International Organisation as Government: Rereading Georges Scelle's Theory of International Government

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Abstract: International organisations have, in different aspects, become important entities in securing some degree of stability of the international social order. Institutions have the function to sort out and execute their constitutional functions and exert a broader influence on the social order, one that guarantees that different social agents' legal positions and competence are appropriately secured in the society in which they operate. Georges Scelle saw this function as a function of government, and he associated it with the activities of an executive. Together with judicial institutions, which guarantee the proper functioning of the legal order, international organisations maintain the material security of the social agents, the States, so they can fully achieve their social objectives. This article aims at revisiting Scelle's argument about the theory of international government and, in light of his broader international legal sociology, to evaluate and examine the role international organisations play nowadays in respect of States and local populations more broadly. For Scelle, the relation between social functions and the legal organisation of competences is integral to forming a proper legal order. This article hopes to contribute to the debate on how international organisations simulate government action by taking inspiration from Georges Scelle's theory of international government, espoused in his report to Institut de Droit International in 1934: *Théorie du Gouvernement International*. In doing so, the article will provide an intellectual history of Scelle's contribution to the development of international organisations' position within international law. It also hopes to answer the question of how international organisations differentiate their actions from domestic public administrations and contribute to the debate about functionalism and autonomy of international organisations.

Keywords: Georges Scelle, International Government, International Organizations, International Labour Organization, League of Nations

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Les institutions internationales peuvent subir des assauts, ne pas trouver toujours, comme aujourd'hui, les hommes et les activités les plus aptes à hâter leur croissance; elles ne sauraient péricliter. Elles répondent, en effet, non seulement à un besoin, mais à une nécessité organiquede la vie internationale et de nouveaux cataclysmes ne feraient que rendre plus urgente leur consolidations [...]. L'ère du particularisme ouvrier, dont la représentation s'est incarnéedans l'OIT, n'était que l'annonce ou l'amorce du nouvel ordre.[1]

I. Introduction

International organisations have, in different aspects, become essential entities in securing some degree of stability in the international social order. Institutions are required to sort out the means to execute their constitutional functions. Still, they also exert a broader influence on the social order, which guarantees that different social agents' legal positions and competencies are appropriately secured in the society in which they operate. Georges Scelle saw this as a function of government and associated it with an executive's activities.[2] Together with judicial institutions, which guarantee the proper functioning of the legal order, international organisations maintain the material security of the social agents, the States, so they can fully achieve their social objectives.[3]

In general, readings of Georges Scelle's understanding of global governance focus on his concept of *dedoublement fonctionnel.* In short, Scelle's theory of the *dedoublement fonctionnel* posits that representatives of national governments, when acting on the international plane, also operate as members of an *international government.* Many see in this concept, which reflects Scelle's monist understanding of international law, the core of Scelle's contribution to a theory of global government – or what today is more precisely referred to as global governance.[4] The present article challenges this view by taking stock of other contributions made by Georges Scelle

[1] Georges Scelle, *L'organisation internationale du travail et le B.I.T.* (1930), at 308.

[2] Georges Scelle, 'Théorie du Gouvernement International', Rapport, Institut International de Droit Public (1934), at 11.

[3] *Ibid.*, at 12.

[4] Scelle's theory aimed at setting up a conceptual framework within which one can understand the various roles international institutions – courts and international organisations – and national governments should have in coordinating the various aspects of international society at different levels (international, regional, local). The legal vocabulary of his time, as well as the influence of the ideology of internationalism from the 19th Century meant the use of the word *government* was fully en vogue, rather than *governance* – a concept that will enter the international legal and political jargon mostly after the Second World War. For an interesting history of the idea of world government and the vocabulary associated to it, see Mark Mazower, *Governing the World: The History of an Idea, 1815 to the Present* (2013), especially at 66 et seq. Nonetheless, Scelle's theory can be understood to have had an important influence on contemporary theory of global governance.

that go beyond his idea of *dedoublement fonctionnel* and can help us better grasp how Scelle considered and understood global governance. It also shows how, at the beginning of the 20th Century, Scelle understood that international organisations had to undergo the necessary changes to effectively be considered part of an international government. To do so, it is essential to look at the theoretical work developed by Scelle on the theory of government and his critique and evaluation of the most prominent international organisations of his time: the International Labour Organization (ILO) and the League of Nations.

More specifically, this article aims to revisit Scelle's argument about the theory of international government. Considering his broader international legal sociology, it seeks to evaluate and examine the role international organisations play in respect of States and local populations more broadly. After all, for Scelle, international society is not merely composed of various States, but, more importantly, a society of individuals and groups integrated by different forms of solidarity.[5] In this context, a legal order should account for the relation between social functions and the legal organisation of competencies of those under its scope.[6] Much has been written about how international organisations act similarly to States in the last years. For example, they expand their powers by reinterpreting their constitutional goals;[7] or have the necessary elements to be considered analogous to States from an international legal personality standpoint.[8] This article hopes to contribute to the debate on how international organisations can or should simulate government action following Scelle's theory on the topic.[9]

Scelle's theory of international organisations appears in his works, reflecting on the role of the League of Nations and the ILO at the beginning of the 20th century. Although not formally compiled in a single treatise or text, Scelle's ideas on international organisation reveal much of what he saw as an essential trait of international society's evolution. His legal theory and philosophy connect aspects of sociological theory with the fundamentals of law's transformation at the international level. In this sense, the development of international law must account for the institutional changes in international society. Scelle identifies a similar move in global society to

[5] Georges Scelle, *Problèmes Internationaux: Les faiblesses de l'organisation internationale de 1918 à 1940* (1945), at 5; Scelle, *Théorie du Gouvernement International*, *supra* note 2, at 48 – 49.

[6] *Ibid.*, at 14.

[7] See e.g. Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (2017).

[8] For this, see Fernando Lusa Bordin, *The Analogy between States and International Organizations* (2018).

[9] Although a great deal of his theory on international government is espoused in his *Théorie du Gouvernement International*, many of his ideas have also been developed in his other writings which will also form the basis of the present text.

that in States. This owes much to the influence the development of the public discipline in France had in his formation, including Maurice Hauriou, but perhaps more importantly, that of Léon Duguit.[10]

Within this broader context, for Scelle, it is inevitable to think that the full development of international society will happen through establishing a public law framework. The emergence of institutional apparatuses at the international level is thus a naturally occurring phenomenon to facilitate the operations of such a society. Throughout his writings, one can identify the fundamental criteria Scelle recognises as imperative for international organisations to achieve the state in which they effectively would accomplish their tasks of being proper institutional apparatuses for the government of international society. The first is the recognition of their creating treaties as constitutions imposing obligations on the members irrespective of their consent. Such a 'constitution' would give the organisation enough authority to enact decisions that would have to be followed by the members even if they were against their will. Second, international organisations should operate as public services to international society. They would effectively have the power and authority to intervene and control different actions taken, which would have a global effect. Lastly, but no less critical, international organisations should represent the *peoples* and not only States. International organisations should become less administrative bodies where States' representatives participate and should increasingly include representatives of different *classes* or *groups* that share some kind of international solidarity. In this case, Scelle opposes the tripartite system of the ILO, which he sees as the beginning of an *international parliament* to the machinery and representation scheme of the League of Nations.

Based on these three points, Scelle details the different limitations and advantages establishing international organisations may have for advancing international law. This article will provide an intellectual history of Scelle's contribution to the development of international organisations' position within international law. It also hopes to answer how international organisations differentiate their actions from domestic public administrations and contribute to the debate about functionalism and autonomy of international organisations. To this end, the article will proceed by situating Georges Scelle's theory of international government and international legal sociology within the more extensive intellectual history of international institutional law. First, it looks at Scelle's intellectual contribution to the field and engages with the above-referred text and other writings of the author. The article then assesses its

[10] Various of the concepts used by Scelle to develop his theory of international law and organisations had been previously sketched in relation to French public law by both Maurice Hauriou and Léon Duguit (e.g. solidarity, the State as public service, amongst others). For an excellent analysis of these legal fundamentals developed by these authors, see Dieter Grimm, *Solidarität als Rechtsprinzip* (1973).

eventual practical and theoretical impact on the field (for instance, Scelle's influence on our understanding of the ILO operations). Such an assessment lays the groundwork to examine whether Scelle's theory of international government still finds resonance nowadays. For this purpose, the article concludes by looking at the work of specific organisations both at the global and regional level (e.g., the World Bank, the IMF, the African Union, or the EU) to test whether Scelle's contribution still holds for thinking about international organisations' activities nowadays between functionalism and autonomy.

II. Georges Scelle and the Fundamentals of his International Legal Project

A. French Public Law Scholarship Influence on Scelle's Legal Theory

Georges Scelle belongs to the context of a broader development of the science of public law in France.[11] In this context, Scelle's work situates itself within the general process of developing public law in Europe. Thus, his work was broadly impacted by furthering the discipline and instruments of public law designed in France. Still, it also relies on developing such a field in other European countries.[12] Following Léon Duguit and Maurice Hauriou, Scelle's grounding objective is to showcase how public law elements largely determine the scope of action of State (and international) institutions. For Scelle, understanding the State's action in domestic and international contexts reveals how public law becomes more relevant and how fundamental institutions of the State consolidate themselves and intervene – legally – ever more in the constitution of local societies.[13] Contrary, however, to what might be deduced from the work of a public lawyer such as Scelle, his attempt to identify the [legal] limits of State actions intended precisely to demystify the State's protagonism in both domestic and international law.[14]

When examining the fundamental concepts Scelle articulates in his legal theory, one can quickly identify the influence of authors such as Hauriou and Duguit. The ideas of how the State, or more generally, political organisations form, the concept of solidarity, or the very notion of public service are central to the constitutional and administrative theory of both Hauriou and Duguit. Although, for instance, Hauriou

[11] Paul Reuter, 'Georges Scelle', 13(2) *Revue Internationale de Droit Comparée* (1961) 380, at 381.

[12] Michael Stolleis, *Konstitution und Intervention, Studien zur Geschichte des öffentliches Rechts im 19. Jahrhundert* (2001), at 253 et seq.

[13] *Ibid.*, at 261 – 263.

[14] *Ibid.*

would see public services as organisations created by an administrative body to fulfill a collective need,[15] it was still to be taken as an essential function of the State. State operations through public services justified the ascription of rights of public power to State bodies.[16] Duguit went a step further and assimilated public service with the very materialisation of the State in everyday life. Like Hauriou, Duguit also sees the notion of public service as the core concept informing administrative law.[17] More importantly, the use of public services to fulfill the general interests of society provided the necessary legitimation of the different public powers constituted within the State.[18] The State's organisation of public life involved recognising its responsibilities to fulfill general interest[19] and organise itself accordingly.[20] This informs much of Duguit's distinction between government and governed,[21] which will be later taken up by Scelle to read the development of international government.

Another important concept that Scelle will borrow from the French public law tradition – specifically from Duguit – developed in the late 19th Century is solidarity. Effectively, solidarity should not be taken as a mere sociological concept[22] but as a legal principle of public law, informing how State action is legitimated.[23] As a legal principle, solidarity justifies the socialisation of law amongst all individuals. It legitimates them to require the State actions to guarantee the realisation of general interests in practice.[24] As seen in the following sections, the concept of solidarity is instrumental for Scelle to justify procuring institutional mechanisms to organise international society. It will serve him to provide the sociological basis to argue for different machinery to operate international law. It will also justify the need to reconstruct international law on a different basis than sovereignty. Finally, this will come to Scelle as a ground for expanding participation by other groups – and not only States – in international legal life.

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[15] Maurice Hauriou, *Précis de Droit Administratif* (2nd ed., 1929), at 150.

[16] *Ibid.*, at 151.

[17] Léon Duguit, 'De la situation des particuliers à l'égard des services publics', 24(1) *Revue du droit public et de la sciences politique en France et à l'étranger* (1907) 411, at 414.

[18] Grimm, *supra* note 10, at 73–74.

[19] Léon Duguit, 'Le droit social, le droit individuel et la transformation de l'État', Conférences Faites à l'École des Hautes Études Sociales (1908), at 88.

[20] Duguit, *De la situation des particuliers à l'égard des services publics*, *supra* note 17, at 415.

[21] *Ibid.*, at 415–416.

[22] Grimm, *supra* note 10, at 40.

[23] *Ibid.*, at 31.

[24] *Ibid.*, at 44.

B. The Political Underpinnings of Scelle's Political and Legal Position

It is no secret that Georges Scelle held largely left-wing political views. Yet little is discussed how much this has decisively influenced his very own legal philosophy.[25] Much of his philosophy was informed by his professional and academic experience. Interested from the beginning in the different social problems affecting France during the 3rd Republic, Scelle quickly joined the radical party of Léon Bourgeois, which aimed to provide a 'synthesis' of those defending economic liberalism and socialists. [26] The radical party aimed to promote as much material equality as possible between citizens without directly affecting or disrupting individual liberties.[27] This party, nevertheless, was strongly reliant on the *bourgeois'* idea of solidarity, one that Scelle would strongly incorporate into his legal philosophy.[28] Instead of provoking or promoting the concept of solidarity amongst different social groups, Scelle believed that solidarity should be left to happen naturally between various individuals. [29] On this basis of natural solidarity between humans of society, Scelle grounds his fundamental critique of the parliamentary State of the 3rd Republic.[30] With his conception of solidarity and critique of the parliamentary State in France, Scelle also became a fervent critic of the concept of *sovereignty*. Decisively influenced by Duguit, for whom the State was a legal fiction[31] and traumatised by the events of the First World War, Scelle saw the concept of sovereignty as essentially misleading, for it was impossible to ascribe to the State any true personality.[32]

Scelle's legal contribution started in labour law but soon turned to international law. His political views were also known about events happening in the European and global sphere and informed much of his international legal theory. For instance, Scelle was a well-known peace activist having mobilised strongly to create the League of Nations and was also the vice-chairman of the French commission for the Eu-

[25] Oliver Diggelmann, 'Georges Scelle', in Anne Peters and Bardo Fassbender (eds.), *Oxford Handbook on the History of International Law* (2013) 1163, at 1165.

[26] Hugo Canihac, 'Du Solidarisme aux Communautés Européennes, Le Concept de Solidarité dans la Pensée de Georges Scelle', 51(1) *Revue Française d'Histoire des Idées Politiques* (2020) 195, at 205 – 206.

[27] *Ibid.*

[28] *Ibid.*, at 206.

[29] *Ibid.*, at 208.

[30] *Ibid.*

[31] Martti Koskenniemi, *The Gentle Civilizer of Nations* (2002), at 330.

[32] *Ibid.*, at 331. And as Koskenniemi notes, this is also one of the reasons for why Scelle decides to go back to the expression '*droit des gens*' (*ius gentium*), with 'people being understood in the everyday sense of "individuals"'.

ropean Customs Union.[33] In the context of this Pan-Europeanism, Scelle argues that there are several different 'solidarities' between smaller groups and nations, all of which compose smaller 'international societies' and the vast canvas of the global public order.[34] Such an observation leads Scelle to reinforce his belief in the promises of federalism[35] as a model for international organisations. Indeed, Scelle sees the League of Nations as the first official attempt to create a *federation* at the international level.[36] However, as he saw for the European question, there should not be, at first, any direct institutional planning.[37] He believed that institutional transformation should happen through 'natural evolution,' where jurists first take stock of the political realities to construct their 'doctrines then.'[38]

C. The Basic Tenets of Scelle's Legal Philosophy

In different ways, Scelle's objective was to propose a single public law theory capable of encompassing the variety of structures and institutions present in both domestic and international public orders.[39] In other words, Scelle hoped to provide the fundamental structure for his well-known supported monistic view of law and politics.[40] For Scelle, there was no point in retrieving back to legal concepts that had no bearing on social reality.

If the law were to reflect the necessities and conditions of society scientifically, it had to do away with assumptions that did not provide for the *emergence* of law as

[33] Jean-Michel Guieu, 'The Debate about a European Institutional Order among International Legal Scholars in the 1920s and its Legacy', 21(3) *Contemporary European History* (2012) 319, at 325. His counterparts included, for example, Alfred Verdross and Hans Kelsen in Austria, and Nicolas Politis in Greece.

[34] *Ibid.*, at 327 – 328.

[35] For Scelle, federalism required the following elements: 'efficacité et liberté à fin de garantir la "stabilité sociale (double représentation)"; garantie (des compétences, intégrité territoriale, etc.); et participation', see Georges Scelle, 'Fédéralisme et Proudhonisme', in Pierre-Joseph Proudhon, *Du Principe Fédératif et ouvres diverses sur les problèmes politiques Européens* (1959) 6, at 16 – 19.

[36] Georges Scelle, 'Essai Relatif á l'Union Européenne,' 31(6) *Revue Générale de Droit International Public* (*RGDIP*) (1931) 521, at 524.

[37] Although there was strong belief that institutional mechanisms were necessary to make certain the functioning of the European Customs Union, there was broad consensus – which included also Scelle – that this would not – and perhaps should not – lead to a federation. See Guieu, *supra* note 33, at 330.

[38] *Ibid.*, at 329.

[39] Georges Scelle, '*Essai de Systématique du Droit International (Plan d'un cours de droit international public)*', 30(5) *RGDIP* (1923) 116, at 117; Georges Scelle, *Précis de Droit de Gens*, *Principes et Systématique, Première Partie* (1932), at 15 – 16.

[40] Koskenniemi, *supra* note 31, at 331.

such. In his view, one way to do this was to displace the State as the central actor in domestic and international law.[41] After all, the law did not emerge from the State's existence but rather from the relationship between individuals within a society.[42] Such a law, composed of those fundamental social rules governing a social group, is what Scelle calls *objective law* (*droit objectif*).[43] The objective law has a biological origin as it corresponds to the needs of individuals within social groupings.[44] In this context, positive law, on the other hand, would be nothing more than a 'translation, which can be more or less exact, of the biological laws that govern the life of a society.'[45] Perhaps more than that, positive law translates objective law into 'sanctioned competencies.'[46] Competencies, for Scelle, are to be understood as proper capacities of individuals to act according to social rules and not as abstract concepts detached from social reality.[47] This means, however, that positive law can be deemed both anti-social or anti-juridical if not in proper accordance with objective law.[48] As Diggelmann puts it, the question remains as to what fundamentally constitutes the social necessity that brings about the emergence of objective law and how a proper translation to positive law should occur.[49]

How should objective law be operated in everyday life? For that, constitutionally established public powers – or institutions – should materialise objective law to fulfil social necessities when effectively translated into positive law. This should be done by making use of a variety of legal techniques. The legal technique is divided by legislative, jurisdictional, and executive functions.[50] To be clear, the function of government generally encompasses the so-called essential social or constitutional functions.[51] Organising social groups based on specific solidarities, especially those based on geographical, economic, or political specificities, is not a privilege of

[41] Scelle, *Précis de Droit de Gens*, *Principes et Systématique, Première Partie*, *supra* note 39, at 3.

[42] Patrick Daillier, 'L'heritage de Georges Scelle, une Utopie, une Theorie ou une doctrine juridique', 34(5) *Anuario Español de Derecho Internacional* (2018) 5, at 6.

[43] Scelle, *Précis de Droit de Gens*, *Principes et Systématique, Première Partie*, *supra* note 39, at 5; see also, Diggelmann, *supra* note 25, at 1162.

[44] Scelle, *Précis de Droit de Gens*, *Principes et Systématique, Première Partie*, *supra* note 39, at 6; Diggelmann, *supra* note 25, at 1163.

[45] Scelle, *Précis de Droit de Gens*, *Principes et Systématique, Première Partie*, *supra* note 39, at 5.

[46] Diggelmann, *supra* note 25, at 1164.

[47] *Ibid.*, at 1164.

[48] Scelle, *Précis de Droit de Gens*, *Principes et Systématique, Première Partie*, *supra* note 39, at 5; Diggelmann, *supra* note 25, at 1164.

[49] Diggelmann, *supra* note 25, at 1164. Diggelman points out that Scelle was indeed a 'consequent leftwinger', which means that social necessity will inevitably be linked with the requirements of solidarity.

[50] Scelle, *L'organisation internationale du travail et le B.I.T.*, *supra* note 1, at 95.

[51] Scelle, *Théorie du Gouvernement International*, *supra* note 2, at 49.

States.[52] Therefore, there was no reason to assume that international society could not find ways to set itself similarly to that of States. Consequently, it is crucial to understand how Scelle translated some of the fundamental aspects of his theory of law and government which can be applied to international society.

III. The Criteria and Conditions for International Government According to Scelle

A. International Organisations and Social Justice: The Basic Foundations of Solidarity

One of the central elements developed by Georges Scelle in his legal theory of international law is the concept of solidarity he introduces to justify the existence of various *international* societies within the global spectrum. For Scelle, rather than one unified and homogeneous *global* society, the world public order is composed of a variety of smaller, somewhat well-contained societies that often transcend the national sphere.[53] These societies, Scelle argues, are constituted without direct reference to State institutions or structures. They represent, for example, the various communal societies formed by different churches, and the workers' movement, amongst others.[54] Indeed, Scelle does not deny that States still compose the bulk of what instigates the development of international law and constitute an *interstate* society.[55] However, considering the processes of communication and trade between different groups around the globe, it is undeniable that the 'intersocial juridical fact' (*le fait juridique intersocial*) is a world phenomenon.[56] Therefore, the processes of solidarity formation have become highly diffused.[57]

Indeed, the more diffused such solidarity, the weaker in intensity it is.[58] However, according to Scelle, the law is realised and materialised more or less perfectly in these societies, depending on the degree of integration.[59] To provide institutional backing to an otherwise sociological assessment of how societies 'come together' internationally, such cooperation or bridging between different societies would be operated

[52] *Ibid.*, at 44.

[53] Diggelmann, *supra* note 25, at 1164.

[54] *Ibid.*

[55] Scelle, *Précis de Droit de Gens*, *Principes et Systématique, Première Partie*, *supra* note 39, at 50.

[56] *Ibid.*, at 51.

[57] *Ibid.*

[58] Koskenniemi, *supra* note 31, at 330.

[59] Scelle, *Précis de Droit de Gens, Principes et Systématique, Première Partie*, *supra* note 39, at 51.

by 'collaboration' or 'concurrent action' (*action concurrente*) of governments or State officials of each State – within the context of an interstate society. This would ultimately act as 'government' or *international* 'officials.'[60] Eventually, as a solution to the diffusion and eventual dilution of international solidarities, Scelle proposes his famous formula of the *dédoublement fonctionnel* as an institutional pathway to making sure that the local and global can connect in international institutions.[61]

Recently, also, solidarity has been a concept much used in international relations and social theory to define new forms of relationship between actors on the international plane. For instance, in IR theory, solidarity represents ways States can create specific forms of cooperation to advance common goals.[62] Moreover, this idea of solidarity finds resonance in various legal instruments, such as the EU treaties. It is, however, similar to what Scelle proposed, being often problematised and opposed precisely to the concept of sovereignty. Nevertheless, in this context, for as much as such a concept of solidarity establishes the conditions of possibility for clear cooperation legal principles, it does not yet have the potential to ascribe to States individual obligations coercing them to do so.[63] Thus, while some authors have suggested that abandoning the vocabulary of solidarity in favour of a human rights conception or distributive justice idea of how States ought to behave might be better,[64] the concept remains durable in scholarship and practice.[65] In short, solidarity in international law can be understood as a condition under which States allow themselves to engage in the promotion of particular common or similar goals in international politics. The forms such solidarity take up in practice vary and range,

[60] *Ibid.*

[61] Diggelmann, *supra* note 25, at 1165. As Diggelmann summarises: 'This concept claims in essence that State governments are required by objective law to act in the international sphere not only as representatives of their States, but also of the concerned international societies that lack own representatives'. We shall go back to the topic of *dédoublement fonctionnel* in the next section of this article.

[62] Max Weber, 'The Concept of Solidarity in the Study of World Politics: Towards a Critical Theoretic Understanding', 33(4) *Review of International Studies* (2007) 693, at 696 – 697.

[63] Philip Dann, 'Solidarity and the Law of Development Cooperation', in Rüdiger Wolfrum (ed.), *Solidarity: A Structural Principle of International Law* (2010) 55, at 58. To exemplify, one only needs to look at the recent debates as to whether financial aid to poorer countries in the Southern hemisphere during the Covid-19 pandemic is a matter of law or morals. Also, and perhaps more poignant, the discussions on the European Union recovery package for the pandemic reveal to which extent 'solidarity' can be used as a moral, or ethical, principle, but will have very little legal bearing on how States behave.

[64] *Ibid.*, at 59 – 60.

[65] An interesting example can be drawn from the Millennium Declaration where solidarity figures as a 'fundamental value': 'Solidarity. Global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most', see United Nations Millennium Declaration, United Nations General Assembly Res. 55/2, 8 September 2000.

as exemplified above, from setting out legal principles of cooperation in treaties to external manifestations by governments to help, aid, or support others in particular circumstances.

In social theory, one finds a definition of the concept of solidarity much closer to what has been proposed by Georges Scelle, although not departing from Durkheimian premises. Such a concept often relates to how individuals can connect and form specific communities. Social movements have been hailed as central to the expansion of 'democratic solidarity.'[66] This concept of solidarity implies more than just an idea of mutual aid in the consecution of specific social goals. Still, it means a form of social relations based on the recognition of mutual esteem, which ultimately constitutes the basis for an ethical life.[67] Such an idea of solidarity indicates that one is bound not only to take responsibility for herself but also to account for the precariousness of the other, precisely not to reduce solidarity and break essential social ties.[68] Solidarity is, therefore, something, as Rahel Jaeggi puts it, 'given and made,' meaning it is a fact derived from the relationships between individuals. At the same time, it is also an element constitutive of such relations.[69]

In Scelle's legal theory, the concept of solidarity operates as a social fact that induces the creation of law, but it is also a political imperative.[70] Thus, on the one hand, it allows one to 'reject the absolutism of the State – or more specifically the sovereignty of parliament – after all, for Scelle, individuals are the only subjects of international law.[71] But, on the other hand, as a political imperative, solidarity is also a 'political action' to improve the quality of life of local societies.[72] Such dual character of solidarity in Scelle's theory grants it a competing normativity to those acts produced by local parliaments and pushes them towards specific social justice goals.[73] To be sure, for Scelle, it is not a matter of conflicting local and global solidarities. Instead, international institutions would be the epitome of consolidated forms of international solidarities that would, in different ways, begin to detach themselves from local governments in favour of general global interests.[74] After all, in

[66] Generally, see Hauke Brunkhorst, *Solidarity: From Civic Friendship to Global Legal Community* (2005).

[67] Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (1995), at 178.

[68] Rahel Jaeggi, 'Pathologies of Work', 45(3/4) *Women's Studies Quarterly* (2017) 59, at 64–65.

[69] Rahel Jaeggi, *Alienation* (2014), at 219.

[70] Canihac, *supra* note 26, at 208–209.

[71] Scelle, *Précis de Droit de Gens, Principes et Systématique, Première Partie*, *supra* note 39, at 42; see also, Scelle, *Essai de Systématique*, *supra* note 39, at 118.

[72] Canihac, *supra* note 26, at 209.

[73] *Ibid.*

[74] Koskenniemi, *supra* note 31, at 332.

Scelle's conception, the world should be taken unitarily, institutionally, and normatively.[75] Yet, within such a monistic system, one finds an interconnected plurality of legal systems referencing the international.[76]

The concept of solidarity also serves Scelle because it allows him to do away or marginalise the concept of sovereignty, favoring individuals and social groupings as primary elements of the international public order.[77] The shift towards solidarity meant a methodological change aimed at materialising individual solidarity.[78] Relying on the concept of sovereignty meant for Scelle and other jurists of his time, depending on an idea that left governments unable to effect social justice and peace effectively.[79] Indeed, Scelle argues that every composite of the different societies making an international society has some social utility in one way or another.[80] These smaller parts, constituting new forms of solidarity, inevitably lead to the construction of modern rational bureaucracies.[81] It thus favors international organisations and international [social] law. After all, world peace can only be materialised if social peace and justice are attained.[82]

When looking at international law and the role international organisations can play in international life, the League of Nations provided the foremost example. The League's Covenant served as the normative construct from which Scelle could discuss and theorise the potentials and limitations of international organisations. However, Scelle thought that the League's Covenant laid on a wrong assumption. It rested on the reaffirmation of the principle of sovereignty. Scelle argued that this gave rise to a 'logical contradiction' between the desire to have the Covenant as a constitutional instrument, establishing a legal organisation, and maintaining the principle of sovereignty.[83] For Scelle, the ideology of sovereignty presupposes that States have 'some sort of natural property or right' (*droit ou propriété naturelle*) based on which any rule of law does not bind governments that it does not consider to be beneficial to itself.[84] On this ground, a State could not be forced to subject itself to a law to which it has not consented by any form of social organisation.[85] Central to Scelle is

[75] Scelle, *Essai de Systématique*, *supra* note 39, at 118 – 119.

[76] Koskenniemi, *supra* note 31, at 267.

[77] Canihac, *supra* note 26, at 210.

[78] Koskenniemi, *supra* note 31, at 267.

[79] Canihac, *supra* note 26, at 209 – 210.

[80] Koskenniemi, *supra* note 31, at 267.

[81] *Ibid.*

[82] Canihac, *supra* note 26, at 210.

[83] Scelle, *Problèmes Internationaux*, *supra* note 5, at 12.

[84] *Ibid.*, at 13.

[85] *Ibid.*

that such a principle of sovereignty is inherently a negation of international solidarity. It does not allow for general interest to be imposed over particular interests.[86] The principle of sovereignty, according to Scelle, is a principle of anarchy.[87]

B. The Constitution of International Society and Government

Although Scelle generally speaks of *international* government, he by no means sets out a theory of *world* government. Instead, he intended to devise a legal and conceptual framework wherein one could identify the different areas and functions international organisations could operate with national governments to regulate and govern international society. Scelle analogises certain institutional features of international organisations to those identified in States, such as legislative, executive, and judiciary branches. Yet he does not believe international organisations should serve as necessary repositories of such institutional apparatuses to replace those of States. Instead, he believes international organisations and States should operate concomitantly in governing international society – much like what is understood nowadays as global governance.[88] Scelle, however, understands that there are different forms in which international society can be organised.

To determine the conditions for international society's organisation, Scelle looked at how States had developed institutionally. Like H. L. A. Hart, Scelle also thought that international society found itself in a primitive State.[89] Nevertheless, Scelle understood that international society was going through a process of evolution that required more than just legal ordering through treaties. It required an institutional basis beyond legal norms to function and operate correctly.

Therefore, the evolution of international society transitions between two models of *organisation:* interstate society and supranational societies.[90] There are fundamental differences between them, but the most important is how governmental competencies are attributed. In the latter type, federal or supranational governments

[86] *Ibid.*

[87] *Ibid.*

[88] See Eyal Benvenisti, *The Law of Global Governance* (2014), at 26 – 27.

[89] Herbert L. A. Hart, *The Concept of Law* (2012), at 213 – 214; Scelle, *Problèmes Internationaux*, *supra* note 5, at 11.

[90] Scelle's idea of the 'evolution' of international society owes much to Duguit, and perhaps more importantly, to Durkheim's idea of evolution of social change. Durkheim understood that social change flowed from the recognition of stages of society that preceded those of modern society, all the way back to a 'primitive society'. For an interesting explanation of Durkheim's social evolution's thought, see Roscoe C. Hinkle, 'Durkheim's Evolutionary Conception of Social Change', 17(3) *The Sociological Quarterly* (1976) 336.

are ascribed specialised and common competencies. In the former case, no supranational institutions exist, and essential government functions are exercised by each national collective belonging to the interstate society.[91] In interstate societies, however, there is still a hierarchy of norms in the same way as in the case of federal societies. Scelle calls this a 'pure normative federalism' (*fédéralisme normative pure*).[92] Furthermore, there is no common government. There is no typical legislative, judicial power, or executive branch. Instead, the international society uses local governments to make use of their members to exercise such functions.[93]

In light of such decentralisation, national government members represent their local constituencies and the international society when acting on the international plane: national governments are immediately *international* government. This is what Scelle calls the law of the *dédoublement fonctionnel*.[94] Such a law, or principle, sets out what Scelle sees as an interstate constructive constitutional law (*droit constitutionnel constructif interétatique*) that lays down national governments' competencies to act as international government at the international legal level.[95] In this case, it is possible to admit that a national court, for instance, acts as an international court when deciding international law matters.[96] This means that whenever the action of a national legislative, executive, or judicial branch directly impacts the interstate legal order, that branch acts as international government.[97] For Scelle, the *dédoublement fonctionnel* is not ideal, but rather a fact reflecting how international government operates effectively.[98]

In Scelle's view, the evolution of international constitutional law – primarily through institutionalisation – tends to replace the features of an interstate society with a supranational society. In this latter case, there is an effective rearrangement of competencies between international and national governments.[99] Progressively, the content of the international government function replaces the exercise of specific competencies attributed to international officials and fundamentally maintains the (international) public order.[100] In interstate societies, one notices the establishment of reciprocal guarantees (rights and obligations) between the treaty parties. In the

[91] Scelle, *Théorie du Gouvernement International*, *supra* note 2, at 53.

[92] *Ibid.*

[93] *Ibid.*, at 54.

[94] *Ibid.*

[95] *Ibid.*

[96] *Ibid.*, at 55.

[97] *Ibid.*, at 56.

[98] *Ibid.*

[99] *Ibid.*, at 57.

[100] *Ibid.*, at 58.

case of international organisations, one sees that obligations are set out broadly to all union members, giving way to a process of constitutionalising that slowly replaces the characteristics of an interstate society.[101] He proceeds to argue that the objective nature of the guarantors of intervention in the League of Nations, meant to be effectively controlled by the Council, showed that international organisation was moving away from the interstate paradigm to the supranational.[102]

Scelle's jargon to deal with the role of international organisations and national governments in constituting what he calls *international* government may sound strange to contemporary scholars of international organisations.[103] However, since the end of the Second World War, the idea of a global government, or a world government, was decisively abandoned. In turn, international law and international relations scholars spoke instead of global *governance*. Broadly defined, global governance can be understood as the division and recognition of institutions that can effectively exercise authority across borders and impact the exercise of rights and obligations in different parts of the world.[104] In this context, despite the use of a different vocabulary, it is undeniable that Scelle's theory of the *dédoublement fonctionnel* and his theory of division of competencies between international and domestic institutions represent a significant contribution to the modern theory of global governance. Moreover, Scelle's critique of the concept of sovereignty derived from classic international law doctrine finds strong resonance in contemporary assessments of how international authority is not only assessed but constructed and illustrates how the social conditions of States – as the single decisive unities of the international – significantly changed.[105]

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[101] *Ibid.*, at 62. Scelle cites the example of Art. 10 of the Covenant of the League of Nations to illustrate this evolution: 'The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled', Art. 10 Covenant of the League of Nations 1919, 1 League of Nations Official Journal (1920), at 3.

[102] *Ibid.*, at 63.

[103] The jargon of 'international' or 'world' government was common until the creation of the League of Nations and was strongly influenced by the internationalist movement of the 19th Century. For how the expression became problematic in general international relations (and law), see Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (2009). After the failure of the League, the vocabulary and conceptual framework in international legal scholarship changed and the use of expressions such as 'international government' was largely abandoned.

[104] Michael Zürn, *A Theory of Global Governance: Authority, Legitimacy, Contestation* (2018), at 3–4.

[105] Much of modern theory of global governance relies on a critique of the concept of sovereignty whereby States would not accept, authorise or recognise the authority of international institutions. The various types of authority exercised by international (and sometimes transnational) institutions on States show that in practice the concept of sovereignty is not as absolute as international law

C. On How International Society Can Be Organised

International society follows a historical process that moves from basic legal institutions to proper mechanisms to simulate government at the international level. At the State level, international society begins to devise means to rationalise its everyday operations. This process of rationalisation develops in different forms of organisation. Scelle identifies three types of organisations that help understand the role and functions of international institutions.

The first kind is where different social participants join a unitary institution for international society. There is a central organisation and no other division of competencies between lower States and bodies and the institution itself.[106] The second type of institutional formulation is that of federal organisations. These can be further subdivided into two kinds. The first one follows the structure developed for the consolidation of the United States of America, where a constitution establishes the different competencies between the federation and federated States. A second kind is similar to the British *Commonwealth*, where the competencies are loosely defined, and 'federated' States have more autonomy.[107] A third, and last type, is that of an associational (*associationnel*) organisation. This type can establish a stricter division of competencies or set concurrent and more relaxed competencies between social participants. Although associational organisations could be taken as forms of federations, they differ from these by being generally established at the international level with a specific goal, such as, for instance, collective defense.[108] More importantly, the difference between a federation and such an associational organisation is that a constitution rests as the legal basis for the former. At the latter, there is a treaty.[109] As examples of associational organisations, Scelle cites the case of the administrative unions.[110]

How do these forms of organising international society fit with Scelle's understanding of the evolution of international society? In the lack of a proper constitution defining the role and competencies of their different bodies, organisations

doctrine would like to admit. See Zürn, *supra* note 104, at 25 – 36. For a contemporary view, even more similar to that of Scelle concerning the role of international law and the critique of the principle of sovereignty as a historical and social construct, see Joel P. Trachtman, *The Future of International Law: Global Government* (2013), particularly at 41 – 65.

[106] Georges Scelle, 'La Société des Nations est-elle un Super-État?', 48(4) *La Vie des Peuples* (1924) 413.

[107] *Ibid.*, at 413 – 414.

[108] *Ibid.*, at 414.

[109] *Ibid.*

[110] *Ibid.*, at 415.

of the associational type cannot represent supranational institutions.[111] For an organisation to be supranational, it must be subject to constitutional authority, obligating it to fulfill its social obligations.[112] This condition must be met regardless of whether an organisation has a legal personality. Institutions that have an associational character can have legal personality. However, having a legal personality does not turn them into supranational organisations. For that to happen, international political organisations of the associational type need to be constitutionalised and ascribed to what Scelle calls authority rights (*droits d'autorité*).[113]

Scelle identified the League of Nations as the prototype of an international federation[114] for various reasons. First, although its Covenant could not yet be taken as an international constitution[115] since it did not create public powers,[116] it aimed to assemble all the previously created administrative unions within its institutional apparatus,[117] as set out in the Covenant's Article 24.[118] In this case, Scelle understood that the functions and tasks – including those of preparing conventions and treaties – previously ascribed to the administrative unions were then incorporated by the technical bodies of the League.[119] The work of such bodies, together with that of the secretariat, all of which used administrative techniques,[120] pointed to some characteristics of an executive branch. Nevertheless, it still falls short of being a true public power.[121]

In the League of Nations context, States opted for establishing an institutional system, similar to that of States, based upon a legal organisation, with international law as its regulatory framework and the possibility of a jurisdictional system to

[111] *Ibid.*, at 416.

[112] *Ibid.*

[113] *Ibid.*

[114] Scelle, *Problèmes Internationaux, supra* note 5, at 11.

[115] Scelle, *La Société des Nations est-elle un Super-État?*, *supra* note 106, at 419, 'En outre, le pacte n'est pas une constitution, car il n'organise pas de pouvoirs publics proprement dits ... dans le pacte, il n'y a ni pouvoir judiciaire, ni pouvoir législatif, ni pouvoir exécutif'.

[116] Although the Covenant created the Permanent Court of International Justice, the lack of a compulsory jurisdiction for such a court meant it could not be considered to represent the establishment of a judiciary, see *ibid.*

[117] *Ibid.*, at 417.

[118] 'There shall be placed under the direction of the League all international bureaux already established by general treaties if the parties to such treaties consent. All such international bureaux and all commissions for the regulation of matters of international interest hereafter constituted shall be placed under the direction of the League', Art. 24 Covenant of the League of Nations 1919.

[119] Scelle, *La Société des Nations est-elle un Super-État?, supra* note 106, at 420.

[120] Scelle, *Problèmes Internationaux, supra* note 5, at 11.

[121] Scelle, *La Société des Nations est-elle un Super-État?*, *supra* note 106, at 422.

follow.[122] Within the League's framework, Scelle saw that despite competencies ascribed to the organisation, they are effectively exercised by individuals.[123] These individuals were given powers by law to manifest the will of political powers realised in legal situations guaranteed by material coercion.[124] Indeed, sovereignty has been associated with exercising the executive function in government for a long time.[125] The usage of competencies by the executive composes the framework of legal circumstances (*ordonnance juridique*)[126] generated within the legal order by using constitutionally defined competencies.[127] Generally, conflicts involving competencies are solved by the jurisdictional function.[128] Nevertheless, whenever the jurisdictional function fails to realise the material objectives of the law, the executive function should guarantee its materialisation.[129]

In considering the potential failure of the League of Nations, Scelle also displays a colonial mindset typical of those international lawyers of the beginning of the 20th century. He argues that one of the shortcomings of the Geneva organisation was that its Covenant was elaborated on too strong of an ideological basis. According to Scelle, the authors of the Covenant made a 'scientific mistake' by including all different types of States, including under the same organisation, those that are big and small, and those 'civilised' ('*de haute culture*') and those less advanced ('*de civilisation moins avancée*'). It did not account for their geographical, political, and social 'affinities.'[130] This argument feeds into Scelle's call – and he sees the League as a potential motor for this – for a regional internationalism,[131] where we would recognise 'families of states (*familles d'États*).'[132]

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[122] Scelle, *Problèmes Internationaux, supra* note 5, at 10.

[123] Georges Scelle, 'Théorie et pratique de la fonction exécutive en droit international', in Recueil de Cours de l'Académie de Droit International de la Haye, vol. 55 (2008) 87, at 92.

[124] *Ibid.*

[125] *Ibid.*

[126] *Ibid.*, at 94.

[127] *Ibid.*

[128] *Ibid.*

[129] *Ibid.*, at 95.

[130] 'Si vous voulez toute ma pensée, je crois que le Pacte a été conçu sur un plan trop idéologique. Je considère que ses auteurs ont commis une véritable erreur scientifique en juxtaposant sur le même plan, comme dans une sorte de *puzzle* international, tous les États quels qu'ils soient, les petits et les grands, les anciens et les nouveaux, ceux de haute culture et ceux de civilisation moins avancée, sans tenir compte de la situation géographique, de la contiguïté, des affinités', Scelle, *La Société des Nations est-elle un Super-État?*, *supra* note 106, at 427.

[131] *Ibid.*

[132] *Ibid.*, at 428.

IV. The Functions of International Government and the Role of International Organisations

A. The Limits of International Organisations to Act as Government

From political power in social (and economic) orders established by legal rules, States have sought recently – in the last 150 years – to resort to another form of institutionalisation. This form has to do with the organisation of power at the international level. The structure of organising power at the international has indeed followed similar traits to a modern State. Initially, there were demands for the institution of organs composing an international judiciary.[133] Next, there was an increasing movement to create institutions with an administrative character and functions reproducing those exercised by State executive powers. These institutions are necessary to avoid disturbance to the public order. They can be eventually called into liability or responsibility for the reparation 'or anything equivalent' for damages caused by their illegal acts. Therefore, for Scelle, it would be safe to speak of these bodies and institutions as exercising an 'executive function.'[134] For him, if judicial institutions, in interpreting and telling the law, are necessary to guarantee stability to the legal order,[135] the social order as such can only be stabilised if the material security – which comprises the basic functions of the executive we described above – of the social agents is guaranteed.[136] And for this to occur, the exercise of the executive function is essential.[137] The need for organising such power leads to the necessity of creating administrative and regulatory mechanisms. In Scelle's view, the *government* is the most common method to provide such stability. An example of how international organisations is provided by Anne Orford when she describes how Dag Hammarskjöld used the UN charter to construct the UN's authority to serve as a type of 'international' executive when dealing with crises in the decolonised world after the 1960s.[138]

Scelle goes a step further. Generally, national government theories presuppose a two-dimensional structure where the *governed* distinguish from those who *govern*.[139] Unlike such theories, the idea of government can be taken in either a broad or a

[133] Scelle, *Problèmes Internationaux*, *supra* note 5, at 11.

[134] Scelle, *Théorie du Gouvernement International*, *supra* note 2, at 51.

[135] *Ibid.*, at 50.

[136] *Ibid.*

[137] *Ibid.*, at 51.

[138] See, generally, Anne Orford, *International Authority and the Responsibility to Protect* (2011).

[139] *Ibid.*, at 51 – 54. Also similar to how Duguit devised his own theory of public law and services.

narrow sense at the international level.[140] Government generally means exercising essential social functions, or as Scelle puts it, 'constitutional functions.'[141] And in this context, it means combining the three fundamental tasks identified in most governments: the judiciary, the legislative, and the executive.[142] These functions materialise at the international level through a legal technique that guarantees the material realisation of the law, which Scelle identifies with the exercise of the *executive* function.[143] Taking the international public order as a constitutional space means that for Scelle, government competencies should be devised similarly to domestic constituencies. Therefore, the government is limited and organised by such constitutional law.[144] From this stems Scelle's idea of the *dédoublement fonctionnel*, which for Scelle should be taken as fact and not merely as an ideal.[145]

Such a separation at the international level – between government and governed – remains too fuzzy. However, by using Scelle's definition of government as exercising an *executive* function, one can easily verify the potential for many international organisations to act in a *government-like* manner on the international plane. More importantly, this becomes clearer when one looks at how the recent history of some of the most active international organisations have consistently reread their constitutive treaties to increment and expand on their powers to *intervene* in the global *and* domestic public orders.[146] In international institutions, it is easier to note the hierarchical differentiation that grows from establishing such bodies between government and the *agents* in service of the former, which results from using a precise 'determination and attribution' of legal competencies.[147] The relation between social functions and legal organisation of competencies – determination of competencies, attribution of competencies, and usage of competencies – is integral for forming proper legal order and the scope of action of international organisations.[148] From such organisation of competencies also stems the fundamental trait of administrative bodies as mechanisms that facilitate the organisation of social order.

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[140] *Ibid.*, at 48.

[141] *Ibid.*

[142] *Ibid.*, at 12.

[143] *Ibid.*, at 13.

[144] *Ibid.*, at 14.

[145] *Ibid.*, at 16.

[146] The examples provided by Guy Fiti Sinclair, especially with respect to the World Bank and the International Labour Organization, are very illustrative of such processes. See Sinclair, *supra* note 7; see also Dimitri van der Meersche, 'Performing the Rule of Law in International Organizations: Ibrahim Shihata and the World Bank's turn to Governance Reform', 32(1) *Leiden Journal of International Law* (2018) 47.

[147] Scelle, *L'organisation internationale du travail et le B.I.T., supra* note 1, at 5.

[148] *Ibid.*

Following this rationale, governments have attempted to construct a similar mechanism to those they know domestically at the international level.[149] However, this replication at the international level of structures found at the domestic level is often problematised when there is some *conflict* of competencies or when such international institutions begin to interact with national powers.[150] In these cases, to ensure proper *organisation* of such competencies amongst administrative and judicial institutions, national and international,[151] there is a need to find criteria beyond positive law to determine an appropriate scheme for the separation of powers.[152] For instance, theories of separation of powers have sought to justify government based on its systematisation and have attempted to provide it with the necessary legitimacy for its social functioning.[153] However, this has proved rather tricky given the specific circumstances of international relations between States. Suppose one considers that the critical feature of theories of separation of powers is meant to articulate the relationship between the defense of individual freedoms and democratic self-determination based on the ultimate organisational principle of this tripartite division of the highest political power.[154] Thus, the legitimation of the administrative structure and political power – legally attributed competencies – is continuously generated by procedures allowing for the individual and collective self-determination of those under it.[155]

To give these theoretical considerations a more concrete substance, it suffices to look at Scelle's assessments of the structural limits he identified in the League of Nations and how they compared with the work of the ILO. For instance, Scelle argued that a general principle of unanimity, or consensus, which he saw prevailing within the League of Nations, was unsustainable.[156] This principle allowed States to

[149] Scelle, *Problèmes Internationaux*, *supra* note 5, at 10.

[150] Interestingly, the UN in the early 1960s had a particular idea of what the *administration* of government meant that seems to be very much in line with the early development of international organisations and illustrates relatively well the ideological and theoretical underpinning of the separation between government and agents. It said: 'The administrative organization of a government is not an end in itself but a means for the achievement of national objectives', see Herbert Emmerich, Department of Economic and Social Affairs, United Nations, *A Handbook of Public Administration: Current Concepts and Practice with Special Reference to Developing Countries* (1961), at 15.

[151] A classic example here, more than traditional IOs, is that of the relationship of the EU and its Member States.

[152] Christoph Möllers, *Die drei Gewalten: Legitimation der Gewaltengliederung in Verfassungsstaat, europäischer Integration und Internationalisierung* (2015), at 9.

[153] *Ibid.*, at 12.

[154] This can be framed in different conceptual manners, such as not only by the expression 'separation of powers', but also 'limitation of powers' or 'checks and balances', *ibid.*, at 13.

[155] *Ibid.*

[156] Scelle, *Problèmes Internationaux*, *supra* note 5, at 16.

make all decisions from the various bodies of the League not to be binding unless they were taken by unanimity.[157] The ILO, however, provided an exception to this method, according to Scelle.[158] Another critique posed by Scelle has to do with the League's proposition for ensuring collective security. In the lack of a centralised scheme for guaranteeing collective security, each State could elaborate on its defense plans as long as they do not counter the Covenant's obligations.[159] This meant the League returned to yet another politics of balance between States and gave up the attempt of a proper 'legal construction and politics of law.'[160]

Another difficulty Scelle saw was that international organisations should have broader aims than just preventing war. International organisations should not only aim to achieve peace between the States but also, more importantly, social peace.[161] Social peace meant attaining goals beyond States' relations and delving deeper into the needs of peoples and groups that shared solidarity internationally in different ways. He saw the ILO as an illustration of an organisation with such an aim: it was essentially an institutional instrument of social peace.[162] However, Scelle was well aware that there was no way of achieving social peace without addressing the fundamental economic problems the world was going through. Such economic issues could also not be tackled without accounting for the social impact they have or may have on different groups. In this sense, Scelle understood that the separation between the economy and the social, though existing, was somewhat artificial and was to be bridged by all the organisations' actions concerning different topics, such as hygiene, health, and safety navigating between these spheres.[163] Dealing with them means striving to achieve social peace.

Scelle's theory contains much of what one could call 'wishful thinking.' In describing the work of the ILO, Scelle discusses the possibility of one day having an 'international social parliament' emerge, of which the ILO is the very beginning.[164] His argument follows from his assessment of the International Labour Conference as a proper international legislative body capable of producing texts – conventions and recommendations – that can significantly bind or intervene in States' actions.[165] To justify the legislative character of what the Conference makes, Scelle relies on the

[157] *Ibid.*, at 15.

[158] *Ibid.*, at 16.

[159] *Ibid.*, at 21.

[160] *Ibid.*, at 23.

[161] Scelle, *L'organisation internationale du travail et le B.I.T.*, *supra* note 1, at 35–36.

[162] *Ibid.*, at 37.

[163] *Ibid.*, at 86–87.

[164] *Ibid.*, at 165.

[165] *Ibid.*, at 184.

distinction between *traité-contrat* and *traité-loi*,[166] arguing that the Conference aims to create the latter and that even if it may be imperfect for not being genuinely *imperative*, but remain, nevertheless, obligatory.[167] Despite the various limitations he identified in the existing organisations of his time, Scelle remained convinced that the essential elements for proper international organisations, such as them being taken as 'public service,' were already present in the constitutive agreements of both the League and the ILO. That is what the next section hopes to show.

B. International Organisations as Public Service: Serving the General Interest of International Society?

One of Scelle's main arguments is that for an international organisation to correspond to the needs of international society, it requires the establishment of a constitution for the *government* of the 'society of peoples.'[168] Although Scelle saw the work of many international administrative unions created in the 19th century, his theory of international organisations focused mainly on the experiences of the League of Nations and the ILO. If, for Scelle, the League's Covenant contained a variety of problems that rendered a proper organisation of international society unattainable, the ILO successfully established a more comprehensive *constitutional* framework for the international society. It effectively created a *public service* of legislation, jurisdiction, and administrative coordination of the economic activity of its members.[169] According to Scelle, the ILO constitution sets out precise competencies for its agents to act and provide international public service.[170] In this context, one of the advantages of the ILO was that it went beyond defining its members as mere governments and incorporated employers and workers as part of its broader essential actors.[171] This point follows Scelle's idea of international solidarity that bridges peoples and individuals and not only State machinery. Therefore, the ILO is invested in a much more *international* character than the League of Nations. It is a juxtaposition of States and the essential role of professional group representatives in the organisation's functioning.[172] This allows the ILO to seek ways to sort out genuinely international problems.[173] Thus, for Scelle, the ILO represents the

[166] *Ibid.*, at 181.

[167] *Ibid.*, at 183.

[168] Scelle, *Problèmes Internationaux*, *supra* note 5, at 5.

[169] Scelle, *L'organisation internationale du travail et le B.I.T.*, *supra* note 1, at 49.

[170] *Ibid.*, at 50.

[171] *Ibid.*, at 54.

[172] *Ibid.*, at 55.

[173] *Ibid.*

institutional setting where one can effectively see the embryo of a proper 'international people' (*peuple international*) emerge.[174] Such a process of incorporating other entities or groups in the works and operation of international organisations continues to this date, not only at the ILO but also at other institutions, where the integration of non-governmental organisations (NGOs) and representatives of specific groups are increasingly gaining voice – although mostly not translated into votes.

Nevertheless, Scelle could also identify the embryo of international public service in the League of Nations. Within the League, different technical bodies accomplished various tasks not initially foreseen in the Covenant. Therefore, progressively, the League has developed, argues Scelle, bodies similar to ministries providing international public service.[175] Among the many functions they would have, there would be aiding in unifying international regulations about technical issues such as the economy, health, and security.[176] In the case of the League of Nations case, technical bodies' attributions were progressively developed as the Covenant was reread to expand its powers.[177] Differently, the ILO had already set out in its constitution the tasks of its internal bodies in more precise terms.[178] Effectively, there have been cases where the competencies of the ILO have been put into question, and here Scelle points to the essential role international courts play in helping to determine the competencies of international organisations. For example, Scelle refers to the advisory opinion of the Permanent Court of International Justice (PCIJ) that confirmed the ILO's competence to operate on matters relating to agricultural work[179] on the basis that a reading of the organisation's constitution allowed for a comprehensive understanding of work relations.[180]

The League, Scelle argues, revealed an important phenomenon. The League saw within its framework not only the representation of States as entities of the international society but also that of specific *truly international* (*vraiment internationaux*) groups representing social classes and not only the States to which they

[174] *Ibid.*, at 56.

[175] *Ibid.*, at 58.

[176] *Ibid.*

[177] *Ibid.*, at 60. For an interesting reading of how organisations' powers have increased through the interpretation of their constitutions, see Sinclair, *supra* note 7.

[178] *Ibid.* Again, on this topic Guy Fiti Sinclair shows how progressively the ILO also reinterpreted its own constitution to expand its powers and develop its technical assistance programmes. See Sinclair, *supra* note 7.

[179] See PCIJ, *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, Advisory Opinion, 12 August 1922, Series B, No. 2.

[180] Scelle, *Théorie du Gouvernement International*, *supra* note 2, at 74–75.

belong.[181] This was less clear in the League than in the ILO.[182] Yet, Scelle thought of the League's machinery as apt to conduce States towards a proper international society and organisation. The fundamental problem lay in the insistence of an ideology grounded on governments' and peoples' desire to maintain and defend their interests in favour of the general interest of the human community.[183] This is where Scelle's concept of solidarity is useful. One identifies solidarity when the public interest imposes itself over the interest of particulars, commonly recognised by all those belonging to a social group.[184] For Scelle, nevertheless, an essential trait lacking in the League of Nations to attend to the needs of 'the global society of humanity' (*société globale de l'humanité*) was a representative body that went beyond State representatives. It required a body that effectively included groups, peoples, and their interests.[185] As he put it, the League lacked the popular mystic, 'the soul of peoples, the soul of humanity.'[186]

C. International Government as Intervention and Control

Also, in international organisations, there is a strong assumption that they will represent general or public interests similarly to national administrations. International organisations are also endowed with some degree of *personality* – legal and moral – that will not only result from a *legal* or *juridical technique*.[187] It should facilitate the achievement of the common interests of the social actors within the order – always grounded on different levels of solidarity.[188] Interestingly, this meant combining elements of a modern branch of public law – administrative law – with principles of international cooperation that originated in 19th-century internationalism. In one way or another, these theories provided a process of institutionalising social relations by law and by political mechanisms – bureaucratic.[189] Regulation, administration, or the economy's government – crucial aspects of all

[181] Scelle, *La Société des Nations est-elle un Super-État?*, *supra* note 106, at 434.

[182] *Ibid.*

[183] Scelle, *Problèmes Internationaux*, *supra* note 5, at 25. Mainly represented by the insistence to defend the principle of sovereignty.

[184] *Ibid.*, at 6.

[185] *Ibid.*, at 26.

[186] *Ibid.*, at 26–27.

[187] Scelle, *Théorie du Gouvernement International*, *supra* note 2, at 3.

[188] *Ibid.*, at 3–4.

[189] Generally, Derek Heater, *World Citizenship and Government: Cosmopolitan Ideas in the History of Western Political Thought* (1996), and Henry Jacoby, *The Bureaucratization of the World* (1973).

these projects – did not escape the need for institutionalisation, mainly through legal processes.

One essential element of Scelle's theory of international government is institutions' capacity – or possibility – to *intervene* in the interstate system. For Scelle, to govern is to *intervene*.[190] And evidently, the notion of intervention has often been associated with the existence – lack of – a police force to guarantee and secure the rule of law.[191] The capacity to intervene also means ascribing responsibility to the government in case there is a violation of rights and freedoms[192] – and intervention is considered within the interstate system as directly or indirectly affecting local solidarities. What exactly Scelle means by this kind of intervention is that government – international – requires to the very least the possibility of imposing certain forms of control to make sure members respect the rules of law.[193] Government, in this context, would have the capacity to directly or indirectly intervene in those composing its political order to make sure the social and legal complex is not disturbed.[194] If such interventions are executed, should other governments not respect them, depending on how integrated States are, they can suffer some sort of sanction.[195] In this respect, the system that seems best developed, according to Scelle, is that of the International Labour Office, which at the time, through its Administrative Council, could require an intervention – which although lacking direct execution[196] – could be subject to sanctions.[197]

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[190] Scelle, *Théorie du Gouvernement International*, *supra* note 2, at 19.

[191] Scelle, *Problèmes Internationaux*, *supra* note 5, at 18.

[192] Scelle, *Théorie du Gouvernement International*, *supra* note 2, at 35.

[193] *Ibid.*, at 38.

[194] *Ibid.*, at 57.

[195] *Ibid.*, at 56.

[196] On the topic of coercive and non-coercive measures, this is what Scelle had to say about it in relation to international organisations and States: 'Parmi ces procédés techniques l'attribution des compétences fonctionnelles aux gouvernants internationaux est essentielle, mais c'est dans l'ordre social international que le droit constructif devient particulièrement déficient. Les raisons en sont faciles à comprendre. L'organisation internationale se superpose à des organisations étatiques qui, en raison de l'intégration historique du groupe national, de sa psychologie exclusiviste, de ses méfiances traditionnelles, offrent une résistance particulière à la hiérarchie institutionnelle et même à la hiérarchie purement normative. Les gouvernant étatiques sont réfractaires à l'expression normative de la règle de droit internationale, parce que l'insuffisance constructive de la société internationale rend cette règle à la fois imprécise, inefficace et subjective; ils sont aussi réfractaires à la règle constructive ou institutionnelle, non seulement parce qu'elle limite leur arbitraire (qu'ils appellent souveraineté), mais parce qu'elle précise et rend efficace le droit normatif auquel ils veulent se réserver d'échapper. C'est un cercle vicieux dont la quadrature ne sera trouvée que lorsque l'esprit national aura "réalisé" qu'il n'est de sécurité réelle que par la contrainte juridique', see *ibid.*, at 48 – 49.

[197] Scelle, *L'organisation internationale du travail et le B.I.T.*, *supra* note 1, at 39.

Intervention, for Scelle, does not mean only protection against territorial violation. For instance, it has a basic legal form and can be illustrated by the guarantee of diplomatic protection.[198] This control is exercised before control of legality and is guaranteed based on diplomatic and consular services and immunities.[199] Another type of control identified by Scelle is that of a financial nature. These can be illustrated by the interventions made by the League through its Financial Committee in the cases of Bulgaria and Greece.[200] One also sees that these types of control have remained in different ways possible, considering the competencies ascribed to various contemporary international organisations, such as the IMF and the World Bank. For instance, especially since the so-called 'Washington Consensus,' since the late 1980s, these organisations have further elaborated on a variety of conditionalities to be attached to their loans or credits, and by those means have directly interfered in the macroeconomic policy making of many countries – especially in the Southern hemisphere, but more recently also in Europe. However, Scelle notes that control is not the same as tutelage[201] and should be effectively based on a division of competencies between governments and organisations. This is one of the reasons Scelle sees that institutional control takes over the prior types of intergovernmental forms known before organisations.[202] Yet another example of control cited by Scelle exercised by international organisations, but more specifically by the League, is the administrative nature exercised by the Mandates Commission.[203]

With international organisations, the intervention takes on an institutional facet. Before actions between States can be taken, the organisation acts to resolve potential international or national disputes.[204] Such a competence to act in such cases, argues Scelle, is generally accepted when ratifying organisations' constitutional agreements.[205] Scelle states that decisions of international organisations could not be understood as mere recommendations to their members, for in those cases, organisations' actions would be deprived of any legal character whatsoever.[206] This would result in the constitutional agreement of the organisation falling short of being effective constitutive social pacts (*pacte social constitutif*), meaning they would

[198] Scelle, *Théorie du Gouvernement International*, *supra* note 2, at 73.

[199] *Ibid.*, at 75.

[200] *Ibid.*, at 76 and 78.

[201] *Ibid.*, at 76.

[202] *Ibid.*, at 77.

[203] *Ibid.*, at 80.

[204] *Ibid.*, at 88.

[205] *Ibid.*

[206] *Ibid.*, at 89.

be simply pact of consultations (*pacte de consultation*).[207] Even if the bodies of the international organisations are not given a hierarchical place in international government (they cannot enact orders, for example), reducing international governors to mere international civil servants, these institutions do not only have a 'consultative' character. They have the competencies to recognise or determine with 'legal force' the existence of specific facts, such as aggression, the danger of war, breaking of the covenant, etc.[208] For the very least, the acts of the organisation determine the existence of 'a legal obligation to intervene,'[209] leading to the institution's need for 'intervention.' One last dimension of control Scelle identifies is that the publicity of acts taken by organisations is already a measure of 'control.'[210] For Scelle, making members' decisions and acts within the organisation public generates social impact and requires them to do so be justified. In that respect, publicity would be an essential trait of international organisations' operations.

In this case, intervention and control constitute features of organisations' work as international public service. In this light, international organisations, grounded on a constitutional instrument defining the competencies of those to which they provide public service, could be taken as serious contenders, if not the proper materialisation, of international government.

V. Concluding Remarks

There is no doubt about Georges Scelle's place in the intellectual history of international law. However, there was somewhat little about his thoughts on international organisations. Although treated in various works, this article has tried to systematically present Scelle's ideas on international organisations and law's limits, advantages, and prospects. Interestingly, as his critiques of the League of Nations are made clear and his support of the ILO system apparent, one begins to understand better how Scelle could produce a coherent and solid theory of international organisations within his broader doctrine of international law.

Unsurprisingly, the evolution of international society leads Scelle to think of international organisations under the guise of public law. By rejecting States' unique status as primary political organisations, Scelle suggests that international society can – and probably will – be organised similarly. Although in a somewhat primitive state, the process of institutionalising international legal life, Scelle sees in the first proper

[207] *Ibid.*

[208] *Ibid.*

[209] *Ibid.*

[210] Scelle, *L'organisation internationale du travail et le B.I.T.*, *supra* note 1, at 188.

international organisations of the 20th Century the beginning of a movement he hoped to have taken a more solid shape in the future. If nowadays, one cannot say international organisations are actual *international governments*, many of the traits he identified as typical of governments can be seen in many contemporary international organisations. For instance, there is general acceptance that some international organisations directly *intervene* in the life of States. Also, there is no doubt some organisations can effectively exercise control over some States' actions when they interfere with international legal life. Whether these interventions and control are framed as the exercise of authority with or without legal basis does not alter the fact that those governmental traits already seen by Scelle are not present. It is also difficult to deny that international organisations act similarly to public services. International organisations have made their presence felt everywhere by providing financial or technical assistance to countries, significantly reducing the distance between international and national lives.

However, this does not mean international organisations are to be taken, as Scelle's theory often suggests, as good doers that need to be effectively turned into structures of global government in the same way we understand national governments. Nevertheless, it does point to the shortcomings of such organisations. Moreover, it anticipates many problems identified in modern international organisations' theories, such as public representations, seen and recognised by modern international organisations and law theories. In this context, looking back at Scelle – but also to other of his contemporary jurists – can provide an interesting insight into how international organisations should (or maybe could) be understood within international legal life.