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# Louis Sohn's Legacy

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## Abstract

*Louis Sohn was an émigré scholar who fled Poland for the USA in 1939, two weeks before the Nazis invaded. His most widely known work is World Peace through World Law, co-written with Grenville Clark, a vision for a reconstructed United Nations. Writing at a time when political realism was ascendant in the USA, Sohn was labeled an 'idealist'. Yet a strain of pragmatism also runs through his scholarship, leading many to praise him as one of the architects of modern international law. As a scholar-practitioner with a mission to help build the post-World War II international order, little overt legal theorizing appears in his work. But a close reading reveals ideas that drew implicitly on extant theory or were developed by later theorists without reference to Sohn's writing. To help frame the analysis, this article situates Sohn's writing in two strands of theoretical literature: pre-positivist, positivist and 'post-positivist' approaches to law-making by international organizations; and functionalist, constitutionalist and deliberative approaches to the powers of, and constraints on, those organizations. Sohn does not fall neatly into any of those categories; instead, fragments of his work can be found at many points along each spectrum. While the fragments do not add up to a coherent whole, the theoretical contributions of this 'pragmatic idealist' are greater than meets the eye.*

## 1 Introduction

On Louis Sohn's death in 2006, many US international law scholars offered glowing tributes. Harold Koh wrote that he was 'present at the creation of a new vision for international law' and led 'an intellectual revolution'.<sup>1</sup> Tom Buergenthal called him 'one of the world's most eminent international legal scholars who nurtured and gave academic legitimacy to newly emerging branches of international law'.<sup>2</sup> Daniel Magraw described him as the principal architect of the modern legal system.<sup>3</sup> José

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<sup>1</sup> Koh, 'Louis B. Sohn: Present at the Creation', 48 *Harvard International Law Journal (HILJ)* (2007) 14, at 14–15.

<sup>2</sup> Buergenthal, 'Louis B. Sohn (1914–2006)', 100 *American Journal of International Law (AJIL)* (2006) 623.

<sup>3</sup> Magraw, 'Louis B. Sohn: Architect of the Modern International Legal System', 48 *HILJ* (2007) 1.

Alvarez said Sohn was an early liberal internationalist whose goal was to perfect the collective security system that the USA and others had built.<sup>4</sup> According to Thomas Franck, Sohn admitted to being unduly optimistic but thought the best way to make incremental progress was by having a bold vision: '[I]t is the task of the scholar to imagine perfection and of others to find a way to get there'.<sup>5</sup> David Kennedy acknowledged his reputation for being 'a dreamer, an idealist, a utopian' but wrote that Sohn was always looking for practical answers, 'a practical way out'.<sup>6</sup> These and other tributes reflect not only the respect with which he was held by former students and mentees but also that his legacy is considerably more complicated than the label 'utopian idealist' would suggest. His aspirations were certainly idealistic, but he was also a pragmatist, seeking to build a new world order and the institutional architecture to underpin it one brick, 'one document, one textual precedent at a time'.<sup>7</sup>

His most well-known work is *World Peace through World Law*, written with Grenville Clark. The first edition, published in 1958, sold 6,800 copies and was widely read in policy, as well as academic, circles. A blueprint for reform of the United Nations (UN) through amendment of the UN Charter, it was revised slightly in 1960 based on reactions to the first version. A third edition, published in 1966, not only retained the proposals for a revision of the UN Charter but also suggested an alternative plan in the event that Charter amendment proved to be too difficult – the establishment of a World Disarmament and World Development Organization to work alongside the UN.<sup>8</sup> A vision for UN reform was not Sohn's only scholarly contribution. He has been called the 'grandfather of international human rights law in the United States'.<sup>9</sup> He wrote extensively on arms control and disarmament, the law on the use of force, dispute settlement, the law of the sea and environmental law. His writings encompassed regional organizations, the International Labor Organization and nascent forms of international criminal law. Much of his work was about empowering international organizations (IO) in a way that would make them more autonomous actors in international affairs.

What then were Sohn's contributions to international institutional law? It is a complicated legacy. He never offered – nor seemingly felt the need to offer – a general theory of either the powers of, or the constraints on, IOs, yet his work is replete with ideas that are rooted in existing theoretical perspectives or that foreshadowed future developments in IO theory. While a legal positivist at heart, his writings contain fragments of natural law thinking as well as a post-positivist understanding of how international law is made. Similarly, functionalist thinking permeates his writing about the power of IOs, but there are also kernels of constitutionalism and hints of deliberative theory in his work. Sohn's overriding belief in the power of IOs to do good meant

<sup>4</sup> Alvarez, 'A Tribute to Louis Sohn', 39 *George Washington International Law Review* (2007) 643, at 644.

<sup>5</sup> Franck, 'Tribute to Professor Louis B. Sohn', 48 *HILJ* (2007) 24.

<sup>6</sup> Kennedy, 'Louis B. Sohn: Recollections of a Co-Conspirator', 48 *HILJ* (2007) 25.

<sup>7</sup> *Ibid.*, at 28.

<sup>8</sup> G. Clark and L.B. Sohn, *World Peace through World Law: Two Alternative Plans* (3rd edn, 1966).

<sup>9</sup> Pasqualucci, 'Louis Sohn: Grandfather of International Human Rights Law in the United States', 20 *Human Rights Quarterly* (1998) 924, at 924.

that he did not much consider the need to hold those organizations in check. Yet his lack of attention to formal control and *ex post* accountability mechanisms is counter-balanced by his concern with *ex ante* transparency, participation and deliberation in global decision-making.

The absence of explicit theory is telling in two respects. On the one hand, it is a reflection of how Sohn saw himself as a scholar-practitioner and of what he viewed the role of scholar to be. On the other hand, the fragments of theory buried in his work tell us something about the value of theorizing in IO law. It helps us to understand the origins and evolution of IOs – in particular, the forces that drive (or hold back) the expansion of their mandates and autonomous powers. It also helps us understand the inner workings of IOs: who wields influence and how. Does it come down entirely to material resources, as political realists would have it, or do ideas matter, and, if so, how do those ideas become embedded? IO theory also illuminates a number of questions around institutional design that remain relevant to this date: how to empower IOs in a manner that respects state sovereignty? How to put those organizations in the service of not only the governments of the world but also ‘we the peoples’? How to reconcile the need for empowered IOs with democratic demands for accountability and legitimacy?

This article proceeds as follows. In the next part, I situate Sohn and his work in the context of the post-World War II and early Cold War environment in the USA. I consider the accuracy of the label ‘idealist’ that was often applied to him, in an environment where political realist theorists were ascendant, highlighting the strain of pragmatism that also ran through his scholarship. In the third part, I consider whether Sohn was a ‘pre-positivist’, positivist or ‘post-positivist’ in his contributions to the field of IO law. In the fourth part, I zero in on how his scholarship relates to functionalism, constitutionalism and two theories that emerged later: global administrative law and transnational deliberative democracy.<sup>10</sup> While a positivist and functionalist at heart, Sohn’s imagination and desire to experiment took him beyond those categories to ideas that gained traction in IO scholarship many years later.

## 2 Sohn, the Scholar-Practitioner

Louis Sohn’s start in life was not easy. He was born in 1914 in the town of Lwow, Poland, which is now Lviv, Ukraine. By the age of 10, he had lived through World War I, the Poland-Lithuania war and the Poland-Soviet war. He saw Poland’s nascent democracy snuffed out by a coup in 1926. He lived under an authoritarian regime until the age of 25 when, as a Jew, he fled Poland two weeks before the Nazis invaded. His

<sup>10</sup> Klabbers, ‘Contending Approaches to International Organizations: Between Functionalism and Constitutionalism’, in J. Klabbers and Å. Wallendahl (eds), *Research Handbook on the Law of International Organizations* (2011) 3; Klabbers, ‘The EJIL Foreword: The Transformation of International Organizations Law’, 26 *European Journal of International Law (EJIL)* (2015) 9; Klabbers, ‘The Emergence of Functionalism in International Institutional Law: Colonial Inspirations’, 25 *EJIL* (2014) 645; Klabbers, ‘Two Concepts of International Organization’, 2 *International Organizations Law Review (IOLR)* (2005) 277.

father barely survived World War II in an internment camp; his mother died of pneumonia in the first winter.<sup>11</sup>

Sohn arrived in Cambridge, Massachusetts, in 1939 to discover that the Harvard faculty member who had invited him to work as a research fellow had retired.<sup>12</sup> With no financial support, he took on a series of menial jobs. His savings, plus a loan from Harvard, enabled him to enroll in the Master's of Law program, obtaining his degree in 1940. Manley Hudson, former US judge on the Permanent Court of International Justice (PCIJ), then hired him as a research assistant. Together, they attended the San Francisco conference and participated actively in drafting the Statute of the International Court of Justice (ICJ Statute).<sup>13</sup> According to Tom Buergenthal, Sohn became a resource person not only for the PCIJ delegation but also for the US delegation and, as such, had a hand in drafting the UN Charter.<sup>14</sup> He remained on the Harvard faculty until 1981, earning a doctorate in 1961. From 1961 to 1981, he was the Bemis Professor of International Law. In 1981, he retired from Harvard and took up a position as Woodruff Professor of International Law at the University of Georgia Law School. In 1991, he moved to the George Washington University School of Law.

In addition to his work in San Francisco, Sohn held various policy positions throughout his academic career, serving the profession, the USA and the world. He was the president of the American Society of International Law and chair of the International Law Section of the American Bar Association. He was a member of numerous international commissions and conferences. He was counsellor to the legal adviser of the US State Department from 1970 to 1971, with a mandate to connect academics to the policy world. He worked for the Stockholm Conference on the Human Environment in 1972, a gathering that firmly placed the environment on the global agenda. From 1974 to 1982, he was the 'guru' to the UN Conference on the Law of the Sea, where he advised not only the US delegation but also (informally) many former students who were representing their own governments.<sup>15</sup> Elliot Richardson, head of the US delegation, described his contribution to the Law of the Sea conference:

Idealistic, tenacious, driven by the vision of a more perfect world order, he was at the same time a practical, astute and effective advocate of US interests. No one on any delegation, it is fair to say, so successfully combined the role of national representative and servant of the Conference.<sup>16</sup>

This quote captures Sohn's temperament as a scholar and practitioner. An émigré to the USA committed to serving his new country, he saw himself as a truly 'international' lawyer with a mission to build a peaceful global order. He was a visionary, but one who

<sup>11</sup> D. Hevesi, 'Louis B. Sohn, Passionate Supporter of the U.N., Dies at 92', *New York Times* (23 June 2006), available at [www.nytimes.com/2006/06/23/us/23sohn.html](http://www.nytimes.com/2006/06/23/us/23sohn.html).

<sup>12</sup> Buergenthal, *supra* note 2, at 624.

<sup>13</sup> Statute of the International Court of Justice 1945, 33 UNTS 993.

<sup>14</sup> Buergenthal, *supra* note 2, at 624.

<sup>15</sup> K. Teltsch, 'Harvard Professor, the "Guru" of Sea Law Talks', *New York Times* (16 July 1977), at 4.

<sup>16</sup> Richardson, 'Dispute Settlement under the Convention on the Law of the Sea: A Flexible and Comprehensive Extension of the Rule of Law to Ocean Space', in T. Buergenthal (ed.), *Contemporary Issues in International Law: Essays in Honor of Louis Sohn* (1984) 149, at 149.

paid careful attention to detail. This was true of his teaching style,<sup>17</sup> his research<sup>18</sup> and his professional engagement. Sohn's ideas about 'world peace through world law' were not dreamed up in an ivory tower; they were forged through first-hand experience of the ravages of war and the harm that states could inflict on their own people. Being a dispassionate observer and analyst of international affairs was not enough for Sohn; he wanted to participate in those affairs to make the world a better place.

This temperament put Sohn on the margins of US scholarship.<sup>19</sup> He began writing at a time when political realism was ascendant. International law was dismissed as largely irrelevant, and the UN was hamstrung by the Cold War. The Bretton Woods institutions were seen as technical bodies, not the powerful entities they later became in the days of structural adjustment and good governance. Notions of 'world peace through world law' were branded as utopian and discredited by the demise of the League of Nations and the outbreak of World War II. This differed from the European context, where the European Community was growing in influence and the impact of European Union (EU) law was acutely felt. It was also different from the global South, where the UN was a driving force for decolonization. Scholars in other parts of the world were trying to understand the power and purpose of IOs. Clark and Sohn were fighting an uphill battle to advocate for them.

As a scholar-practitioner, Sohn's ambitions were threefold: (i) to imagine and construct the institutional architecture needed to bring about world peace through world law; (ii) to chronicle developments that signalled movement in that direction; and (iii) to stimulate study and action that would further advance his project. He was neither a legal theorist nor an international relations theorist. Nor was he an empirical scholar seeking to test hypotheses through evidence-based research. There is little discussion in his work of the causes of conflict, the dynamics of deterrence, the struggles that permeated domestic and global politics or the incentives and disincentives that states have to cooperate. He had a faith in human nature and a belief that the impetus for global cooperation and peace would win out over darker forces that would lead to war. In 1956, he wrote: '[T]he peoples of the world seem to be far ahead of the statesmen in accepting the idea that the United Nations needs to be strengthened in order to do in a better way the job for which it was created.'<sup>20</sup> To criticize *World Peace through World Law* as being founded on untested and contestable assumptions would be accurate, but it misses the point. Sohn's strategy was to articulate a detailed vision for how to

<sup>17</sup> Anthony D'Amato said 'taking a seminar under Professor Louis Sohn was for me an unprecedented combination of grandiose theme combined with acute attention to the minutest detail. We studied nothing less than world order on the global scale, ...[while] imparting to us a much more valuable philosophy: If you want to solve the problems of the world and be a lawyer at the same time, you have to pay excruciating attention to detail'. D'Amato, 'The *Frolova Case*', in T. Buergenthal (ed.), *Contemporary Issues in International Law* (1984) 89, at 89.

<sup>18</sup> Sohn is famous for the mountain of United Nations (UN) documents he accumulated over 30 years, left to the University of Georgia Law School.

<sup>19</sup> Sohn is quoted as saying that Harvard asked him to teach a course on the UN 'because nobody else would teach anything so crazy'. Hevesi, *supra* note 11.

<sup>20</sup> Sohn, 'United Nations Charter Revision and the Rule of Law: A Program for Peace', 50 *Northwestern University Law Review* (1955–1956) 709, at 710.

reform the UN and to chronicle progress that was being made to realize that vision, contributing directly in any ways that he could.

To the extent that Sohn was an ‘idealist’, it is the sort characterized by Hedley Bull as stemming from a belief in progress:

[T]he belief, in particular, that the system of international relations that had given rise to the First World War was capable of being transformed into a fundamentally more peaceful and just world order; that under the impact of the awakening of democracy, the growth of ‘the international mind’, the development of the League of Nations, the good works of men of peace or the enlightenment spread by their own teaching, it was in fact being transformed; and that their responsibility as students of international relations was to assist this march of progress to overcome the ignorance, the prejudices, the ill-will, and the sinister interests that stood in its way.<sup>21</sup>

This brand of idealism traces its roots to Immanuel Kant’s democratic peace thesis, which came to be seen as ‘an approach to international politics that seeks to advance certain ideals or moral goals, for example, making the world a more peaceful or just place’.<sup>22</sup> Idealists like Sohn saw the global order not as immutable but, rather, as a human creation, the product of particular historical circumstances that can be made and remade by states under imaginative leadership.

Sohn imagined the possibility of a different world order and dedicated his life to bringing it into existence ‘one brick at a time’. On the invention of nuclear weapons, he wrote: ‘For the first time in its history, mankind is confronted by a threat of total annihilation. It is characteristic of the human mind that it does not bow to the inevitable but is willing to gamble on the possibility of finding a solution in time to prevent the catastrophe’.<sup>23</sup> This belief translated into the edifice of *World Peace through World Law* – what Sohn called ‘the minimum requirement for peace, not a utopian scheme for a perfect world community’.<sup>24</sup> Its core elements are:

- the elimination of all national armed forces within 12 years;
- a UN peace force of 200,000–600,000;
- an international judicial system composed of the International Court of Justice (ICJ), a World Equity Tribunal (for disputes of a non-legal nature) and regional courts that can prosecute individuals for war crimes;
- supranational powers for the UN General Assembly (UNGA) and a new Executive Council;
- new weighted voting arrangements that do away with the veto power;
- a bill of rights to protect individuals from abuses by the UN; and
- a budget of 2 per cent of global gross domestic product.

As Sohn’s writing evolved, he turned his attention from broad ethical visions to the practical issues of the day. This was not an abandonment of world peace through world law but,

<sup>21</sup> Bull, ‘The Theory of International Politics, 1919–1969’, in B. Potter (ed.), *The Aberystwyth Papers: International Politics, 1919–1969* (1972) 30, at 34.

<sup>22</sup> P. Wilson, ‘Idealism’, *Oxford Bibliographies* (26 August 2014), available at [www.oxfordbibliographies.com/view/document/obo-9780199743292/obo-9780199743292-0089.xml](http://www.oxfordbibliographies.com/view/document/obo-9780199743292/obo-9780199743292-0089.xml).

<sup>23</sup> Sohn, *supra* note 20, at 710.

<sup>24</sup> Hevisi, *supra* note 11.

rather, a more realistic sense of what it would take to get there. One manifestation is the 'alternative plan' that he and Clark proposed, should amendment of the UN Charter prove too difficult, although their treaty to create a World Disarmament and World Development Organization was almost as idealistic. Towards the end of his life, Sohn wrote an article on improvements that could be made to the UN without Charter revision, touching on everything from semi-permanent seats on the Security Council to better linkages between the UNGA and national parliaments.<sup>25</sup> Meanwhile, he delved into the mechanics of international dispute settlement (judicial, arbitral and in other ways); he wrote extensively on the law of the sea and emerging environmental concerns; he examined techniques of arms control verification and human rights monitoring; and he pulled together a collection of documents on African regional organizations. In this work, there was little abstract theorizing about world order and more of a desire to experiment, trying to understand and propose ways to fix the things that could be fixed. Perhaps influenced by functionalist and neo-functionalist international relations theory, Sohn envisaged an incremental process by which the UN would acquire greater supranational powers.<sup>26</sup>

Three reasons can be posited for the lack of overt theorizing in Sohn. First, as a US-based scholar of the UN, he did not see the need to provide either an explanatory or a normative theory for his major project: the empowerment of IOs. No explanatory theory was needed because, as a comparatively weak organization with the US holding the veto power, there was nothing much to explain about the UN. No normative theory was needed because, for Sohn, the value of international cooperation through IOs was self-evident. Second, as a scholar-practitioner, he wanted to imagine and construct a world order, not theorize about it. Third, while on the margins of US scholarship, he saw himself as a truly 'international' lawyer and, therefore, felt no particular need to engage with the political realists that surrounded him. Yet fragments of theory are implicit in his writing. It is to those that I now turn.

### 3 Louis Sohn and Positivism in the Law of IOs

Legal positivism, in its idealized form, has several elements.<sup>27</sup> Law is distinct from morality. International law is firmly grounded in state sovereignty and consent. Its only sources are those articulated in Article 38 of the ICJ Statute. The relationship between law and politics is binary: there is no non-law, to soft, to hard law spectrum; an instrument is either law or not. The act of judging is a mechanical exercise of identifying

<sup>25</sup> Sohn, 'Important Improvements in the Functioning of the Principal Organs of the United Nations That Can Be Made without Charter Revision', 91 *AJIL* (1997) 652.

<sup>26</sup> D. Mitrany, *A Working Peace System* (1943). While Mitrany purported to be offering an explanatory theory, it turned out to be aspirational. I. Claude, Jr., *Swords into Plowshares: The Problems and Progress of International Organization* (4th edn, 1988), at 378–391. The leading neo-functionalist at the time was Haas, 'International Integration: The European and the Universal Process', 15 *International Organization* (1961) 366; see also Schmitter, 'Ernst B. Haas and the Legacy of Neo-Functionalism', 12 *Journal of European Public Policy* (2005) 255; Niemann and Schmitter, 'Neofunctionalism', in A. Wiener and T.A. Borzel (eds), *European Integration Theory* (2009) 45.

<sup>27</sup> This description of positivism draws on José Alvarez' idealized version of it in his book, J.E. Alvarez, *The Impact of International Organizations on International Law* (2016), which he goes on to critique.

rules and applying them to facts; judicial law-making is inappropriate. Customary law is not easily made because it requires near universal practice and a clear sense of obligation. IOs have only those powers that are expressly conferred by their constituent instruments. At heart, Louis Sohn was a positivist. His major project – the UN Charter and its revision – was premised on creating hard law grounded on state consent. But a careful reading of his legal writing also reveals elements that are pre-positivist, drawing on natural law, and elements that are post-positivist, both in how law is made and how state sovereignty is not absolute. In the following subparts, I identify these elements as well as those that reflect the positivist core.

### A Sohn, the Pre-positivist

Some of Sohn's writing on human rights is pre-positivist in that it draws on natural law thinking. He claims that some human rights are 'inherent' and 'inalienable'.<sup>28</sup> He states that the International Covenant on Civil and Political Rights does not create new rights but simply recognizes them.<sup>29</sup> It is hard to see how that could be true if the rights were not derived from natural law because, when the Universal Declaration of Human Rights (UDHR) was adopted, it would have been far-fetched to suggest that its entire content was customary law.<sup>30</sup> Moreover, he has few qualms about declaring the existence of so-called third generation rights – self-determination, development, peace and a clean environment – none of which have obvious moorings in positive law today let alone when he was writing.<sup>31</sup>

Many of the assumptions that underlie *World Peace through World Law* are also pre-positivist. The foundational values of peace and human dignity are taken for granted, with no thought given to the possibility that these values may be understood differently by different observers. There is no discussion in the book of the causes of war – whether power, territory, resources, religion or identity. The proposed World Equity Tribunal would deal with non-legal disputes that have proven too intractable to solve through negotiation or diplomacy, by holding a 'full inquiry and fair hearing of all sides, [and] recommending a comprehensive solution on the basis of what is "reasonable, just and fair"'.<sup>32</sup> These recommendations would become binding and enforceable if approved by a qualified majority in the UNGA. Clark and Sohn use the Israeli-Arab dispute by way of an example. Imagining that states would be bound by what an equity court and a majority of the UNGA deem to be a 'reasonable, just and fair' outcome to that conflict is a long way from the positivist tenet that states are bound only by the obligations that they consent to formally.

<sup>28</sup> Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States', 32 *American University Law Review (AULR)* (1982–1983) 1, at 17–19.

<sup>29</sup> International Covenant on Civil and Political Rights 1966, 999 UNTS 171.

<sup>30</sup> Universal Declaration of Human Rights, GA Res. 217A (III), 10 December 1948.

<sup>31</sup> Sohn, *supra* note 28, at 48–56.

<sup>32</sup> Clark and Sohn, *supra* note 8, at 104; see also Annex III(B), at 399.



## B Sohn, the Positivist

Yet, as noted above, Sohn at heart was a positivist. He campaigned to convert the UDHR into a binding international treaty because he doubted that a 'soft law' instrument would be complied with. He dedicated years of his life to negotiating the Convention on the Law of the Sea with an authoritative dispute settlement body. There is a good deal of language in *World Peace through World Law* that reinforces the principle of state sovereignty.<sup>33</sup> Revised Article 2(1) of the UN Charter reads:

All nations shall be equally entitled to the protection guaranteed by this revised Charter, irrespective of size, population or any other factor; and there are reserved to all nations or their peoples all powers inherent in their sovereignty, except such as are delegated to the UN by this revised Charter or clear implication.<sup>34</sup>

In other words, the only justifiable impingements on the fundamental principle of sovereignty are powers that states voluntarily delegate to the UN.<sup>35</sup> This positivist perspective is reinforced by the retention of a modified Article 2(7) prohibiting the UN from intervening in matters that are essentially domestic. It is also reflected in Clark and Sohn's view that the international law on the use of force must be enforceable. As Sohn wrote in 1956, '[t]he rule of law will not replace the rule of force in international affairs as long as the forces at the disposal of the law are smaller than the forces of the potential violators'.<sup>36</sup> This realist conception that compliance requires coercive enforcement harkens back to John Austin's brand of positivism. And when it comes to coercive enforcement, Clark and Sohn do not pull any punches. The UN Peace Force must not only be well equipped with conventional arms but also prepared to use nuclear weapons in extreme circumstances.<sup>37</sup>

The proposed voting arrangements for the revised Charter also evince a positivist mindset. For example, the veto power is eliminated. The principle of delegation does not adequately justify the dramatic encroachment on the principle of consent embodied in the veto power of the five permanent members – hence, Clark and Sohn's desire to scale it back. The effect is to reinforce the core positivist principle of sovereign equality. Of course, the continuing ability to make binding decisions by majority vote deviates from that principle, but eliminating the veto mitigates the problem of 'hegemonic law' whereby five countries have disproportionate power to make law for every other state in the world.<sup>38</sup>

Moreover, while their proposed majority voting arrangements create new supra-national powers for the UN (discussed below), those arrangements do not represent a complete shift from one state-one vote to one person-one vote. Voting is to be weighted by population but not in direct proportion to size: small states would continue to have

<sup>33</sup> José Alvarez highlights the seven underlying principles in the introduction to *World Peace through World Law*. See Alvarez, *supra* note 4, at 644.

<sup>34</sup> (Emphasis added). This language is repeated in Art. 1 of the new Annex on a Bill of Rights for states and individuals that feel encroachment by the UN. Clark and Sohn, *supra* note 8, Annex VII.

<sup>35</sup> Clark and Sohn, *supra* note 8, at 9.

<sup>36</sup> Sohn, *supra* note 20, at 6.

<sup>37</sup> Clark and Sohn, *supra* note 8, at xxxii.

<sup>38</sup> Vagts, 'Hegemonic International Law', 95 *AJIL* (2001) 843.

greater voting power than their relative population would entitle them to. Thus, China would have 30 votes in the new UNGA, and Iceland would have one, even though China's population was 4,000 times that of Iceland in 1965.<sup>39</sup> Also, their proposal for amending the UN Charter requires a double super-majority: ratification would require the assent of five/sixths of the UN member states with at least five/sixths of the world's population, including all 12 of the most populated nations. Subsequent amendments (revised Article 108 of the UN Charter) would require four/fifths of all UN members plus three/quarters of the 12 largest states.<sup>40</sup> In other words, the Charter could not be amended unless almost every state agreed – a positivist position.

### C Sohn, the Post-positivist

Yet Sohn's legal thought cannot be understood simply as positivism with a dash of natural law. One must be careful not to overstate the case, but, in some ways, he was 'post-positivist'. I use the term post-positivist to connote a stance towards international law that does not abandon core positivist principles but substantially relaxes them. Thus, a post-positivist is less tied to sovereign consent as an ordering principle, takes a more expansive view of the sources and interpretation of law than a traditional positivist and is more receptive to a capacious understanding of an organization's powers beyond the express terms of its charter. This comes out most strongly in two areas: how international law is made and how the supranational powers of the UN should be enhanced.

Sohn's experience in multilateral conferences shaped his view that customary law could emerge from the negotiations as well as from the treaties. On the Conference on the Law of the Sea, he wrote:

[O]nce a consensus is reached at an international conference, a rule of customary international law can emerge without having to wait for the signature of the convention. Once a convention is signed by a vast majority of the international community, its stature as customary international law is thereby strengthened, as such signatures are clear evidence of an *opinio juris* that the convention contains generally acceptable principles. International law does not impose any formal restrictions on the means by which States may express their common will. If in the last decades of the twentieth century they should decide that consensus at a conference plus a signature by a vast majority of the participants creates a general norm of international law, this new method of creating new principles and rules of international law would thereby become a legitimate method of law creation.<sup>41</sup>

While the positivist requirement of state consent to new law is not abandoned, this manner of making new law substantially relaxes it – both for states that do not sign the treaty and for those that sign but do not ratify it. In a 1978 article on 'shaping international law', he lists new methods of law-making that had been invented, such as UNGA resolutions and declarations. He states categorically that 'there is wide

<sup>39</sup> Clark and Sohn, *supra* note 8, at 27.

<sup>40</sup> *Ibid.*, at 195–205.

<sup>41</sup> Sohn, 'The Law of the Sea: Customary International Law Development', 34 *AULR* (1985) 271, at 278–279.

consensus that these declarations actually established new rules of international law', concluding that the UN has made possible the creation of 'instant international law'.<sup>42</sup> Those bold statements would be contested today, let alone when he made them 30 to 40 years ago.<sup>43</sup>

His views on human rights law-making are especially far-reaching. In 1973, he and Tom Buergenthal described human rights law-making this way:

This process tends to be cumbersome and its output diffuse, for it draws not only on judicial decisions, international and domestic, but also on diplomatic correspondence, governmental pronouncements, international negotiations, debates in national and international assemblies, and on declarations and conventions. Apart from their individual legal significance, each of these acts is a complementary element of a single law-making or institution-building process which derives its authoritative character from the legal consequences that attach to the cumulative effect or interaction of these acts.<sup>44</sup>

In 1995, Sohn went further by claiming that 'states really never make international law on the subject of human rights. It is made by the people that care; the professors, the writers of textbooks and casebooks, and the authors of articles in leading international law journals'.<sup>45</sup> As John Noyes wrote after Sohn's death, 'though a positivist immersed in the human history and process of developing the law ... Louis's positions did not conform to the traditional positivist picture of how international law is made'.<sup>46</sup> He felt IOs, judges and eminent jurists should and did play a major role in developing international law.

Sohn was also post-positivist in his views on what the UN was and on what it could be. He had no qualms about calling the UN Charter the constitution of the international community.<sup>47</sup> He later added that the UDHR joined the Charter as part of the 'constitutional structure of the world'.<sup>48</sup> A traditional positivist sees the UN Charter as an ordinary treaty. More modern positivists see it as a treaty with 'constitution-like' features.<sup>49</sup> Only a post-positivist would call it a constitution for the world. The

<sup>42</sup> Sohn, 'The Shaping of International Law', 8 *Georgia Journal of International and Comparative Law (GJICL)* (1978) 1, at 13. In a later article on the sources of international law, he writes: '[S]tates can agree on international law being made in any way they wish.' Sohn, 'Sources of International Law', 25 *GJICL* (1995–1996) 399, at 399.

<sup>43</sup> See Stephen Schwebel's critique of 'instant custom'. Schwebel, 'The Effect of Resolutions of the United Nations General Assembly on Customary International Law', 73 *American Society of International Law Proceedings* (1979) 301, at 308.

<sup>44</sup> L.B. Sohn and T. Buergenthal, *International Protection of Human Rights* (1973), at preface, v–vi.

<sup>45</sup> Sohn, 'Sources of International Law', *supra* note 42, at 399.

<sup>46</sup> John Noyes, 'Louis Sohn and the Law of the Sea', 16 *Williamette Journal of International Law and Dispute Resolution* (2008) 238, at 247.

<sup>47</sup> Sohn, 'Shaping of International Law', *supra* note 42 at 13; Sohn, *supra* note 20, at 713; L.B. Sohn, *Cases on United Nations Law* (1956), at preface, xi.

<sup>48</sup> Sohn, *supra* note 28, at 17.

<sup>49</sup> S. Chesterman, I. Johnstone and D.M. Malone, *Law and Practice of the United Nations: Documents and Commentary* (2nd edn, 2016). An alternative view is to see it as analogous to a 'relational contract'. See Johnstone, 'The UN Charter and Its Evolution', in S. Chesterman, D.M. Malone and S. Villalpando (eds), *The Oxford Handbook of United Nations Treaties* (2019) 23.

implications are significant. First, it suggests that the UN Charter should be construed broadly, as a ‘living tree’, able to adapt to unforeseen circumstances and global changes. This includes interpretation of the UN’s own powers to do whatever is necessary to fulfil the broad purposes set out in Article 1. Second, calling the UN Charter a constitution for the world suggests that the principles listed in Article 2 and elsewhere (such as Article 55 on human rights) are constitutive norms of the international system. They provide a rudimentary normative framework not only for how the UN functions but also for managing international relations generally.<sup>50</sup>

Moreover, for the UN to be truly effective, Sohn believed it should be granted new supranational powers. In his reformed organization, the UNGA would have the power to enact ‘binding legislation’ by qualified majority vote (Articles 10 and 11). This idea, plus the ultimate goal of allowing citizens to directly elect their representatives, would move the UN further away from being an inter-governmental organization to one that serves the ‘peoples’ of the world. Other new supranational powers include the authority to dispatch the UN Peace Force to enforce the law (Article 11, Articles 39–50 and Annex I, Chapter VII). The ICJ would have compulsory jurisdiction and the power to decide disputes involving the constitutionality of laws enacted thereunder – in other words, the power of judicial review.<sup>51</sup> A new Article 103(2) would make the UN Charter ‘supreme law’ that supersedes not only obligations under any other international agreement (Article 103(1)) but also national constitutions.

The new UN would also have direct powers over individuals. The UNGA could enact what is in effect a criminal code, prohibiting individuals from engaging in ‘violations of the Charter or any law or regulation enacted thereunder’.<sup>52</sup> A UN Attorney-General (backed by civilian police forces) and new regional courts would be established to prosecute and try the individuals, subject to appeal to the ICJ (Article 93 and Annex III). This is highly ambitious – more far-reaching than the International Criminal Court because it covers not only mass atrocity crimes but also all violations of the Charter and UN-generated law. In one fell swoop, individuals would become the subjects of a wide swath of international law.

## 4 Louis Sohn and Functionalism in the Law of IOs

Jan Klabbers has usefully sketched out two contending schools of IO law: functionalism and constitutionalism.<sup>53</sup> The former sees IOs as the creation of states, designed to perform tasks delegated to them by those states. It is closely tied to legal positivism, and it is consistent with Westphalian conceptions of state sovereignty. Klabbers

<sup>50</sup> Chesterman, Johnstone and Malone, *supra* note 49, at xxxiii.

<sup>51</sup> Art. 96(3). Art. 11(4) reads: ‘[A]ny member nation shall have the right to contest the validity of any such law, regulation or decision by appeal to the International Court of Justice.’ Art. 25 includes similar language with respect to the decisions of the Executive Council. Clark and Sohn, *supra* note 8.

<sup>52</sup> Clark and Sohn, *supra* note 8, at 341.

<sup>53</sup> See Klabbers, ‘EJIL Foreword’, *supra* note 10; Klabbers, ‘Emergence of Functionalism’, *supra* note 10; Klabbers, ‘Contending Approaches’, *supra* note 10.

argues that functionalism has been the dominant paradigm in thinking about IO law at least since the founding of the League of Nations and perhaps earlier. He questions whether it has ever provided a full explanation of why IOs exist and how they operate.<sup>54</sup> His most pointed critique is the foundational assumption that IOs are relatively benign entities that can do no wrong and therefore are not in need of much control.<sup>55</sup> If anything, according to functionalist theory, IOs should be liberated from constraints that would stand in the way of doing good. This explains the rather broad privileges and immunities that typically appear in the constitutive documents of IOs and related treaties.<sup>56</sup> It is increasingly obvious that IOs can do 'nasty things', from violating due process rights in targeted sanctions regimes to sexual exploitation and abuse by peacekeepers, yet accountability mechanisms are weak.<sup>57</sup> More generally, Klabbers notes that functionalism's focus on the relationship between the organization and its member states does little to explain the organization's relationships with its own employees or third parties.<sup>58</sup>

The contending school of thought, constitutionalism, has more to say about controlling IOs. A common feature of constitutions is to allocate powers and responsibilities among different branches of government. Many also incorporate a bill of rights. Together, these two dimensions establish checks and balances. While constitutionalism has emerged as a contender to functionalism in IO law, it is still weak. The EU may be a true constitutional order, but, in global IOs, checks and balances are few and far between. And the chain of accountability between citizens and international institutions is long, meaning that democratic control over acts of IOs tends to be highly attenuated.

Before considering where Sohn falls on the spectrum between the contending schools, it is worth emphasizing that 'control' mechanisms should be thought of in three ways: (i) the control that member states have over the organization so it does not overstep or impinge on sovereign prerogatives (which can be understood in principal-agent or trustee terms); (ii) the control that different parts of the organization have over each other (which can be understood in checks and balances terms); and (iii) the control that individuals have over the organization, either through participation in decision-making or protection against abuse (which can be understood in human rights terms).

<sup>54</sup> Klabbers, 'Contending Approaches', *supra* note 10, at 3; see also Johnstone, 'Law-Making by International Organizations: Perspectives from International Law/International Relations Theory', in J. Dunoff and M. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2012) 266. The European Union (EU) in all of its complexity is not easily explained in terms of the delegation of powers from principals (the member states) to agents (the EU institutions). Conversely, nor is the World Trade Organization, where there is little delegation other than for dispute settlement.

<sup>55</sup> Klabbers, 'Emergence of Functionalism', *supra* note 10, at 666.

<sup>56</sup> Convention on the Privileges and Immunities of the United Nations 1946, 1 UNTS 15.

<sup>57</sup> Klabbers, 'Contending Approaches', *supra* note 10, at 3. The International Law Commission's Articles on the Responsibility of International Organizations seek to address this lacunae, but they have been strongly contested – including by IO lawyers. International Law Commission, Articles on the Responsibility of International Organizations, with Commentaries, Doc. A/66/10 (2011).

<sup>58</sup> Klabbers, 'EJIL Foreword', *supra* note 10, at 9.

## A *Sohn and Functionalism*

A good deal of Sohn's writing reflects functionalist thinking. He believed that IOs were and should be created to perform delegated functions.<sup>59</sup> Because Sohn's intellectual mission was to imagine how IOs could bring about peace, he was not preoccupied by the harm they could inflict. He was more worried about the harm that states could inflict on each other and on their people, having lived under authoritarianism and witnessed Nazism on the march. Moreover, his focus was on the UN at a time when the concern was less about an overactive UN stomping on the rights of states and individuals and more about an underactive Security Council, paralysed by the superpower rivalry. It was not until the end of the Cold War that the Security Council began addressing non-traditional threats to the peace, such as fragile states (Somalia), mass atrocities (Bosnia and Libya) and terrorism (Afghanistan post 9/11), and when it began authorizing intrusive weapons inspection regimes (Iraq), creating criminal tribunals (former Yugoslavia and Rwanda) and trustee-like transitional administrations (Kosovo and East Timor) and adopting quasi-legislative resolutions (to suppress the financing of, and support for, terrorism). In Sohn's day, these measures were unimaginable.

That being said, two important elements of *World Peace through World Law* evince functionalist principles. The first is the precision with which Clark and Sohn set out the new powers of the UN. The legislative powers of the UNGA (Article 11(2)) are indicative, as are the detailed provisions on the authority of the UN Peace Force and other new organs (Annexes I, II and IV). Moreover, Clark and Sohn are adamant about the powers the UN would not have. They insist that the legislative authority of the UNGA would be strictly limited to matters directly related to the maintenance of peace: it would not cover trade, immigration, commerce, travel, currency or any matter that fell within domestic affairs.<sup>60</sup> Elsewhere, *World Peace through World Law* articulates a relatively expansive version of the implied powers doctrine, granting the UN such powers 'as are delegated ... by this revised Charter, either by *express language or clear implication*'.<sup>61</sup> But in the General Comment on Annex VII, Clark and Sohn provide assurances that the UN 'would still be an organization of strictly limited powers in no way comparable, for example, to a federation of very wide powers such as the United States of America'.<sup>62</sup> This careful attention to the scope and limits of powers of the UN organs is evidence of functionalist thinking. Second, they come out as strong functionalists in their proposals on privileges and immunities. The immunities are essentially the same as those in the Convention on UN Privileges and Immunities, with the right and duty of the Secretary-General to waive them on essentially the same terms (Annex VI, C.6).<sup>63</sup> There are some general provisions on the responsibility of the UN

<sup>59</sup> Harold Koh describes Sohn's vision of 'international institutions governed by multilateral treaties aspiring to organize proactive assaults on a vast array of problems'. Koh, *supra* note 1, at 15.

<sup>60</sup> Clark and Sohn, *supra* note 8, at xxii, 366.

<sup>61</sup> Grenville Clark and Louis Sohn, *World Peace Through World Law* (1st edn, 1958), at 81 (emphasis added). See Art. 2(1) of the revised UN Charter, Art. 1 of the new Bill of Rights (Annex VII), and Art. 2 of the Treaty Establishing World Development and World Disarmament Organizations.

<sup>62</sup> Clark and Sohn, *supra* note 8, at 365.

<sup>63</sup> Convention on the Privileges and Immunities, *supra* note 56.

for damages caused, but no opportunity for legal recourse against the UN other than through consultation.

## B Sohn and Constitutionalism

While functionalist thinking dominates Sohn's work, there are fragments of constitutionalism in his writing as well. While sovereignty is encroached on only as much as absolutely necessary, the voting arrangements in *World Peace through World Law* have constitutionalist overtones. The proposal for majority voting weighted by population and the direct election of representatives by popular vote can only be justified as a matter of democratic theory if one assumes the existence of a nascent global *demos*.<sup>64</sup> Clark and Sohn may have doubted such a *demos* existed at the time of writing, but they seemed to believe it could be cultivated.<sup>65</sup> Revised Article 4 reads: 'The citizens of the member Nations ... shall be deemed to be citizens of the United Nations as well as of their own respective nations.' Revised Article 18(1) provides that representatives shall vote as individuals, raising the possibility that delegates from the same state could vote differently on a particular matter (since most states would have more than one representative). The rationale for allowing this is to 'nurture and hasten' the development of 'a new spirit ... whereby it would be normal rather than exceptional for the Representatives in the General Assembly to vote in the common interest of all people of the world rather than always to vote in the supposed interest of their particular nation as determined by its government of the day'.<sup>66</sup>

Second, as a constitution for the organization, the revised UN Charter specifies in some detail the allocation of power among the various organs and the relationship between them. Most notably, the revised Charter sets out a hierarchical relationship between the UNGA and the Executive Council. This includes the right of the UNGA to issue directions to the Council (Article 24(1)) and its power to discharge the entire Council through a vote of non-confidence (Article 24(4)). It empowers the ICJ to engage in judicial review of the acts of other organs. A standing committee on peace enforcement agencies was to be established, with a mandate to keep a constant watch on the disarmament plan and on the 'organization, administration and activities' of the peace force (Article 22 and Annex 1).

Third, Clark and Sohn proposed a new Bill of Rights to protect individuals from abuses of authority by the UN (Annex VII). The bulk of the Annex is devoted to due process rights – such as a fair trial, the right to a lawyer and the prohibition against cruel and unusual punishment (Article 2.b–g). It also includes a provision that would protect freedom of conscience, religion, speech and association (Article 2.a). Thus, their revised Charter both imposes obligations on individuals (not to violate the

<sup>64</sup> On the relevance of *demos* to international organization, see J. Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (1999).

<sup>65</sup> They were not the first to see the possibility that global citizens could be created. Guy Fiti Sinclair observes this attitude among the progenitors of the International Labour Organization (ILO) in the 1920s. G. Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (2017), at 55–56.

<sup>66</sup> Clark and Sohn, *supra* note 8, at 15, 33.

Charter) and provides them with protection against ‘the usurpation of power or oppression by the strengthened organization’.<sup>67</sup> Integrating the rights and duties of individuals in the Charter reflects constitutionalist thinking.

### C Sohn, *Global Administrative Law and Deliberative Theory*

While Sohn had something to say, albeit indirectly, about functionalism and constitutionalism, he had other innovative ideas that gained traction in IO scholarship long after his major contributions: global administrative law and transnational deliberative democracy.<sup>68</sup> Both see instrumental and inherent value in participation, reporting and reason-giving or public justification. Impressed by the success of the International Labour Organization’s supervisory system, which was based on persuasion and deliberation rather than sanctions,<sup>69</sup> Sohn advocated reporting obligations on member states, especially in the field of human rights.<sup>70</sup> Revised Article 56 requires members to report on the ‘joint and separate action’ that they must take on human rights and on other social and economic matters. Revised Article 14 goes further by introducing a reporting obligation in regard to UNGA recommendations: ‘[E]ach member nation undertakes to give prompt and due consideration to any recommendation addressed to such nation by the General Assembly, ... and to report as soon as practicable what action it has taken with reference thereto, or, if no action has been taken, its reasons therefor’ (Article 14(2)).<sup>71</sup> Sohn even argued that failure to comply with a recommendation without giving reasons would be illegal. Drawing on the work of Hersch Lauterpacht, he claims that UNGA and Security Council resolutions have this effect because failure to give them due consideration or to provide reasons for not complying would be acting in bad faith.<sup>72</sup>

Similarly, Clark and Sohn propose various mechanisms for consultation between the UN and the new organs of the World Disarmament and World Development Organization.<sup>73</sup> Persons accredited to the UN can take part in the deliberations of the others. Any of the principal organs of the UN can make recommendations to the new organization, which the latter is obliged to consider and then to report back on action

<sup>67</sup> *Ibid.*, at 368.

<sup>68</sup> The connection between the two strands was made explicitly in Kingsbury, Donaldson and Vallejo, ‘Global Administrative Law and Deliberative Democracy’, in A. Orford and F. Hoffman (eds), *Oxford Handbook of International Legal Theory* (2015) 526.

<sup>69</sup> ILO, *Review of ILO Supervisory Mechanism*, 29 February 2016, at 13, para. 37.

<sup>70</sup> Sohn and Ransom, ‘The Development of International Law’, 35 *American Bar Association Journal* (1947) 217. On the impact of state reporting in the ILO, see B. Rombouts (ed.), P.F. van der Heijden and A.G. Koroma, *International Labour Organization: Review of ILO Supervisory Mechanism: The Standards Initiative: Joint Report of the Chairpersons of the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association* (2016). International Labour Office, *Governing Body 326th Session, Geneva, 10–24 March 2016*. GB.326/LIIS/3/1. For a recent analysis of the impact of state reporting in the human rights field, see Creamer and Simmons, ‘The Proof Is in the Process: Self-Reporting under International Human Rights Treaties’, 114 *AJIL* (2020) 1.

<sup>71</sup> The obligation to report on recommendations was drawn from Art. 19 of the new ILO Constitution of 1948. Sohn and Ransom, *supra* note 70, at 219.

<sup>72</sup> Sohn, ‘The Shaping of International Law’, 8 *GJIL* (1978) 1, at 24.

<sup>73</sup> ‘All the organs and agencies of the new Organization shall consult with the organs and agencies of the UN on all matters of mutual interest or concern’. Proposed Treaty, Chapter VIII, Art. 90(1), at 496. Clark and Sohn, *supra* note 8.



taken.<sup>74</sup> Sohn also envisioned greater consultation between the UN and national legislatures. In 1997 (when his vision for *World Peace through World Law* had long passed), Sohn argued for better links between the UNGA and national parliaments through a 'Consultative Conference of Members of Parliament'.<sup>75</sup> Under the banner of global administrative law, a group of scholars have identified transparency, the participation of affected groups and reason-giving as procedural norms that permeate global administration.<sup>76</sup> These norms complement constitutionalism, which is mainly about the allocation of power and authority, by focusing on the institutional workings of how power and authority are actually exercised in IOs.<sup>77</sup> The norms do not create *ex post* accountability, but they do serve to constrain the exercise of public power.<sup>78</sup> One can infer from Sohn's writing his belief that, to the extent that his restructured UN and other IOs incorporated these principles, there would be little call for after-the-fact accountability.

In a similar vein, deliberative democrats see instrumental value in open debate and public justification. The theory of deliberative democracy rests on the principle that the quality of deliberations that precede and follow votes is a measure of legitimacy. Deliberation can produce better outcomes by ensuring that a variety of perspectives and interests are accounted for. It can also extract reputational costs. The felt need to engage in public justification – to back up one's positions with 'good arguments'<sup>79</sup> – enables members of an IO to engage with and scrutinize each other, enables different parts of the organization to question what other parts are doing and opens the whole system to public scrutiny. Consultation, reporting and reason-giving may be mere talk, but the theory of deliberative democracy holds that it is rarely cheap. It is costly to engage in behaviour that can only be justified in terms that others see as purely self-serving or beside the point. This is true of individuals, it is true of states and it is true of IOs, all of which have reputations to uphold.<sup>80</sup>

Yet the value of deliberation is not only instrumental. Klabbers writes of the agora function of IOs: a forum where states can meet, exchange ideas and discuss their common future, not necessarily with a view to solving problems or, indeed, even reaching an outcome, but merely for the sake of debate itself.<sup>81</sup> Moreover, deliberation

<sup>74</sup> Proposed Treaty, Chapter VIII, Art. 90(3), at 496.

<sup>75</sup> Sohn, *supra* note 25, at 657.

<sup>76</sup> Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Problems* (2005) 15; E. Benvenisti, *The Law of Global Governance* (2014).

<sup>77</sup> Kingsbury, Krisch and Stewart, *supra* note 76, at 7.

<sup>78</sup> Administrative law, whether national or global, is the law that governs the exercise of power by public officials. Dyzenhaus, 'The Rule of (Administrative) Law in International Law', 68 *Law and Contemporary Problems* (2005) 127, at 127. On the distinction between *ex post* accountability and *ex ante* constraints on the abuse of power, see Grant and Keohane, 'Accountability and Abuses of Power in World Politics', 99 *American Political Science Review* (2005) 29, at 30.

<sup>79</sup> A good argument in any public setting has at least two features: it must be impartial, as opposed to purely self-serving, and it must be relevant to the nature of the enterprise as generally understood by those engaged in the deliberation. I. Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (2011), at 14–20.

<sup>80</sup> A. Guzman, *How International Law Works: A Rational Choice Theory* (2010); Johnstone, 'Do International Organizations Have Reputations?', 7 *IOLR* (2010) 235; Daugirdas, 'Reputation and the Responsibility of International Organizations', 25 *EJIL* (2014) 991.

<sup>81</sup> Klabbers, 'Two Concepts', *supra* note 10, at 280, 283. On the inherent value of political debate, Klabbers follows Hannah Arendt.

is tied to human dignity – the basic idea that all should have a say over decisions that affect their lives or, at a minimum, should feel satisfied that their interests are being taken into account by those who wield authority. It is a process through which actors seek common ground on matters of mutual concern or at least seek to find ways of living with disagreement rather than resorting to conflict.<sup>82</sup> If voting is preceded by deliberation, those who lose the vote have the solace that their concerns were taken into account – that the decision was not entirely arbitrary – even if they do not like the outcome. Sohn seemed to appreciate both the instrumental and inherent value of deliberation. Consider this quote:

[T]oday, there is a new dynamic mechanism, allowing the international community to create new law directly by all nations gathering around a conference table, and by patient negotiations, quiet consultations and long public debate to agree on what the law should be. ... An agreement [on the law of the sea] reached in such a way truly represents the opinion of mankind, and was likely to be approved by the General Assembly in a unanimous vote. This was not an instant legislative act, but a final result of a long, deliberative process, taking all interests equitably into account, and by persistence and ingenuity finding a solution for each apparently intractable problem. While no state could dictate the adoption of all its wishes, enough of them were accepted to make the final result acceptable to all. Every state had an important stake in the final result, and the final agreement was truly everybody's common intellectual product.<sup>83</sup>

He describes patient multilateral negotiation as a mechanism for finding common ground and for taking the interests of all stakeholders 'equitably into account'. One can infer that, even if a 'common intellectual product' does not result, the effort would have value.

## 5 Conclusion

In this article, I portray Louis Sohn as a scholar who not only imagined, but also helped to construct, the post-World War II legal and institutional architecture. His mix of idealism and pragmatism makes it hard to place him on the legal theoretical spectrum that runs from natural law, to positive law, to post-positivism, or to situate him in the functionalism versus constitutionalism debate in IO law. Indeed, perhaps because of his life experience and temperament as a scholar-practitioner, he was not motivated to engage in deep theorizing. The fragments of theory that appear in his work do not add up to a coherent whole. Yet there is a consistent thread that runs through his scholarship: how to empower IOs in a manner that is perceived to be legitimate by states 'large and small' and by 'we the peoples'. While many of his proposals seemed fanciful from the perspective of political realism and balance of power politics, he touched on themes in IO law that continue to resonate today. In that sense, the theoretical contributions of this pragmatic idealist are greater than meets the eye.

<sup>82</sup> A. Gutmann and D. Thompson, *Democracy and Disagreement* (1998).

<sup>83</sup> Sohn, 'International Law Implications of the 1994 Agreement', 88 *AJIL* (1994) 696, at 700–701.