of Nations provided for all ‘international bureaux already established by general treaties’, and ‘all commissions for the regulation of matters of international interest’ subsequently constituted, to be placed under the League’s direction. Article 24 further committed the members of the League to ‘establish and maintain the necessary international organisations’ to ‘secure and maintain fair and humane conditions of labour’. These various categories were not understood as limited to public or intergovernmental bodies, however. A *Handbook* published by the League in 1921 to facilitate the fulfilment of its obligations under Article 24 thus contained sections on the League itself and the International Labour Organisation (ILO), but also a long listing that included ‘public bureaux’, ‘private bureaux’ and “‘semi-public” bureaux’.<sup>37</sup> Moreover, the so-called ‘technical organizations’, established under the auspices of the League to address social and economic questions, did not take any consistent form, and were not independent of the League itself.<sup>38</sup>

Nor did the jurisprudence of the Permanent Court of International Justice (PCIJ) unequivocally recognize the existence of a law of international organizations, in the plural, as opposed to the law of a *particular* international organization. Several of the PCIJ’s advisory opinions are commonly read today as laying a foundation for international organizations law, but a close reading of these opinions casts into doubt whether the Court saw itself as doing any such thing. The PCIJ’s opinions

<sup>33</sup> F.C. Hicks, *The New World Order: International Organization, International Law, International Coöperation* (1920), Ch. II. In this sense, ‘international organization’ was more or less synonymous to the contemporaneous term, ‘international government’. E.C. Mower, *International Government* (1931); J.A. Hobson, *Towards International Government* (1915).

<sup>34</sup> Hicks, *supra* note 33, Chs. III–V; N.L. Hill, ‘Unanimous Consent in International Organization’, (1928) 22 *AJIL* 319.

<sup>35</sup> P.B. Potter, ‘The League of Nations and Other International Organization: An Analysis of the Evolution and Position of the League in Cooperation among States’, (1934) 6 *Geneva Special Studies* 1, at 9.

<sup>36</sup> *Ibid.*, at 3.

<sup>37</sup> League of Nations, *Handbook of International Organisations* (1921), 8–9.

<sup>38</sup> M.D. Dubin, ‘Transgovernmental Processes in the League of Nations’, (1983) 37 *International Organization* 469; D.P. Myers, ‘National Subsidy of International Organs’, (1939) 33 *AJIL* 318, at 321; J.L. Kunz, ‘Experience and Techniques in International Administration’, (1945) 31 *Iowa Law Review* 40, at 47.

on the competence of the ILO, for example, are limited to a careful interpretation of that organization's constituent document (Part XIII of the Treaty of Versailles), without any express suggestion that their conclusions could or should be extended to other bodies.<sup>39</sup> It is tempting to read back into the *European Commission of Danube* advisory opinion something like a post-war conception of an international organization, such as in the Court's holding that the Commission was 'not a State, but an international institution with a special purpose'.<sup>40</sup> However, the observation that the Commission had 'independent means of action and prerogatives and privileges which [were] generally withheld from international organizations' necessarily implied that there were international organizations *without* independent means of actions, prerogatives or privileges – that is to say, without legal capacities or personality distinct from their members – and that the Court saw the Commission as merely one of a broad variety of international bodies.

Given the lack of agreement on the defining features of an international organization, it is unsurprising that the scholarship in this period focused primarily on individual institutions and did not assert the existence of a singular, trans-institutional law of international organizations.<sup>41</sup> Certainly, a comparative approach to international institutions can be observed in some of this scholarship.<sup>42</sup> Yet only occasionally did such studies narrow their focus to 'public international organizations';<sup>43</sup> most sought to compare both public and private institutions, which were too diverse to yield any useful general conclusions.<sup>44</sup> By 1930, Arnold McNair could identify the constituent instruments of public international unions as 'a species of the law-making treaty' that 'created something organic and permanent', further distinguishing 'treaties creating Constitutional International Law', such as the Covenant of the League of Nations and Statute of the PCIJ, which constructed 'a kind of public law transcending in kind and not merely in degree the ordinary agreements between states'.<sup>45</sup> Yet these distinctions, though useful, went no further in identifying the study of that specific 'public law' as a branch of international law.

<sup>39</sup> *Competence of the International Labour Organisation in Regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, Advisory Opinion, 1922, PCIJ Series B No 2; *Competence of the ILO to Examine Proposals for the Organization and Development of the Methods of Agricultural Production*, Advisory Opinion, 1922, PCIJ Series B No 3; *Competence of the International Labour Organization to Regulate Incidentally the Personal Work of the Employer*, Advisory Opinion, 1926, PCIJ Series B No 13. It is also notable that, in its advisory opinion on the *Employment of Women During the Night* (1932), the Court referred to the International Federation of Trade Unions, International Confederation of Christian Trade Unions, and International Organization of Industrial Employers all as 'international organizations' (at 6/367).

<sup>40</sup> *Jurisdiction of the European Commission of Danube between Galatz and Braila*, Advisory Opinion, 1927, PCIJ Series B No. 14, at 64; see also at 57, using the term 'international organization' to refer to the Commission.

<sup>41</sup> See, e.g., L. Oppenheim, 'Le caractère essentiel de la Société des Nations', (1919) 26 RGDIP 234; J. Corbett, 'What is the League of Nations?', (1924) 5 BYIL 119. General treatises on international law typically devoted a chapter or section to the League, with an occasional (brief) discussion of the ILO. See, e.g., L. Oppenheim, *International Law* (1928); G. Butler and S. MacCoby, *The Development of International Law* (1928); G.G. Wilson, *International Law* (1935); A. Berriedale Keith, *Wheaton's Elements of International Law* (1929).

<sup>42</sup> See, e.g., D.P. Myers, 'Representation in Public International Organs', (1914) 8 AJIL 81; Hill, *supra* note 34; L. Preuss, 'Diplomatic Privileges and Immunities of Agents Invested with Functions of an International Interest', (1931) 25 AJIL 694; Myers, *supra* note 38.

<sup>43</sup> Preuss, *supra* note 42, at 694.

<sup>44</sup> See, e.g., Hill, *supra* note 34, at 327.

<sup>45</sup> A.D. McNair, 'The Functions and Differing Legal Character of Treaties', (1930) 11 BYIL 100, at 112, 116, 117.



Two terms used in the interwar period might, at first blush, appear as early designations of what would later be identified as international organizations law. The first of these, international administrative law, addressed an expansive range of cooperative relationships, including the interactions between national administrative agencies and what we might now term ‘intergovernmental networks’,<sup>46</sup> as well as public international unions.<sup>47</sup> In another sense, it referred to the law governing the administrative workings, problems, and processes of international secretariats, such as those of the League and the ILO.<sup>48</sup> The second term, Manley O. Hudson’s conception of an ‘international constitutional law’ – concerning ‘disputes which grow out of the activities of . . . international bodies’ and ‘within international organizations themselves’, rather than those that arise between states – arguably provides a more likely forerunner of international organizations law.<sup>49</sup> That conception never acquired widespread acceptance, however, and its restriction to *disputes* excluded many of the structural dimensions that form an essential part of international organizations law today.

Perhaps the most likely forerunner of international organizations law is the early twentieth-century corpus of works by Paul Reinsch on international administrative law. Indeed, Jan Klabbers has recently argued that Reinsch’s writings on this subject are ‘eminently recognizable to today’s audiences as research into international institutional law’.<sup>50</sup> Setting aside the question of whether Reinsch should be regarded as ‘one of the founders of international organizations law functionalism’,<sup>51</sup> his work surely serves as an early example of the kind of comparative method that came to define the field. I disagree, however, that Reinsch’s work can be assimilated to international organizations law as it later emerged. In the first place, the international unions that Reinsch studied included ‘numerous private unions and associations for international purposes’ and hybrid public-private bodies such as the Pan-American scientific congress.<sup>52</sup> Secondly, Reinsch largely depicted these unions as fora for closer co-operation among national administrations, rather than as distinct organizations possessing separate legal capacities. Indeed, in defining international

<sup>46</sup> K. Neumeyer, *Internationales Verwaltungsrecht Vol. I* (1910), reviewed by P. Reinsch in (1913) 7 AJIL 666; J.A. Salter, *Allied Shipping Control: An Experiment in International Administration* (1921); S. McKee Rosen, *The Combined Boards of the Second World War: An Experiment in International Administration* (1951); Kunz, *supra* note 38, at 40. On intergovernmental networks see A. Slaughter, *A New World Order* (2005).

<sup>47</sup> Vinacke, *supra* note 32, at Ch. 14; E. Krehbiel, ‘The European Commission of the Danube: An Experiment in International Administration’, (1918) 33 *Political Science Quarterly* 38. See also P. Kazansky, ‘Théorie de l’administration internationale’, (1902) 9 *Revue de Droit International Public* 353 (discussing the theories of international administration advanced by Johann Caspar Bluntschli, Friedrich Martens, and Lorenz von Stein, among others).

<sup>48</sup> F.B. Sayre, *Experiments in International Administration* (1919); E.F. Ranshofen-Wertheimer, *The International Secretariat: A Great Experiment in International Administration* (1945); A. Loveday, *Reflections on International Administration* (1956).

<sup>49</sup> M.O. Hudson, ‘The Advisory Opinions of the Permanent Court of International Justice’, (1925) 10 *International Conciliation* 321, at 338; M.O. Hudson, ‘Contributions of the Permanent Court of International Justice to the Development of International Law’, (1930) 24 *ASIL Proceedings* 63, at 64.

<sup>50</sup> Klabbers, *supra* note 10, at 650.

<sup>51</sup> J. Klabbers, ‘The EJIL Foreword: The Transformation of International Organizations Law’, (2015) 26 EJIL 9. See also G.F. Sinclair, ‘The Original Sin (and Salvation) of Functionalism’, (2015) 26 EJIL 965.

<sup>52</sup> P.S. Reinsch, *Public International Unions* (1911), 126 and 71–2.

administrative law as regulating ‘*the relations and activities of national and international agencies*’, Reinsch arguably comes closer to present-day conceptions of ‘global administrative law’ than the law of international organizations.<sup>53</sup>

None of this is to say that these interwar studies and experiences were unimportant. Clearly, international organizations law as it later emerged drew on, reformulated, synthesized, and systematized a wide variety of doctrinal elements from earlier practice, case law, and scholarship. Nevertheless, the unsettled and imprecise nature of legal thinking about international institutions continued for some time. Writing at the outset of US involvement in the Second World War, Quincy Wright was still using ‘international organization’ in the general sense.<sup>54</sup> As late as the fifth edition of his *Introduction to the Study of International Organization*, Pitman Potter defined international organization as including ‘special forms’ such as diplomacy and treaties, international conferences, and international administration and adjudication; while ‘general international organization’ included examples of ‘international federation’ such as alliances, the balance of power and international concert, in addition to the League of Nations and UN.<sup>55</sup> Political scientists continued to use ‘international organization’ in the general sense well into the 1950s.<sup>56</sup> Nevertheless, it was during the war, and especially in the years immediately afterwards, that international organizations law was first conceived, defined, and elaborated, as the next section of this article shows.

#### 4. BIRTH OF A DISCIPLINE

The emergence of international organizations law as a systematic, comparative discipline was made possible by an intensive process of stock-taking and reflection on international institutional arrangements undertaken during the Second World War. That process was led, most consequentially, by agencies of the US government; however, it also engaged the efforts of a considerable number of leading international lawyers.<sup>57</sup> It acquired a sharpened focus as planning began for the formation of new institutions to serve the post-war international order, such as the UN Relief and Rehabilitation Administration, the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD), and especially the new ‘general international organization’ to replace the League.<sup>58</sup> In the massive effort to design and draft the instruments that would provide the legal frameworks

<sup>53</sup> *Ibid.*, at 130 (emphasis in original). On global administrative law, see B. Kingsbury et al., ‘The Emergence of Global Administrative Law’, (2005) 68 *Law and Contemporary Problems* 15.

<sup>54</sup> Q. Wright, ‘Fundamental Problems of International Organization’, (1940-1) 20 *International Conciliation* 467.

<sup>55</sup> P.B. Potter, *An Introduction to the Study of International Organization* (1948), 1.

<sup>56</sup> See, e.g., S.S. Goodspeed, *The Nature and Function of International Organization* (1959); and L.L. Leonard, *International Organization* (1951). The title of the journal *International Organization*, launched in 1947, is another example of this usage.

<sup>57</sup> M.O. Hudson, ‘A Design for a Charter of the General International Organization’, (1944) 38 *AJIL* 711; ‘The International Law of the Future: Postulates, Principles and Proposals’, (1944) 38 *AJIL Supplement* 41; M.B. Carroll, ‘Postwar International Organization and the Work of the Section of International and Comparative Law of the American Bar Association’, (1945) 39 *AJIL* 20.

<sup>58</sup> Hudson, *supra* note 57; H.W. Briggs, ‘Membership in the Proposed General International Organization’, (1945) 39 *AJIL* 101.

of these new institutions, certain problems and questions arose repeatedly, spurring the development of a comparative legal methodology.<sup>59</sup>

Consciousness of the (at least partial) comparability of the new organizations is apparent in contemporaneous legal instruments, both international and domestic. Perhaps surprisingly, the UN Charter itself is unrevealing in this regard: it uses the term 'international organization' only three times, twice in reference to the UN,<sup>60</sup> and once to refer to international non-governmental organizations.<sup>61</sup> Another term, 'specialized agencies', appears more frequently in the Charter to designate entities that are 'established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields' and 'brought into relationship with the United Nations'.<sup>62</sup> In contrast, the Articles of Agreement of the IBRD and the IMF referred to each of those organizations co-operating 'with any general international organization and with public international organizations having specialized responsibilities in related fields'.<sup>63</sup> Most explicitly, the US International Organizations Immunities Act of 1945 defined 'international organization' as 'a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation', and stated that all such organizations would enjoy certain legal capacities, as well as the privileges and immunities afforded to foreign governments.<sup>64</sup>

Scholarship in the same period tracked this growing precision in terminology and interest in comparing the treatment of common problems by different organizations. This appears especially true of international lawyers in the US. Thus, for example, Philip Jessup's 1944 analysis of the privileges and immunities of international officials used the term 'international organization' in the specific sense that would soon be adopted widely, and undertook a comparative analysis of the provisions of the recent Articles of Agreement of the IBRD and IMF, and proposed Constitution of the Food and Agriculture Organization.<sup>65</sup> Three years later, Jessup drew on a similar kind of analysis, now extended to include the UN, to discuss the legal status of international organizations.<sup>66</sup>

With such an accumulation of institutional practice and analysis, it became possible for the first time to herald the arrival of a new branch of international law. A seminal article by Clarence Wilfred Jenks in 1945, titled 'Some Constitutional Problems of International Organizations', set the agenda and methodology for

<sup>59</sup> See generally C.W. Jenks, 'Some Constitutional Problems of International Organizations', (1945) 22 BYIL 11.

<sup>60</sup> Charter of the United Nations, Preamble, Art. 3.

<sup>61</sup> *Ibid.*, Art. 71. More revealingly, Art. 34 of the Statute of the International Court of Justice refers to 'the constituent instrument of a public international organization'.

<sup>62</sup> *Ibid.*, Art. 57.

<sup>63</sup> IBRD Articles, Art. V, s. 8 (see also Art. V, s. 2., s. 6); IMF Articles, Art. XII (see also Art. XII, s. 2(iv)).

<sup>64</sup> International Organizations Immunities Act, Pub. L. 79-291, 59 Stat. 669, H.R. 4489, enacted December 29, 1945, s. 1, s. 2. See generally L. Preuss, 'The International Organizations Immunities Act', (1946) 40 AJIL 332.

<sup>65</sup> P.C. Jessup, 'Status of International Organizations: Privileges and Immunities of their Officials', (1944) 38 AJIL 658; see also J.L. Kunz, 'Privileges and Immunities of International Organizations', (1947) 41 AJIL 828.

<sup>66</sup> P.C. Jessup, 'The Subjects of a Modern Law of Nations', (1947) 45 *Michigan Law Review* 383, at 391-2. Also see C. Prince, 'The U.S.S.R. and International Organizations', (1942) 36 AJIL 425; E.F. Ranshofen-Wertheimer, 'The Position of the Executive and Administrative Heads of the United Nations International Organizations', (1945) 39 AJIL 323; Kunz, *supra* note 65.

international organizations law as it would emerge over the next two decades.<sup>67</sup> The same year, Jenks referred to ‘the development of the law of international institutions’,<sup>68</sup> while Georg Schwarzenberger observed that ‘a far from negligible body of international institutional law’ had evolved in the jurisprudence of international courts, though he allowed ‘room for disagreement on the question to what extent the legal principles elaborated by the Permanent Court of Justice regarding specific international institutions are applicable to other international institutions’.<sup>69</sup> Two years later, one Alger Hiss referred to ‘the adjectival law of international organizations – a branch of international law generally’, defining international organizations as ‘inter-governmental organizations, as opposed to international organizations of a non-governmental nature’.<sup>70</sup> By 1954, Jenks could confidently describe the ‘law of international institutions . . . as the law governing the constitutional framework of a developing world community’, with subdivisions addressing the ‘constitutional’, ‘parliamentary’, and ‘administrative’ law of international organizations, and governing their mutual relations.<sup>71</sup>

The decades following the end of the Second World War saw a rapid accretion of further practice and jurisprudence, particularly in relation to the UN. Between 1945 and 1970, the International Court of Justice (ICJ) issued a series of landmark advisory opinions, addressing such important issues as admission to membership,<sup>72</sup> powers,<sup>73</sup> interpretation of constituent instruments,<sup>74</sup> and the decisions of organs.<sup>75</sup> Most significant in this respect was the *Reparation for Injuries* advisory opinion, which at once confirmed that the UN possessed international legal personality and articulated a broad doctrine of implied powers.<sup>76</sup> The former was noteworthy in settling an issue that had long troubled international lawyers, relating to the essential question of the legal capacity of international organizations.<sup>77</sup> No less significant was the Court’s reference to implied powers as a principle of law applied by

<sup>67</sup> Jenks, *supra* note 59.

<sup>68</sup> C.W. Jenks, ‘The Legal Personality of International Organizations’, (1945) 22 BYIL 267, at 271.

<sup>69</sup> G. Schwarzenberger, *International Law, Vol. 1* (1945), at 338 and 341. Schwarzenberger later claimed that, ‘As a distinct academic discipline and separate teaching subject, the Law of International Institutions probably came into existence in the University of London in the closing years of the Second World War.’ G. Schwarzenberger, ‘Reflections on the Law of International Institutions’, (1960) 13 CLP 276, at 276.

<sup>70</sup> A. Hiss, ‘The Development of International Organizations – with Special Emphasis on the Contribution of the United States to This Development since 1942’, (1947) 41 *ASIL Proceedings* 107, at 107.

<sup>71</sup> C.W. Jenks, ‘The Scope of International Law’ (1954) 31 BYIL 1, at 14–15.

<sup>72</sup> *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)*, Advisory Opinion of 28 May 1948, [1948] ICJ Rep. 57; *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion of 3 March 1950, [1950] ICJ Rep. 4.

<sup>73</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174; *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion of 13 July 1954, [1954] ICJ Rep. 47; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, [1962] ICJ Rep. 151.

<sup>74</sup> *Constitution of the Maritime Safety Committee of the IMCO*, Advisory Opinion of 8 June 1960, [1960] 150 ICJ Rep. 5.

<sup>75</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Advisory Opinion of 21 June 1971, [1971] ICJ Rep. 16.

<sup>76</sup> *Reparation for Injuries*, *supra* note 73.

<sup>77</sup> Jenks, *supra* note 68, at 267 (noting the existence of ‘a considerable amount of controversy’ on this question). Also see generally D.J. Bederman, ‘The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Sparte!’, (1996) 36 *Virginia Journal of International Law* 275.

the PCIJ in its advisory opinion on the competence of the ILO – by implication, as it were, asserting a principle that applied trans-institutionally.

The growth of UN practice, and advisory opinions arising out of it, contributed to a body of scholarship on ‘the law of the United Nations’.<sup>78</sup> Hans Kelsen’s 1950 book on that subject referred to the UN as ‘an international organisation’, but focused narrowly on interpretation of the Charter without reference to a larger corpus of international organizations law.<sup>79</sup> In a similar vein, Josef Kunz wrote about ‘the particular law of an international organization’, arguing that ‘the law of the United Nations has to be carefully distinguished from general international law’.<sup>80</sup> Nevertheless, the law and practice of the UN, as the leading international organization of the post-war order, were also now understood to form part of a larger law of international organizations, discernible in the practices of a range of institutions established on a broadly similar basis.

Just as the ICJ had done with the PCIJ’s advisory opinion on the ILO, then, rules and principles derived from advisory opinions on the UN could legitimately be applied, *mutatis mutandis*, to other international organizations. Indeed, much of the relevant practice and judicial work that went into constructing international organizations law centred on the UN. This was the case even though – or perhaps paradoxically because – the UN was such an atypical institution, whose practice was therefore arguably unrepresentative of international organizations law more broadly. In 1963, Bowett thus reported that the law of international organizations was the most rapidly expanding branch of international law, despite his being the first introductory textbook in English, due to the existence of ‘numerous commentaries on particular organisations’ and ‘monographs on special topics’.<sup>81</sup> The next section of this article examines the circumstances and concerns that made the production of such scholarship possible.

## 5. POSTCOLONIAL INSPIRATIONS

So far, I have argued that international organizations law did not (and could not) come into being until a certain degree of conceptual and practical commensurability had been established between its objects of study, thereby permitting a comparative analysis of their main structural or ‘constitutional’ features. Once that precondition was established, legal scholars were able to systematize a growing mass of practice and case law into a coherent field or discipline. Just as that precondition came into place, however, the international order – including international organizations and

<sup>78</sup> See, e.g., H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (1950), 3; A. Ross, *Constitution of the United Nations* (1950); L. Sohn, *Cases on United Nations Law* (1956). For more recent examples in this genre see O. Schachter and C. Joyner (eds.), *United Nations Legal Order* (1995); J.-P. Cot and A. Pellet (eds.), *La Charte des Nations Unies* (2005); R. Kolb, *An Introduction to the Law of the United Nations* (2010); B. Simma et al. (eds.), *The Charter of the United Nations* (2012); S. Chesterman et al. (eds.), *Law and Practice of the United Nations: Documents and Commentary* (2016).

<sup>79</sup> Kelsen, *supra* note 78, at 3.

<sup>80</sup> J.L. Kunz, ‘International Law and the Law of International Organizations’, (1953) 47 AJIL 456, at 458.

<sup>81</sup> Bowett, *supra* note 2, at xi. See also Schermers, *supra* note 18, at v (‘As a rule international organizations have been studied individually, as each organization has its own problems and opportunities. Many issues, particularly those of a constitutional nature are found to be similar when they arise in different organizations.’).

the law applicable to them – began a profound transformation, driven largely by the processes of decolonization.

This section of the article argues that the post-war invention of international organizations law, following the first outline of the field by Jenks, was crucially shaped by the context of decolonization. That context informed legal and political concerns and disputes which influenced the practice of international organizations. Several such disputes led to advisory proceedings before the ICJ, resulting in opinions that comprise key pillars of international organizations law. Finally, legal scholars in the ‘developing’ states of the global South contributed a set of important doctrinal treatises that helped to establish international organizations law as a dynamic branch of public international law. The following sections describe in turn how postcolonial circumstances and concerns inspired much of the practice, jurisprudence, and doctrinal scholarship of the new discipline.

### 5.1. Practice

The assembly of a new family of international organizations synchronized with a concerted struggle for decolonization by diverse populations throughout Asia, Africa, and elsewhere. The Great Depression had already lent impetus to embryonic independence movements in many colonies;<sup>82</sup> these were further energized by the initial defeats suffered by European colonial powers, as well as by the Atlantic Charter’s affirmation of the principles of ‘sovereign rights and self-government’, and ‘the right of all peoples to choose the form of government under which they will live’.<sup>83</sup> Just as importantly, the rising costs of maintaining colonial territories in the face of nationalist resistance created pressure for decolonization from within the metropolitan powers themselves.<sup>84</sup> The UN and other international organizations provided important – though certainly not the only, and perhaps not even the most important – political and legal fora within which those struggles were waged.

To the extent that international organizations were perceived as a crucial battleground for decolonization, the debates that took place within them were transformed into struggles over questions of institutional purpose, design, and evolution. Planning for the new organizations was dominated by ‘great power’ interests, and their constituent instruments strongly reflected those interests. Most notorious in this respect was the composition of the Security Council and the veto wielded by its five permanent members. However, similar structural features in other organizations – such as the preferential representation of particular states on executive organs, or weighted voting mechanisms, as in the IMF and IBRD – likewise operated to entrench control by Western states.<sup>85</sup> Yet the UN Charter also affirmed the principle of the ‘equal rights and self-determination of peoples’;<sup>86</sup> created a trusteeship system with the explicit objective of promoting the ‘progressive advancement’ of the

<sup>82</sup> E. Hobsbawm, *Age of Extremes* (1994), 213–15.

<sup>83</sup> 1941 Declaration of Principles known as the Atlantic Charter, 204 LNTS 381, eighth and third principles.

<sup>84</sup> F. Cooper, ‘Development, Modernization, and the Social Sciences’, (2004) 10 *Revue d’Histoire des Sciences Humaines* 9, at 22. See also Y. El-Ayouty, *The United Nations and Decolonization* (1971), 7–9.

<sup>85</sup> See generally J.K. Cogan, ‘Representation and Power in International Organization: The Operational Constitution and its Critics’, (2009) 103 *AJIL* 209, 220–1, and references therein.

<sup>86</sup> Charter of the United Nations, Art. 1(2).



inhabitants of trust territories 'towards self-government or independence';<sup>87</sup> committed administering powers to developing self-government for populations in non-self-governing territories;<sup>88</sup> and established a structure for international co-operation through specialized agencies to promote 'economic and social progress and development'.<sup>89</sup>

These antinomies provided focal points for the new states within the UN and other international organizations. A steady trickle of colonies achieved independence in the immediate post-war years, beginning with the Philippines, India and Pakistan. Not all of the new states joined the UN immediately, but by the end of 1955 the organization's membership had grown to 76, from 51 in 1945; five years later it reached 99. The eagerness of these states to promote decolonization elsewhere was supported, in rhetoric if not always in positive action, by the two great superpowers. The USSR vociferously advocated dismantling the overseas empires of Western states; the US also favoured decolonization, albeit in a more gradual and managed form and complemented by an 'open door' economic policy that would give US corporations competitive access to foreign markets and resources.<sup>90</sup> These avowed positions did not, however, prevent either from maintaining spheres of influence (and indeed domination) over territories outside their national borders, as well as colonized peoples within them.

The rhetorical support afforded by the public pronouncements of the two superpowers, as well as by the text of the UN Charter, encouraged the newly independent states to use international organizations to advance the cause of decolonization internationally. These states became frustrated at the unequal representation and voting provisions in international organizations, which they saw as contravening the UN Charter principle of sovereign equality, and sought to use their growing numbers to endow the UN General Assembly and the plenary organs of specialized agencies with greater relative authority, and so to reorient the priorities and activities of those organizations. The 'great powers' retained significant control over many international organizations, however, through both 'hardwired' procedural rules and informal agreements, such as those relating to the allocation of positions of authority and decision-making.<sup>91</sup> Moreover, the secretariats of many organizations were initially staffed to a disproportionate degree by North Americans and Europeans, including many former colonial service officers, with inevitable consequences for institutional ideology and cultural norms.<sup>92</sup>

The result was a series of struggles within and through international organizations, in three broad areas of activity. First, the 'Afro-Asian' bloc in the UN sought to accelerate the decolonization of non-self-governing territories, both through the Trusteeship system and by evolving a parallel system of supervision under

<sup>87</sup> *Ibid.*, Arts. 75, 76(b); see generally Chs. XII and XIII.

<sup>88</sup> *Ibid.*, Art. 73; see generally Ch. XI.

<sup>89</sup> *Ibid.*, Art. 55(a); see generally Chs. IX and X.

<sup>90</sup> R.F. Betts, *Decolonization* (1998), 24.

<sup>91</sup> See generally Cogan, *supra* note 85.

<sup>92</sup> L.M. Goodrich, 'Geographical Distribution of the Staff of the UN Secretariat', (1962) 16 *International Organization* 465, 467; J.M. Hodge, 'British Colonial Expertise, Post-Colonial Careerism and the Early History of International Development', (2010) 8 *Journal of Modern European History* 24.

Chapter XI of the Charter.<sup>93</sup> Those efforts resulted in the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960, and establishment of the Special Committee on Decolonization under the auspices of the General Assembly the following year. They also led to a sequence of confrontations with recalcitrant colonial powers, especially in southern Africa. In particular, efforts to expel South Africa from the UN and various specialized agencies, refusals to accept the credentials of its representatives, and the imposition of economic sanctions made important contributions to the body of practice concerning participation in international organizations.<sup>94</sup> Likewise, appeals by the General Assembly and the Special Committee on Decolonization to the specialized agencies (in particular the IBRD and the IMF) to refrain from providing assistance to South Africa and Portugal, contributed, albeit somewhat ambiguously, to practice on the relations between international organizations.<sup>95</sup>

A second area of activity affected by decolonization concerned international economic relations. The rapid emergence of a large number of independent states coincided with the advent of a new science of development economics, based in large part on Keynesian economic principles and undergirded by the universal progress narrative of modernization. To US policy-makers, modernization provided a key strategy to combat the spread of communism in decolonized states, while opening up new markets for American products; to leaders and elites in the new states, it promised a greater degree of economic independence and state-building. The UN Charter mandate to promote economic development and co-operation<sup>96</sup> was further linked to trade in the constituent instruments of the IBRD and IMF,<sup>97</sup> and thereby also to the General Agreement on Tariffs and Trade (GATT). These endeavours took on ever more tangible institutional forms over the following decades, resulting in the establishment of an Expanded Program of Technical Assistance (EPTA), comprising the UN and seven specialized agencies, as well as a proliferation of international organizations concerned with development in decolonized states, including a number of regional organizations.

Increasingly, the new states became dissatisfied with the policies promoted by the Western-dominated economic organizations. In December 1962, the General Assembly passed a further resolution declaring that '[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interests of their national development and of the well-being of the state concerned',<sup>98</sup> which would later become a centrepiece of calls by Third World states for a 'New International Economic Order' (NIEO).<sup>99</sup> Perhaps most significant in

<sup>93</sup> See generally El-Ayouty, *supra* note 84.

<sup>94</sup> Amerasinghe, *supra* note 2, at 122–3; Klabbbers, *supra* note 4, at 108; Schermers and Blokker, *supra* note 4, at 207–8, 931–2; El-Ayouty, *supra* note 84, at 236–41; A. Duxbury, *The Participation of States in International Organisations* (2011), 116–17.

<sup>95</sup> S.A. Bleicher, 'UN v. IBRD: A Dilemma of Functionalism', (1970) 24 *International Organization* 31; 'United Nations: Statements of U.N. Legal Counsel and I.B.R.D. General Counsel on Relations of U.N. and I.B.R.D. and Effect of U.N. Resolutions', (1967) 6 *ILM* 150. See generally Sinclair, *supra* note 9, at 231–3.

<sup>96</sup> See especially preamble, Arts. 13, 55.

<sup>97</sup> IMF Articles of Agreement, Art. I; IBRD Articles of Agreement, Art. I.

<sup>98</sup> UNGA Res. 1803 (XVII) (14 December 1962), UN Doc. A/ RES/ 1803(XVII) Art. 2, [1], [7].

<sup>99</sup> See generally N. Schrijver, *Sovereignty over Natural Resources* (1997), Chs 3 and 4.

institutional terms was the establishment in 1964 of the UN Conference on Trade and Development, which became a major vehicle for the ‘developing’ states of the global South to exert moral and political pressure on the ‘developed’ countries of the North.<sup>100</sup>

Lastly, the newly independent states sought to assert their equal rights of participation in matters of international peace and security. The Asian-African conference held at Bandung, Indonesia, in April 1955, is usually remembered as a milestone in the rise of the non-aligned movement in the Third World,<sup>101</sup> but the leaders of the 29 states gathered there also gave significant attention to the structure and operations of international institutions.<sup>102</sup> In his opening address to the Conference, the Prime Minister of Ceylon referred to the possibility of UN Charter revision as ‘an historic opportunity’ for the countries of Africa and Asia to demand that the UN be ‘reconstructed so that it can be in fact what [it] was intended to be in theory – an effective instrument of peace’.<sup>103</sup> Describing the human race as standing ‘on the brink of chaos’, he further argued that the UN ‘should be so reconstituted as to become a fully representative organ of the peoples of the world, in which all nations can meet on free and equal terms’.<sup>104</sup> The Final Communiqué of the conference reflected this position, declaring that the existing level of representation of Asian and African countries on the Security Council was inadequate to the principle of equitable geographical distribution, and recommending co-operation through the United Nations to reduce armaments and eliminate nuclear weapons.<sup>105</sup>

Though these ambitions were never realized, the Asian-African bloc had a significant influence in reshaping the UN’s peace and security apparatus, beginning as early as November 1950 in the passage of the ‘Uniting for Peace’ resolution. That resolution, proposed by the US Secretary of State Dean Acheson, provided that the General Assembly would have power to consider ‘any case where there appear[ed] to be a threat to the peace, breach of the peace, or act of aggression’, where the Security Council was ‘unable to exercise its primary responsibility for the maintenance of peace and security because of lack of unanimity of the permanent members’. To many of the new states, the expansion of the General Assembly’s powers at the expense of the Security Council was justified, in both legal and moral terms, by the principle of sovereign equality among states. Emphasizing those members’ concern with the impasse created by conflict between the ‘great powers’, the resolution’s Preamble referred to the Charter’s aim of developing ‘friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples’. In the Assembly debate, moreover, several representatives situated

<sup>100</sup> B. Gosovic, *UNCTAD: The Third World’s Quest for an Equitable World Economic Order through the United Nations* (1972); M. Shah, *Developing Countries and UNCTAD* (1968).

<sup>101</sup> V. Prashad, *The Darker Nations* (2007), 31–50; L.M. Lüthi, ‘Non-Alignment, 1946–1965: Its Establishment and Struggle against Afro-Asianism’, (2016) 7 *Humanity Journal* 201. On the legacies of the Bandung conference, see L. Eslava et al. (eds.), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (2017); S. Tan and A. Acharya (eds.), *Bandung Revisited* (2008).

<sup>102</sup> See generally, *Selected Documents of the Bandung Conference* (1955) (Text of Final Communiqué of Asian African Conference).

<sup>103</sup> *Ibid.*, at 7 and 9.

<sup>104</sup> *Ibid.*, at 9.

<sup>105</sup> *Ibid.*, at 33.

the resolution within a longer sequence of struggle in the UN between great and small powers.<sup>106</sup>

Decolonization and the rights of small states were equally central to the invention of UN peacekeeping. It is no coincidence that the earliest peacekeeping operations all addressed conflicts that arose out of the dissolution of empire, particularly in the Middle East, South Asia, and Africa.<sup>107</sup> In the debates surrounding their establishment, in the make-up of their forces, and in the advisory committees established to guide their actions, peacekeeping operations became vehicles for much more direct involvement by decolonized states in matters of international peace and security.<sup>108</sup> Moreover, several of these operations – the UN Truce Supervision Organization (UNTSO, 1948), the UN Emergency Force (UNEF, 1956), and the UN operation in the Congo (ONUC, 1960) – gave rise to legal disputes in the ICJ, producing two of the most significant advisory opinions in the jurisprudence of international organizations law. The next section surveys these and other opinions that were prompted by circumstances of decolonization.

## 5.2. Jurisprudence

This article cannot recount all the different ways in which decolonization influenced the content of international organizations law. Nor is the argument made here that *all* relevant principles and rules emerged directly from that context. However, it is the case that a significant number of the most important, foundational concepts and norms of the discipline were articulated in response to circumstances and concerns arising from the fact of decolonization; and that decolonized states played an important role in many of the disputes that placed such concepts and norms in question. In truth, it could hardly have been otherwise, as newly-decolonized states sought to play an ever-greater role in international organizations, and as a great portion of the work of those organizations focused in turn on those states – promoting decolonization, providing development assistance of various kinds, and resolving conflicts emerging from the end of empire.

The ICJ's leading opinion on the legal personality and implied powers of international organizations provides a case in point. In the immediate aftermath of the Second World War, a number of crises broke out in regions that had been subject to European imperial influence and rivalry. One such crisis was centred in Palestine, where the British mandate was coming to an end amidst an escalating conflict between Arabs and Jews. The involvement of the UN in attempts to resolve such crises raised the very real likelihood of harm to its agents; indeed, in the

<sup>106</sup> See generally UN GAOR, 5th Sess., 301st plen. mtg., UN Doc. A/PV.302 (1950); UN GAOR, 5th Sess., 299th plen. mtg., UN Doc. A/PV.299 (1950).

<sup>107</sup> The first two peacekeeping operations were the UN Truce Supervision Organization (UNTSO), established in May 1948 to supervise the truce between Arab and Israeli forces after the termination of the British Mandate of Palestine; and the UN Military Observer Group in India and Pakistan (UNMOGIP), established in January 1949. The first armed peacekeeping operation was the UN Emergency Force (UNEF), established in 1956. Subsequent operations were established in Lebanon (1958), the Congo (1960), West New Guinea (1962), Yemen (1963), Cyprus (1964), and the Dominican Republic (1965).

<sup>108</sup> See generally Sinclair, *supra* note 9, at 146, 153, 155. As I have argued, peacekeeping simultaneously provided occasions for the formulation of new rationales and techniques of international executive rule. *Ibid.*, at 160–98.

Arab-Israeli conflict several UN officials were assassinated, including its lead mediator, Count Folke Bernadotte. *Reparation for Injuries* thus sought to answer the question whether, in the event of an agent of the UN suffering injury or death, the UN had the capacity to bring an international claim against the responsible government for reparations in respect of damages caused to the UN itself as well as to its agents, or persons entitled through those agents. As the Court put it, that capacity was essential to ensure that agents of the UN could independently and efficiently perform their ‘important missions . . . in disturbed parts of the world’<sup>109</sup> – an unmistakable reference to the UN’s emerging role in managing the end of colonialism.

Two other early cases arose from the growing frustration of small and medium states on the General Assembly with the permanent members’ repeated exercise of their veto power on the Security Council to block the applications of new states to membership in the UN.<sup>110</sup> Proposals to amend the Council’s voting procedures and abolish the veto, introduced by the Philippines and Cuba at the Assembly’s first session, were defeated.<sup>111</sup> In its first advisory opinion, issued in 1948 at the General Assembly’s request, the ICJ confirmed that the conditions of admission set out in Article 4(1) of the Charter were exhaustive, albeit ‘very wide and very elastic’ in nature, and therefore subject to a process of interpretation that took into account a range of political factors.<sup>112</sup> Two years later, the Court concluded that Article 4(2) of the Charter precluded the General Assembly from effecting the admission of a state to UN membership when the Security Council had not first recommended such admission, either because it had failed to obtain support from the requisite majority of the Council or because of the negative vote of a permanent member.<sup>113</sup> Together, these opinions cast light on relations between organs in an international organization, as well as membership.

Both *Reparation for Injuries* and the two *Admissions* opinions addressed the important matter of how to interpret the constituent instruments of international organizations. Another early opinion that did the same, *IMCO Maritime Safety Committee* (1960), might not on its face appear to bear any connection to decolonization. The rather technical question asked of the Court concerned the meaning of the phrase ‘eight largest ship-owning nations’ in the Constitution of the Inter-Governmental Maritime Consultative Organization.<sup>114</sup> Here too, however, arguments were raised the proceedings that invoked the principle of sovereign equality, by then a familiar argument of decolonized states. As the countries with the third and eighth largest registered tonnage, respectively, Liberia and Panama claimed a right to representation on the Maritime Safety Committee. In its pleadings, Panama asserted that the IMCO’s action in not affording it that representation was:

<sup>109</sup> *Reparation for Injuries*, *supra* note 73, at 183.

<sup>110</sup> E. Luard, *A History of the United Nations* (1981), Vol 1., Ch. 19, at 364–72.

<sup>111</sup> S.V. Scott, ‘The Question of UN Charter Amendment, 1945–1965: Appeasing “the Peoples”’, (2007) 9 *Journal of the History of International Law* 83, at 90.

<sup>112</sup> *Conditions of Admission of a State*, *supra* note 72, at 63.

<sup>113</sup> *Competence of the General Assembly for the Admission of a State*, *supra* note 72.

<sup>114</sup> *Constitution of the Maritime Safety Committee of the IMCO*, *supra* note 74.

a violation of the sovereignty and dignity of the Republic of Panama and also a violation of well-known principles of equality of all sovereign States and of non-intervention into the internal affairs of a sovereign State, well settled under International Law and embodied in the Charter of the United Nations.<sup>115</sup>

The Court's opinion in *Certain Expenses* (1962) widened the doctrine of implied powers as articulated in *Reparation for Injuries* and articulated the presumption that action by the organization was *intra vires* where it appeared to be appropriate for the fulfilment of one of the organization's stated purposes. The Court had been asked to provide an advisory opinion on whether the expenditures authorized by General Assembly resolutions for the financing of UNEF and ONUC – both dealing with the aftermath of imperial dissolution, in the Middle East and the Congo, respectively – constituted 'expenses of the organization' within the meaning of Article 17(2) of the Charter. The Court affirmed that they did, in effect endorsing the transfer of significant responsibility in relation to international peace and security from the Security Council to the General Assembly, in accordance with the 'Uniting for Peace' resolution. The same opinion also effectively confirmed the legitimacy under international law of all subsequent peacekeeping operations, many of which were likewise established to help manage the process of decolonization.

Lastly, the long-running dispute concerning South Africa's Mandate over South West Africa and its policy of apartheid, led by decolonized states in the General Assembly, resulted in the articulation of a range of important principles in international organizations law. In a series of advisory opinions, the ICJ addressed questions of succession between international organizations (the supervisory functions previously exercised by the League of Nations in relation to Mandates having transferred to the UN General Assembly);<sup>116</sup> the powers of international organizations (including the General Assembly's power to terminate Mandates, and the Security Council's general powers under Article 24(1) of the Charter);<sup>117</sup> and the legal nature of instruments adopted by international organizations (including whether the Mandate could be understood as a treaty between the League and South Africa).<sup>118</sup>

It is certainly not the case that these opinions articulate a coherent set of rules and principles applicable to international organizations. The *Certain Expenses* case, for example, revealed a striking contrast in the application of international law rules and principles to international organizations by jurists in the Western and Soviet blocs.<sup>119</sup> Nevertheless, we do find here the self-conscious elaboration of a body of jurisprudence addressed to international organizations generally, much

<sup>115</sup> 'Written Statement of the Republic of Panama', in ICJ Pleadings, *Constitution of the Maritime Safety Committee of the Governmental Maritime Consultative Organisation* (1960), 165, at 199–200. See also K.R. Simmonds, 'The Constitution of the Maritime Safety Committee of IMCO', (1963) 12 ICLQ 56, at 66.

<sup>116</sup> *International Status of South-West Africa*, Advisory Opinion of 11 July 1950, [1950] ICJ Rep. 128; *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against the UNESCO*, Advisory Opinion of 23 October 1956, [1956] ICJ Rep. 23.

<sup>117</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, supra note 75.

<sup>118</sup> *Ibid.*; *International Status of South-West Africa and Judgments of the Administrative Tribunal of the ILO upon complaints made against the UNESCO*, supra note 116; *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962, [1962] ICJ Rep. 319.

<sup>119</sup> See generally Sinclair, supra note 9, at 192–3; *Certain Expenses of the United Nations*, Dissenting Opinion of President Winiarski, [1962] ICJ Rep. 227.



of which arose out of circumstances and concerns relating to decolonization and the relationship of newly decolonized states to the international legal order.

### 5.3. Doctrinal scholarship

Each of the practices, disputes, and advisory opinions surveyed above informed the burgeoning scholarship on international organizations law. What is not often acknowledged, however, is the extent to which non-Western jurists contributed to that scholarship. It is worth noting, therefore, that international lawyers from the global South were among the first to produce monographs on such central topics of international organizations law as voting procedures,<sup>120</sup> termination of membership,<sup>121</sup> the functions and duties of international civil servants,<sup>122</sup> domestic jurisdiction,<sup>123</sup> privileges and immunities,<sup>124</sup> the jurisdiction and competence of international courts,<sup>125</sup> capacity to conclude treaties,<sup>126</sup> the legal significance of particular acts and instruments,<sup>127</sup> and implied powers.<sup>128</sup> While some of these titles purported to examine particular international organizations, they typically adopted a comparative approach that encouraged the cross-application of principles to other organizations.<sup>129</sup> As such, they constituted some of the more important ‘commentaries on particular organisations’ and ‘monographs on special topics’ that made broad introductions such as Bowett’s possible.<sup>130</sup>

Notwithstanding their generally narrow focus on legal doctrine, many of these works reflect concerns stemming from issues related to decolonization. In his 1947 treatise on voting procedures, the Chinese diplomat Wellington Koo (who later served as a Judge on the ICJ) thus framed the issue as centring on ‘the concept of equality of independent states in international organizations’,<sup>131</sup> and discussed the debate over Security Council voting procedures in the UN Charter as a ‘battle . . . between the great powers and the small powers’.<sup>132</sup> Another scholar of Chinese (Taipei) origins, Hungdah Chiu, suggested the importance of the treaty-making

<sup>120</sup> W. Koo, *Voting Procedures in International Political Organizations* (1947); E. Jiménez de Aréchaga, *Voting and the Handling of Disputes in the Security Council* (1950).

<sup>121</sup> N. Singh, *Termination of Membership of International Organisations* (1957). See also N. Singh, *Essays in Maritime International Law and Organisation* (1966).

<sup>122</sup> M. Bedjaoui, *Fonction Publique Internationale et Influences Nationales* (1958).

<sup>123</sup> M.S. Rajan, *United Nations and Domestic Jurisdiction* (1958).

<sup>124</sup> K. Ahluwalia, *The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organizations* (1964).

<sup>125</sup> R.P. Anand, *Compulsory Jurisdiction of the International Court of Justice* (1961); I.F.I. Shihata, *The Power of the International Court to Determine Its Own Jurisdiction* (1965).

<sup>126</sup> H. Chiu, *The Capacity of International Organizations to Conclude Treaties and the Special Legal Aspects of Treaties so Concluded* (1966); B. Kasme, *La capacité de l'Organisation des Nations Unies de conclure des traités* (1960).

<sup>127</sup> O.Y. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (1966); J. Castaneda, *The Legal Effect of United Nations Resolutions* (1969).

<sup>128</sup> R. Khan, *Implied Powers of the United Nations* (1970). See also M. Rama-Montaldo, ‘International Legal Personality and Implied Powers of International Organizations’, (1970) 44 BYIL 111.

<sup>129</sup> See, e.g., Rajan, *supra* note 123; Shihata, *supra* note 125; Asamoah, *supra* note 127, at 166; Castaneda, *supra* note 127; Khan, *supra* note 128.

<sup>130</sup> See above Bowett, *supra* note 2, at xi. Despite being somewhat lightly referenced, Bowett’s first edition cited Koo (at 325, fn 37); Singh (at 315, fn 9); Bedjaoui (at 92); and Anand (at 269).

<sup>131</sup> Koo, *supra* note 120, at 3. On the equality of states and international organizations see also B. Boutros-Ghali, ‘Le principe d’égalité des états et les organisations internationales’, (1960) 100 (II) *Recueil des Cours* 1.

<sup>132</sup> Koo, *supra* note 120, at 136. On Koo’s long career in politics and law, see S.G. Craft, V.K. *Wellington Koo and the Emergence of Modern China* (2004).

power of international organizations to decolonized states in his lengthy discussions of trusteeship agreements,<sup>133</sup> as well as agreements relating to technical assistance and other aspects of development.<sup>134</sup> Likewise, Nagendra Singh's treatise on the termination of membership in international organizations focused on the position of mainland China, which, as he argued, had 'for all practical purposes . . . ceased to be a member of the United Nations'.<sup>135</sup> More explicitly yet, Rahmatullah Khan noted among his motivations for writing his book on implied powers in the UN, the charge that 'the Afro-Asian States in the General Assembly were forcing the Organization to take irresponsible positions', and doubts that had been raised by the UN's competence in its activities aimed at facilitating decolonization in Rhodesia, Kashmir, South Africa, and the Congo.<sup>136</sup>

Perhaps the clearest connection between a topic in international organizations law and the interests of decolonized states can be seen in works on resolutions of the UN General Assembly. Obed Asamoah, who later became the Foreign Minister and Attorney General of Ghana, expressly set his discussion of General Assembly declarations in the intellectual context of decolonization, noting that '[e]conomic nationalism among the communist and the new nations [had] challenged the traditional principles of state responsibility' and that the 'emancipation of former colonial territories [had] introduced new problems in the law of succession and fostered a concerted drive to undermine the colonial system'.<sup>137</sup> These political developments called for '[s]wift changes in the law', and international organizations provided 'convenient fora for the resolution of conflicts of interest and the adoption of principles to regulate state conduct'.<sup>138</sup> In arguing for the multifaceted legal significance of General Assembly declarations – as interpretation and application of international law, as subsequent practice aiding the judicial interpretation of the Charter, as evidence of custom or general principles, and as agreements – Asamoah took as case studies a series of declarations with particular relevance to new states, including the resolutions on the granting of independence to colonial countries and peoples, the elimination of all forms of racial discrimination, permanent sovereignty over natural wealth and resources, and the prohibition of the use of nuclear weapons.

Scholars of such disparate backgrounds could hardly be expected to share a single perspective on the complex legal issues facing international organizations. Nevertheless, what is significant here is the intense, common interest of jurists from the global South in the structure and functioning of international organizations, arising directly from their perceived potential to serve as vehicles for the promotion of decolonization and the more equal participation of decolonized states in the international order. Already during the interwar period, the League's Mandate Commission and the ILO, in different ways, had begun to highlight problems with

<sup>133</sup> Chiu, *supra* note 126, at 159–68.

<sup>134</sup> *Ibid.*, at 168–83.

<sup>135</sup> Singh, *supra* note 121, at 146.

<sup>136</sup> Khan, *supra* note 128, at xii.

<sup>137</sup> Asamoah, *supra* note 127, at 1.

<sup>138</sup> *Ibid.*, at 2.

imperial rule.<sup>139</sup> The UN's management of decolonization through the Trusteeship system, the mechanisms established under Chapter XI, and peacekeeping, as well as the development assistance provided by and through the specialized agencies, further testified to the efficacy of international organizations in promoting the interests of newly independent states. It should not be surprising, then, that so much of the foundational scholarship in the new nascent discipline of international organizations law should emerge from scholars from these states. The next section of this article seeks to reconstruct the imaginary of international organizations law, drawing on theoretical and judicial statements spanning the period covered in the previous three sections of this article, to demonstrate the wide appeal of that imaginary.

## 6. A POSTCOLONIAL IMAGINARY

In recent years, several scholars have suggested that the problems facing international organizations law can be attributed, at least in part, to the functionalist paradigm within which it operates.<sup>140</sup> Defining functionalism as 'essentially a principal-agent theory, with a collective principal (the member states) assigning one or more specific tasks – functions – to their agent', for example, Klabbers contends that this 'leaves no room for third parties' and makes it 'well-nigh impossible to hold international organizations accountable to those other than their own member states'.<sup>141</sup> This analysis is persuasive, and I do not wish to oppose it here. Rather, I want to focus on an element that is rarely emphasized in such accounts: namely, the extent to which the functionalism of international organizations law has been consistently understood and represented as opposed to the hegemonic territorial logic of imperialism. This opposition has operated as much at the level of symbolism and imagination as in the practices of international organizations, which have had an ambivalent relationship to imperialism at best.

Indeed, I claim that one cannot properly appreciate the appeal of international organizations law functionalism – and thus the difficulty of discarding or moving beyond it – until one appreciates the postcolonial *imaginary* implicit in it. This claim rests on a body of scholarship that conceptualizes the social imaginary as a complex 'common understanding' of social existence that is both descriptive and normative, is typically 'carried in images, stories, and legends', and 'makes possible common practices and a widely shared sense of legitimacy'.<sup>142</sup> Closer to a shared sensibility than a fully articulated doctrine or theory, the imaginary of international organizations law functionalism pictures a world of nation-states, in which apolitical, specialized organizations carry out technical functions as

<sup>139</sup> See S. Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (2015); Anghie, *supra* note 1; Sinclair, *supra* note 9, at Ch. 2.

<sup>140</sup> See especially Klabbers, *supra* note 51; V. Engström, 'Reasoning on Powers of Organizations', in J. Klabbers and A. Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (2011), Ch. 3; A. Reinisch, 'Privileges and Immunities', in *ibid.*, at Ch. 6.

<sup>141</sup> Klabbers, *supra* note 51, at 10, 73.

<sup>142</sup> C. Taylor, 'Modern Social Imaginaries', (2002) 14 *Public Culture* 91, 106. Also see generally C. Taylor, *Modern Social Imaginaries* (2004).

the agents and in the service of those states, without infringing their sovereignty.<sup>143</sup> Occupying ‘a fluid middle ground between embodied practices and explicit doctrines’,<sup>144</sup> this imaginary gives meaning to, and incorporates a set of normative expectations about, the practices of international organizations, even if it does not reflect those practices precisely.<sup>145</sup> It is postcolonial in that it (implicitly or explicitly) rejects the expansive territorial hegemony of imperial power, although in doing so it tends to obscure the ongoing reality of informal modes of empire.

From an early stage, this imaginary was expressed in repeated statements distancing international institutions from any intention to construct a world state. In 1897, Pierre Kazansky contended that the public international unions that had appeared since the 1860s had been created to serve ‘the interests more or less common to all civilized states’, and expressed the ‘hope that our globe will never be governed by some single political centre’: ‘Our own dream is the decentralised, administrative organisation of humanity’.<sup>146</sup> A ‘political world organisation would quickly become more or less sovereign’, he claimed, and thereby ‘deprive states of their sovereignty’, whereas the existence of states was still possible and compatible with ‘an international administrative organisation’, the latter being based on social interests.<sup>147</sup> Accordingly, it was possible to claim that the construction of public international unions meant ‘[a]bandoning the idea of integral reform of the international order’, and turning ‘from politics to administration’.<sup>148</sup>

By focusing on the common interests or needs of states, international institutions thus appeared to early twentieth-century scholars as a pragmatic *via media* between international anarchy and world unification through imperial conquest. For Paul Reinsch, world organization had become ‘an accomplished fact’ through ‘the slow working of economic and social causes, guided by the conscious will of man’.<sup>149</sup> On the one hand, the ‘positive internationalism’ he advocated precluded any ‘narrow and exclusive policy’; on the other, it was ‘equally averse to any attempts artificially to create a world state, either by the deadening force of military empire or by mechanical construction’.<sup>150</sup> Nor was this internationalism opposed to nationalism: ‘The more nationalism itself becomes conscious of its true destiny and its effective aims, the more will it contribute to the growth of international institutions.’<sup>151</sup>

Perhaps the clearest articulation of this vision can be found in the writings of Pitman Potter, who served as professor of international organization at the Graduate Institute of International Studies in Geneva in the decade before the Second World War. Potter’s

<sup>143</sup> It should be clear that this article focuses narrowly on the functionalism associated with international organizations law. ‘Functionalism’ has a range of meanings in the social and political science; some are quite compatible with colonialism, while others envisage the eventual disappearance of nation-states as sovereignty is split into discrete specialist functions. See generally D. Long, ‘International Functionalism and the Politics of Forgetting’, (1993) 48 *International Journal* 355.

<sup>144</sup> D.P. Gaonkar, ‘Toward New Imaginaries: An Introduction’, (2002) 14 *Public Culture* 1, 11.

<sup>145</sup> For example, it is hardly possible to characterize the work of the UN as merely apolitical or technical.

<sup>146</sup> P. Kazansky, ‘Les premiers éléments de l’organisation universelle’, (1897) 29 *Revue de Droit International et de Législation Comparée* 238, at 241 and 247.

<sup>147</sup> Kazansky, *supra* note 47, at 367.

<sup>148</sup> Kazansky, *supra* note 146, at 239.

<sup>149</sup> Reinsch, *supra* note 52, at 5.

<sup>150</sup> *Ibid.*, at 5.

<sup>151</sup> *Ibid.*, at 11.

monumental *Introduction to the Study of International Organization*, which first appeared in 1922 and ran to its fifth edition by 1948, was hugely influential in shaping a conception of international organizations as aligned with the nation-state, and opposed to two other forms of world unity: 'empire and cosmopolitanism'. Empire entailed 'the forcible union and subjection in one state of the people of otherwise independent nations'. Cosmopolitanism, by contrast, involved the voluntary unification of individuals on the basis of common interests; 'in its form of government it would tend towards anarchy'. Standing between empire and cosmopolitanism, 'international organization' assumed the permanence of 'the national state', expecting 'neither its subjugation nor its disappearance by the sublimation of the principle of nationality', instead proceeding by 'the voluntary coöperation of separately organized nations'.<sup>152</sup> By implication, particular international organizations would allow the flourishing of nation-states while avoiding the twin dangers of imperialism and lawlessness.

The interwar experiences of the ILO exemplify the force of this imaginary in practice. In the negotiations over the ILO's constituent instrument, one sticking-point was the American view that the British draft 'would have set up an international parliament of labor' with power to make and impose legislation on its member states, and that a modification of the text was needed in order to avoid 'the appearance of a super-state making labor laws for all the world'.<sup>153</sup> Several of the earliest advisory opinions issued by the PCIJ arose from concerns regarding 'the tendency displayed by [the ILO] to establish a hegemony',<sup>154</sup> such as in 'overstepping the limits of its competence and encroaching on that of another body'.<sup>155</sup> In response, ILO officials took pains to depict their activities as the technical work of international administration. As the first Director of the International Labour Office put it, 'we are not, no certainly not, a super-State! We are only humble administrators, obliged to take account of every social movement, of every incident in the political and Governmental life of fifty States'.<sup>156</sup>

By the end of the Second World War, the understanding of international organizations as established on a functional basis had gained widespread acceptance. To some international lawyers, two stark alternatives faced the world: 'world empire, achieved by conquest, or some form of association, such as world federation, achieved by consent'.<sup>157</sup> Yet to the leading advocate of the 'functional approach to world organization', the Romanian-British political theorist, David Mitrany, both

<sup>152</sup> Potter, *supra* note 55, at 16–17. The same passage appears, with only minor differences, in the 1922 edition. Also see Goodspeed, *supra* note 56, at 3–4.

<sup>153</sup> J.T. Shotwell, *At the Paris Peace Conference* (1937), 199, 205.

<sup>154</sup> *Competence of the ILO in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture*, Proceedings, 5 July 1922, Annex 25c, at 218 (Speech by M.J. Maenhaut, representing the International Agricultural Commission).

<sup>155</sup> *Competence of the ILO in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture*, Proceedings, 3 August 1922, Annex 37, at 299 (Speech by M.A. de LaPradelle, representing the French Government).

<sup>156</sup> *Competence of the ILO in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture*, Proceedings, 6 July 1922, PCIJ (ser. C), No. 1, Annex 26, at 268 (speech by M. Albert Thomas).

<sup>157</sup> Commission to Study the Organization of Peace, 'Preliminary Report' (April 1941) 359 *International Conciliation*, 195, 198–9.

empire and world federation were based on a flawed territorial logic, associated with ambitions for a ‘universal world-State’,<sup>158</sup> and likely to provoke new regional antagonisms.<sup>159</sup> In contrast, his ‘functional approach’ aimed to construct a ‘working peace system’ through specialized international agencies such as the ILO, which provided technical services to meet actual needs, as and when they arose. As such, it sought, ‘by linking authority to a specific activity, to break away from the traditional link between authority and a definite territory’.<sup>160</sup>

The same antipathy towards world government, and an anxiety not to conflate international organizations with sovereign states, underpins a functionalist approach in many fundamental aspects of international organizations law. Article 104 of the UN Charter states that the organization ‘shall enjoy . . . such legal capacity as may be necessary for the exercise of its *functions* and the fulfilment of its purposes’ (emphasis added), but stops short of endowing the UN with legal personality. As Jenks noted, that formulation was intended to ‘avoid any implication that the United Nations will be in any sense a “super-state”’.<sup>161</sup> In coming to the conclusion that the UN was in fact an international person, the ICJ’s *Reparation* opinion took care to address this anxiety: ‘That is not the same thing as saying that it is a State, which it certainly is not . . . Still less is it the same thing as saying that it is a “super-State”, whatever that expression might mean.’<sup>162</sup> Accordingly, the rights and duties of an international organization depended on its particular functions and purposes, and did not extend to ‘the totality of international rights and duties recognized by international law’ as possessed by states.<sup>163</sup> Similarly, an international organization’s immunities are ‘based on the necessity of functions’, given that it does not possess the attribute of sovereignty or ‘territory of its own where it can exercise its exclusive jurisdiction’.<sup>164</sup>

The principle of speciality or attributed powers, which limits the competences of international organizations, in contrast to the plenary powers of states, likewise derives from a functionalist logic. Already in 1927, the PCIJ had articulated this principle in relation to the European Commission of the Danube, underscoring that the Commission was ‘not a State, but an international institution with a special purpose’.<sup>165</sup> Some 70 years later, the ICJ relied on the same rationale to delimit the World Health Organization’s powers: ‘international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the “principle of speciality”’.<sup>166</sup>

<sup>158</sup> D. Mitrany, *The Progress of International Government* (1933), 135.

<sup>159</sup> D. Mitrany, ‘The Functional Approach to World Organization’, (1948) 24 *International Affairs* 350, at 352–3.

<sup>160</sup> D. Mitrany, *A Working Peace System* (1946), 6.

<sup>161</sup> Jenks, *supra* note 68, at 270.

<sup>162</sup> *Reparation for Injuries*, *supra* note 73, at 179.

<sup>163</sup> *Ibid.*, at 180.

<sup>164</sup> Ahluwalia, *supra* note 124, at 199. See also UN Charter, *supra* note 60, Art. 105; 1946 Convention on the Privileges and Immunities of the United Nations, 1 UNTS 15, at preamble; Art. IV, s. 11 and 14; and Art. VI, s. 22.

<sup>165</sup> *Jurisdiction of the European Commission of the Danube*, *supra* note 40, at 64.

<sup>166</sup> *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 66, at 78. See also *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, [1980] ICJ Rep. 99, at 103 (Judge Gros, Separate Opinion) (‘In the absence of a “super-State”, each international organization has only the competence which has been conferred on it by the States which founded it, and its powers are strictly limited to whatever is necessary to perform the



Citing this opinion, the World Bank's legal counsel argued that the Bank should not insert itself into areas of activity more suitable to other, existing international organizations: 'The Bank cannot act as a supra-national organization with an open-ended mandate . . . The Bank is certainly not a world government for its borrowing members'.<sup>167</sup> As Rahmatullah Khan put it, the Court's opinions articulated 'built-in checks and balances, or auto-limitations, both legal and political', on the expansion of an organization's functions.<sup>168</sup>

What I am calling a postcolonial imaginary – that is, the implicit image of a world order comprised of nation-states, reinforced by functionally organized international organizations – naturally appealed to states and scholars from the global South. To this constituency, the functionalist logic of international organizations law appeared to fortify their political project to dismantle colonialism in the decades immediately following the Second World War. By cutting across the old imperial structure of international relations, the new multilateral system seemed to advance anti-colonial objectives, with international organizations serving as vehicles of decolonization, development, state-building, and the assertion of sovereign equality in international relations. Where European imperial powers had once exercised sovereign powers, international organizations, fortified by a functionalist law of international organizations, now provided the very means for establishing independent states, constituting statehood and sovereignty itself through functional support without territorial governance.

That imaginary also appealed to states and scholars in the global North, particularly as decolonization gained momentum through the late 1950s. Part of the very design of the multilateral system created at the end of the Second World War was to support a US-led 'open door' trade policy that necessitated the breakdown of imperial trading blocs. For many in the West, however, decolonization represented a profound threat to the established world order, and thus to international peace. To Josef Kunz, for example, the crisis in international law could be traced to the 'decline of Europe' and the rise of an 'anti-colonial rebellion' among non-Western peoples.<sup>169</sup> To Wilfred Jenks, too, the ideological divisions of the Cold War were mirrored in a basic disagreement on 'the nature of law itself, while rapid decolonization carried the 'grave danger' of diluting the content of the law'.<sup>170</sup> In a world that seemed beset by potential cleavages, international organizations appeared crucial to socializing new states to the values of the international community. As one observer put it: 'Filtering an act of intervention . . . through an international organization may transform what would otherwise have been labeled as "an imperialistic act" into an action recognized

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functions which its constitutive charter has defined. This is thus a *compétence d'attribution*, i.e., only such competence as States have "attributed" to the organization.')

<sup>167</sup> I.F.I. Shihata, 'The Dynamic Evolution of International Organizations: The Case of the World Bank', (2000) 2 *Journal of the History of International Law* 217, at 221.

<sup>168</sup> Khan, *supra* note 128, at 214.

<sup>169</sup> J.L. Kunz, 'The Changing Law of Nations', (1957) 51 *AJIL* 77, at 82.

<sup>170</sup> Among progressive international lawyers, Jenks was notably sympathetic to non-Western views, yet he also expressed concern with the 'psychology of newly won independence', which was 'sometimes inclined to take a high view of the prerogatives of sovereignty'. C.W. Jenks, *The Common Law of Mankind* (1958), 29.

on every side as necessary and fair to all parties.<sup>171</sup> International organizations law promised to buttress the institutions that would midwife the birth of new states, tutor them into full maturity, and knit together an emerging world community.<sup>172</sup>

## 7. CONCLUSION

This article has traced the outlines of a postcolonial genealogy of international organizations law through several lines of argument. In the most straightforward temporal sense, I have suggested that international organizations law should be understood as postcolonial because it emerged in the period of decolonization following the Second World War and not, as the conventional narrative would have it, during the interwar period or earlier. At a more meaningful level, I have shown how much of the practice, jurisprudence, and doctrinal scholarship of international organizations law was profoundly shaped by postcolonial circumstances, actors, and – most importantly – concerns. Lastly, I have argued that international organizations law functionalism should be understood as mediating a postcolonial imaginary, which pictures a world of nation-states in opposition to the hegemonic territorialism of colonialism; and that this should be seen as fundamental to the appeal of international organizations law to states and jurists from both the global North and South.

By retracing international organization law's origins in the decolonization period, this article aims to assist in a diagnosis of its contemporary condition. A full genealogy would, of course, need to account for the dramatic changes in international relations and law that have occurred following the period covered by this article – including the collapse of the NIEO project, the rise of the neoliberal 'counter-revolution', and consequent transformations in the global economy.<sup>173</sup> Yet postcolonial circumstances and concerns remain central to international organizations law. Consider, for example, the debates regarding organizational responsibility and accountability in relation to the UN's role in the Haiti cholera outbreak, sexual abuse by peacekeepers in Africa, or the negative impacts of World Bank-sponsored projects in 'developing' countries.<sup>174</sup> Indeed, a notable change that has occurred over the half-century since 1970 is the extent to which jurists from the global South have become more critical of both international organizations and postcolonial states.<sup>175</sup>

That change in attitude, too, can be understood as arising paradoxically from the postcolonial genealogy of international organizations law. As analyzed in this article, the imaginary of international organizations law functionalism supported

<sup>171</sup> A.B. Fox, 'International Organization for Colonial Development', (1951) 3 *World Politics* 340, 343.

<sup>172</sup> Jenks, *supra* note 170, at 22 (describing international organizations law as 'the law governing the constitutional framework of a developing world community').

<sup>173</sup> N. Lazarus, 'Third Worldism' and the Political Imaginary of Postcolonial Studies', in G. Huggan (ed.), *The Oxford Handbook of Postcolonial Studies* (2013), Ch. 14.

<sup>174</sup> Also consider the postcolonial backgrounds to significant cases such as *Interpretation of the Agreement between the WHO and Egypt*, *supra* note 166; *Legality of the Use by a State of Nuclear Weapons*, *supra* note 166; and *Case Concerning East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, [1995] ICJ Rep. 90.

<sup>175</sup> See, e.g., B.S. Chimni, 'International Institutions Today: An Imperial Global State in the Making', (2004) 15 *EJIL* 1. In this sense, the works by global South scholars discussed in Section 5 of this article are representative of the 'first wave' of Third World approaches to international law. See generally A. Anghie, 'TWAII: Past and Future', (2008) 10 *International Community Law Review* 479.

the continued existence of nation-states – a feature that made it attractive to states and jurists from the global South as well as the North. With the support of international organizations, the ‘radical act of liberation from colonial domination’ was thus transformed and channeled into the form of the nation-state,<sup>176</sup> enabling at once the consolidation of power in national elites and the expansion of global markets.

To the extent that the practices of international organizations no longer seem to embody or serve these purposes, they have placed the shared imaginary of international organizations law functionalism under pressure. On the one hand, criticisms of international organizations and the failures of international organizations law have been especially acute precisely where functionalist and territorial logics become blurred – where the ‘functional’ activities of international organizations have been extended to embrace the effective governance of territory – such as in an increasing number of UN peacekeeping operations, or in development projects that involve large-scale environmental changes and the forcible removal of populations. On the other hand, the functionalist focus on serving particular needs of states has paradoxically resulted in the untrammelled growth of powers exercised by international organizations and a corresponding disaggregation of state functions.<sup>177</sup> As a consequence, the dilemma facing international organizations law is how to retain the political energy derived from its postcolonial genesis, while simultaneously addressing a set of challenges that seem to demand a new imaginary to make sense of the actual practices of international organizations today.

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<sup>176</sup> Pahuja, *supra* note 1, at 47.

<sup>177</sup> Slaughter, *supra* note 46; G. Harrison, *The World Bank and Africa: The Construction of Governance States* (2004).