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# Functionalism According to Paul Reuter: Playing a Lone Hand

Evelyne Lagrange\*

## Abstract

*The true designer of the High Authority of the European Coal and Steel Community (ECSC) might have been a French professor of international law, Paul Reuter (1911–1990). Then working in the shadow of Jean Monnet, he became one of the leading experts in public international law in France from the late 1950s on and also served on the International Law Commission. It was not his style to develop a fully-fledged theory of functionalism, but he paid the utmost attention to the ‘functions’ of international organizations. While demonstrating a certain reluctance towards some consequences associated with functionalism, he expressed no disdain for a lite version of ‘constitutionalism’. Discretely, Reuter outlined a balancing between ‘functionalism’ and ‘constitutionalism’. He more insistently elaborated on the respective role of experts and policy-makers.*

The true designer of the High Authority of the European Coal and Steel Community (ECSC) might have been neither the French statesman Robert Schuman, who sketched it out in a historical statement on 9 May 1950, nor Jean Monnet, who convinced him to take this initiative and to whom the original method for building up a European Community – or at least communities – is attributed (*‘méthode J. Monnet’*).<sup>1</sup> Both the concept of sectoral integration placed under the responsibility of a supranational authority and the name of the institution itself seem to have been in fact creations of a French professor of international law, Paul Reuter (1911–1990). Monnet himself acknowledged this point in his *Memoirs*.<sup>2</sup> Yet Paul Reuter has not been considered until now as the herald of this approach that would situate him in relation to David

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<sup>1</sup> For a brief overview of the conditions under which this plan was forged and unveiled and the statement itself (in French), see Gerbet, ‘La genèse du Plan Schuman. Des origines à la Déclaration du 9 mai 1950’, 6(3) *Revue française de science politique (RFSP)* (1956) 525.

<sup>2</sup> J. Monnet, *Mémoires* (1976) at 415ff, especially at 431. His tribute is remarkably warm, but Monnet also hints at other projects revolving around a European Authority for Steel in the 1940s.

Mitrany's functionalism (built on the obsolescence of the territorial paradigm and its replacement through functions undertaken by international authorities sector by sector), on the one hand, and, on the other, to neo-functionalism (a sectoral approach of integration with a view to fostering a process of federalization in Europe in the long run). Unexpectedly, some potential sources of reference for the '*méthode Jean Monnet*' waned. First, the name of Mitrany, the theoretician of functionalism, does not come up in Monnet's references and archives.<sup>3</sup> Second, Reuter himself seemed to be reluctant to reveal in detail whom his proposals hinted at; he quoted Mitrany neither in his major handbooks nor in other pieces of work used for the present article. Third, Reuter's name was progressively overshadowed in the literature dedicated to the first European blueprints and achievements.<sup>4</sup> Historical investigations on his intellectual background are not exhaustive, despite some insightful recent publications on the origins of the European Communities that were of great help in writing this article.<sup>5</sup> As far as we know, Reuter was certainly a man deeply rooted in his time, sharing ideas widespread throughout Europe and the USA. He certainly was not an epigone of any founder of a school of thought or a mentor himself, and he was not a theoretician of neo-functionalism; rather, he played a lone hand.

Colleagues who paid tribute to his talents as a teacher and a legal practitioner insisted on his modesty, his passion for brevity and, correspondingly, his preference for focused short notices.<sup>6</sup> Reuter himself was inclined to understate his contribution to European institutions.<sup>7</sup> These personal dispositions might explain, first, why Paul

<sup>3</sup> According to Devin, 'Que reste-t-il du fonctionnalisme international? Relire David Mitrany (1888–1975)', 38(1) *Critique internationale* (2008) 137.

<sup>4</sup> According to Cohen, 'Le Plan Schuman de Paul Reuter entre communauté nationale et fédération européenne', 48(5) *RFSP* (1998) 645.

<sup>5</sup> A. Cohen, *De Vichy à la Communauté européenne* (2012), at 447; J. Bailleux, *Penser l'Europe par le droit: L'invention du droit communautaire en France* (2014), at 484.

<sup>6</sup> Gros, 'Hommage au Professeur Paul Reuter', in *Le droit international: Unité et diversité. Mélanges offerts à Paul Reuter* (1981), at 1–7; Combacau, 'Paul Reuter, le juriste', 35 *Annuaire français de droit international* (AFDI) (1989) 7.

<sup>7</sup> Paul Reuter published brief accounts of his role in discussions about the Schuman Plan but did not systematically mention it in academic presentations directly related to European institutions. The biography preceding his Hague Lecture on the Coal and Steel Community swiftly mentions his positions as deputy legal adviser with the French Ministry of Foreign Affairs and then member of the French delegation to the negotiations related to the Schuman Plan. It is probably symptomatic of the sensitivity of the issue and the strategy of political actors at that time that the foreword by R. Schuman to Reuter's *La Communauté européenne du charbon et de l'acier* (1953) did not pay any tribute to Reuter's decisive inputs. The foreword just insisted on the absence of official preparatory documents to the Treaty of Paris or other common documents with an interpretative value and concluded that 'therefore' a study such as that of Reuter was very useful and provided an academic analysis of texts, economic and legal issues, which indeed would not have been possible if the author had not been involved in the drafting process. However, the reader has to draw such a conclusion himself. Reuter did not leak many words on the drafting of the statement: it was soaked in secrecy and came out as a surprise (at 23). In fact, researchers now have access to abundant historical sources. Du Réau, 'Le processus de décision en politique étrangère: Les nouveaux enjeux du multilatéralisme', in R. Frank (ed.), *Pour l'histoire des relations internationales* (2012), at 535. Some monographs on the European Coal and Steel Community (ECSC) or the High Authority dedicate few lines to Reuter, insisting on his presence on the bench of technical experts while mentioning that the High Authority (the thing and the word) was his invention. D. Spierenburg and R. Poidevin, *Histoire de la Haute Autorité de la CECA: Une expérience supranationale* (1993).

Reuter did not claim for himself the merit of being one of the early founders of the reunification of Europe, not even in an effort to explicitly conceptualize his personal intuitions, despite an exemplary curriculum. Endowed with missions on behalf of the French post-war governments and in embryonic international organizations, Reuter became one of the most prominent scholars in France until he retired in 1980. His handbooks, including *Organisations européennes*, *Institutions internationales* and *Droit international public*, are classics in French legal literature, while his *General Course on Public International Law* at the Hague Academy remains a model of French classicism.<sup>8</sup> However, classicism features Reuter from a stylistic and didactic standpoint only since his thoughts on international law encountered few *a priori* restrictions.

Second, although not refusing any reference to morals, Paul Reuter could be said, at least with regard to international organizations (IOs), to be a moderate positivist and a scholar resolutely drawing more on his own experience of international life as a practitioner than on abstract approaches to international law. He reluctantly considered building systems.<sup>9</sup> Quite to the contrary, his main concern and talent were to faithfully account for what states – or other subjects of international law – undertook or convened and, alternatively, to help them reach political goals with adequate legal means. As limits to states' freedom cannot be presumed, limits to institutional innovations are necessarily rare as well. For him, it was not the task of academics to disregard, underplay or disqualify them.

During the founding years of post-war reconstruction and pacification in Europe, Reuter was in fact not one who would have hesitated when requested to help resolve the most urgent and intricate political challenges with innovative means. However, once the European institutions had been set up, he did not take the lead in the race for determining the very nature of these institutions, even less in theorizing integration or supranationality. Nor did he develop an apologetical or critical approach to (neo-) functionalism but, rather, applied a systematic approach to the European Communities and other IOs. Reuter did not publish a conceptual study on the functions of IOs and/or functionalism comparable to what Michel Virally did, though Virally did so without

<sup>8</sup> P. Reuter, *Organisations européennes* (1965); P. Reuter, *Institutions internationales* (8th edn, 1975); P. Reuter, *Droit international public* (5th edn, 1976), P. Reuter, *Principes de droit international public*, 103 Collected Courses of the Hague Academy of International Law (1961).

<sup>9</sup> This reluctance is far from unique in the French world of internationalists. To situate Paul Reuter in the French tradition, see Jouannet, 'Regards sur un siècle de doctrine française du droit international', 46 *AFDI* (2000) 1. According to A. Pellet, paying a tribute to his predecessor at the International Law Commission (ILC), '[i]t was difficult to place Professor Reuter in one of the various schools of thought of international lawyers. His realism and sense of proportion ruled out the voluntarist school; he had known full well that law could not be reduced to pure theory. He certainly came closer to objectivism, but as he had said in his 1961 course at The Hague Academy of International Law, "law is not only a product of social life; it is also the fruit of an effort of thought. ... In some quarters, Professor Reuter had been described as belonging to the "natural law" school; but it seemed hardly possible so to classify him and thus lock him into a closed system of thought. He might perhaps have been willing to be associated with natural law so long as it was understood as a bridge between ethics and law'. Pellet, 1 *ILC Yearbook* (1990), at 301. This might be true in general but moral concerns did not conduce him to idealize international organizations and to account for their nature or functioning in accordance with ideals rather than practice.

ever quoting Reuter in his well-known study on the notion of ‘function’.<sup>10</sup> Indeed, his numerous, but scattered, papers on international organizations, apart from his handbooks, reveal some hesitation with respect to two of the core issues of international institutional law – the classification of IOs and the role of function (and functionalism) in practice and in theory.

His intellectual authority notwithstanding, the imprint that Paul Reuter left on concepts in the field of international institutional law is, in retrospect, not commensurate to his imprint on the institutions themselves. Despite his international fame, his apparent legacy in the worldwide legal literature on IOs seems to be rather thin. Nonetheless, it is worth recalling his contribution to the creation and development of the law of European and international organizations and then re-exploring the seminal reflections of one of the pioneers of the great leap forward of international institutions after World War II. Adding a plethora of words to his concise writings would not do justice to his moderate positivism and deliberate modesty. Yet some subtleties in the way he accounted for nascent international institutional law require attention. If the word ‘functionalism’ is missing from his writings, functions are everywhere but often coupled with considerations on ‘constitutional’ aspects of the law of international organizations. Finally, it is worth trying to relate his insights on functionalism to his views on the role of law and lawyers compared to that of politics and politicians.

## 1 Paul Reuter as an Influential Maker of IOs and Their Law

World War II was probably decisive for Reuter’s intellectual orientation. A professor of public law since 1938, Reuter turned his back on the academic world and was mobilized in the French armed forces during World War II. He was made a prisoner of war but soon escaped and came back to Poitiers, where he had his first position, and then moved to Aix-en-Provence, where he took up a position as professor at the law faculty. His experience as a teacher at the Ecole des cadres d’Uriage in the French Alps is related to his later role in the foundation of the ECSC. The Ecole des cadres d’Uriage, which he worked at from 1940 until December 1942, had been set up by the government of Maréchal Pétain to train leaders devoted to the regeneration of French youth and leaders. However, this ‘school’ was an ambivalent institution, where intellectuals who would take part in the Résistance met as well. Today, the Ecole des cadres d’Uriage is still the object of controversies, with regard to its very nature. It was a melting pot of followers of Pétain as well as opponents of the trend that the ‘Révolution nationale’ was to take (especially from 1942 on). Controversial is also its role as a forerunner of the Ecole nationale d’administration (ENA), which was created after World War II in 1945.<sup>11</sup>

<sup>10</sup> Virally, ‘La notion de fonction dans la théorie de l’organisation internationale’, in M. Virally, *Mélanges offerts à Charles Rousseau* (1974) 277. For a presentation of his work, see Viñuales, ‘The Secret of Tomorrow’: International Organization through the Eyes of Michel Virally’, 23(2) *European Journal of International Law* (2012) 543. Virally deemed the notion of ‘function’ central in the law of international organizations but rebutted the concept of ‘functionalism’ as predictive or axiological.

<sup>11</sup> Or the Ecole nationale d’administration, where the most prominent French civil servants are trained and where many political leaders come from.

Paul Reuter's path during the war is illustrative of this ambivalence and the prevalent trend in Uriage. He was introduced into the Ecole des cadres d'Uriage by Hubert Beuve-Méry, who a few years later became editor in chief of the newspaper *Le Monde*; he joined the French Résistance before the dissolution of the Ecole des cadres d'Uriage and is said to have encouraged other members to join the Résistance (successively, the 'Liberté' and 'Combat' movements). Reuter was then involved in the creation of the ENA. But, during his Uriage years, he was one of its pillars and delivered a great number of lectures, many of them dealing with the economy and European policy. One of his main concerns at that time was the trust (in the cartel sense of the term). In his opinion, this phenomenon called for state interventions, on the one hand, and an effort to endow Europe with federalist structures, on the other hand, in order to preserve 'a fully human economy' (according to his own words) in spite of the worldwide expansion of the influence of trusts. Another major concern was the 'community' as a cornerstone for the reconstruction of France and Europe, a polysemic notion to which he dedicated a series of lectures.<sup>12</sup> These reflections at a time of occupation foreshadowed his post-war contribution to the Schuman Plan, once federal schemes for Europe or the 'community' had definitely distanced themselves from homonymous projects under the aegis of Maréchal Pétain and his 'Révolution nationale'.<sup>13</sup> The search for a 'third way' between communism and capitalism remained, but it was made in a renewed political framework, which was fairly liberal.

Not only a professor at this time but also a collaborator of ministerial offices, Paul Reuter met Jean Monnet 'by chance' in April 1950. In fact, his expertise on trusts was requested by the French Authority for Planning, which was headed by Monnet (as *commissaire général au plan*). At that time, Monnet was convinced that war was threatening Europe again and that too little attention was being paid to a statement by the German Chancellor Konrad Adenauer calling for tightening up of cooperation between France and Germany. During an informal exchange, Monnet is said to have tested different options: the creation of a binational parliament (for France and Germany), the rebirth of Lotharingia and a common plan for border areas. Reporting on this impromptu interview, Reuter recalled his opposition to the creation of institutions with undetermined functions and his plea in favour of the opposite (functions first!). He again vividly underscored his visceral opposition to the secession of French Lorraine (where he was born) from France but was aware that 'taking Europe seriously' meant the 'end of a certain France', to be distinguished from a farewell from France.

Beyond subjective reasons to reject the second option, Reuter advocated a political and territorial *status quo* balanced with actions in economic sectors for border regions, and he came to the conclusion that action was needed for coal and steel. Monnet is said to have replied with the concept of 'pooling ressources in coal and steel'. Certainly,

<sup>12</sup> A. Cohen provides an easy access to archive references and an extract from a lecture delivered by Paul Reuter in Uriage, in Cohen, *supra* note 5 at 104–116.

<sup>13</sup> These elements are borrowed from the rich contribution of Cohen, *supra* note 4, at 651; see also Beaud, 'L'Europe vue sous l'angle de la Fédération. Le regard paradoxal de Paul Reuter', 45 *Droits* (2007) 47, at 51. For more details, see Cohen, *supra* note 5, at 447.

drawing on his Uriage and Aix-en-Provence lectures in economics, Reuter envisaged an alternative to shape this pooling: either a single enterprise, presenting a major drawback – that of reminding the USA of the creation of a transnational cartel – or a single market, enshrined in the liberal international economic order that the USA was designing with the Havana Charter, the Organisation for European Economic Co-operation and the General Agreement on Tariffs and Trade, but submitted to regulation and oversight or, to put it in a nutshell, public interventions. The choice for the second option (the single market) was seemingly not attributable to Paul Reuter but, rather, to Pierre Uri.<sup>14</sup> However, Reuter endorsed this proposal that matched with both his interest in American experiences of quasi-judicial, administrative or economic independent authorities, especially since the Roosevelt presidency, and his own experience within the Opium Advisory Committee (1948).<sup>15</sup>

Three fundamentals were settled in the early days of these secret discussions involving only a handful of men: control over coal and steel industries should be vested in an authority (according to the word singled out by Reuter himself) composed of independent individuals; the authority should be designed to exert leading powers rather than bureaucratic management; and the statement submitting this plan to Germany – and, later, to other European countries – should be as brief as possible. It was Reuter's mission to draft a first version of the two-page statement.<sup>16</sup> Later, he ingeniously suggested presenting the scheme of the High Authority under the reassuring label of 'community'. There was no precise definition of that word, but it had become quite popular in different intellectual circles since World War II. It renewed the usual terminology in international institutional law (association, union, organization and so on), and it permitted public discourses to circumvent such disputed terms as 'federation' and 'supranationality' or such a mollifying notion as 'confederation'.<sup>17</sup> Paul Reuter later contributed to the formal drafting of the Treaty of Paris itself and had to counterbalance the High Authority with an intergovernmental organ (the Council), a parliamentary assembly and a court of justice vested with far-reaching powers comparable to those of administrative courts in the French legal system.<sup>18</sup>

In the meantime, the Schuman Plan gained the support of the USA, but the ultimate goal – the reunification and empowerment of Europe in a time of division between East and West – was to be threatened by the Korean War. The American government seriously considered the participation of European divisions that included German soldiers in order to alleviate the burden of defending Korea. The rearmament of Germany was on the agenda. This option was considered unacceptable in France,

<sup>14</sup> Another collaborator of Jean Monnet, expert in economics, who later played a major role in the creation of the European Economic Community.

<sup>15</sup> Later, he chaired for a long time the International Narcotics Control Board (1974–1983). His experience in this field inspired in him a certain interest for 'personal union', experienced in the fight against opium. See Reuter, 'Actualité de l'Union personnelle', in *Mélanges en l'honneur de G. Gidel* (1995) 483.

<sup>16</sup> These elements are a summary of Reuter, 'Aux origines du Plan Schuman', in *Mélanges Fernand Dehousse* (1980), vol. 2, 64. A. Cohen put on display different narratives of the genesis of the Schuman Plan (Cohen, *supra* note 5, at 7–62); they enrich Reuter's narrative more than they challenge it.

<sup>17</sup> On his reflections on the different uses of terminology, see Beaud, *supra* note 13.

<sup>18</sup> Legal remedies against acts of the High Authority were already mentioned in the statement.

not least because a German rearmament within an Atlantic framework would have challenged the European construction in progress. However, because of the numerous restrictions surrounding the projects of the French allies, this scheme could not be simply rejected by France. Once again, Monnet took the initiative: a French initiative 'to save the European construction' was urgently needed. Reuter would be tasked, together with Jacques-René Rabier, with drafting within a day a statement similar to the Schuman Plan, with the ultimate political object: a European defence. The French minister for foreign affairs, Schuman again, was to support it, and the French premier (president of the Council), René Pleven, would take it over and give his name to the plan for a European Defence Community (Plan Pleven). Despite all similarities in the method and the men involved, for Reuter, it was clear from the outset that the Pleven Plan entailed something more than the already famous Schuman Plan: the creation of a 'European political authority' of a federal nature.<sup>19</sup>

These early contributions to major post-war political discussions cannot be explained by Paul Reuter's fame as an international lawyer who would have envisioned new trends in international law. As Jean Combacau has pertinently remarked, Reuter was not considered for a long time a greater expert in public international law than other scholars of his generation. In fact, he had no real opportunity to specialize in public international law as a teacher until the early 1950s, when he moved to the law faculty in Paris.<sup>20</sup> But, then, his career made a fresh start. Within a few years, he became one of the most prominent scholars – in international law. Among other distinctions, Reuter was a member of the Institut de droit international (he presided over the Helsinki session in 1985). Most interestingly, he was a member of the International Law Commission (ILC) for more than a quarter of a century (1964–1990). In this role, he was appointed special rapporteur on treaties concluded by IOs.<sup>21</sup> In a very didactical first report, he recalled how treaties concluded by IOs were finally withdrawn from the works of the ILC devoted to treaties in the 1960s,<sup>22</sup> and he underlined that IOs were almost never parties to multilateral treaties enshrining 'rules intended to safeguard the general interests of the international community' – a core issue according to him.<sup>23</sup> This was due to the persisting tension between the need to submit IOs to a set

<sup>19</sup> These elements are a summary of Reuter, 'L'origine du projet de Communauté européenne de défense: Souvenirs et réflexions', in *Humanité et droit international: Mélanges René-Jean Dupuy* (1991) 241.

<sup>20</sup> Combacau, 'Paul Reuter, le juriste', 35 *AFDI* (1989) 9.

<sup>21</sup> The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (March 21, 1986) has attracted to date (June 2020) 44 ratifications or adhesions of both states and international organizations (IOs), which is still not sufficient for its entering into force (35 ratifications by states are requested).

<sup>22</sup> An outstanding expert of the law of treaties, Paul Reuter dedicated a contribution to 'Le droit des traités et les accords internationaux conclus par les organisations internationales' in which he recalled that IOs had been left aside for the sake of simplification: their specificities made extraction of general rules difficult. Reuter, 'Le droit des traités et les accords internationaux conclus par les organisations internationales', in *Miscellanea W.J. Ganshof van der Meersch* (1972), vol. 1, at 192ff.

<sup>23</sup> 'Premier rapport sur la question des traités conclus entre États et organisations internationales ou entre deux ou plusieurs organisations internationales, par Reuter, "Rapporteur spécial", 2 *Annuaire de la Commission du droit international* (1972) 191. In 1980, the rapporteur seemed more sceptical towards the participation of IOs to multilateral treaties, and even towards the permissive mechanism of 'mixed agreements'. Reuter, 'Sur quelques limites du droit des organisations internationales', in *Festschrift für R. Bindschedler* (1980) 491, at 501–502.



of conventional rules with a large scope and the reluctance of states to let IOs become formal parties to ‘their’ multilateral treaties, considering the blurring of the division of competences between the IO and its member states as well as, sometimes, the missing powers on the part of organizations for the implementation of such treaties.

However, respectful of states, dispositions, Paul Reuter considered indirect means to bring IOs to commit themselves and the possibility for the ILC to further elaborate on such mechanisms. Looking back at treaties formally concluded by states and IOs or between IOs only, he underscored the need to refrain from drafting rules with a restrictive scope (*ratione personae*) since such rules could generate at least three regimes (one for states, one for IOs in the most restrictive sense, one or many others for the rest of IOs). Consequently, in his opinion, there was no need to refine the definition of IOs. It was sufficient to refer to their intergovernmental nature. Furthermore, it would do no good to assign extremely precise limits to their capacity. Reuter’s preference was explicitly in favour of formulas that would not deal with the treaty power of IOs in general terms, so that their freedom would be preserved and, with it, their diversity and institutional dynamics. There was also no obvious need to include a provision ‘without prejudice to the proper rules of the IO’, as defined either in the constituent treaty or through the well-settled practice of the IO. Actually, Reuter left open the options between (i) a final reference to the proper law of the IO, including its well-settled practice and, consistently, a binding (non-peremptory) set of ILC articles potentially suppressing institutional creativity, on the one hand, and (ii) a looser reference to the rules of the IO and its practice (settled or not) and, consistently, a set of ILC ‘guidelines’ for the future, on the other hand.

Going a step forward, Paul Reuter insisted in his second report on the necessity for IOs to abide by general rules when they entered into relationships with third parties (third states, other IOs and so on). With respect to treaties, such general rules were to be found in the 1969 Vienna Convention and adapted to IOs to the extent necessary.<sup>24</sup> But this should be done under two conditions. The first condition was to avoid unnecessary details and formalism; the second was not to try to fix issues that should rather be left to the IO, according to its ‘own features’, through common rules. Despite his personal preference for a formula drawing on the inherent capacity of IOs to enter treaties – unless the constituent instrument provides otherwise<sup>25</sup> – the rapporteur recommended that the draft articles remain silent on the issue of capacity since it is foreseen by the special status of each IO, not by general abstract rules. One reason was that general rules might trigger states’ opposition to an expansion of IOs power and thus impede, paradoxically, the further spontaneous development of IOs based on mutual trust.<sup>26</sup>

<sup>24</sup> Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

<sup>25</sup> Some variations in his writings were noticeable. In a 1972 contribution, he wrote that it might be difficult to assert that IOs are apt to conclude treaties within their sphere of competences or with regard to administrative needs and even more to prove the existence of a customary rule. This is a more restrictive view than those outlined in the ILC report. Reuter, ‘Le droit des traités’, *supra* note 22, at 208–209.

<sup>26</sup> ‘Deuxième rapport sur la question des traités conclus entre États et organisations internationales ou entre deux ou plusieurs organisations internationales par Reuter, “Rapporteur spécial”, Doc. A/CN.4/271, *Annuaire de la Commission du droit international* (1973), vol. 2, at 80–81.

As a whole, Reuter paid the greatest attention to the irreducible diversity of IOs and their need for flexibility in practice. References to ‘functions’ of IOs are logically numerous in his reports. However, his reluctance concerning abstract functionalist assertions is manifest, as if ‘adaptation to needs’ (more or less, the basic meaning of functionalism) termed only the spontaneous development of powers, capacities, rights or structures of IOs. Of course, these lessons should be considered in the very sensitive framework of codification: in a context that is rather hostile to abstract notions, in Reuter’s own words, the process should not disturb the spontaneous dynamics of IOs. Such was his concern.<sup>27</sup> But it is plausible that Reuter’s experience in international or intergovernmental agoras also slightly modified some of his original views.

## 2 Paul Reuter’s Insights on Functionalism

Reuter’s intellectual modesty and his special emphasis on the diversity of IOs did not prevent him from advocating the possibility of developing a general theory on IOs. This possibility – or even necessity – derived from the rebuttal of assimilation of IOs to states. It came to the fore clearly in his paper on subsidiary organs: differences between IOs were to him ‘undebatable’, but they should not be overstated as if IOs were all ‘leibnizian monads’. General legal theories were not only legitimate but also needed to ‘rationalize practice’ and ‘bring back unity’ in a field where states themselves regret an excess of diversity.<sup>28</sup> In the eighth edition of *Institutions internationales*, the general theory is maintained, but it is supported by a downplayed sense of its necessity.<sup>29</sup> Considering legal regimes now, even if some general rules for IOs could be contemplated, they were to be very limited in scope, except to the extent that their external relationships were concerned.<sup>30</sup> All in all, IO legal studies were not doomed to comparativism. Nonetheless, the utmost prudence was requested: the political context was

<sup>27</sup> Indeed, Paul Reuter’s fears were not exaggerated. The Vienna Conference saw the Soviet Union resisting any attempt to affirm IOs’ autonomy. See Manin, ‘La Convention de Vienne sur les accords entre Etats et organisations internationales ou entre organisations internationales’, 32 *AFDI* (1986) 454.

<sup>28</sup> Reuter, ‘Les organes subsidiaires des organisations internationales’, in *Hommage d’une génération de juristes au président Basdevant* (1960) 415, at 420.

<sup>29</sup> *Ibid.*, at 252–253.

<sup>30</sup> See Reuter, ‘Sur quelques limites du droit’, *supra* note 23, especially at 507. This position is slightly different from the one he expressed in other contexts. Ten years earlier, he saw some merits in the view that IOs are so specific that it is difficult to formulate rules validly addressing the United Nations, specialized agencies as well as regional organizations (Reuter, ‘Le droit des traités’, *supra* note 22). These variations might be due to his experience as a practitioner, facing the scarcity of practice (especially case law) and a demand for codification. However, he restated later the necessity to submit treaties made by IOs to rules emanating from the international legal system (not from their proper legal orders). Reuter, ‘L’ordre juridique international et les traités d’organisations internationales’, in *Völkerrecht als Rechtsordnung: Internationale Gerichtsbarkeit: Menschenrechte. Festschrift für H. Mosler* (1983) 745; P. Reuter, *Le développement de l’ordre juridique international: Ecrits de droit international* (1995), at 291ff.

not conducive to the building up of a complete general theory; some elements that would take place in such a framework in better times could already be envisaged.<sup>31</sup>

Reuter's contribution to such a theory was underpinned by an institutional, rather than a contractual, approach to IOs.<sup>32</sup> Having no difficulty with considering states, IOs and private persons as subjects of international law, it is no surprise that Reuter distanced himself from Dionisio Anzilotti's representation of international organizations as common organs of the participating states.<sup>33</sup> Still, he was fully aware that, politically speaking, states tend to treat IOs as their creatures or reduce them to a 'diplomatic process', among others,<sup>34</sup> even if such an attitude should conflict with growing interdependences that render IOs essential.<sup>35</sup> Entities belonging to this new class of subjects of international law were international by nature but not fatally intergovernmental since non-state actors could find a place in the framework of these entities.<sup>36</sup>

All idiosyncrasies and political episodes in the life of IOs notwithstanding, Reuter was inclined to contend that IOs are indeed living institutions and not just creatures of the founding states. This, according to him, was largely due to the structuring and dynamic effect of functions. It would appear clearly if one focused on processes rather than on pre-fixed categories and considered the way in which IOs adapted to their functions. However, functionalism should not be without limits. Very discretely, Paul Reuter outlined a balancing between 'functionalism' and 'constitutionalism' (strictly speaking, the submission of IOs to the rule of law and of their acts to judicial review).

### *A Processes Rather Than Rigid Categories (Cooperation versus Integration)*

Paul Reuter became neither a prominent theoretician of supranationality and integration law as distinct from both international and municipal law nor an adamant advocate of an all-embracing unchanged international law. His positions were much

<sup>31</sup> This held true in the early 1960s (Reuter, 'Les organes subsidiaires', *supra* note 28) as well as at the threshold of the 1980s (Reuter, 'Sur quelques limites du droit', *supra* note 23), Paul Reuter insisting at that time on the 'artificial' nature of IOs (even if they were endowed with a legal personality of their own). In the meantime, Reuter seemed to hesitate to assert the existence and scope of a general law of international organizations. Reuter, 'Confédération et fédération: "vetera et nova"', in *La Communauté internationale – mélanges offerts à Charles Rousseau* (1974) 199–218.

<sup>32</sup> Reuter paid some discrete tribute to authors of the corresponding school within the domestic realm (M. Hauriou and A. Mestre) in early writings and resolutely insisted on the fact that IOs produce a proper law, a legal order of their own, as other institutions do. In *Institutions internationales*, he insisted from the outset on two key elements of IOs: permanence and the existence of a proper will. Reuter, *Institutions internationales*, *supra* note 8, at 235–236.

<sup>33</sup> *Principes de droit international public*, *supra* note 8, 425. Ironically, Reuter identified something like a law common to all member states and integrated in their domestic legal system the law generated by the institution of the ECSC. Reuter, 'Le Plan Schuman', 81 *Recueil des Cours de l'Académie de Droit International de La Haye (RCADI)* (1952) 517, at 548, 550.

<sup>34</sup> See, e.g., Reuter, *Institutions internationales*, *supra* note 8, at 237, 252.

<sup>35</sup> Once again, at the beginning of the 1980s, Reuter seemed to take more seriously the view that IOs could be no more than a 'technical mechanism enabling States to act collectively'. Reuter, 'Sur quelques limites du droit', *supra* note 23, at 504.

<sup>36</sup> Reuter, *Institutions internationales*, *supra* note 8, at 237ff.

more nuanced. Well identified as an influential expert in international law, he was nonetheless inclined to disregard clear-cut oppositions between models and, instead, highlighted the continuum of forms and rules. Reuter constantly underlined a remarkable feature of all international institutions: they give birth to proper 'legal bodies' or their own 'legal order'. As early as 1956, he wrote that the development of IOs brought about 'legal systems' distinct from both domestic and international law.<sup>37</sup> Building on this distinction, he assumed in his *General Course* (1961) that the internal law of IOs ('droit interne à l'organisation') is alternatively closer to domestic law (producing immediate effects based on subordination) or to international law (depending on the type of relationships considered). While rules applicable to the relationships between IOs and private persons (especially civil servants) or within the institutional system (procedural rules, for instance) have the same features as domestic rules, relationships between IOs and member states are more similar to the rules of international law – even within the European Community.<sup>38</sup> But this, he suggested, was no more than a tendency.

In fact, the kind of rules applicable to relationships of the latter type depends on whether member states aim at 'limiting their sovereignty' – in other words, establishing new international relationships – or at 'pooling sovereignty' on certain objects – meaning approximately, translating sovereignty (a notion that Reuter resorted to as well). This was the purpose of the Schuman statement: from the beginning on, the term 'supranational' was used in discussions to point out the creation of a 'unique State as to coal and steel'.<sup>39</sup> Obviously, the author did not shy away from the most innovative qualifications, provided they were strictly requested by practice. And for good reason: it is open to sovereign states to pool sovereignty – at least in some sectors. But Reuter was much more reluctant to enclose the Communities in a category, to subsume them under a qualification settled once and for all. And again for good reason: such a qualification is only of interest, legally speaking, if it corresponds to 'precise and unquestionable features'. In other words, qualification is only of interest when a legal regime can be attached to the qualification. Still, there is no such well-settled regime since it remains within the power of sovereign states to contest the nature of the IO they created, even against the internal consistency of the underlying agreement.<sup>40</sup> Writing on the European Communities, the most constant position of Reuter was that:

none of these legal forms (international organization, confederation, union of States, *real union*) is rigorously defined by opposition to the others and one moves on from the most rudimentary organizations to the narrowest federal forms by imperceptible transitions. So, it is possible to order, in a continuous series, all examples of composed political structures; in the absence of a clear dividing line some types might appear that are defined by consistent relationships existing

<sup>37</sup> Reuter, 'Organisations internationales et évolutions du droit', in Reuter, *L'évolution du droit public*, *supra* note 8, 457.

<sup>38</sup> See also Reuter, *Institutions internationales*, *supra* note 8, at 262–263.

<sup>39</sup> Reuter, 'Quelques aspects institutionnels du Plan Schuman', *Revue du droit public et de la science politique en France et à l'étranger* (1951) 105; see also Reuter, 'Le Plan Schuman', *supra* note 33, introduction and Part I.

<sup>40</sup> Reuter, *Organisations européennes*, *supra* note 8, at 195.

between the different elements they are composed of. ... In that respect, it is reasonable to consider the Communities as organizations with specific characters; their nature as international organizations is undebatable because it implies itself only certain consequences that are abundantly clearly ascertained by provisions of the treaty; however, all difficulties are related to specific characters. ... These characters are not debatable; they consist in that an organization as Communities is closer to federal structures than an ordinary organization.<sup>41</sup>

Reuter identified these characters with a degree of integration or, to put it otherwise, with the degree of power exerted by the Community over member states and, on a more abstract level, with the ‘superiority of the Community legal order’.

With regard to the ECSC, Paul Reuter assumed in his *Special Course*, first, that the provisions of the Treaty of Paris designed a supranational institution – supranational meaning that a federal state had been built up, but within limited sectors only.<sup>42</sup> Second, he assumed that, despite appearances, the Treaty of Paris was ‘intrinsically’ political because of the intent of the parties – they had peace in mind – because of its duration and because of its object. Concretely, coal and steel were deeply linked to French–German contentious relationships. Most importantly, ‘[t]he Schuman Plan is characterized by an internal dynamic, an expanding force, due to necessities of different natures but equally compelling; Unifying the production regime of coal and steel, one must proceed to other unifications that will extend step by step – or fail’.<sup>43</sup>

It is difficult not to recognize here what has been termed a neo-functional approach (he used the expression ‘functional method’): the pooling of sectoral powers precedes the establishment of European integrated political powers; the ECSC can be envisaged as being both constitutional in nature (notably due to the revision process of the constituent treaty) and federal in a limited sector.<sup>44</sup> He also explained in his

<sup>41</sup> *Ibid.*, at 194–195, 198 (emphasis in the original). Original text: ‘[A]ucune de ces formes juridiques (organisation internationale, structure confédérale, union d’Etats, union réelle) n’est rigoureusement définie par opposition aux autres et l’on passe par transitions souvent insensibles des organisations internationales les plus sommaires aux formes fédérales les plus étroites. On peut ainsi ordonner, dans une suite continue, tous les exemples de structures politiques composées; à défaut de coupure bien nette, il peut cependant apparaître des types définis par les rapports *cohérents* qui existent entre les différents éléments qui les constituent. ... Dans cette perspective, il est raisonnable de considérer les Communautés comme *des organisations internationales à caractères spécifiques*; leur nature d’organisations internationales est indiscutable parce qu’elle n’implique par elle-même que certaines conséquences qui se vérifient surabondamment dans les dispositions des traités; en revanche, toute la difficulté est reportée sur les caractères spécifiques’ (at 195). ‘Ces caractères ne sont guère discutables; ils tiennent à ce qu’une organisation du type des Communautés se rapproche davantage des structures fédérales qu’une organisation ordinaire’ (at 198). Ces deux caractères sont, ‘sur le plan quantitatif’, le degré d’intégration ou degré de pouvoir que la Communauté exerce sur les Etats membres et sur le plan plus abstrait, ‘la supériorité de l’ordre juridique communautaire’ (at 198).

<sup>42</sup> Reuter, ‘Le Plan Schuman’, *supra* note 33, at 550–551.

<sup>43</sup> Original text: ‘Il y a dans le Plan Schuman un dynamisme interne, une force d’expansion, dus à des nécessités de divers ordres mais d’une force contraignante égale: en unifiant le régime de la production du charbon et de l’acier on sera obligé sous peine d’échec de procéder à d’autres unifications qui de proche en proche s’étendront.’ Reuter, ‘Le Plan Schuman’, *supra* note 33, at 533; see also the very explicit introduction to the book *La Communauté européenne du charbon et de l’acier* (at 30–34).

<sup>44</sup> In this sense, see Reuter, ‘La conception du pouvoir politique dans le Plan Schuman’, 1(3) *RFSP* (1951) 258, at 259. The Treaty of Paris sets up no ‘federal State’ but, within sectoral limits, a ‘unique authority substituted to that of States and inheriting some of the attributions they were depriving themselves of’.

handbook *Organisations européennes* that integration as a method is ‘the expression of a political will’ and ‘anticipates’ a ‘solidarity’ that the institutions set up will help to create and to tighten.<sup>45</sup> However, Reuter defended the relevance of this method with a strong focus on the political reach of the very first steps in the ‘technical’ or economic sectors and on the necessary differentiation of the integration process according to its object. It was clear to the author that the pooling of transports would follow a pretty different pattern from that of coal and steel. In this sense, he did not uphold the method deployed by Robert Schuman and Jean Monnet as a one-size-fits-all method or panacea. To sum up, he asserted, first, that the Communities were still no federations in the proper meaning of the term and, second, that a federation was perhaps, politically speaking, the ultimate goal of the European construction but that, legally speaking, it was more akin to ‘an ideal type’, which helps in grasping the nature of the Communities.<sup>46</sup>

### **B IOs as Evolving Forms According to Their Functions**

It is still disputed, but, in Reuter’s opinion, the existence of an IO could be asserted by the use of objective criteria. In a second step only, third parties could decide to recognize it – or not – and enter in legal relationships with it – or not. In any case, he suggested that an IO enjoyed certain rights and supported certain obligations by virtue of the general rules of public international law.<sup>47</sup> That being said, he kept repeating, first, that IOs profoundly differed from one another due to their functions and, second, that while states bore the final responsibility for the fate of a human community, IOs were better described in terms of limited and attributed competences. In that sense, IOs were always to be specific.

The bond between competence and the goal of the IO considered is synthesized in the notion of ‘*compétence fonctionnelle*’ (‘functional competence’), which comes up in different writings. While this notion reminds one, of course, of the well-known principle of speciality, its meaning and scope are not so easy to grasp. As expected, Reuter restated some commonplaces of IOs: they had no sovereign power; they had no control over their own functions (and could be deprived of them); they had a duty to discharge their function for the sole purpose of the members assigned to them; and functions impacted the immunities of IOs, their agents and assets. Certainly, it might be necessary for IOs to create new organs by unilateral acts, but the functions of such organs could not go beyond the functions of the IO, and subsidiary organs could not

<sup>45</sup> Reuter, *Organisations européennes*, *supra* note 8 at 30–31.

<sup>46</sup> This notion of ‘ideal type’ is borrowed from Beaud, *supra* note 13, at 50. Beaud is right to notice that the opposition between cooperation (all IOs) versus federalism (the Communities) structures the 1965 handbook, but the presentation is slightly different: ‘[L]es organisations européennes à base de coopération’ (part I) / ‘les organisations européennes’ (part II). However, we agree that Reuter seemed to have been quite ‘hesitating’ (at 49) all his life long. To learn more about his reflections on confederation and federation, see Reuter, ‘Confédération et fédération’, *supra* note 31, at 199–218. Beaud proposes an in-depth reflection on the limits of Reuter’s approach to federalism and suggests to overcome its shortcomings by using the notion of ‘Federation’ (as opposed to federation in the sense of federal state).

<sup>47</sup> ‘Principes de droit international public’, *supra* note 8 at 519.

exercise functions that principal organs could not delegate to them.<sup>48</sup> Last but not least, ‘competences of IOs extend to all acts essential to the fulfillment of their functions’.<sup>49</sup> Consequently, it could be expected that each IO enjoyed a legal personality in its own right with a specific content in accordance with its nature and function.<sup>50</sup>

Reuter clearly rebutted certain consequences that are sometimes drawn from the reference to functions. Functionalism should be construed neither as a principle for codification nor as a general principle of interpretation,<sup>51</sup> even less as a general principle of constructive interpretation. This sounds quite astonishing, considering the emphasis on ‘functional competence’ as a core notion in the law of IOs. At first, he did not really articulate any theoretical obstacles but just hinted at the international case law from 1926 to 1961 and concluded in rather definitive terms: ‘Indeed, so as not to imperil in that matter the general trend of “development” of international law, one can accept broader rules of interpretation only to the extent that this expansion is closely united to an already rich practice’.<sup>52</sup>

Thus, before the ICJ rendered its advisory opinion in *Certain Expenses Case* (1962), Reuter inferred from the case law of the ICJ and the European Court of Justice something of a possible delineation between functionalist interpretation – according to which the IO should enjoy any power indispensable, essential to its functioning – and teleological interpretation – according to which the IO should possess any power (explicit or not) necessary to the full implementation of its tasks.<sup>53</sup> He could easily accept the first inference, with limited consequences, and noticed that it was predominantly endorsed in cases where IO agent relationships were at stake. By contrast, where IO member states relationships were at stake, he reduced the so-called principle of functionalist interpretation to a presumption: founders are presumed to have endowed the IO with all powers necessary to the accomplishment of its functions. This is, in essence, very different from a principle of constructive interpretation. What is more, the ‘theory of functional competences’ should cede in the presence of a simplified procedure of amendment of the constituent treaty. Does the reasoning ultimately revolve around the intention of the founders or the functions of the IO? Paul Reuter’s views seemed to be quite hesitant. In his study on subsidiary organs, he expressed the opinion that the notion of ‘implied powers’ was difficult to use because it required seeking for the original, ‘fundamental intentions’ of the founders, especially in the most general instruments rather than in specific provisions. A decade later, in his contribution on treaties concluded by IOs, he insisted that, where competence of the IO was well defined and ‘squeezed’ states’ competences, there was little room for the development of implied

<sup>48</sup> Reuter, ‘Les organes subsidiaires’, *supra* note 28, at 426.

<sup>49</sup> Original text: ‘Les compétences de l’organisation s’étendent à tous les actes indispensables à l’exercice de leurs fonctions’. Reuter, *Institutions internationales*, *supra* note 8, at 254–255.

<sup>50</sup> *Ibid.*, at 263.

<sup>51</sup> ‘Principes de droit international public’, *supra* note 47, at 523–524.

<sup>52</sup> Original text: ‘En réalité pour ne pas mettre en péril dans cette matière le mouvement général de “développement” du droit international, on ne peut accepter des règles d’interprétation plus larges que dans la mesure où l’extension est étroitement unie à une pratique déjà consistante’ (at 524).

<sup>53</sup> *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter)*, Advisory Opinion, 20 July 1962, ICJ Reports (1962) 151.

powers; where competence was loosely defined, by contrast, an implied treaty-making power could stretch out, but not encroach upon, the autonomy of member states.<sup>54</sup> The handbook *Institutions internationales* was more synthetic but not less restrictive. Paul Reuter briefly assessed that the case law of the ICJ until 1975 (thus including *Certain Expenses* as well as *Namibia*) dictated a goal-oriented construction of competence rather than a restrictive one.<sup>55</sup> This assertion was immediately followed by much longer developments on the limits to the competence of IOs, drawn, first, from texts and the existence of a supportive practice (with emphasis in the text) and, second, from the existence of matters that are essentially within the domestic jurisdiction of any state or from the resistance originating in domestic, constitutional law, the weak power of sanctions vested with IOs or disputes over competence claims on the part of the IO.<sup>56</sup>

In fact, the functionalism the author envisioned (without naming it) could be related to empiricism and incrementalism. The very justification of a functionalist approach to the constituent treaty resided in the assertion that IOs were just evolutive forms. This is so for the evident reasons that constituent treaties cannot provide for all future needs of the institution, that the intent of members states not only might evolve but also that they might strive for domination over their creatures and instrumentalize any procedure for that purpose. Consequently, the first immediate application of the 'theory of functional competence' should reside in the creation of subsidiary organs.<sup>57</sup> Another justification was to be found in the necessity to resolve legal issues that could not be anticipated during the negotiations of the constituent treaty. For instance, this could arise because member states were still not ready to explicitly endorse the creation of a new subject of international law and, if they did, were reluctant to envisage that IOs could concretely incur responsibility as well as because the right to secrecy happened to conflict with their practice and autonomy.<sup>58</sup> Consideration for the functions of the IO would be an element of the balance to strike so as to fill in vacuums in the law of IOs with acceptable compromises. Still, the vacuum might be filled in according to functions, provided this process was backed up by practice. Practice was not qualified very precisely but implicitly by reference to the practice endorsed by members.

Curiously, Paul Reuter pinpointed an embarrassing legal vacuum in the absence of mechanisms of judicial review of acts of the IO, while linking this to the limits of 'functional competence'. This is quite paradoxical since it is not possible to fill in such a vacuum by the institution of judicial review as a mere consequence of the spontaneous development of the IO through practice.<sup>59</sup> Otherwise, the IO would be granted the power to set up at will proceedings depriving member states from a part of

<sup>54</sup> Reuter, 'Le droit des traités', *supra* note 22.

<sup>55</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Reports (1971).

<sup>56</sup> Reuter, *Institutions internationales*, *supra* note 8, at 255–258.

<sup>57</sup> Reuter, 'Les organes subsidiaires', *supra* note 28.

<sup>58</sup> Reuter, 'Le droit au secret et les institutions internationales', 2 *AFDI* (1956) 46.

<sup>59</sup> Reuter, *Institutions internationales*, *supra* note 8, at 267.



their sovereignty. This would have little chance to happen in practice. Reuter seemed vaguely prone to approving the formal institution of such a mechanism by the founders, but he doubted that the great powers would be ready to confer IOs the last say and certainly not beyond their technical aspects.<sup>60</sup>

### C Usefulness of Constitutionalism in Addition to Functionalism

Reuter tended to present functions as enabling and limiting, with a stronger emphasis on limiting the expansion of powers or the activities of IOs, but he considered that judicial review could be warranted by further developments of the IO only. Thus, references to constitutional rules or constitutional limits could seem either superfluous or contradictory in the long-lasting absence of such a review. However, in the same writings, Reuter, with a reference to the *Meroni* case,<sup>61</sup> insisted on the development of the ‘constitutional’ law of IOs and the necessity for their organs to abide by constitutional principles. In early writings, the definition was rigorous and faithfully replicated domestic constitutional conceptions: ‘[C]ertain fundamental rules, which in the hierarchy of legal rules constituting the right of the IO occupy the highest rank.’<sup>62</sup> Immediately thereafter, Reuter underlined the diversity of constituent treaties, many of them remaining flexible instruments. Elsewhere, however, ‘constitutional’ was used with a very soft meaning – that of organic and procedural questions.<sup>63</sup> The handbook *Institutions internationales* qualified constituent treaties as constitutional by nature, with nuances because of the utmost diversity of their provisions and, hence, of revision procedures.<sup>64</sup> In other publications, IOs were interestingly depicted as proper legal orders with an alternative: the proper law of IOs might be either an ‘internal’ law (by analogy with that of a state) or a special international law. To decide the best qualification, Reuter turned, surprisingly perhaps, to European law. Analysing IOs in the light of the European Communities was not a scarecrow for him, provided that the specificities of the institutions considered were not obfuscated. Thus, distinguishing between primary and secondary law was recommended. Treaties concluded by IOs were controlled by international rules, but they had to be ranked within that hierarchical order; their construction could be strongly influenced by rules proper to the IO.<sup>65</sup> Curiously enough, Reuter refrained from again using the adjective ‘constitutional’ to describe this hierarchical special legal order, partly disconnected from the general rules of international law.

The use of the adjective ‘constitutional’ was so fluctuating that it is difficult to assert that Reuter seriously envisaged that constitutionalism could fortify the limits

<sup>60</sup> *Ibid.*, at 257.

<sup>61</sup> European Court of Justice, Case 9–56, *Meroni v. High Authority of the European Coal and Steel Community*, 13 June 1958. In this case, the Court clarified the conditions under which subsidiary organs of the European Coal and Steel Community might be created and function.

<sup>62</sup> Reuter, ‘Les organes subsidiaires’, *supra* note 28, at 435.

<sup>63</sup> ‘Le droit au secret et les institutions internationales’, *op. cit.*, at 53.

<sup>64</sup> Reuter, *Institutions internationales*, *supra* note 8, at 254.

<sup>65</sup> P. Reuter, ‘L’ordre juridique international et les traités des organisations internationales’, in R. Bernhardt et al. (ed.), *Völkerrecht als Rechtsordnung. Internationale Gerichtsbarkeit. Menschenrechte. Festschrift für Hermann Mosler* (Heidelberg: Springer, 1983), at 745–757.

deducible from assigned functions and 'functional competence'.<sup>66</sup> He envisaged a rather light version of constitutionalism. However, he insisted that the responsibility of IOs should be seriously envisaged in the future.<sup>67</sup>

### 3 Paul Reuter's Views on Science, Law and Politics

One of the most stimulating papers that Paul Reuter published is dedicated to experts and politicians within IOs. Certainly, his thoughts are largely outdated today, but they illuminate the spirit of the 1930s and 1950s. In a critical tone, which is sometimes perhaps unusually ironical, this article directly links the patterns of IOs (considered in their diversity) to the distinction between experts and politicians, with a focus on the role of experts in IOs. The definitions are rather bold: '[T]he politician is the man of ends, the expert is the man of means. ... The expert never has to choose, he has to solve a problem according to a choice.'<sup>68</sup> Thereafter, Paul Reuter highlights the fact that the role that experts play in IOs is incomparably developed for two main reasons. First, many IOs have technical tasks requiring the display of a technical knowledge. Second, states have to overcome national borders and create IOs, but they are reluctant to do so, out of fear for an authentic 'international power'. Then, as a substitute, they vest power with experts, creating a 'government of experts'. This can only be a transitory solution: waiting for the regeneration of political circles, experts are needed, but their role should not be overestimated; power should be repatriated to politicians. These reflections shed light on Reuter's own deontology as an expert and scholar as well as on his contribution to the '*méthode fonctionnelle*'.

#### A *Drawing Lines between Theory and Practice*

Paul Reuter's views on academic experts and politics, and on his own role as a scholar and as an expert appointed by governments, were rather ambivalent. He certainly was convinced that the best scholar was necessarily an experienced practitioner, at least in the field of public international law. Consistently, he did not refrain either from using his experience to flesh out academic papers or from reusing academic pieces of work for other purposes. Thus, he could have won a position enabling him to shape notions, academic discourses and debates in European law with an unrivaled legitimacy.

Actually, Paul Reuter abundantly commented on the ECSC in its early years.<sup>69</sup> He had occasions to shed an 'authentic light' on this disputed achievement and to insist on

<sup>66</sup> Against the backdrop of French approaches to the notion of 'constitution', the use of this adjective is noticeable but not unique at that time in the French international law doctrine. See, e.g., M. Virally, 'L'ONU devant le droit', 99 *Journal du droit international* (1972) 501. However, compared with some German approaches to international law, it seems to be deprived of a true paradigmatic value.

<sup>67</sup> See especially Reuter, 'Sur quelques limites du droit', *supra* note 23, at 506–507.

<sup>68</sup> This distinction is preceded by another: the power on people versus the power on things. Reuter, 'Techniciens et politiques dans l'organisation internationale', in Centre de sciences politiques de l'Institut d'études juridiques de Nice', *Politique et technique* (1958) 181, at 181–182.

<sup>69</sup> Reuter, 'Quelques aspects institutionnels', *supra* note 39, at 105–124; Reuter, 'La conception du pouvoir politique', *supra* note 44, at 256–276; Reuter, 'Le Plan Schuman', *supra* note 33, at 149–157; 'La Communauté européenne du charbon et de l'acier', 81 *RCADI* (1952) 517; P. Reuter, *La Communauté européenne du charbon et de l'acier* (1953).

supranational features. Yet these publications apparently attracted little attention.<sup>70</sup> While taking part in the first international conference on the ECSC in Milan-Stresa in 1957, Reuter chose to remain silent there.<sup>71</sup> It is all the more telling as this congress was convened in order to legitimate and reinforce a model of integration that the failure of the European Defence Community jeopardized. Deceiving all expectations from the ECSC, which supervised and supported it, the conference ended up with the reassessment of the ECSC as an international institution almost like any other.<sup>72</sup> How to explain Reuter's self-restraint? The discretion of Reuter on this occasion, as far as we can tell, might be due to the selection operated by the steering committee (he was not a member of the critical first commission).

Subjective factors certainly had their importance too. First, he was probably worried about putting at risk the trust of the French government towards the faithful counsellor that he used to be if he were to embrace a crusade in favour of the autonomy of European law.<sup>73</sup> Conversely, he was also worried about betraying the European construction he had contributed to. Second, Reuter was seemingly not very interested in the structuration of academic fields or in theoretical clashes. Considering the substance now, his analysis was pretty nuanced: to him, the European Communities were IOs certainly, but with special features, and they promised far-reaching evolutions. He was fully aware that they would renew international law, but one cannot take for granted that he contemplated IOs and European organizations as remedying the original 'flaws' of international law that the global community was happy to get rid of.<sup>74</sup> This subtle positioning might explain why his handbook *Organisations européennes* was still considered a reliable resource concerning the ECSC in the late 1950s and early 1960s by activists of the autonomy of European law and why he was not enlisted in Alain Pellet's crusade in the 1990s conducted in order to reaffirm the international roots of European law.<sup>75</sup>

It is quite challenging to try to compare Roberto Ago's conclusions of the Milan-Stresa congress and Reuter's positions. Ago endeavoured to save the unity of the academic community of internationalists by opposing people who were devoting their lives respectively to action and to science instead of opposing international law and a new branch of law (European law or the law of integration):

In fact, a politician wishing to act and a man of science striving to describe a certain reality place themselves on two different levels. ... This is the reason why I think there is no real contrast between us in our discussions: Men of action (who expound the supranational character of the ECSC), impatient to use instruments proper to rally a mass of people, and men of study

<sup>70</sup> According to Bailleux in an in-depth study devoted to the 'invention of European law' in France. J. Bailleux, *Penser l'Europe par le droit: L'invention du droit communautaire en France* (2014), at 124.

<sup>71</sup> Following Bailleux, *ibid.*, at 209–210.

<sup>72</sup> According to Bailleux, 'Comment l'Europe vint au droit. Le premier congrès international d'études de la CECA (Milan-Stresa 1957)', 60(2) *RFSP* (2010) 295.

<sup>73</sup> It is to be noticed that Paul Reuter acted as a counsel for the French government before the Court of Justice of the ECSC.

<sup>74</sup> Contra, Bailleux, *supra* note 70, at 206; see also Beaud, *supra* note 13, at 49.

<sup>75</sup> 'Les fondements juridiques internationaux du droit communautaire', in *Académie de droit européen, Recueil des cours* (1997), vol. V-2, 193.

(who describe it as an international organization) by prudence, were guided by one and the same desire, by one aspiration: To make possible this accomplishment of Europe which is in our heart.<sup>76</sup>

Paul Reuter's attitude was quite different. As we know, he explicitly assumed that IOs brought change to international law,<sup>77</sup> that European organizations transformed institutional and international law and that changes would affect European organizations over time. Still, to his mind, it was certainly not for a man of science to fix once and for all artificial limits to the imagination of politicians (or even to his counterparts at the university) since the scholars had either to account for what had been experienced or to help politicians (or private interests and so on) realize their goals. In doing so, a man of science could act on behalf of stakeholders with a view to pushing forward with European integration and account for action, without incurring Ago's reproaches.

However, Reuter assigned some limits to men of science and certainly to himself. Indeed, his practice as a scholar and a member of the ambivalent ILC (where experts were governmental and/or academic) was guided by a fear of unleashing controversies with unexpected political consequences or backlash. This fear is perceptible in publications dealing in general terms with IOs. Theorization or codification based on a rationalization of the practice, be it of states or of IOs, should not impede spontaneous developments of international (or European) law. The first principle of prudence in such activities dictates not to define, not to qualify, not to codify beyond strict necessity. The fear of practical unintended effects comes up even more obviously in the foreground in an early publication on some institutional aspects of the Schuman Plan, probably due to Reuter's faith in the federal destiny of Europe.<sup>78</sup> Explaining what the word 'supranational' meant to the men who discussed the Schuman Plan, he refrained from theorizing supranationality and suggested: 'What is more it is useless to sketch out a theory of this new construction [*sic*] it will certainly be elaborated with a view to drawing from it unexpected consequences, perhaps to inferring that the treaty

<sup>76</sup> Original text: '[E]n réalité, l'homme politique qui demande à agir et l'homme de science qui tend à décrire une certaine réalité, se placent sur deux plans différents. ... Voilà pourquoi je pense qu'il n'y avait pas un contraste réel entre nous dans ses discussions: les hommes d'action (qui soutiennent le caractère supranational de la CECA) dans leur impatience d'employer des instruments aptes à rallier les masses, et les hommes d'étude (qui la décrivent comme une organisation internationale) dans leur souci de prudence, étaient guidés les uns et les autres par un même désir, par une seule aspiration: rendre possible cette réalisation de l'Europe qui est dans nos cœurs.' R. Ago at the Milan-Stresa congress, quoted by Bailieux, *supra* note 72, n. 89).

<sup>77</sup> The changes brought about by IOs are listed in particular in Reuter, 'Organisations internationales et évolution du droit', in Reuter, *L'évolution du droit public*, *supra* note 8, 447. As early as the mid-1950s, Reuter stated that IOs influenced 'core notions' of international law because of their being distinct subjects of international law, of the loss of States' monopoly over customary precedents, of IOs law-making power, of the ever growing intertwining of administrative and international law and so on. Above all, IOs embody new 'legal bodies', distinct from both classical public international law and domestic systems. However, some changes were still needed – for instance, the introduction of a right of action before international courts for IOs.

<sup>78</sup> Some sentences scattered in his academic publications allow for the expression of a personal disappointment. Reuter, *Organisations européennes*, *supra* note 8 at 202. For an in-depth study of Paul Reuter's vision of, and commitment to, federalism, see Beaud, *supra* note 13.

is constitutionally inconsistent with one of the six municipal legal systems in presence!<sup>79</sup> Thus, the second principle of prudence is not to build theories disregarding their possible concrete effects. As we can see, power was not seen as an incentive for a man of science whose proper vocation is to scrutinize the way power is distributed and redistributed (in the words of Reuter) in order to build up a federation.

## B Bridging the Gap between Science/Expertise and Politics

Some of Paul Reuter's formulas might suggest that, to him, the ultimate virtue of IOs – and especially of the ECSC – was their apolitical nature and the predominant role that experts were to play within their structures. Still, he discussed this supposedly apolitical nature for two reasons at least. First, as we saw in Part 2, it was a result of the continuum of technical and political questions (despite some ambiguous sentences here and there). Second, it was the outcome of the transformation that the blueprint for a European authority had undergone since the Schuman statement, especially through the powers vested in the Council. But, with respect to the role of science – and, consequently, expertise – he audaciously wrote:

The power [of the High Authority] seeks only to rely on lessons from economic rationality ...; the role of the High Authority being 'nearly quasi jurisdictional', 'it functions somehow as an arbitrator' ('*une magistrature arbitrale*'); 'in fact, its numerous competences entail normally no political options, properly speaking'. 'So, one can accept that the principal organ of the Community enjoys the large independence that must be that of experts; the institution is then bound to the model of the common market: 'conditions which will *in themselves* assure the most rational distribution of production'.<sup>80</sup>

Thus, Reuter seemed to reason as if members of the High Authority only had to be voices for economic rationality. At the same time, he was aware that such a solution (a quasi arbitral college) would not be adapted for other products or other forms of organization than a common market and that members of the High Authority were politicians too since they had to account for their action before the Assembly.<sup>81</sup>

Looking beyond the special case of the ECSC, it appears that Reuter's trust in 'experts' or 'technicians' was rooted in his conviction that authentic Europeans did not exist who could people institutions, in full independence from states as well as from private interests:

<sup>79</sup> Original text: 'Au surplus il est bien inutile d'esquisser la théorie de cette nouvelle construction [sic] elle sera certainement élaborée pour en tirer des conséquences inattendues, peut-être pour en déduire l'inconstitutionnalité du traité au regard d'un des six droits internes en présence!' Reuter, 'Quelques aspects institutionnels', *supra* note 39, at 109. Reuter was involved in a controversy over the constitutionality of the treaty of the European Community of Defence that opposed him notably to Suzanne Bastid.

<sup>80</sup> Reuter, 'La conception du pouvoir politique', *supra* note 44, at 267, 270. Original text: 'Ce pouvoir ne cherche à s'appuyer que sur les enseignements de la rationalité économique. .... [La Haute Autorité] joue un rôle que l'on qualifierait presque de quasi juridictionnel, elle constitue d'une certaine manière une magistrature arbitrale; en effet ses multiples compétences ne comportent pas en principe d'options politiques proprement dites. On peut ainsi accepter que le principal organe de la Communauté possède une grande indépendance qui doit être celle des experts; l'institution est alors liée à la formule du marché commun: ensemble de "conditions assurant *par elles-mêmes* la répartition la plus rationnelle de la production."

<sup>81</sup> Reuter, 'Techniciens et politiques', *supra* note 68, at 195.

When an international organization is created, 'international citizens' should have as many positions as possible in it. Still, they do not exist. Where is the 'European' man that will govern Europe to be found? Where is the 'global' man who will govern the world to be found? Failing to find him, one designates independent personalities, who recommend themselves through their international spirit, and their technical knowledge. The resort to a technician is a sort of desperate solution in the absence of a human substrate able to embody supra-national and international realities.<sup>82</sup>

A precise, positive definition of what authentic Europeans are or could be is missing. In appearance only, Paul Reuter's concern can be linked to seminal investigations on the nature and status of the international civil servant led by eminent members of the French-speaking doctrine (especially Suzanne Bastid).<sup>83</sup> In fact, the recurrent expressions of this concern should rather be traced back to his awareness of the 'sociological obstacles' in the process of building up European institutions. According to him, interdependencies were a fact, making European institutions objectively necessary for experts, but they had to be founded at the outset without any bedrock since people's consciousness was trapped in national narratives, mythologies or political frameworks.<sup>84</sup> What is more, Reuter avowed a profound mistrust towards national parliamentarians and, more generally, politicians. Complaining that the Parliament was almost sovereign but dramatically inefficient in France was a commonplace during the 1930s and World War II.<sup>85</sup> Since national politicians would in no way help to build a still theoretical European people, it remained necessary to turn to experts but as a tentative solution only. Which experts? In the particular context of reconstruction after World War II and the creation of the *Ecole nationale d'administration*, to which he contributed as a member of the Steering Committee (1945–1959), Paul Reuter dreamed of a new type of man – one 'possessing together the qualities of civil servants and of businessmen'.<sup>86</sup> Thus, the profile of experts expected to serve international/European organizations was not very finely sketched out. Antonin Cohen and Julie Bailleux were certainly right in describing a rivalry between old (political) elites and new (technocratic) elites around positions of power, within the *Ecole des cadres d'Uriage* and then under the veil of debates on Europe. Leading positions within states and beyond states were at stake. Was the parliamentary model or influence to be replicated at a supra-national level or was that level to be structured around the powers of the technocratic elite, detached from old-fashioned parliamentarism? Active as he was during and after World War II, Reuter took part in this struggle and had to admit that parliamentary instances were embedded in the new supranational structures. Another novelty rolling back pure political and diplomatic games was the institution of the European Court of justice. His refusal to sit on the bench of the European Court of Justice and his

<sup>82</sup> *Ibid.*, at 195.

<sup>83</sup> S. Bastid, *La condition juridique des fonctionnaires internationaux* (1930); see also M. Bedjaoui, *Fonction publique internationale et influences nationales* (1958).

<sup>84</sup> See also Beaud, *supra* note 13, at 65–67.

<sup>85</sup> See Cohen, *supra* note 5, especially at 4–6, 291, 346ff, 401ff, at 419–421.

<sup>86</sup> Cohen, *supra* note 4, at 656.

self-restraint let us suppose that his personal fate was not at stake.<sup>87</sup> He preferred to remain an expert in the shadow of policy-makers. At a more general level, despite his insistence on the proper and counterbalancing role of technical experts, he deliberately moderated his plea for neo-functionalism (as a political process) and functionalism (as a ‘legal principle’), thus refraining from building on this dynamic to propel IOs beyond what states and statesmen were ready to endorse. His fascination for technical expertise ultimately did not suppress any deference towards political will.

<sup>87</sup> According to Gros, this refusal was due to his desire to remain a teacher. Gros, *supra* note 6, at 6. Reuter did not refuse nominations to arbitral tribunals (the list of the cases is to be found in Reuter, ‘Biographie sommaire de Paul Reuter’, in *Mélanges offerts à Paul Reuter*, *supra* note 6, at xxii.