The European Journal of International Law Vol. 31 no. 2

Schermers' Dilemma

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Abstract

This article, part of the symposium on 'theorizing international organizations law', discusses the work (and a little of the life and influence) of Henry G. (Hein) Schermers, arguably the leading functionalist international organizations lawyer of the post-war era. The article discusses how Schermers' work solidified and consolidated functionalism and unwittingly laid bare its 'Achilles heel'. Confronted with the growing popularity of human rights and keenly devoted to human rights, Schermers faced a dilemma when the possible responsibility of international organizations for human rights violations came up – a dilemma his functionalism was unable to solve. Therewith, zooming in on Schermers' handling of the dilemma confirms that functionalist international organizations law is unable to address the responsibility of international organizations towards third parties. International organizations law will need to find different theoretical resources in order to come to terms with responsibility.

1 Introduction

For lawyers working within and with international organizations, Leiden University must have seemed the centre of the universe for a decade or two, roughly from the late 1970s until the late 1990s. It owed this status predominantly to one man, the formidable Henry G. (Hein) Schermers. Schermers is one of the representatives of the second wave of international organizations law scholarship[1] and, arguably, the leading post-war representative of the school of thought that has come to be known as functionalism – a school that suggests that organizations are built around their functions, and since those functions and international cooperation generally are inherently benign, it follows that the work of organizations (that is, the performance of their functions) ought to be stimulated and facilitated by the law of international organizations. While functionalism can mean different things in different contexts, in the law of international organizations it stands for the broad proposition that the

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1 See Klabbers, 'The Life and Times of the Law of International Organizations', 70 *Nordic Journal of International Law* (2001) 287.

functioning of those creatures should not be impeded; instead, the law should help organizations to prosper. Over the last few decades, it has transpired, however, that this entails that it is difficult to hold organizations to account.

Functionalism was not a new idea when Schermers started his work on international organizations; its antecedents can be traced from a throwaway remark by Georg Jellinek in the late 19th century, via the writings of Americans such as Paul Reinsch and Frank Sayre and the advisory opinions of the Permanent Court of International Justice (PCIJ), to the classic *Reparation for Injuries* opinion of the International Court of Justice (ICJ), handed down a few years before Schermers started his academic career.[2] Nor was Schermers the only functionalist to work on international organizations law in the period following *Reparation for Injuries*: Derek Bowett, who was quite possibly the author of the first comprehensive textbook in English,[3] and Ignaz Seidl-Hohenveldern, quite possibly the author of the first comprehensive textbook in German,[4] were amongst his main colleagues and contenders. Yet Bowett never really focused on international organizations law *per se* – he was a generalist who also wrote books on islands in international law and on the use of force, and who appeared many times as counsel before the ICJ; international organizations law was something he did 'on the side', so to speak. Moreover, his main work on international organizations is arguably more in the nature of a discussion of individual organizations and their organs than a systematic overview of the legally salient aspects – the latter comprised less than 25 per cent of the text of the fourth edition, which was the last edition Bowett himself prepared.[5] And Seidl-Hohenveldern, writing mostly in German, never reached as large an audience as Schermers did.

The purpose of this article is to set out Schermers' brand of functionalism and investigate both its theoretical credentials and its influence. For me, at least, studying international organizations law in the Netherlands in the 1980s meant studying Schermers, and studying Schermers meant studying functionalism, even though the term itself probably never made its way to the classroom. The compulsory literature when I was an undergraduate student included Bowett's book, then in its fourth edition (it was used for its descriptions of individual organizations rather than for its discussion of general issues such as personality, powers or privileges – the latter were not part of the assigned readings), and the Dutch synoptic version of Schermers' *International Institutional Law*,[6] a condensed work of some 300 pages with all of the charm of a telephone directory – very useful, very informative but not very reader friendly.[7]

2 For this trajectory, see Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law', 26 *European Journal of International Law* (*EJIL*) (2015) 9.

3 D.W. Bowett, *The Law of International Institutions* (1962).

4 I. Seidl-Hohenveldern, *Das Recht der internationalen Organisationen einschliesslich der supranationalen Gemeinschaften* (1967).

5 D.W. Bowett, *The Law of International Institutions* (4th edn, 1982).

6 H.G. Schermers, *Inleiding tot het internationale institutionele recht* (2nd edn, 1985).

7 In addition, our teacher at the time, Joost van den Dool, deserves credit for trying hard – we had to go through *Basic Facts of the UN* and a number of further materials, ranging from newspapers clippings to the Brandt report. These focused not on the legal set up of organizations but, rather, on their substantive activities.

This article is structured around a fundamental tension, representing the two souls beating in Schermers' chest: his faith in international organizations, on the one hand, and his faith in human rights, on the other hand. What to do when the two come together in situations when international organizations are accused of violating human rights? My contention will be that Schermers never managed to reconcile his two souls properly – he found pragmatic ways out, to be sure, but never on the level of principle. What is more, the theory that was central to his faith in international organizations – functionalism – did not, and does not, allow for a principled way out; it cannot (as will be explained below) simultaneously do justice to both the autonomy of international organizations and the protection of third parties. As will be shown, all possible solutions – possible under functionalism, that is – boil down to either responsibility sliding off the organization towards its member states or to imagining the international organization as something other than an international organization. Hence, the study of Schermers' work reveals one of the fundamental limits of functionalism.

2 Schermers' Trajectory

Hein Schermers was born in the Dutch town of Epe in 1928 and thus experienced World War II as a teenager.[8] He went on to study law in Leiden and seamlessly moved on to the Dutch Foreign Ministry upon graduation in 1953. Before moving to the ministry's legal service in 1956, his first years (he started in 1953) were spent in the ministry's department on international organizations, where he carried special responsibilities for the work of the specialized agencies. Naturally, he developed an interest in international organizations, realizing very quickly not only that these were politically and practically relevant vehicles for international cooperation but also that very little general information about them was available and that he was particularly well placed to do something about it. Half a century later, he recalled that his role in informing Dutch ministries of how the specialized agencies had resolved institutional issues 'gave me a reputation of being expert in the institutional questions of the specialized agencies', and the ministries often 'asked me to participate in their internal discussions about the preferred structure' of any organization they may have been contemplating.[9]

His official responsibilities concerning the specialized agencies fell in fertile soil: the war must have taught him that states and their sovereignty are up to no good and that there would be merit in reducing their influence. As such, his work can be placed against a straightforward and effective normative background philosophy, according to which sovereign states were to be approached with suspicion. He rarely put it more clearly than in a book review in the late 1970s, applauding the focus of the book

[8] Much – though not all – of the biographical data is culled from the brief overview listed in the Festschrift dedicated to Schermers. See R. Lawson and M. De Blois (eds), *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers* (1994), vol. 3, at 383.

[9] Schermers, 'The Birth and Development of International Institutional Law', 1 *International Organizations Law Review* (*IOLR*) (2004) 5, at 6.

under review on the protection of individual rights: 'We need law for the benefit of men, not of government officials. The rights of individuals, including undertakings, are of greater importance than the sovereignty of States, which often comes down to the right of government officials to act as they please.'[10]

International organizations then presented themselves almost naturally as benign alternatives to states, all the more so as they lacked sovereignty. The incongruence in the thought that nasty states would set up benign organizations never seemed to occur to him. Already the first edition of *International Institutional Law* oozes a sentiment, amidst the technicalities, about the necessity of there being international organizations. 'The most desirable development', he held, downplaying both state sovereignty and a putative world government, would be 'a development towards a dispersion of powers between local, regional, national and supranational authorities'.[11] And later editions of the book make perfectly clear where his normative sympathies lie. The book is meant, in part, to stimulate the practical workings of international organizations, and these creations are important because they can compensate, in international affairs, for the absence of central authority.[12]

While employed at the Ministry for Foreign Affairs, Schermers was struck in particular – like so many of his generation – by the United Nations (UN) family, and given his everyday responsibilities, he quickly decided that international organizations formed a suitable topic for a doctoral thesis: how are the specialized agencies set up and organized?[13] He finalized his thesis in 1957 and, therewith, was among the first post-war scholars to contribute to the study of international organization. He would be followed over the next 15 years or so by a veritable wave of writings about international organizations law, almost invariably from a functionalist perspective.[14] Scholars were writing about the treaty-making powers of international organizations,[15] their law-making powers,[16] the succession between organizations,[17] issues of membership,[18] the financing of organizations,[19]

[10] Schermers, reviewing Toth, 'Legal Protection of Individuals in the European Communities', 28 *International and Comparative Law Quarterly* (*ICLQ*) (1979) 534, at 534.

[11] H.G. Schermers, *International Institutional Law* (1972), at 3.

[12] H.G. Schermers and N.M. Blokker, *International Institutional Law* (3rd edn, 1995), at 7.

[13] H.G. Schermers, *De gespecialiseerde organisaties: Hun bouw en inrichting* (1957).

[14] The proverbial exception resides in the work of Seyersted, who adopted a more 'organic' framework (for want of a better term). See, e.g., F. Seyersted, *Objective International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend upon the Conventions Establishing Them?* (1963). For a discussion of Seyersted's work and relevance, see Klabbers, 'On Seyersted and His Common Law of International Organizations', 5 *IOLR* (2008) 381.

[15] J.W. Schneider, *Treaty-making Power of International Organizations* (1959); K. Zemanek, *Das Vertragsrecht der internationalen Organisationen* (1957); K. Zemanek (ed.), *Agreements of International Organizations and the Vienna Convention on the Law of Treaties* (1971); H. Chiu, *The Capacity of International Organizations to Conclude Treaties* (1966).

[16] I. Detter, *Law Making by International Organizations* (1965).

[17] Chiu, 'Succession in International Organisations', 14 *ICLQ* (1965) 83; Hahn, 'Continuity in the Law of International Organization', 13 *Östereichische Zeitschrift für öffentliches Recht* (1964) 167.

[18] N. Singh, *Termination of Membership of International Organisations* (1958).

[19] J.D. Singer, *Financing International Organization: The United Nations Budget Process* (1961); J.G. Stoessinger *et al.*, *Financing the United Nations System* (1964).

the privileges and immunities of international organizations,[20] the amendment of their constitutions[21] and even the responsibility of international organizations, or at least of their member states.[22] And much of this embodied a functionalist spirit: invariably, organizations were depicted as benign creatures, set up to do things that states alone could not (or did not want to) take responsibility for. These activities were generally viewed as commendable, as benefiting humankind at large, and, thus, there should be no interference with the work of international organizations. Almost all international organizations lawyers of Schermers' generation adopted the same mantras and understandably so; these were the only mantras available at the time, having been developed by an earlier generation of scholars, even before the 'move to institutions' took place in earnest, and coming out of a world war, they must have seemed quite persuasive.[23]

In 1963, Schermers accepted a chair in the law of international organizations (a new chair at the time, as he recalled;[24] later also held by Richard Lauwaars, Friedl Weiss and Pieter Jan Kuijper) at the University of Amsterdam. It remains speculation, but it is not unlikely that he was brought to Amsterdam by Arnold Tammes, then the chair of public international law at that university and himself the author of pioneering work on international organizations law, which exercised considerable influence on Schermers' thinking.[25] While in Amsterdam, Schermers set up the Europa Institute and focused his studies of international organizations in part on what was then the European Economic Community (EEC) – after all, in those days, it was still common to regard the EEC as an international organization, perhaps somewhat different from others but still a recognizable species of the genus. In this capacity, he wrote his book *Judicial Protection in the European Community*, which lists the legal possibilities for individuals to find relief by seizing the European Union's (EU) Court in Luxembourg.[26] This already indicated that he was not just thinking of organizational structures but that his second main interest was also formed by the position of individuals and, therewith, by human rights law. For many years, he was the Dutch member of the then

[20] K. Ahluwalia, *The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organizations* (1964).

[21] R. Zacklin, *The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies* (1968).

[22] K. Ginther, *Die völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten* (1969).

[23] Kennedy, 'The Move to Institutions', 8 *Cardozo Law Review* (1987) 841.

[24] Schermers, *supra* note 9, at 6.

[25] A.J.P. Tammes, *Hoofdstukken van international organisatie* (1951); Tammes, 'Decisions of International Organizations as a Source of International Law', 94(2) *Recueil des Cours* (*RdC*) (1958) 265. Tammes had earlier written his own doctoral dissertation (in Dutch) on the Commonwealth, according to his obituary, available at www.dwc.knaw.nl/DL/levensberichten/PE00003264.pdf.

[26] H.G. Schermers, *Judicial Protection in the European Communities* (1976). The book went through seven editions, the most recent being published posthumously in 2014.

extant European Commission of Human Rights, and it is possible to argue that his two main interests came together in his work on judicial protection in the EEC.[27]

In 1978, he moved from Amsterdam to the University of Leiden, his *alma mater*, where he held a chair in international organizations law until his 'first' retirement in 1993[28] and became editor in chief of the *Common Market Law Review*, still one of the leading periodicals in the field of EU law. By 1978, he had already published the first edition of his general treatise on international institutional law, a wonderfully rich and informative overview of pretty much everything related to the institutional aspects of international organizations.[29] It is this book, currently in its sixth edition, co-authored with his successor (and former student) Niels Blokker,[30] that can be found on the desks of all international organizations lawyers, whether practitioners or academics. They keep it close at hand for it is capable of providing at least a beginning of an answer to all (or almost all) practical institutional legal questions one can think of, and many more that one never would have thought of. If books are weapons, then *International Institutional Law* is a nuclear device, setting out a picture of a better world, achieved by and through international organizations, and explicitly written so as to support their activities. The world of international organizations law is very much the world according to Schermers; his influence is only matched by the influence of earlier editions of Lassa Oppenheim's *International Law* treatise within the chancelleries of states.[31]

Schermers' work, both in terms of its quantity and its substance, suggests a highly disciplined, systematic scholar, collecting and systematizing knowledge at great length and to great depths. Schermers was not known for his critical attitude,[32] and he may not have been the most influential thinker of his generation, but, as a scholar of a certain type (careful, systematic, moderate and modest), he was unrivalled.

3 Schermers' Functionalism

Schermers' functionalism was, in a way, intuitive rather than cerebral. When he started his academic career, functionalism was already well in place, having been

[27] He also brought these strands together in his contribution to Tammes' *liber amicorum*, offered at the occasion of the latter's retirement in 1977. See Schermers, 'Indirect Obligations: Four Questions in Respect of EEC Obligations Arising from Rights or Obligations of Others', in H. Meijers and E.W. Vierdag (eds), *Essays on International Law and Relations in Honour of A.J.P. Tammes* (1977) 260. Schermers left the University of Amsterdam shortly after Tammes' retirement.

[28] Thereafter, he continued for a number of years as the (part time) Van Asbeck Professor of Human Rights at Leiden University, finally retiring in 2002.

[29] Schermers, *supra* note 11.

[30] H.G. Schermers and N. Blokker, *International Institutional Law* (6th edn, 2018).

[31] On Oppenheim and his influence, see M. Garcia-Salmones, *The Project of Positivism in International Law* (2013).

[32] Typical are the words on the opening page of *Judicial Protection* (and retained through various editions, but by now deleted), in which he extols the virtues of the Court of Justice of the European Union (CJEU): '[A] detailed description of the Court's case-law portrays a fine legal system that is not susceptible to a great amount of fundamental criticism.' Schermers, *supra* note 26, at 1.

developed in the beginning of the 20th century by, in particular, Paul Reinsch, a lawyer *cum* political scientist teaching at the University of Wisconsin-Madison and later Woodrow Wilson's 'minister' (that is, ambassador) in China.[33] Reinsch had studied some 30 public international unions in existence at the turn of the century and had noted that they all had in common the fact that their tasks could be perceived as technical or functional: from arranging postal traffic, to harmonizing weights and measures or railway tracks, to combating diseases. What is more, they did so at little cost, whether political or financial, and in service of the common good: for who could complain about improved communications or the eradication of diseases? Best of all, they carried with them the promise of universal peace.[34]

Reinsch was, to be sure, a child of his time. While he abhorred colonial imperialism if it came with territorial conquest, he was nonetheless sensitive to the possibilities for organizations, in exercising their functions, to exercise domination on behalf of some over others. He was most explicit perhaps in a lecture to the Milwaukee Bankers Club in 1906, aiming to sell US membership of the Pan-American Union in terms his audience could understand: it would allow the USA to dominate Latin America just as effectively as colonizing the continent would. Moreover, much of his comparative method had been borrowed from his earlier works on colonial administration: these were set up as comparisons of the experiences of the great colonial powers in their respective colonies, fairly systematically and in fairly great depth. Reinsch employed the same comparative method to his study of the public unions.[35]

Reinsch was followed by Frank Sayre, Woodrow Wilson's son-in-law and author of *Experiments in International Administration*.[36] Sayre's *Experiments* largely emulated Reinsch's work but with one crucial, though, at the time, largely unnoticed, difference. Where Reinsch had (unwittingly, probably) limited his studies to organizations devoted to the common good, Sayre was far less discriminate or, perhaps, more overtly indiscriminate. For him, almost all forms of international cooperation qualified as international organizations, whether it was devoted to the public good or explicitly devoted to the endorsement or protection of highly particular interests. Thus, river commissions protecting Western traders in China qualified as international organizations (regardless of whether China would participate), as did police missions in unruly Balkan places where commercial interests were threatened. As a result, the conception of the common good that still informed and underpinned Reinsch's work, however vague, became excruciatingly thin: the mere circumstance of international cooperation came to represent the common good, regardless of how and for whom the international cooperation was put in place.[37]

[33] On Reinsch, see N. Pugash, *Paul S. Reinsch: Open Door Diplomat in Action* (1979).

[34] P.S. Reinsch, *Public International Unions, Their Work and Organization: A Study in International Administrative Law* (1911).

[35] See further Klabbers, 'The Emergence of Functionalism in International Institutional Law: Colonial Inspirations', 25 *EJIL* (2014) 645.

[36] F.B. Sayre, *Experiments in International Administration* (1919).

[37] See further Klabbers, *supra* note 2.

Hence, when Schermers began his career, there was already a functionalist framework in place, which he absorbed lock, stock and barrel, mixing Reinsch's undoubted idealism with the thinner version represented by Sayre. If Schermers' doctoral dissertation encompassed Reinschian entities (the specialized agencies), *International Institutional Law* embraced a Sayrean broad notion of international organizations, capturing not just the World Health Organization (WHO), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the like but also commodity organizations or interest groups such as the International Wool Study Group or the Organization of Petroleum Exporting Countries. It would seem at first sight that Schermers added little to the theory of functionalism. This is both accurate and somewhat deceptive. It is accurate in that Schermers was rarely tempted to make grand theoretical claims, and what he (and perhaps Blokker more than Schermers[38]) added drew inspiration from a short piece by Michel Virally, written when Schermers' own thought system was already firmly in place.[39] Schermers seems mostly to have been quietly systematizing. But it is precisely here where the deception resides: Schermers' systematic comparative method became its own theory, a functionalism within functionalism.

A comparative approach has always informed the study of international organizations. Both Reinsch and Sayre had employed a rough-and-tumble comparative method, looking at various entities to see what they had in common and liberally drawing things together. Sayre, in particular, was not very systematic, distinguishing between three basic categories of organizations (or organs) on the basis of the rather fluid criterion of the power they exercised, while leaving it unclear what he meant by 'power'. Thus, one group consisted of organizations 'with little or no real power of control', presumably over their member states, since he listed the Universal Postal Union as an example. A second group had power, though not so much over member states but, rather, over 'local situations', while his third group consisted of two organizations with power over member states: the International Sugar Commission and the International Rhine Commission (which could have fit in the second group as well, presumably). This was the academic equivalent of comparing apples, organs and bicycles, with it remaining uncertain whether some fruits were apples or oranges or both perhaps.

Schermers, by contrast, proved far more systematic in his comparativism. Schermers systematically and almost relentlessly compared institutions not in accordance with some fluid criterion but, rather, on the basis of functional criteria: who can join; how does one join; how does membership terminate; can members be expelled; how are

[38] The references to Virally's work have been retained in the fifth edition of *International Institutional Law*, published and prepared without Schermers' involvement.

[39] See Virally, 'La notion de fonction dans la théorie de l'organisation internationale', in S. Bastid *et al.* (eds), *Mélanges offerts à Charles Rousseau: La communauté internationale* (1974) 277. Virally's piece was published well after the first edition of *International Institutional Law*, whereas M. Virally, *L'organisation mondiale* (1972), on which the article draws, was first published in the same year as *International Institutional Law*.

organs set up; do they need to be representative; do elections play a role and so on and so on. In effect, within the broader theory of functionalism (concerning the functioning of the organization at large), Schermers broke down the human experience in small functional bits and pieces. This added to the theory, however unobtrusively perhaps. Take, for example, his discussion on the withdrawal of member states (rather topical in times of Brexit). Withdrawal generally means a weakening of the organization and can possibly even 'overthrow' the organization in its entirety, especially if the organization is a supranational one.[40] If a constitution contains a withdrawal clause, then this needs to be followed. But where such a clause is absent, things are less obvious. Schermers, as early as 1972, went through a discussion of the UN, the WHO and UNESCO and their practices and concluded that international law (in the form of the Vienna Convention on the Law of Treaties) as well as the practice of organizations did not accept a right of unilateral withdrawal in the absence of a clause to that effect.[41]

Innocuous as all this seems, it did have one important side effect: where the masters of the treaty had omitted creating any rules, mastery of the same constitutive instrument was taken over by the organization. Effectively, the absence of any provision in the constitutional design could be remedied by organizational decision, typically decision by the competent organ (whichever this turned out to be, as few constituent instruments tend to be specific in endowing specific organs with precisely delineated competences). By zooming in on the function of withdrawal and how it would affect the functioning of the organization, the ball had shifted from the member states' court to the organization's court: since withdrawal would generally have the potential to undermine the organization's functioning, it ought not to be stimulated. The functional analysis of withdrawal joined forces with the functional analysis of the organization, and, together, they created an impregnable bulwark.

Indeed, Schermers also considerably refined the functionalist approach and seemed, for a while at least, capable of reconciling apology and utopia, as his discussion of withdrawal illustrates. Organizations were creatures of states, created by states to serve certain purposes; hence, all member states had an interest in seeing the functions performed – this, after all, is why they joined, *ex hypothesi*. As a result, the interest of the organization dovetailed neatly with the interests of each and every member state, with the exception of the member state that was about to withdraw. Whatever the organization would decide would thus be in the national interest of the remaining member states, and since it was more practicable to speak with one voice, why not leave things to the organization? Again then, in Schermers' work, the interest of the

[40] Schermers, *supra* note 11, at 44. He added presciently that 'the transfer of national sovereignty to the supranational organization by all Members should not be undone by a unilateral act of one Member'.

[41] Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331. The sixth edition structures the analysis differently. It posits the Vienna Convention's rule, and then ruefully suggests that if states seriously wish to withdraw, the 'other members are in fact powerless to prevent' this from occurring; thereupon it lists a number of arguments that withdrawing states can invoke. See H. G. Schermers and N. M. Blokker, *International Institutional Law* (6th edn, 2018), at 117.

member states joined forces with those of the organization – and, again, together they created an impregnable bulwark.

To summarize then, Schermers exercised a considerable influence on the development of functionalism, managing to support it both on the level of ideas and under reference to practice and politics. And the key to all this resided, in particular, in his comparative approach, which unlocked the various positions and suggested how, at the end of the day, all noses pointed in the same direction. Looking back on his earlier career, Schermers himself viewed comparativism as something of an 'infant industry' analogy. The creation of new organizations after the war meant that there 'was much room for comparison'. Comparative work, however, could slowly be displaced by proper coordination between existing organizations, and the focus of international institutional law (the discipline but perhaps also the book) could therewith shift to something else. Here too, however, functionalism was never far away: the law could (and perhaps should) move 'in the direction of an efficient and successfully functioning of each organization'.[42]

4 Schermers' Human Rights Problem

If the likes of Reinsch and Sayre could develop functionalism in a rather uncomplicated manner, it was because theirs was a conceptually uncomplicated time. International law was made between states and meant to affect only states. Effects on anyone else were always mediated and were mediated by those same states, while the PCIJ's first musings on directly effective international law were still a decade or so in the future.[43] This state-centric orientation was the conceptual framework in place, and it assisted functionalism enormously, for it meant that international organizations could be portrayed as derived from states and as still only touching states – the legal dynamics of international organizations could be fully captured by pointing to their member states: these member states created organizations, and these member states were the addressees of the activities of international organizations. The conceptual universe, it seemed, was neatly closed off.

This picture may not have been particularly plausible: surely, who else are International Labour Organization (ILO) conventions to affect but individual workers?[44] Nonetheless, the picture was as real as any picture can get: these were dualist times, and dualism, as Heinrich Triepel reminded his contemporaries,[45] was essentially based on the empirical observation that international law and domestic law operated in separate spheres and would not come in contact with each other.[46] What

[42] Schermers, *supra* note 9, at 7.

[43] See *Jurisdiction of the Courts of Danzig*, Advisory Opinion, 1928 PCIJ Series B, No. 15.

[44] For an excellent discussion on how the International Labour Organization and other organizations came to affect the domestic settings of their member states while expanding their own powers, see G.F. Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (2017).

[45] Triepel, 'Les rapports entre le droit interne et le droit international', 1 *RdC* (1923) 75.

[46] R. Roxburgh, *International Conventions and Third States: A Monograph* (1917).

happened in international law stayed in international law. This now was a luxury that was no longer quite as forcefully present when Schermers wrote. When Schermers was an undergraduate student in Leiden, the Universal Declaration on Human Rights saw the light, as did the European Convention on Human Rights (ECHR).[47] The human rights revolution may have kicked off slowly and only reached its peak during the 1970s, as has been argued,[48] but, nonetheless, it came to affect the way Schermers had to think about international organizations.

The problem that transpired was that, under functionalism, international organizations were supposed to contribute to the common good and pave the way towards universal peace. They are, to the functionalist, essentially benign creatures, and cannot be otherwise: any criticism meets with a Teflon-like response. Should they aim to do wrong, the *ultra vires* doctrine kicks in to correct them: they are not to step outside their assigned powers and functions, and these, after all, cannot encompass anything bad. Should they be set up for nefarious purposes, then general international law kicks in, finding fault with the states who set up a creature for nefarious purposes – or, alternatively, nefarious organizations are 'defined away', pigeonholed as not truly constituting international organizations.[49] And should they nonetheless do wrong, it cannot be their own fault – it must be the fault of the member states failing to control them. Hence, on a conceptual level, under functionalism, the international organization literally can do no wrong – any wrong done by an organization is always, and by definition, a wrong done by the member states, and it is no coincidence that early studies of the responsibility of international organizations quickly morphed into studies on the responsibility of member states.[50]

This rosy picture was no longer sustainable by the 1970s, but Schermers struggled long and hard to come to terms with it – he struggled generally with issues of the responsibility or accountability of international organizations.[51] The first edition of *International Institutional Law* devoted less than half a page (out of more than 750 pages) to issues of responsibility, and, even then, he hardly seemed willing to recognize that organizations could intentionally do wrong. The first example he listed (as a hypothetical) of an instance of responsibility related to the possible crashing of a satellite. Yet this is one of the few instances where international law assigns strict liability to the entity sending the satellite in orbit and holds that fault or *culpa* are irrelevant.[52]

[47] Universal Declaration of Human Rights, GA Res. 217A (III), 10 December 1948; Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 222.

[48] As suggested by S. Moyn, *The Last Utopia* (2010).

[49] Schwartz and Leven, 'International Organizations: What Makes Them Work?', 30 *Canadian Yearbook of International Law* (1992) 165.

[50] Eagleton, 'International Organization and the Law of Responsibility', 76(1) *RdC* (1950) 319; K. Ginther, *Die völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten* (1969).

[51] A relatively late, lengthy overview by Schermers discussed 'liability' in three sentences of a general nature, suggesting that should liability occur, it would be useful to have a court to go to; otherwise things would have to be resolved through diplomatic channels. There is not a word on why organizations could be liable or under what conditions. See Schermers, 'International Organizations', in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (1991) 67, at 73.

[52] J. Klabbers, *International Law* (2nd edn, 2017) 141.

Hence, this still is a far cry from acknowledging that organizations can actually do wrong: they can be responsible under a strict liability scheme, but that is no admission of wrongfulness. His second example was different in nature, but he managed to give a highly arid overview of the responsibility incurred and accepted by the UN following its operations in the Congo. These 'caused considerable injury', as he put it, but he could not, it seems, get himself to concede that the UN may have done something wrong here – the formulation is passive, as if something wrong had happened to the UN.[53]

Schermers, as a member of the European Commission of Human Rights and with considerable EU law expertise, knew better than most that issues of accountability could not forever be avoided. Still, he formulated his reluctance to discuss accountability in no uncertain terms. Setting up organs such as an inspection panel might be useful, he thought, so as to strengthen the responsibility of the organization itself. But this is where it should stop: an external accountability mechanism seemed not to occur to him (inspection panels are, after all, internal to the organization[54]), and to hold states individually accountable for the acts of organizations 'would endanger the functioning of the organization, as it may move states to abstain from supporting action which they could consider useful'.[55]

During the 1970s, his EU law expertise sensitized him to two developments that problematized the idyllic functionalist picture. First, while the EU treaties had envisaged a period of transition from the start, this formally came to an end by 1970, and the EU started to exercise some powers by exclusivity, thus effectively replacing its member states in governmental action. And if national authorities have the potential to violate human rights, so too do supranational authorities like the EU when performing tasks they have come to call their own. Importantly, moreover, the exclusive nature of the powers implied that the member states could no longer be blamed – they may have delegated tasks at some earlier point in time, but they have since lost control thereof; the problem resides with the execution, not the tasks, and execution had become the exclusive province of the EU. Second, the European Commission of Human Rights received several allegations concerning human rights violations by international organizations – in particular, the EU. Hence, somehow Schermers was forced to reconcile his human rights sensibilities with his functionalism, and this proved no easy task; in fact, on the level of principle, he was unable to do so.

Various options presented themselves, but none of them could be reconciled with functionalism. A first option, advocated by Schermers in the 1970s, was for human rights somehow to become incorporated into EU law, and he suggested that, to some

[53] Schermers, *supra* note 11, at 752. The sixth edition devotes altogether some 30 pages to issues of responsibility and accountability, broadly conceived. See Schermers and Blokker, *supra* note 12, 12–18, 457, 1049–1065, 1088–1089, 1241–1242, 1264–1265.

[54] See Klabbers, 'Self-control: International Organisations and the Quest for Accountability', in M. Evans and P. Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (2013) 75.

[55] Schermers, 'Final Remarks', in N.M. Blokker and H.G. Schermers (eds), *Proliferation of International Organizations* (2001) 549, at 561.

extent, the case law of the Court of Justice of the European Union (CJEU) had already developed in that direction.[56] Indeed, his faith in the CJEU was limitless: the fact that, by the early 1990s, the EU was not bound by the ECHR created a gap in legal protection of the individual, but the gap was mostly 'theoretical' and small at any rate, 'as the Community judiciary will annul any Community act which infringes general principles of law, which normally include human rights'.[57] This would do little to alleviate the general issue though: it would be akin to an organization setting its own rules, without ever broaching the principled question whether it could be held responsible for breaches of external standards.

A second option, endorsed by Schermers in the 1990s, was for the EU to accede to the ECHR.[58] This would not solve all of the problems (the human rights catalogue is broader than just the ECHR) and, more importantly perhaps from a theoretical perspective, would effectively suggest that the EU was no longer an international organization but something a lot closer to a state. Schermers would perhaps have been happy to draw that conclusion, but it would not have rescued functionalism – it would have retained the tension between functionalism and human rights.

A third possible option was to continue to blame the member states, and this too was resorted to whenever possible. This had become implausible whenever the EU was exercising exclusive powers but, in other domains, was still an option. Thus, the organization of elections to the European Parliament was viewed as a matter for the member states rather than the EU, with the result being that in *Matthews v. United Kingdom*, the British authorities rather than the EU were accused of depriving certain individuals of their right to vote.[59] More generally, as Schermers' student Moshe Hirsch would write, member states can be held responsible for organizational wrongdoings in two ways: either secondary responsibility (the claimant can proceed against the member states after an initial claim against the organization has failed) or indirect responsibility (the claimant can proceed against member states in order to force them to control their organization properly – for example, by making sufficient funds available for compensation).[60]

Either way then, it transpires that Schermers (and, with him, functionalism) had great difficulties in somehow bringing international organizations and accountability together. Either the transgressing organization turned out to be not a proper

[56] Schermers, 'The European Court of Justice: Promoter of European Integration', 22 *American Journal of Comparative Law* (1974) 444.

[57] Schermers, 'Comment on Weiler's *The Transformation of Europe*', 100 *Yale Law Journal* (1991) 2525, at 2531–2532. Schermers had great faith in courts in general. See Schermers, 'Judicial Protection of International Rights', 23 *German Yearbook of International Law* (1980) 181.

[58] Schermers, 'The European Communities Bound by Fundamental Human Rights', 27 *Common Market Law Review* (1990) 249; see also Schermers, 'Comment on Weiler', *supra* note 57, at 2532.

[59] The European Commission, comprising Schermers, would eventually find that no violation had taken place in *Matthews v. United Kingdom*, Appl. no. 24833/94, Judgment of 29 October 1997. The Court disagreed with this outcome, but not with the framing of the complaint as one involving a citizen *vis-à-vis* a member state of the European Union (EU) rather than the EU itself. See judgment of 18 February 1999.

[60] M. Hirsch, *The Responsibility of International Organizations toward Third Parties: Some Basic Principles* (1995).

organization but, rather, something closer to a state or the transgressing organization can deflect complaints towards its member states. Indeed, it is no accident that the most popular solution of the human rights dilemma of international organizations is the doctrine of 'equivalent protection', formulated authoritatively by the European Court of Human Rights during the 1990s and adopted by the literature as a sensible pragmatic solution.[61] Under this doctrine, organizations are supposed to take internal steps to guarantee human rights, on the presumption that those internal steps offer a level of protection equivalent to the protection that state parties to the ECHR are supposed to offer.

Schermers' thinking on matters of accountability and human rights was strongly influenced by his functionalist orientation. As noted, he was reluctant to think that states would stop doing things together out of fear of unintended legal consequences, but the connection exists on a deeper level as well. It is notable how much he expected from the EU's accession to the ECHR, and he explained this by pointing out that, if this were to happen, then the Community 'would be an independent party … with its obligations concerning matters other than the obligations of the Member States, namely Community acts, and with the Member States responsible for domestic acts'. EU accession, so he conceded, might create some institutional hassles (can the EU have its own Strasbourg judge, for example), but, as far as the treaty obligations were concerned, EU accession 'would cause no problems'.[62]

Underlying this is a conception of powers of international organizations as 'communicating barrels': the member state's loss is the organization's gain and *vice versa*.[63] The normative universe, in this picture, can neatly – and exhaustively – be divided: powers (and, thus, responsibility) rest either with member states or with the organization; there are neither overlaps here nor grey areas. And this, in turn, is characteristic for functionalism, which starts from the proposition that member states delegate functions to an organization and endow their organization with the powers necessary to give effect to that function. Logically, it would seem that this exhausts the possibilities: a power is either granted to the organization or retained by the member states. *Tertium non datur*.

Neat and elegant as this conception is, it may be questioned how realistic it is. It has been suggested, for example, that in exercising their proper domestic powers EU member states can nevertheless end up in conflict with EU law. The EU has, for example, nothing to say about abortion, but it does have something to say about the free movement of services. Consequently, offering abortion services across national boundaries may offend national authorities but possibly be protected by EU law and its fundamental freedoms.[64] And, from here, it is but a small step to appreciate that

[61] See, e.g., G. Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (2011).

[62] Schermers, 'International Organizations as Members of Other International Organizations', in R. Bernhardt *et al*. (eds), *Völkerrecht als rechtsordunung; Internationale Gerichtsbarkeit; Menschenrechte: Festschrift für Hermann Mosler* (1983) 823, at 835.

[63] The term may be a 'Dutch-ism': in Dutch, one would speak of '*communicerende vaten*'.

[64] The example derives from De Búrca, 'Fundamental Human Rights and the Reach of EC Law', 13 *Oxford Journal of Legal Studies* (1993) 283.

thinking solely in terms of legal competences may be a functionalist trait, but it might also create a distorted analysis.[65] Authority, even if based on an initial division of competences, tends to be more fluid than functionalism presumes – it tends to be more 'liquid'.[66]

5 Schermers' Influence

In the Dutch academic setting of the 1980s and 1990s, it was decidedly uncommon for leading law professors to groom doctoral students in their own specializations and create something of a school – usually, doctoral students could follow their own interests and see where their intuitions would take them. It might be sensible to find a supervisor knowledgeable of the field of study, but the idea of a joint project, run by a professor and carried out by several doctoral students, was unheard of. All the more remarkable it is, then, that Schermers supervised a handful of doctoral dissertations on international organizations law over the period of a decade, all of them (in varying degrees, to be sure) addressing central concepts in institutional law, and all of them (in varying degrees, to be sure) grappling with functionalism in one way or another. This did not add up to a coherent study group: the topics were a bit too far removed from each other. But, still, the works all ooze an interest in, and affection for, functionalism, and all can be said to take on themes that had occupied Schermers for some time. This is not to say that a 'Schermers School' was created, whether by design or by default; Schermers also supervised doctoral students working in human rights law, *pur sang*, or in EU law, *pur sang*, without particular reference to functionalism. But, still, a handful of his doctoral students worked on international organizations and did so in a recognizably functionalist vein.

The first of these, though perhaps the least occupied with central aspects of functionalist thought, was Niels Blokker's thesis,[67] co-supervised by Schermers and addressing questions of normative architecture. Blokker studied the position of the multi-fibre agreement within the international trading system, which was in those days still based on the General Agreement on Tariffs and Trade (GATT).[68] This was an important study on an important question: how can a regime ostensibly devoted to the liberalization of trade nonetheless accommodate a special position for a particular industrial sector and one where, in particular, the wealthier nations feel threatened by possible competition from poorer countries? In functionalist terms, if the function of the GATT is to stimulate free trade, then how can an instrument such as the multi-fibre agreement be justified? After all, it seems to take much away from the

[65] Klabbers, 'Restraints on the Treaty-making Powers of Member States Deriving from EU Law: Toward a Framework for Analysis', in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (2002) 151.

[66] Krisch, 'Liquid Authority in Global Governance', 9 *International Theory* (2017) 237.

[67] N. Blokker, *International Regulation of World Trade in Textiles: Lessons for Practice, a Contribution to Theory* (1989).

[68] General Agreement on Tariffs and Trade 1994, 55 UNTS 194.

formal function of the GATT. Perhaps surprisingly, given Blokker's subsequent career path, the main orientation of his study was towards international economic law, with Blokker influenced by the teachings of Pieter VerLoren van Themaat, a former European Commission civil servant turned law professor at Utrecht University and sometime advocate-general at the CJEU.[69] Still, the thrust of VerLoren van Themaat's thoughts and those of Schermers were highly compatible: VerLoren van Themaat saw international economic law mostly in functional terms, with large chunks of it taken care of by international organizations.[70]

The works by Peter Bekker and Sam Muller were more obviously functionalist in inspiration.[71] Bekker aimed to provide a legal justification for the powers and privileges and immunities of international organizations and found those precisely in the notion of function. With brilliant brevity, he observed that organizations 'shall be entitled to (no more than) what is strictly necessary for the exercise of its functions in the fulfilment of its purposes'.[72] Muller zoomed in on a particular class of relations of organizations – namely, those with their home states.[73] Ironically perhaps, the theoretical relevance of this class of agreements went somewhat unnoticed: if organizations can be said to have any inherent powers at all (that is, powers not deriving from their functions but simply from their existence and nature), it would be the power to conclude a headquarters agreement. This, however, remained largely unexplored, with Muller aiming to explain and discuss the substantive contents of headquarters agreements in terms of functions.

The final two doctoral dissertations in this group switched to concerns that are currently rather in vogue. Moshe Hirsch was one of the first, following the International Tin Council's collapse, to address the responsibility of international organizations and their member states under international law.[74] Noting, as others had done, how difficult it would be to hold organizations directly responsible, the work quickly shifts gears to discussing the responsibility of member states for acts or omissions attributable to the organization. If the member states refuse to make funds available or otherwise impede the organization from doing what it should do, it is they who incur responsibility, either indirectly or secondarily.[75]

[69] VerLoren van Themaat wrote the classic Dutch treatise on EU law, together with P.J.G. Kapteyn, a judge at the Dutch Council of State and the CJEU. P. VerLoren van Themaat, *Inleiding tot het recht van de Europese Gemeenschappen* (1970).

[70] See, in particular, P. VerLoren van Themaat, *The Changing Structure of International Economic Law* (1981), which is predominantly a study of the work of a number of international organizations.

[71] P. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (1994).

[72] *Ibid.*, at 5.

[73] A.S. Muller, *International Organizations and Their Host States: Aspects of a Legal Relationship* (1995).

[74] Hirsch, *supra* note 60. I reviewed this book in 8 *EJIL* (1997) 385, and, in retrospect, much as I liked it, I may not have fully appreciated its pioneering contribution at the time. The relevance of the Tin Council's collapse on the study of the responsibility of international organizations can hardly be underestimated. See J. Klabbers, *An Introduction to International Organizations Law* (3rd edn, 2015), at 312–315.

[75] A recent study takes this a step further and discusses the responsibility of member states for their role in organizational decision-making. See A.S. Barros, *Governance as Responsibility: Member States as Human Rights Protectors in International Financial Institutions* (2019).

Finally, Rick Lawson wrote a very substantial and subtle work (in Dutch, alas) on the relationship between the EU and the ECHR, highlighting what was to become the unsatisfied vanishing point of Schermers' functionalism.[76] Lawson, following a suggestion repeatedly made elsewhere by Schermers,[77] suggests that one practical way out (although not very gratifying on the level of principle) may be for the EU to accede to the ECHR. But the bolder suggestion was for Lawson to advocate that, if there were a situation involving an alleged human rights violation by an international organization, the human right just had to be prioritized. Where Schermers would still prioritize the organization – witness his expressed discomfort with any accountability discussion – Lawson unapologetically went the other way, viewing organizations as having been created by states, and those states, therefore, could be held accountable if things were to go wrong.[78]

The influence of Schermers as a doctoral supervisor has remained by and large limited, it seems, to Leiden. Blokker has remained throughout his professional life affiliated with that university. While he also served the Dutch Ministry for Foreign Affairs for a while, he retained a part-time chair in Leiden and, upon returning from the ministry, became a full-time academic. He occupies, fittingly, the Schermers chair, set up with funds dedicated by Schermers himself. Blokker is best known for his work on international organizations law; while, arguably, he was the least obviously functionalist of the five doctoral students, he is now the one most associated with Schermers' tradition.

Lawson is also still affiliated with Leiden University, having recently served as dean of the law school. Following his doctoral thesis, he has worked mostly on human rights law, including the connecting points with institutional law, but is most assuredly not limited to it. Bekker and Hirsch are both also academics, although Bekker only returned to academia after a lengthy spell in private practice. He is currently a law professor in Dundee, dealing mostly with energy and investment matters. Hirsch has become a law professor at the Hebrew University in Jerusalem and also has left institutional law by and large behind – currently, he is perhaps best known for his pioneering work in bringing law and sociology together. Finally, Muller has not completely severed his academic ties but has been more closely involved in international legal practice and diplomacy – for instance, through spells with the United Nations Relief and Works Agency for Palestine Refugees in the Near East, the Yugoslavia Tribunal and the International Criminal Court. He has founded and directs the Hague Institute for the Innovation of Law, a policy-oriented think tank annex funding agency based in The Hague and aiming to stimulate justice and the rule of law globally, and is chair of the Dutch branch of the World Wildlife Fund.

[76] R. Lawson, *Het EVRM en de Europese Gemeenschappen* (1999).

[77] For instance, in Schermers, *supra* note 62.

[78] He even suggested an addition to the International Law Commission (then draft) articles on state responsibility, to the effect that conduct of an organization shall be considered as an act of one or more of its member states if that conduct would breach obligations of those member states. See Lawson, *supra* note 76, at 529.

Surprisingly, then, none of the five has moved on to positions within international organizations or foreign ministries (with the temporary exceptions of Blokker and Muller). Schermers' influence therewith stems largely from elsewhere, even if it cannot be excluded that a huge number of his former master's students have gone on to the national or international civil service.[79] The most likely source of Schermers' influence then resides in his voluminous academic writings and, in particular, in the treatise, setting out a functional approach to international organizations while often (not unlike Molière's *bourgeois gentilhomme*) remaining unaware of the theoretical relevance of his work – something that curiously adds to its charm and persuasiveness.

6 To Conclude

Hein Schermers did not invent functionalism, but he did a great deal to consolidate it and helped to ensure that functionalism grew to be a true paradigm, even in the limited sense of that (oft-abused) term that Thomas Kuhn gave it.[80] He did so in a number of ways. First, rather obviously, he did so by 'tightening up' the theory and methodology of functionalism. Compare Schermers to earlier functionalist writers such as Reinsch and Sayre, and what immediately catches the eye is the systematic nature of his work: he could lay a legitimate claim to being considered the Linnaeus of international organizations law, presenting fine-grained taxonomies and detailed analyses. If he did not invent functionalism, he improved on it and consolidated both its normative and explanatory appeal. He did so in part by supervising a group of talented young scholars and, more generally, did a lot to nurture gifted students. One of the things for which he became known in the Netherlands was the founding of an association of students, at some point in the late 1980s, under the name Mordenate College – with Mordenate being a rendition of 'more than eight'. He invited students whose grades (on a scale of one to ten) tended to be eight or higher and brought these individuals together. Mordenate College still exists as a student association. [81]

And then there is the *magnum opus*. His treatise *International Institutional Law* has gone through six editions (four during his lifetime) and has been enormously influential. It has almost doubled in size over the almost half-century of its existence, and while the materials have regularly been updated, the tone was firmly set already with the first edition in 1972. International organizations were forces for good, despite being created by sovereign states, and their functioning should not be impeded. If ever a mantra for international organizations law was devised, this was it, and its author was Henry G. Schermers.

[79] In addition, several of his other former doctoral students, less obviously interested in the law of international organizations, have gone on to high levels in public service at the Dutch Ministry of Justice and Security.

[80] Kuhn's strict definition led him to suggest that in the social sciences no true paradigms had yet existed. See T.S. Kuhn, *The Structure of Scientific Revolutions* (2nd edn, 1970), at 15.

[81] See Mordenate College, available at www.mordenate.nl/.