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## THE LEGAL STATUS OF INTERNATIONAL ORGANIZATIONS: AN OVERVIEW

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### ABSTRACT

*In the opinion of Henry G. Schermers and Noils M. Blokker whose scholarly observation noted that we depend for our future on international order. Our destiny is increasingly influenced by the activities – or lack thereof – of international organizations. These activities affect our daily life more than we often realize. It is difficult to imagine life today without international organizations. Each organization has its own unique law and practice, designed for the realization of its objectives. Despite their widely diverging objectives, powers, fields of activity and number of member states, share all kinds of similar problems. The rules for dealing with those problems are often similar. When a new organization is established a number of its rules are copied mautatis mutandis from other organizations. The United States continues to be a super power that plays a key role in many international organizations. Even though other states such as China, Brazil and India have also become powerful players in international relations. International organizations are usually legal persons in both international and national law. In the earlier centuries, states alone were recognized as persons in public international law. Other entities were precluded from obtaining the status of international legal persons. The notion of absolute state sovereignty was predominant. States were considered to be the supreme centres of authority. This was the prevailing view in the 19<sup>th</sup> century and into the beginning of the 20<sup>th</sup> century. In the 20<sup>th</sup> century, the notion of absolute state sovereignty has become obsolete. There was more need for international organizations to operate independently on the international level, separate from the member states. As in domestic legal orders, the circle of legal persons recognized in international law has changed over time. There was increasing recognition that international organizations required legal personality within the domestic legal order, as well as under international law. It was accepted without much difficulty that international organizations should become legal persons under the domestic law of the member states. After all, they could simply be added to the existing categories of legal persons.*

**KEYWORDS:** *International Organizations, Legal Status of International Organizations, International Personality, International Law.*

## INTRODUCTION

International organizations have a profound substantive as well as procedural purpose, and are intended to function above and beyond mere administrative convenience. Having international status for an international organization means possessing rights, duties, powers and liabilities as distinct from its members or its creators on the international plane and in international law. International personality is very rarely dealt with explicitly or impliedly in the constitutions of international organizations. In international law the term international organization is generally used to refer organization composed entirely or mainly of states and usually established by treaty which serves as the organization's constituent instrument<sup>1</sup>. Non-governmental organizations commonly known as (NGO) are not the creation of states but, rather are formed under national law by individuals or private groups sharing a common non-profit objective<sup>2</sup>. They include worldwide organizations involved in humanitarian, health, human rights and environmental matters; professional and scientific associations; federations and international unions made up of national associations representing labour or employers; religious bodies; scientific academies; and so on<sup>3</sup>. Non-governmental organizations provide vehicles through which transnational "civil society" can influence the decisions and actions of states and of international organizations and indeed the attitudes and conducts of diverse actors<sup>4</sup>.

The international law commission in its current study of "responsibility of international organizations has defined 'international organization' as an organization which includes states among its members insofar as it exercises in its own capacity certain governmental functions"<sup>5</sup>

International organizations have existed since the 19<sup>th</sup> century, but became an especially notable feature during the period following World War II with the creation of the United Nations, the World Bank, the International Monetary Fund and many other United Nations "Specialized agencies"<sup>6</sup>. As of the 21<sup>st</sup> Century, the numbers, ambitions and range of activities of such international organizations have increased remarkably, with

hundreds of <sup>7</sup>international organizations now in existence<sup>8</sup>. Many schools of thoughts in international law have set out various approaches on the existence of international organizations. The rationalist approach emphasizes the notion of a world order of states that is moving towards the more sophisticated types of order found within states<sup>9</sup>. It is progressive in that it believes in the transformation of a society of states into a true world community based upon the application of universality valid moral and legal principles. Another approach is the revolutionary approach which regards international institutions in terms of specific policy aims. Here the primary aim is not the evaluation of a world community of states based upon global associations as perceived by the rationalists, but rather the utilization of such institutions as a means of attaining the final objective, whether it be the victory of the proletariat or the re-arrangement of existing states into, for example continental units<sup>10</sup>.

## CLASSIFICATION OF INTERNATIONAL ORGANIZATIONS

Because of the great diversity of the international and regional intergovernmental organizations, ranging from the United Nations to the North Atlantic Treaty Organization and other organizations great difficulty has been experienced in the classification of international organization<sup>11</sup>. Many writers of international law in the course of the study of international organizations have classified international organizations as follows. Malcolm N. Shaw in his book International Law<sup>12</sup> has classified international institutions into institutions of universal character, regional institutions. While some other authors have classified it into specialized organizations, Regional Organizations. Classification based on the organizational activity. In some angle other writers have classified international organizations as closed organizations, universal organizations, closed specialized organizations. All these classifications go to describe the creation and activities of the various international organizations.

## THE REASONING FOR LEGAL STATUS OF INTERNATIONAL ORGANIZATIONS

The role of international organizations in the world order centers on their possession of international legal personality<sup>13</sup>. A question that arises *in limine* is whether it is necessary to have a concept of personality for international organizations

<sup>1</sup> Peter Malanczuk, Akerhurst's Modern Introduction to International Law (7<sup>th</sup> adverse ed.) 1997, P.92.

<sup>2</sup> Ibid P.93.

<sup>3</sup> Oppenheim, International Law (2<sup>nd</sup> edition 1992). pg. 10

<sup>4</sup> Ibid P.101.

<sup>5</sup> Report of the international law commission 55<sup>th</sup> Session, U.N DOCA/58/10 @ 33 (2003).

<sup>6</sup> Armstrong, Lloyd & Redmond, From Versailles to Maastricht: International Organization in the twentieth century.

<sup>7</sup> Malcolm Shaw International Law 5<sup>th</sup> Edition Pg.1102.

<sup>8</sup> Ibid Pg. 1103.

<sup>9</sup> Shaw, International Law 5<sup>th</sup> edn, 2005 p.1161.

<sup>10</sup> Ibid p.1162.

<sup>11</sup> Malcolm Shaw, International Law 5<sup>th</sup> edtn, 2005 p.1161.

<sup>12</sup> 5<sup>th</sup> Edition Reprinted 2005 Pg.1164.

<sup>13</sup> Ibid Pg.1187

or whether such organizations can function without having legal personality at all<sup>14</sup>. The question has sometimes been raised but hardly ever discussed in any detail. In the Reparation for injuries suffered in the service of the United Nations Case<sup>15</sup> of the ICJ assumed that it was unnecessary to answer this preliminary question, as had the PCIJ in the Exchange of Greek and Turkish Populations Case<sup>16</sup>. In the former case the ICJ went directly to the question whether the UN had personality, while in the latter case the PCIJ simply assumed that the international body concerned had personality<sup>17</sup>. There are good reasons, mainly practical, why the concept of personality is useful for the law of international organizations<sup>18</sup>. Conceptually, there is no problem with attributing legal personality to organizations. Under domestic laws corporate organizations are given legal status or personality to enable them function well in the scheme of things within the nation registered. International Organizations would be additional artificial or legal persons, just as states are artificial or legal persons. Without personality an organization would not be able to appear in its own right in legal proceedings, whether at the international or noninternational level<sup>19</sup>. There would also not be a single international person as such having the capacity in its own right to have rights, obligations and powers, whether implied or expressed, both at the international level and at the non-international level. Such rights, obligations and powers would be vested collectively in all the creating states, which may not have been the intention behind the creation of the organization and also could create unnecessary practical problems, particularly in the area of responsibility, both active and passive. Contracts or treaties, for example, would be made between all the members and the other party and, in the case of treaties between the organization and a member state, would result in the state party to the treaty being also one of the other parties, insofar as it is a member of the organization. The question of implying powers to enable organizations to function effectively is a separate issue from personality<sup>20</sup>. Whether powers are express or implied, what makes a difference is whether they are vested in the organization as a legal person or in the individual member states as a collectivity. The practical

convenience of personality is what makes it theoretically justified. Immediately legal personality is established an International Organization becomes a subject of international Law and thus capable of enforcing rights and duties upon the international plane as distinct from operating merely within the confines of separate municipal jurisdictions<sup>21</sup>.

## ATTRIBUTION OF INTERNATIONAL STATUS

In law it is presumed that only corporate registered organizations and individuals have legal status in law. But this has been expanded in argument and writes up by many international law scholars. Before the Second World War the PCIJ perhaps only hinted that international Organizations had international personality<sup>22</sup>. In the European Commission on the Danube Case<sup>23</sup> it did state: As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfillment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it. In comparing the Commission to a state and regarding it as being able to perform functions with international consequences<sup>24</sup>. But the issue of personality was neither argued nor discussed in the opinion<sup>25</sup>. There were several other cases in which the PCIJ had to decide disputes about the powers of the International Labour Organization<sup>26</sup> but in none of these were the issue of personality directly raised or contested. In all but one case the Court held that the exercise of the powers disputed was, its constitution, within the competence of the ILO<sup>27</sup>. The view may be taken, nevertheless, that it is difficult to see how the Court could have been saying that in exercising the powers to regulate work (as all these powers were) it was not the ILO that was acting as a legal person in its own right but it was the members of the ILO exercising those powers in their individual capacities directly through the organization<sup>28</sup>. In a comment on the UN Charter by the Chairman of the US delegation to the San Francisco Conference is to be found the following statement<sup>29</sup> This Article does not deal with

<sup>14</sup> C.F Amersinagaha, Principles of Institutional Law of International Organizations 2<sup>nd</sup> edition pg.20

<sup>15</sup> ICJ Reports, 1949, p.174;16 AD, p.318.

<sup>16</sup> PCIJ, Series B,No.10,pp.19-21;3AD,p.378.

<sup>17</sup> C.F Amersinagaha, Principles of Institutional Law of International Organizations 2<sup>nd</sup> edition pg.25

<sup>18</sup> Ibid Pg.26

<sup>19</sup> Ibid Pg.27

<sup>20</sup> McWhinney, 'The Evolution of United Nations Constitutionalism. The Emerging Constitutional Law of International Organization', 16 *Thesaurus-Acroasium* (1990) at p. 337

<sup>21</sup> Malcolm Shaw, International Law 5<sup>th</sup> edtn,2005 p.57

<sup>22</sup> ibid page 60.

<sup>23</sup> ibid page 61

<sup>24</sup> Schwarzenberger, *A Manual of International Law* (1960) p. 227;

<sup>25</sup> ibid page 228

<sup>26</sup> Schermers and Blokker, *International Institutional Law* (1995) pp. 31 ff.

<sup>27</sup> *Proliferation of International Organizations: Legal Issues* (2001) at pp. 14f

<sup>28</sup> Kirgis, *International Organizations in Their Legal Setting* (1993) preface,p.v

<sup>29</sup> Bastid, *Droit des Gens* (lectures -- 1956--7) p. 329;

what is called the ‘international personality’ of the Organization. The Committee which discussed this matter was anxious to avoid any implication that the United Nations will be in any sense a ‘super state’. So far as the power to enter into agreements with states is concerned, the answer is given by Article 43 which provides that the Security Council is to be a party to the agreements concerning the availability of armed forces. International practice, while limited, supports the idea of such a body being a party to agreements<sup>31</sup>. No other issue of ‘international personality’ requires mention in the Charter. Practice will bring about the evolution of appropriate rules so far as necessary<sup>30</sup>. The report of the Committee IV/2 of the San Francisco Conference made it clear that (a) Article 104 of the Charter was confined to a statement of the obligations incumbent upon each member state to act in such a way that the organization enjoyed in its territory a juridical status permitting it to exercise its function, and (b) as for international personality, in regard to which a proposal expressly to recognize in the Charter the international personality of the UN had been rejected at the conference, the Committee had considered it superfluous to have a text on the matter, because, in effect it would be determined implicitly from the provisions of the Charter taken as a whole<sup>31</sup>. Department of State Publication 2349, Conference Series 71 at pp. 157-8.35 UNCIO Doc. 933. The ICJ in the Reparation Case, when discussing the establishment of international personality for the UN, did say: ‘It (the Charter) has defined the position of the Members in relation to the Organization by giving the Organization legal capacity<sup>32</sup>.

*Reparation Case*,<sup>33</sup> where Court set out first to establish whether the UN had international personality as a precondition to answering the principal question put to it, the Court has come to the conclusion that the organization is an international person.<sup>34</sup> The Court examined (i) several factors surrounding the establishment of the UN, (ii) provisions of its constitution and (iii) even the subsequent practice of the international community in relation to the UN, in coming to the conclusion that the UN had international personality. It did not hesitate to refer to the intention of the founders of the UN either. Further, it made a pragmatic assessment of the basis of international personality when it stated: This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are

specified in the Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable.<sup>35</sup> Thus, the establishment of international personality for an international organization does not appear to be as simple an exercise as identifying certain objective criteria which confer personality in general international law. The Court’s view was that essentially (i) the achievement of the ends (purposes) of the organization must require as indispensable the attribution of international personality; (ii) the organization must be intended to exercise and enjoy functions and rights which can only be explained on the basis of the possession of international personality<sup>36</sup>. To establish these elements an examination of the circumstances of the creation of and the constitution of the organization had to be undertaken. This would be in keeping with the search for ‘intention’ as objectively expressed in the creation of the organization. Similarly, there may be other relevant factors on the negative side, which lead to the conclusion that the organization has no international personality. These would depend on the circumstances of each case<sup>37</sup>. But then it would also be clear perhaps that the required criteria, whatever they are, had not been fully satisfied. The point is that the total picture must be examined.<sup>38</sup> As for what objective criteria are basic to the concept of international personality for international organizations, the Court did not commit itself on this subject, though some authorities have tried to identify these. The following may be suggested: (i) an association of states or international organizations or both (a) with lawful objects and (b) with one or more organs which are not subject to the authority of any other organized communities than, if at all, the participants in those organs acting jointly; (ii) the existence of a distinction between the organization and its members in respect of legal rights, duties, power and liabilities, etc. in the Hohfeldian sense) on the international plane as contrasted with the national or transnational plane, it being clear that the organization was ‘intended’ to have such rights, duties, power and liabilities.<sup>39</sup> Although the Court did not refer to these criteria specifically, most of what is contained in them may be regarded as covered by what it said. The real difficulty arises not in regard to the extraction of the above criteria from the Court’s statement but in ascertaining whether the Court

<sup>30</sup> White, *International Non-Governmental Organizations: Their Purposes, Methods and Accomplishments* (1968).

<sup>31</sup> Klabbbers, *An Introduction to International Institutional Law* (2003); pg.21

<sup>32</sup> *ibid* pg.33

<sup>33</sup> 1954 ICJ Reports p. 47.

<sup>34</sup> Rosenne, *The Law and Practice of the International Court 1920–1996* (1997) pp.1481ff

<sup>35</sup> C. F. Amerasinghe, *Jurisdiction of International Tribunals* (2003) pp. 322ff.

<sup>36</sup> *ibid* Pg. 333

<sup>37</sup> Bowett, *The Law of International Institutions* (1982) pp. 150–1. GATT,

<sup>38</sup> Bowett, *The Law of International Institutions* (1982) pp. 150–1. GATT,

<sup>39</sup> *ibid* Pg.334

purported to require more than these criteria in order to establish International personality for international organizations. As already noted: (i) the fulfillment of these criteria is to be tested in relation to the 'Intention' behind the establishment of the organization as reflected in the objective circumstances of such establishment including the constitution of the organization (which is what was done by the Court when it referred to such matters as several articles of the Charter); and (ii) any negative elements in those circumstances, including the constitution, must be taken into account in determining whether international personality does not exist. Beyond this, it may be concluded, the Court did not intend to go. By referring to several features of the Charter and other phenomena, the Court must be taken not to have been adding to the criteria required for the establishment of international personality but to have been satisfying itself that the criteria set out above had been fulfilled in the case of the UN.<sup>40</sup> According to the criteria referred to above, there would be no difficulty in ascribing to all the open international organizations international personality. There is ample evidence in the circumstances of their creation, including their constitutions, that they were 'intended' to have international personality without which they could not function properly<sup>41</sup>. Whether it is the UNESCO, the FAO, the IMF, or the IBRD, for instance, which is being considered, it is easy to see that it must have international personality because the two criteria referred to above are clearly satisfied. It is significant that during the crisis in the International Tin Council (an open but small organization), after which it ceased<sup>42</sup>. The identification of these criteria is a matter of pragmatic good sense. For example, Brownlie and Seystersted have in essence noted all or some of these criteria. Further, the identification attempts to keep within the confines of what the ICJ did and said in the *Reparation Case*.<sup>43</sup> Lord Pearce pointed out that the UN was not a super-state, or even a sovereign state but was a unique *legal person* based on the sovereignty of its respective members to exist, the international personality of the Council was considered to have been established.<sup>44</sup> The question of real universality or near-universality may also be raised, since the ICJ did advert to it. However, it was not in the context of the incidence of personality that this factor was referred to, when the ICJ said that the 'vast majority' of States in the international

community enjoyed membership in the UN.<sup>45</sup> but in the context of the opposability of this personality to non-member States. The size of the membership of an organization, open or closed as it may be, therefore, has no bearing on the incidence of international personality. It is not one of the criteria required for international personality. The case of the ITC which had a comparatively small membership is very much in point here. Although no open international organization has been found whose constitution expressly attributes international personality to it, there are several closed organizations where this has occurred.<sup>46</sup> In the light of the ICJ's references to the 'intentions' of the framers and its reliance on the Charter of the UN in establishing the international personality of the UN, it may be asked what importance is to be attached to such an explicit attribution of personality. The matter was not discussed by the Court but it may be suggested that such a grant of personality has validity insofar as it is evidence that the criteria for personality are regarded as having been satisfied. example, it is obvious that in spite of this expressed attribution the organization does not have independent functioning capacity or organs (as required by the criteria) and that the attribution is a subterfuge for the creating states to avoid their direct responsibilities the attribution may legitimately be ignored by third states. It is significant that towards the end of the twentieth century, ostensibly because international tribunals, whether arbitral tribunals or standing courts, had become a common feature in the life of the international community, but also because, it may be suggested, such international tribunals were an important and core aspect of international relations in the context of the preservation of peace and the securing of international justice, the issue of the international as well as national law personality of international tribunals came into the limelight. The matter had not been discussed by text writers but it was not only adverted to but faced head-on in the Dutch case, *AS v. Iran-United States Claims Tribunal*,<sup>47</sup> a case which went up to the Supreme Court of the Netherlands. In *AS v. Iran-United States Claims Tribunal* the local court held that the defendant tribunal was an international organization with a legal personality derived from international law and that as a consequence of that and the applicable law derived from international law and Dutch legislation the tribunal was entitled to the relevant immunity from jurisdiction enjoyed by international organizations. The Dutch court said about personality. The parties have not contested, and can thus be deemed to have accepted, that the defendant, the Tribunal, was instituted by the Claims

<sup>40</sup> *ibid* Pg.335

<sup>41</sup> Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986)pp. 42ff.

<sup>42</sup> See *J. H. Rayner Ltd v. Department of Trade and Industry* [1989] 3 WLR p. 969 (HL)

<sup>43</sup> 1949 ICJ Reports at p. 185

<sup>44</sup> See, e.g., ECSC Treaty, Article 6; EEC Treaty, Article 210; African Development Bank

<sup>45</sup> Rousseau, *Droit international public* (1971) vol. I, pp. 241ff

<sup>46</sup> *ibid* at Pg.104

<sup>47</sup> 1949 ICJ Reports at p. 185

Settlement Agreement between the Islamic Republic of Iran and the United States of America. This Agreement is embodied in the Declaration of the Algerian Government of 19 January 1981 concerning the settlement of claims by the Government of the United States and the Government of the Islamic Republic of Iran<sup>48</sup>. The court referred to the fact that the parties had not contested the legal personality. This, however, does not affect the holdings of the court. The matter related to jurisdiction and could have been examined by the court as jurisdictional issues, if the view of the law as agreed was unsound. The District Court and the Supreme Court agreed with the lower court on the law on the points mentioned above<sup>49</sup>. It is important that the personality was primarily *international* personality deriving from the international acts of two states in reaching an international agreement to create the tribunal with certain powers and functions which were essentially judicial but also entailed administrative acts. This case would, therefore, support the position that international tribunals, whether arbitral tribunals or standing courts, created by the agreement of states enjoy international personality because their functions, being essentially judicial, are similar in nature to those entrusted to the Iran-US Claims Tribunal. Where the court is constituted under the aegis of a wider treaty creating an international organization, such as the UN Charter, it would share in the international personality of the international organization or be endowed with a personality of its own, as the case may be, on the basis of the constitutive treaty or instrument. Thus, the ICJ and the ICTY and ICTR fall into this category as do IATs. Tribunals or courts such as the ITLOS, the human rights courts and the CJEC also depend on wider treaties for their personality. ICSID tribunals would benefit from the coverage of the ICSID Convention *but each tribunal created* under it would have personality<sup>50</sup>.

### THE OBJECTIVE STATUS OF INTERNATIONAL ORGANIZATION

The ICJ in the *Reparation Case* dealt with this issue in relation to the UN by concluding. Accordingly the question is whether the Organization has capacity to bring acclaim against the defendant State to recover reparation in respect of that damage or whether, on the contrary, the defendant State, not being a member, is justified in raising the objection that the Organization lacks the capacity to bring an international claim. On this

point, the Court opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being<sup>51</sup> 94 ILR at p. 326, 94 ILR at p. 327 respectively.<sup>52</sup> It is important to note that what the Court did say was that fifty states representing the vast majority of the international community (at the time) had the power to create an entity possessing objective international personality. It did not say that there always had to be a vast majority of states creating an entity in order that the international personality of that entity be objective and effective *vis-à-vis* third states. If it had meant what it did not say, it would mean that the objective legal personality of the majority of international organizations which happen not to be universal or near universal (even though open) would be excluded<sup>53</sup>. However, the issue of how many member states at a minimum are required to endow an organization with objective personality was not an issue before the Court and was not decided by it.<sup>54</sup> In the light of this uncertainty and certain current trends in the practice relating to international organizations, the view could be taken that the number of states creating an entity is irrelevant for the purposes of objective legal personality. No recent instances are known of a non-member state refusing to acknowledge the personality of an organization on the ground that it was not a member state and had not given the organization specific recognition. It is possible to interpret the Court's opinion as having left open the question whether objective legal personality would only be extended in exceptional circumstances or whether objective legal personality was a general idea pertaining to the personality of international organizations. However, it would seem that subsequent practice, particularly at the international level, has led to the extension of the personality of international organizations quite generally, provided only that certain minimal criteria related more or less to the existence of personality exist<sup>55</sup>. The result is that there has not been a separate *practice* of recognition or non-recognition such as continues to trouble the area of statehood. As will be seen, recognition is probably not relevant to the issue of the international personality of international organizations. It is arguable then that the Court's opinion has been 'interpreted' in subsequent practice

<sup>48</sup> McDougal, Lasswell and Miller, *The Interpretation of International Agreements and World Public Order* (1994);

<sup>49</sup> Seyersted, 'Applicable Law in Relations between Intergovernmental Organizations and Private Parties', 122

<sup>50</sup> *ibid* at Pg.123

<sup>51</sup> See Gray, 'The International Court's Advisory Opinion on the WHO--Egypt Agreement of 1951', 32 ICLQ (1983) p. 534.

<sup>52</sup> Seyersted, 'International Personality of Intergovernmental Organizations', 4 IJIL (1964) at p. 53,

<sup>53</sup> *ibid* at pg.54

<sup>54</sup> *ibid* at Pg.55

<sup>55</sup> *Essays in Honour of M. Lachs* (1984) pp. 500--18; Martinez Sanseroni, 'Consentimiento del Estado y

to support a view of 53 1949 ICJ Reports at p. 185.<sup>56</sup> Among open organizations the status of the IMF, the IBRD, the IFC and the IDA before Russia and the Eastern European countries became members, and of the present Common Fund for Commodities and ISA, would have been or would be in doubt.<sup>57</sup> legal personality objective personality whatever view of objective personality the Court intended to propound. There are cases where an organization has without encountering difficulty successfully entered into legal relations with a non-member state which had not as such recognized the organization, and where the argument has not been used that such legal relations could not validly be created. In *International Tin Council v. Amalgamet Inc*<sup>58</sup>. the courts of New York accepted the international personality of the ITC (an open organization) which at the time had twenty-four members, though in that case the issue was not contested. The USA was not a member of the ITC nor had it expressly or implicitly done anything to recognize the ITC. The Swiss courts have also given effect to the personality of organizations of which Switzerland is not a member. But there may be difficulties related to the recognition of objective international personality by the UK courts, for instance, because of the special rules applicable in the UK national legal system. These require generally recognition or membership by the UK government of the organization and incorporation of the constituent treaty in the law of the UK or incorporation of the organization in a foreign state so as to enable the application of the constituent treaty and international law by reference to the rules of private international law<sup>59</sup>. These special rules, however, merely affect the manner in which the UK courts will give effect to international personality at a national level. They do not affect the issue of objective international personality which must be decided on the plane of international law. The authorities are divided on the issue. There are those who are of the opinion that, like states, organizations must be recognized in order that they may have legal status, mainly on the ground that those states which are not parties to the constituent treaty are not bound by it. But most of these authorities would also not take full account of thing of the ICJ that the UN had objective legal personality, while *a fortiori* requiring that non-universal organizations and even organizations with a

membership similar to the UN be recognized by non-member states. A variation of this view is that, except for the UN, which is a special case, it is necessary that non-member states recognize the personality of organizations for such personality to be effective in relation to them<sup>60</sup>. There are others who hold, pursuant to their interpretation of the opinion of the ICJ, that only universal or near-universal organizations do have objective personality (in the absence of recognition).<sup>61</sup> On the other hand, there are some who are of the view that once an organization is created with international legal personality by whatever number of states that personality is objective and is effective *vis-à-vis* non-member states as well<sup>62</sup>. If the view of the ICJ in the *Reparation Case* is closely analyzed, it emerges that the Court approved the conclusion that in the case of at least one organization the constitutive effect of recognition was not operative. In so far as the Court rejected the constitutive effect of recognition in this case, it lent its imprimatur to the view that in the case of international organizations, at any rate, there *could* be circumstances in which recognition of personality was immaterial for the creation of legal status.

The reference to universality was probably motivated by the desire to leave open the more general issue which it was not necessary to settle in the case and which had not been argued in specific terms. Thus, it is possible to argue that universality, near-universality or a large number of member states is not necessarily an essential element for objectivity of personality of international organizations<sup>63</sup>. Whatever the position was earlier, there may be a modern trend towards acknowledging that what is relevant to the issue should not be the actual number of member states. In theory whether a small number of states or a larger number establish an organization, non-member states will be in the same position *vis-à-vis* the organization in that they would not have taken part in, acquiesced in or expressly recognized the establishment of the organization by the fact of its establishment.<sup>64</sup> Thus, it is some other factor or factors than numbers that should primarily detract from the objective personality of the organization. These, it is submitted, relate to such matters as fraud and absence of legitimate or proper purpose, though there is no example of an organization being refused recognition of personality for these reasons. In principle an organization should have objective personality, unless for some reason it is proved that

<sup>56</sup> Makarczyk, 'The International Court of Justice on the Implied Powers of International Organizations',

<sup>57</sup> See, e.g., Seidl-Hohenveldern, 'Die völkerrechtliche Haftung für Handlungen internationaler Organisationen im Verhältnis zu Nichtmitgliedstaaten', 11 OZOR (1961) at pp. 497--507.

<sup>58</sup> Schermers and Blokker, *International Institutional Law* at p. 980:

<sup>59</sup> Seyersted, loc. cit. note 39 at p. 240:

<sup>60</sup> Simon, *L'interprétation judiciaire déstabilisée d'organisations internationales* (1981)

<sup>61</sup> Simon, *L'interprétation judiciaire déstabilisée d'organisations internationales* (1981) pp. 391ff.;

<sup>62</sup> See also Rouyer-Hamery, *Les compétences implicites des organisations internationales* (1962);

<sup>63</sup> Chaumont, 'La signification du principe de spécialité des organisations internationales',

<sup>64</sup> *Melanges H. Rollin* (1964) pp. 55ff.;



there is such a vitiating factor. In theory also it would be easier to prove absence of proper or legitimate purpose where the number of member states is small. As regards the requirement of recognition, some help in and support for interpreting its relevance in the context of the personality of international organizations is perhaps to be had from the position with regard to the recognition of states. An examination of the subject<sup>65</sup> resulted in the conclusion that recognition is not a prerequisite for the legal existence of a state *vis-à-vis* the recognizing or non-recognizing state once the criteria for statehood had been objectively found to exist. The absence of recognition is not really a legally relevant consideration in normal circumstances. In principle the denial of recognition to an entity which otherwise qualifies as a state cannot entitle the non-recognizing states to act as if the entity in question was not a state.<sup>66</sup> The categorical constitutive position, which implies the contrary view, is suspect. On the other hand, it cannot be denied that, in practice, in regard to states recognition does have important legal and political effects. For example, where an entity is widely recognized as a state, especially where such recognition has been accorded on non-political grounds, that is strong evidence of the statehood of that entity, though it may not be conclusive. This may result in recognition rendering opposable a situation otherwise not opposable. But generally the conclusion reached is that the international status of a state 'subject to international law' is, in principle, independent of recognition. Just as recognition is not in principle relevant to the objective determination of the legal status of statehood, though it continues to be in practice, and while it may sometimes have what may be described by and large as an estopping effect, in the case of the personality of international organizations it is also an acceptable position that recognition by non-member states is not necessary for the legal effectiveness of that personality *vis-à-vis* those states, unless as in the case of states, there are exceptional or ambiguous circumstances. Though the analogy between the two situations is not complete, the fact that in both cases what is at stake is the legal status of an entity warrants the disregard of the need for recognition in the one (international organizations), because it has come to be de-emphasized in the other (states). A consequence of that position is that organizations will *prima facie* have objective personality Irrespective of the actual universality of their membership. Thus, non-member states (and nationals of such states) may not regard such organizations as lacking international personality in their dealings with them. This means that (objective) personality does not depend on recognition but on a legal status flowing from the existence of certain facts associated with the creation

<sup>65</sup> Skubiszewski, 'Implied Powers of International Organizations', in Dinstein and Tabori (eds.),

<sup>66</sup> Law of nations.

of the organization which implies a declaratory view of recognition, if it takes place at all, recognition not being necessary for the existence of personality<sup>67</sup>.

The position in national law, as has been seen, may be different. In some legal systems, courts still rely to some extent and *prima facie* on recognition in order that international organizations may have personality *vis-à-vis* them. This seems to be the attitude of the UK, as was seen in *Arab Monetary Fund v. Hashim and Others (No. 3)*,<sup>68</sup> where a power is expressly granted by the constitution, no problem arises in recognizing it. However, there are numerous powers, apart from those expressly granted, which organizations may have by implication. At the non-international level an organization that has personality will generally, either by express grant or by implication, have the capacity to institute legal proceedings and be sued, to contract and to acquire, own and dispose of movable and immovable property.<sup>69</sup> An IGO may also claim the relevant immunities and privileges. But personality at the national level may embrace more than this. There is no reason why there should not be a presumption that international organizations would qualify to have some general powers, rights and even obligations that legal persons in any legal system have. They would have more to the extent that such capacities may be legitimately implied in their constitutions and less to the extent that the constituent instrument either expressly or impliedly so requires or capacities are inconsistent with<sup>70</sup>. The theory of implied powers has been discussed also in There is much discussion in these sources of the position in the EU. In the case of, e.g., the IMF and the IBRD, as has been seen, these powers, etc. are expressly granted. In the case of the UN, Article 104 of the Charter also makes an express grant of such and wider powers, etc.

## CONCLUSION

In the *Reparation Case* the ICJ made important preliminary statements regarding the consequences of having international personality for international organizations. What it does mean is that it is a subject of international law and capable of possessing international rights and duties.<sup>71</sup> There can be no doubt that the Court was of the view that acknowledging that an international organization has international personality does not mean recognizing (i) that it is a super-state; (ii) that it is a state; and (iii) that it has the same rights, duties, capacities, etc. as a state. That statement was clearly based on the view that some form of acknowledgment of personality was necessary for the Arab Monetary Fund to have

<sup>67</sup> 1980 ICJ Reports at p. 90.

<sup>68</sup> International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne (1989)

<sup>69</sup> *Ibid.* at p. 159

<sup>70</sup> 1949 ICJ Reports at p. 178.

<sup>71</sup> *Ibid.* at p. 179. See also the *WHO Agreement Case*, 1980 ICJ Reports at p. 89,

personality in the UK. This view is less acceptable at the present time than it might have been in the past. The comparison with statehood cannot be ignored, if value is to be given to the reasoning of the Court. It has to be acknowledged that, even if the Court believed that the acceptance of the international personality of organizations resulted in the vesting of inherent rights, duties and capacities in organizations somewhat independently of their constitutions as opposed to those that were only implied, these rights, duties and capacities were not the same in extent or content as those of states. Since there was a denial of super-statehood to international organizations, it would seem to be a logical conclusion that the Court's view was that the inherent rights, duties and capacities of organizations, if any, did not have to be as numerous or extensive as those of states, while not being identical. That having been said, there are important questions which arise both from the Court's opinions and as a result of theories that have been propounded.<sup>72</sup> These are: (i) whether inherent rights, duties, capacities, etc. flow from the international personality of international organizations and what, if any, these are; or (ii) whether they have only powers implied in their constitutions or the circumstances of their creation; (iii) on what principles, rights, duties, capacities, etc. may be implied; and (iv) what is the effect of express or implicit prohibitions in the constitutional instruments.<sup>73</sup> The views taken by theorists may be classified as follows: (i) those that assert broadly that international personality results in the same inherent capacities for States and international organizations.<sup>74</sup> There are and have been other entities than states and international organizations in international law which have or have had international personality, e.g., protectorates, the Holy See, even individuals, etc. It is clear that the Court took the view that they did not have the same 'inherent' rights, duties, capacities, etc. as states, which seems to be the case, irrespective of whether they can be given or acquire such rights, duties, capacities, etc., as a result of agreements between states or other international acts.<sup>75</sup>

An examination of what the ICJ has said and done reveals that it is not possible to give a categorical answer to the question of the legal consequences of personality for international organizations. The issues are complicated but it is useful first to look at what exactly the Court said and did in those cases in which the question came up in one way or another: namely, the *Reparation Case*, the *Effect of Awards Case*<sup>76</sup> and the *Expenses Case*<sup>77</sup> and

a separate opinion in the *WHO Agreement Case*.<sup>78</sup> In the *Reparation Case*, where the issue of the consequences of personality confronted the Court directly, the Court decided that: (i) the UN had the capacity, as a subject of international law, to maintain its rights by bringing international claims which involved the presentation and settlement of claims by resorting to protest, request for an enquiry, negotiation and request for submission to judicial settlement;<sup>79</sup> (ii) this capacity included the right to bring an international claim against a member (or a non-member) which has caused injury to it by a breach of its international obligations towards the UN;<sup>80</sup> and (iii) it also included

the capacity to include in the claim for reparation damage caused to its agent or to persons entitled through him, as an assertion of its own right and not in a representative capacity.<sup>81</sup> In regard to (i) personality meant that the UN was a subject of international law and capable of possessing international rights and duties and that it had capacity to maintain its rights by bringing international claims.<sup>82</sup> A state possessed the totality of international rights and duties recognized by international law but the rights and duties of an entity such as the UN depended upon its purposes and functions as specified or implied in its constituent documents and developed in practice.

Because the functions of the organization were of such a character that they could not be effectively discharged if they involved the concurrent action, on the international plane, of fifty-eight or more Foreign Offices, member states had endowed the organization with capacity to bring international claims when necessitated by the discharge of its functions.<sup>83</sup> In regard to (ii) the damage in respect of which such a claim could be brought is limited exclusively to damage caused to the interests of the organization itself, to its administrative machine, to its property and assets and to the interests of which it is the guardian.<sup>84</sup> In regard to (iii) the Court conceded that the Charter did not expressly confer upon the organization the capacity to include in its claim for reparation damage caused to the victim or to persons entitled through him. Consequently, the Court considered whether the provisions of the Charter of the UN concerning its functions and the part played

<sup>77</sup> 1980 ICJ Reports at p. 90

<sup>78</sup> *ibid* at Pg. 91

<sup>79</sup> Schermers and Blokker, *International Institutional Law* pp. 975ff.

<sup>80</sup> *ibid* at Pg.976

<sup>81</sup> *ibid* at Pg. 977

<sup>82</sup> *ibid* at Pg 978

<sup>83</sup> Reuter, *The Law of International Institutions* (1958) pp. 214ff.;

<sup>84</sup> Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations', 44 BYIL (1970) at pp. 126, 144.

<sup>72</sup> Seyersted, *loc. note* 39 at pp.1-4

<sup>73</sup> Schwarzenberger, *International Law* vol. I, pp.104

<sup>74</sup> *ibid* at Pg.105

<sup>75</sup> *ibid* at Pg.106

<sup>76</sup> 1949 ICJ Reports at p. 178.

by its agents in the performance of those functions implied for the organization power to afford its agents the limited protection that would consist in the bringing of a claim on their behalf for reparation for damage suffered in such circumstances, a power which could only be deemed to exist if it could be necessarily implied as being essential to the performance of its duties.<sup>85</sup> It concluded: Upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter<sup>86</sup>. Points (i) and (ii) are closely connected. If the organization possessed the capacity referred to in (i), it would no doubt have the capacity referred to in (ii), because that is probably the principal example of the capacity to bring a claim at international law. Indeed, the Court seems to have inferred (ii) from (i) directly. The statements made are not clear as regards (i). In the first instance, it looked as if the Court intended to say that the capacity to bring an international claim was synonymous with international personality and was, therefore, inherent in it. But in the second quotation it relates it to the purposes and functions of the organization and makes it depend on being necessitated by the discharge of its functions. As regards (iii) the capacity to bring a claim was based fairly and squarely on 'necessary intendment' or on 'necessary implication' as being essential 'to the performance of duties'. In the *Effect of Awards Case*, the Court first found that the Secretary-General of the UN could settle disputes between the staff and the organization in the absence of other machinery without explaining the basis on which it came to this conclusion except for references to practice and then decided in regard to the power to establish an administrative tribunal, in the absence of an express authorization to do so in the Charter: In these circumstances, the Court finds that the power to establish a tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat. and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter.<sup>87</sup> The ideas of essentiality and necessary intendments were clearly mentioned. In the *Expenses Case*, the approach taken to the issue of the lawfulness of activities for which the UN had incurred expenses was slightly different. The Court said: [T]he Court

agrees that such expenditures must be tested by their relationship to the purposes of the United Nations in the sense that if an expenditure were made for a purpose which is not one of the purposes of the United Nations, it would not be considered an 'expense of the Organization.'<sup>88</sup> But when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization.<sup>89</sup> The reference was to 'fulfillment of purposes' as a criterion of capacity. In the *WHO Agreement Case* the Court did not advert again to the source of powers as such, although it did refer to obligations which are binding upon organizations under general rules of international law, under their constitutions and under international agreements to which they are parties,<sup>90</sup> and asserted that the WHO had *prima facie* the power to choose the location of its headquarters or regional offices.<sup>91</sup> However, Judge Gros in a separate opinion stated, without disagreeing with the Court: In the absence of a 'super-State', each international organization has only the competence which has been conferred on it by the States which founded it, and its powers are strictly limited to whatever is necessary to perform the functions which its constitutive charter has defined. States are sovereign in the sense that their powers are not dependent on any other authority, but specialized agencies have no more than a special competence, that which they have received from those who constituted them, their member States, for the purpose of a well-defined task. Anything outside that competence and not calculated to further the performance of the task assigned lies outside the powers of the organization, and would be an act *ultra vires*, which must be regarded as without legal effect.<sup>92</sup> Reference is made to what is necessary for the performance of functions assigned by the constitution. Apart from the doubt whether the capacity to bring an international claim as such was regarded as inherent in international personality by the Court and if so what exactly was regarded as inherent, there is to be seen in the approach of the Court three distinct formulations: (i) Organizations have those capacities and powers which arise by *necessary implication* out of their constitutions as being *essential* to the performance of their *duties* (necessary intendment); (ii) Organizations have those capacities and powers which are *necessitated* by the

<sup>85</sup> Reuter Op.cit pg.245

<sup>86</sup> *ibid* at Pg.246

<sup>87</sup> Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations', 44 BYIL (1970) at pp. 126, 144.

<sup>88</sup> C. F. Amerasinghe, *Jurisdiction of International Tribunals* (2003) p. 43.

<sup>89</sup> *ibid* at Pg.44

<sup>90</sup> *ibid* at Pg.45

<sup>91</sup> *ibid* at Pg.46

<sup>92</sup> *ibid* at Pg.47

discharge of their *functions*,<sup>93</sup> and (iii) Organizations have those powers and capacities which are *appropriate* for the fulfillment of their *stated purposes*.<sup>94</sup> On the other hand, express grants or express prohibitions of powers and capacities must be recognized. It is not practical to predetermine in the abstract for all cases and in relation to all organizations what powers may be implied. To some extent much depends on the circumstances of the case. Some generally implied powers are discussed below. In implying powers what are of importance are the particular principles of interpretation. What remains to be discussed is whether the Court left room for the recognition of inherent capacities and powers in addition to implied ones. It has been contended that there are capacities, such as the treaty making power, the active and passive power of legation and the capacity to bring international claims, which inhere to their fullest extent in an organization, unless they are expressly prohibited in an organization's constitution, and regardless of the organization's purposes, functions.<sup>95</sup> There are other cases decided by the PCIJ in which disputed powers were held to exist on the basis of implication (rather than inherence)

This does not emerge, however, from the ICJ's jurisprudence. What may be possible is that there are inherent capacities and powers which are skeletal in their incidence, their content and extent being subject to implication or express grant.<sup>96</sup> It is not clear whether the Court intended to take this position in regard to the capacity to bring international claims, in view of what it said in the *Reparation Case*. Even if it did take this view, it is certain that much of the actual content and extent of capacities must be left to implication; for that is what the Court said in the same case and accepted in finding that the capacity to bring the two kinds of claims which were the subject of the request for an advisory opinion existed. That the Court believed that the implication of capacities was a valid and necessary exercise cannot be denied. Thus, the existence of inherent skeletal capacities would not eliminate the need to imply the content of capacities and powers in regard to the exercise of powers, functions and duties. In the case of organizations in general, it is not difficult to imply the capacities and powers that are claimed also to be inherent, such as the treaty-making power and the power of legation.<sup>97</sup> However, it is important to recognize that, whereas

recognition of inherent capacities may result in organizations having an unlimited treaty-making power, for instance, the application of the doctrine of implied powers may result in the imposition of restrictions in the exercise of this power as a result of taking into account their functions, duties and purposes. Further, there may be differences between organizations in respect of powers and capacities. The doctrine of inherent capacities, it must be recognized, cannot render nugatory the distinction made by the Court between international organizations and states in terms of international personality. The Court distinctly took the view that, while states were international persons *par excellence* with the fullest range of capacities and powers, international organizations were lesser entities. This is not surprising. For whether capacities are based on implication or inherence, it is unlikely that international organizations would have *per se* such capacities as those of administering territories and of owning a flag for ships on the high seas or exercising some of the other powers that states may exercise. This consideration may also give more credibility to the Court's concentration on the implication of powers than to the doctrine of inherent capacity.<sup>98</sup>

The States of international organizations in national law has been less controversial than in international law, for state sovereignty was less threatened. But here also the functions of international organizations are used as key indicators to determine their status more precisely. Many constitutions provide that the organization is to enjoy the legal capacity necessary to exercise its functions. Other constitutions stipulate more specifically that the organization is to possess legal personality and have the capacity to contract, to acquire and dispose of movable and immovable property and to institute legal proceedings, but the scope of those capacities is usually also related to the organization's functions. These functions are also the basis for granting privileges and the standards by which their scope is usually determined. Of course, the often broadly circumscribed functions of an international organization do not give ready-made answers to daily questions of privileges and immunities, or to the granting of waivers. But they offer at least the key to finding such answers.<sup>99</sup>

<sup>93</sup> Schwarzenberger, *International Law* vol. I, pp. 128-30;

<sup>94</sup> Crawford, *The Creation of States in International Law* (1979) pp. 23-4.

<sup>95</sup> *ibid* at Pg. 25

<sup>96</sup> Schwarzenberger, *International Law* vol. I, pp. 128-30;

<sup>97</sup> *Ibid* at Pg. 134

<sup>98</sup> See Rama-Montaldo, *loc. cit.* note 39, particularly at pp. 126ff.

<sup>99</sup> Schermers, H. G. and Blockker. *International Institutional Law* 5<sup>th</sup> ed. Martinus Nijhoff Publishers.